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A Gazdasági Versenyhivatal számára mindig fontos szempont volt, hogy a fiatal, versenyjog és/vagy fogyasztóvédelem iránt érdeklődő joghallgatók és PhD-hallgatók számára lehetőséget biztosítson tehetségük megmutatására. E hallgatói különszám kifejezetten ezt a célt szolgálja, hiszen dedikáltan csak olyan tudományos cikkek kerülnek publikálásra benne, amelyek feltörekvő kutatók tollából származnak. A különszámban egyrészről a V4 Competition Law & Fundamental Rights Challenge címet viselő verseny legmagasabb színvonalú pályaművei, másrészről kettő, a 2023. évi Országos Tudományos Diákköri Konferencián I. helyezést elért dolgozatból készített és lerövidített cikk kap helyet. Míg előbbiek angol, utóbbiak magyar nyelven íródtak. A cikkek a versenyjog és határterületeinek legaktuálisabb kérdéseit feszegetik, mint például a Digital Markets Act és egyéb digitális relevanciával bíró problémakörök, a munkaerőpiaci kihívások versenyjogi szemlélete, a fenntarthatóság kérdései, a híres-hírhedt Illumina/Grail fúzió, a büntetőjog és versenyjog kapcsolata vagy éppen a személyes adat mint ellenszolgáltatás kérdése.

Bízunk benne, hogy a cikkekkel még több fiatalt tudunk a versenyjog irányába terelni, megmutatva azt, hogy milyen komplex és megoldásra váró feladatok tornyosulnak e jogterület hatókörében, amelyekben szükség van az új generációk szemléletére is.

Dr. Csirszki Martin Milán

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Gazdasági Versenyhivatal
a V4 Competition Law & Fundamental Rights Challenge
szervezője

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The Digital Markets Act: The Future of Competition Law in the Digital Market

***Abstract**: Technology giants have an ever-increasing power over our everyday lives. From search engines to social media, from e-commerce to the most widely used software application stores, online platforms offer the possibility of unprecedented consumer welfare. However, data-driven network effects, economies of scale and scope and user lock-in effects make digital markets prone to tipping, with a single dominant provider emerging. These incumbents can further entrench their gatekeeper status through killer acquisitions and by abusing their dominant market position. With the Digital Markets Act entering into force in 2023, this paper aims to provide an overview of the characteristics and unfair practices of online platforms. Although the exact consequences of this novel regulation cannot be foreseen, the paper concludes with the proposal of a holistic regulatory and enforcement approach in order to effectively tackle platform power.*

Keywords: online platforms, Digital Markets Act, core platform service, gatekeeper, platform regulation.

1. Introduction

The early 2020s are the age of online platforms. In 2022, five of the world's top ten companies were technology giants (Figure 1). Indeed, online platforms offer several benefits for consumers. They can set prices in real time, optimise inventory levels and allocate resources according to consumers' needs, while also promote fierce competition, and provide higher quality products and services for lower prices to their users due to continuous innovation.

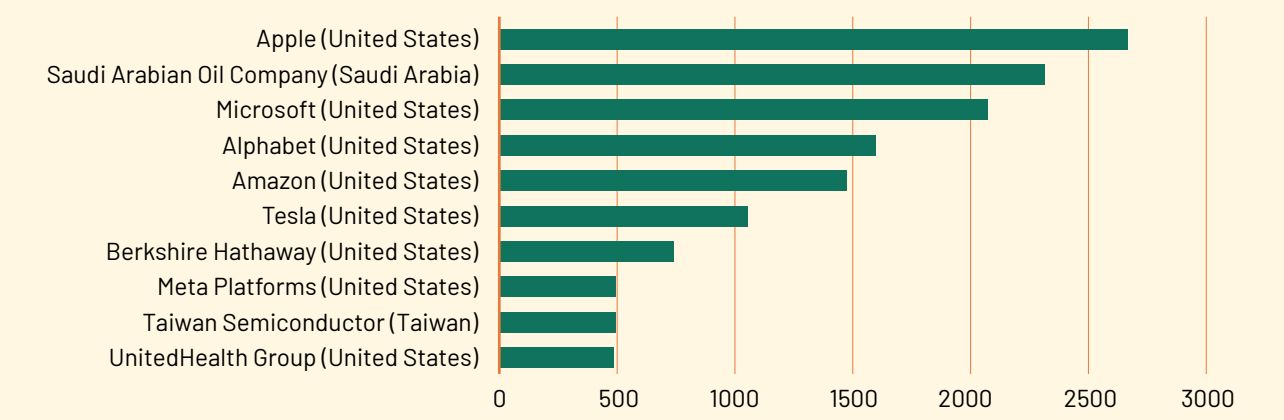

Figure 1: The 100 largest companies in the world by market capitalization in 2022 (in billion U.S. dollars)[2]

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[2] Statista: The 100 largest companies in the world by market capitalization in 2022 (in billion U.S. dollars). Available at: https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/.

On the other hand, deceptive and misleading data practices and 'dark commercial patterns' may unduly influence millions of transactional decisions in the cyberspace.[3] Furthermore, the recognition of the real social significance of online platforms required the Cambridge Analytica scandal, the Brexit and Trump campaigns and the rampant hate speech during the refugee crisis.[4] Disinformation campaigns spread during the Russian–Ukrainian war and the Corona virus pandemic have made regulatory intervention even more timely.

As a result of the emergence of digital ecosystems, trade barriers imposed by the dominant platforms may now be even more significant than trade barriers imposed by nation states.[5] It is arguable that their dominance and status in digital markets, the lack of alternatives available and their impact on competition and democracy have made some platforms modern time gatekeepers, thus conferring upon them special obligations.

In light of this, some argue that classical legal analogies have become outdated and that their continued invocation is inadequate to appropriately address the problems generated by online platforms.[6] In response to the economic challenges posed by platforms, EU regulation has introduced novel legal instruments based on and complementary to competition law, alongside the classical media and data protection law approach.[7]

Against this backdrop, this paper is structured as follows. Following the present Introduction, Section 2 provides a brief summary of the economic factors driving the proliferation of online platforms. Section 3 illustrates the shortcomings of the traditional competition law framework by examining relevant European Union ('EU') and national competition cases. Section 4 briefly assesses the direction of the newly adopted sector specific EU legislation. Section 5 summarises the results and provides recommendations for the future.

2. Common characteristics of online platforms

Online platforms, as all disruptive technologies, pose challenges to the existing legal framework. Applying previous regulatory instruments that align to the previous level of technology may become insufficient or even over-regulatory.[8] The specific features of online platforms have been examined in detail by legislators in the EU[9] and the United Kingdom,[10] among others. A brief overview of the common characteristics identified provides a better understanding of the reasons behind their explosive growth.

Online platforms are not simply a new business model, a new social technology or a new form of infrastructure. Online platforms are the basic organisational form of the information society or 'general control mechanisms', as Ződi[11] puts it. Platforms can not only enter or expand markets; they also have the ability to replace traditional

[3] McSpedden-Brown, Nicholas: Consumer Policy: A Complement to Competition Policy in Tackling Dominant Online Businesses. Competition Policy in Eastern Europe and Central Asia, 16 March 2021. Available at: https://oecdgvh.hu/pfile/file?path=/contents/about/newsletters/Newsletter-16_Abuse-of-dominance-in-digital-markets&inline=true 12.

[4] Polyák Gábor et al.: Versenyjogi előzmények és piacszabályozási eszközök a digitális piacokról szóló európai rendelet tervezetében. In Valentiny Pál et al.: Verseny és szabályozás 2021. Budapest, 2021. KRTK Közgazdaság-tudományi Intézet, 150.

[5] Firniksz Judit: Rangsorolás – Új szabályozási igény a platformok és az információs túlterheltség korában. In Valentiny Pál et al.: Verseny és szabályozás 2021. Budapest, 2021. KRTK Közgazdaság-tudományi Intézet, 173.

[6] Frank, A. Pasquale: Platform Neutrality. Enhancing Freedom of Expression in Spheres of Private Power. Theoretical Inquiries in Law, 2016. (487) 512.

[7] Chapdelaine, Pascale – McLeod Rogers, Jaqueline: Contested Sovereignties: States, Media Platforms, Peoples, and the Regulation of Media Content and Big Data in the Networked Society. Laws, 2021. (10) 155.

[8] Klein Tamás: A közösségi (média)platformok társadalmi integrációs és dezintegrációs hatásai. Glossa Iuridica, 2020. (1-2) 71.

[9] Jacques, Crémer – Yves-Alexandre, de Montjoye – Heike, Schweitzer: Competition policy for the digital era, 2019. Available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[10] Digital Competition Expert Panel: Unlocking digital competition, 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[11] Ződi Zsolt: Algoritmikus koordinációs a platformuniverzumban. A platform mint új koordinációs mechanizmus és ennek jogi következményei. In: Török Bernát – Ződi Zsolt (ed.): A mesterséges intelligencia szabályozási kihívásai. Budapest, 2021. NKE Ludovika Egyetemi Kiadó Iroda. 492.

market exchanges.[12] In a digital environment, the minimal marginal cost of accessing, reproducing and distributing information gives platforms a competitive advantage over existing structures and allows them to control and manage the delivery of their services to millions of people through a very lean algorithm-based infrastructure.[13]

Online platforms operate in two-sided markets, which are characterised by two distinct groups, with an intermediary at the intersection providing a service that matches demands.[14] However, the real purpose of the platform is not only to collect a commission on the transactions it facilitates, but to monetise the data extracted during the transactions.[15]

Indeed, online platforms can be grouped the following ways. On transaction platforms, a monetary transaction takes place between the two groups of users (e.g. online marketplace), on non-transaction platforms such a monetary transaction is missing, however, an interaction is nevertheless present (e.g. social media or search engine).[16] Schrepel distinguishes between platforms and aggregators; the former being used to develop and run applications or software (e.g. operating system), the latter compiling and organising vast amounts of content for its users (e.g. social media or search engine).[17]

Platforms turn all communication into data ('datafication'), turn data into a commodity ('commodification') and ultimately monetise data ('monetisation'). In addition, platforms have a significant strength in a specific area and seek to reach as many users as possible.[18] These two characteristics result in an almost self-reinforcing process, where the more people use a platform, the more data is generated, and the more data is generated, the more people join the platform, due to the increasingly personalised service it offers.[19] Indeed, data is seen as the oil of the 21st century,[20] and heralded as 'the world's most valuable resource'.[21]

The most widely used online platforms generally employ a zero-price business model, meaning that users 'pay' for the service with their personal data and attention, rather than monetarily.[22] Without the price, platforms generally compete on quality and innovation.[23] However, consumers are significantly more likely to choose a 'free' product than a similar product that is not 'free', even if the 'free' product is of lower quality.[24]

Also a related issue is the 'privacy paradox', whereby users, despite being aware of the privacy risks involved, continue to give up their privacy little by little by giving out their data too often and too cheaply.[25] A possible solution to this paradox

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[12] Cohen, Julie E.: Law for the Platform Economy. Georgetown Law Faculty Publications and Other Works, 2017.

[13] Sartor, Giovanni: The secondary liability of online intermediaries. In Parcu, Pier Luigi – Brogi, Elda: Research Handbook on EU Media Law and Policy. Cheltenham, 2021. Edward Elgar, 142.

[14] Szabó Endre Győző: A kétoldalú piacok elmélete és a személyes adatok védelme – a Google-ítélet elemzése versenyjogi és adatvédelmi szempontok szerint. In Medias Res, 2017. (1) 173.

[15] Ződi Zsolt: A platform mint elméleti konstrukció és mint narratív keret – A platformfogalom kialakulásának történetei. In: Török Bernát – Ződi Zsolt: Az internetes platformok kora. Budapest, 2022a. NKE Ludovika Egyetemi Kiadó, 27-28.

[16] Solek, Lukas: Need to Revise or Apply the Concept of Market Definition with a View to 'Zero-Price' and Overarching Markets. Journal of European Competition Law & Practice, 2021. Vol. 12., (8) 595.

[17] Schrepel, Thibault: Platforms or Aggregators: Implications for Digital Antitrust Law. Journal of European Competition Law & Practice, 2021. Vol. 12., (1).

[18] Ződi Zsolt: Platformok, robotok és a jog. Budapest, 2018. Gondolat, 102-103.

[19] Pók László Gábor: Védeni vagy megosztani? – A személyes adatok szerepe az internetes platformok szabályozásában. In: Török Bernát – Ződi Zsolt: Az internetes platformok kora. Budapest, 2022. NKE Ludovika Egyetemi Kiadó, 381.

[20] Vezzoso, Simonetta: Competition Policy in Transition: Exploring Data Portability's Roles. Journal of European Competition Law & Practice, 2021. Vol. 12., (5) 358.

[21] Prince, Jeffrey – Wallsten, Scott: Empirical Evidence of the Value of Privacy. Journal of European Competition Law & Practice, 2021. Vol. 12., (8) 648.

[22] Tóth András: Fogyasztóvédelmi, adatvédelmi, médiajogi és versenyjogi eszközök együttes alkalmazása az online figyelempiacok kudarcainak kiküszöbölésére. Infokommunikáció és Jog, 2021a. (77) 8.

[23] Jenny, Frederic: Changing the way we think: competition, platforms and ecosystems. Journal of Antitrust Enforcement, 2021. Vol. 9., 3.

[24] Pásztélyi Emese – Bordács Bálint: Competition concerns in zero price markets. Versenytükör, 2020. Vol. XVI., (2020/2) 27.

[25] Giancarlo, F. Frosio: Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility. Oxford International Journal of Law and Information Technology, 2018. Vol. 26., (1) 10.

might be the establishment of a market for the voluntary sale of users' personal data or a distinct version of online platforms, whereby users receive compensation for the provisions of their personal data.[26]

A specific competition law aspect of platforms is that once a certain number of users ('critical mass') is reached, a monopoly can easily be established. Direct network effects lead users to join platforms where there are already more users by default, and thus exit costs become increasingly high. Indirect or cross-platform network effects, on the other hand, increase the attractiveness of the platform for businesses on the other side of the platforms (e.g. advertisers).[27]

The platform will eventually eliminate other competitors from the market due to economies of scale and scope.[28] Once the tipping point is reached, competition is no longer on the market, but for the market. As a consequence, users no longer have a realistic option to switch services. The extreme rate of return and the external network effects give the incumbent extreme market power.

This is further exacerbated by the barriers established by the dominant platform to use different services ('multi-homing') and the 'winner-take-all' phenomenon caused by data collected and combined from different sources. A cause for additional concern is the killer acquisitions of innovative, emerging competitors, which acquisitions do not fall under the scope of classic competition law.[29] Empirical evidence shows that the operation of most of the mobile applications acquired by technology giants are quietly discontinued shortly after their acquisition.[30]

If not outright eliminating competition, dominant firms in a given market commonly transfer their influence to other markets through vertical integration, thereby creating a whole digital ecosystem. In such cases, traditional distribution chains are replaced by a value web.[31] These 'kill zones' around the core business functions of technology giants are further exacerbated by the fact that 'start-ups that complement the incumbent's business model are more likely to receive venture capital than start-ups that challenge the incumbent'.[32]

Within platforms, search engines are explicitly services where the user has very little information about the functioning of the systems ('black box') and therefore tends to use the service that is already familiar to him in order to reduce risk.[33] This phenomenon is known as 'automatic conditioning', whereby the user searches for unknown pages exclusively by using the tried and tested solution.[34] Indeed, empirical evidence shows that 'on devices where Google is the default search browser, 97% of searches are made on Google. On those where Bing is the default, 86% are made on Bing.'[35]

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[26] Economides, Nicholas – Lianos, Ioannis: Restrictions on Privacy and Exploitation in the Digital Economy: a Market Failure Perspective. Journal of Competition Law & Economics, 2021. Vol. 17., (4).

[27] Reverdin, Vladya M. K.: Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU? Journal of European Competition Law & Practice, 2021. Vol. 12., (3) 181.

[28] Ződi 2018. 109.

[29] Priskin Boglárka – Hantosi István: A versenyjog kihívásai a digitális gazdaságban – Az Európai Bizottság tanácsadó testületének jelentése és a Furman-riport tükrében. Versenytükör, 2019. Vol. XV., (2019/2) 27-31.

[30] Affeldt, Pauline – Kesler, Reinhold: Big Tech Acquisitions — Towards Empirical Evidence. Journal of European Competition Law & Practice, 2021. Vol. 12., (6) 476.

[31] Kondrát Flóra: A digitális platformok definiálási és szabályozási kérdései – A Digital Markets Act megoldási megközelítései. Versenytükör, 2021. Vol. XVII., (2021/2) 7-8.

[32] Krämer, Jan – Schnurr, Daniel: Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies. Journal of Competition Law & Economics, 2022. Vol. 18., (2) 267.

[33] Polyák Gábor: A forgalomirányító szolgáltatások médiaszabályozási kérdései. In Polyák Gábor (ed.): Algoritmusok, keresők, közösségi oldalak és a jog – A forgalomirányító szolgáltatások szabályozása. Budapest, 2020. HVG-ORAC, 109.

[34] Polyák Gábor – Pataki Gábor: Google Shopping: a 2017-es versenyjogi „gigabírság" elemzése, avagy milyen tanulságokkal szolgált a keresőmotorra kiszabott rekordbüntetés. In: Polyák Gábor (ed.): Algoritmusok, keresők, közösségi oldalak és a jog – A forgalomirányító szolgáltatások szabályozása. Budapest, 2020b. HVG-ORAC, 276.

[35] Anderson, Julia: To regulate or not to regulate: an age-old question in the digital age – EBRD. Competition Policy in Eastern Europe and Central Asia, 21 January 2023. Available at: https://oecdgvh.hu/pfile/file?path=/contents/about/newsletters/Competition_enforcement_and_ex-ante_regulation_in_digital_markets_vegl.pdf1&inline=true. 22.

Platforms' anticompetitive behaviour and unfair trading practices were not a prominent problem until these providers had much less ability to influence users' behaviour. Users were open to the possibility of leaving and joining another service if they disagreed with the provider's practices.[36] Today, however, presence on online platforms is not a matter of convenience or choice, but of societal expectations and business realities.[37]

3. Competition cases against technology giants

Abusive practices of technology giants have been the subject of a number of EU and national competition law procedures in recent years. The common characteristics of online platforms, as described above, have emerged in several proceedings as challenges to which classical competition law has not always been able to provide adequate answers. By grouping examples of past jurisprudence under three distinct categories and providing an illustrative overview, some (ir)regularities of the digital economy can be identified.

3.1. 'Data hunger', combining personal data

Data is essentially a non-competitive product, meaning that several companies can collect or, where appropriate, use the same data of the same users at the same time.[38] However, extensive data collection can create market power in cases where a particular type of data is collected by one undertaking specifically (e.g. Facebook on user activity or Google on search terms).[39] Key questions in this regard include 'whether the data could be replicated, whether it could be collected from other sources, the degree of substitutability between different datasets, how quickly the data in question becomes outdated, and how much data an undertaking need to compete'.[40]

Facebook notified the European Commission ('Commission') in 2014 of its plans to acquire WhatsApp, a privacy-friendly chat platform.[41] According to the fears of many, the merger would allow Facebook to obtain personal data collected by WhatsApp and could easily expand the scope of the data collected, thereby entrenching its already dominant position in the online advertising market. However, at that time, the Commission's assessment suggested that, beyond the technical difficulties of combining the databases, WhatsApp users could easily switch services if Facebook changes its privacy policy on the platform.[42]

Soon after the merger was approved, Facebook combined the personal data of users from its different services without obtaining the consent of users. The practice of linking various privacy policies 'to extract users' consent to the combination of their data generated in both markets for commercial purposes' is also known as 'envelopment by privacy policy tying'.[43] Consequently, the Commission fined the undertaking EUR 110 million for misleading information provided in the original proceedings.[44] However, mere *ex post* fines cannot provide an appropriate solution to such infringements. Some even argue that this realisa-

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[36] Mueller, Milton L.: Networks and States. The Global Politics of Internet Governance. Massachusetts, 2010. Massachusetts Institute of Technology, 213.

[37] Pünkösty András: Egy új digitalis etika megalapozásának egyes szempontjai – big data, algoritmusos döntéshozatal és a személy az adatalapú társadalomban. In: Török Bernát – Ződi Zsolt (ed.): A mesterséges intelligencia szabályozási kihívásai. Budapest, 2021a. NKE Ludovika Egyetemi Kiadó Iroda. 60.

[38] Kathuria, Vikas – Globocnik, Jure: Exclusionary conduct in data-driven markets: limitations of data sharing remedy. Journal of Antitrust Enforcement, 2020. Vol. 8., 522.

[39] Tóth András: A mesterséges intelligencia versenyjogi vonatkozásai. In: Török Bernát – Ződi Zsolt (ed.): A mesterséges intelligencia szabályozási kihívásai. Budapest, 2021b. NKE Ludovika Egyetemi Kiadó Iroda. 473.

[40] Clark, John: Antitrust and Data: What Your Car Knows and Who It Should Tell. Journal of European Competition Law & Practice, 2021. Vol. 12., (2) 83.

[41] Case no. COMP/M.7217. (Facebook/WhatsApp), C(2014) 7239 final, 2014.10.03.

[42] Id. (184)-(191).

[43] Gormsen, Liza Lodvdahl – Llanos, Jose Thomas: Facebook's exploitative and exclusionary abuses in the two-sided market for social networks and display advertising. Journal of Antitrust Enforcement, 2022. Vol 10., 92.

[44] Case no. COMP/M.8228. (Facebook/WhatsApp), C(2017) 3192 final, 2017.08.30.

tion paved the way for the introduction of more effective regulation applicable to digital platforms.[45]

In 2019, Facebook was fined by the German competition authority for combining user data generated through Facebook accounts with data collected about users through other Facebook apps and third parties. Although users formally consented to the combination of their data, they could not continue to use the services provided by Facebook if they refused. According to the authority, in view of Facebook's dominant position, this exploitative data policy violates users' right to informational self-determination.[46] This was the first decision that a national competition authority fined an undertaking for an apparent breach of data protection rules.

Consequently, the question of how Facebook uses the personal data it collects is indeed a matter of data protection law, but the competitive advantage that combined databases can bring is a matter of competition law.[47] Indeed, the privacy practices of technology giants fuel competition in digital markets.[48] 'Thus, as soon as the data accumulation becomes directly related to the abuse of users' cognitive biases and their inability to make well-informed decisions, there is a good reason to deem this practice anticompetitive.'[49]

3.2. Vertical integration, 'killer acquisitions'

The Commission has recently noted that 'a small number of transactions, which could have an impact on competition in the internal market have escaped merger control review'.[50] Indeed, over the past 15 years, technology giants have carried out more than 400 mergers, none of which have been prohibited by the EU competition authorities.[51] Conglomerate mergers are traditionally viewed as creating efficiency having inconsequential impacts on competition – a presumptions that might not hold true for digital markets.[52]

Back in 2008, the Commission cleared the acquisition of DoubleClick, an undertaking that collects browsing history, by Google, a search and online advertising service provider. In the Commission's assessment, the combination of the two sets of data did not represent competition risks because of practical, contractual difficulties and the risk of switching to other providers available to users.[53] However, it has now become clear that Google's advertising algorithm combining search and browsing data has no viable competitor, meaning that as a result of the merger Google has become a vertically integrated online advertising undertaking, impeding competition in the online advertising market.[54]

In 2020, the Commission approved Google's acquisition of Fitbit, a manufacturer and marketer of fitness watches and bracelets. Drawing on the lessons of the Facebook–WhatsApp case, the Commission required Google to combine health, fitness, location, etc. data collected by smart devices with other Google services only with

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[45] Gosztonyi Gergely: Early Regulation of Social Media Liability Issues in the United States of America and the European Union. Jogtörténeti Szemle, 2021. Vol. 19., (Special Issue) 21.

[46] Case no. B6-22/16. (Facebook v Verbraucherzentrale Bundesverband), 2019.02.06.

[47] Polyák Gábor – Pataki Gábor: A személyes adatok értéke a Facebook–WhatsApp összefonódás versenyjogi értékelésében. In: Polyák Gábor (ed.): Algoritmusok, keresők, közösségi oldalak és a jog – A forgalomirányító szolgáltatások szabályozása. Budapest, 2020a. HVG-ORAC, 268.

[48] Liguori, Laura – Marasà, Enzo – Picciano, Irene: Data Privacy and Competition Protection in Europe: Convergence or Conflict? CPI Columns, 6 April 2021. Available at: https://www.competitionpolicyinternational.com/data-privacy-and-competition-protection-in-europe-convergence-or-conflict/. 3.

[49] Scheele, Rachel: Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice. Journal of European Competition Law & Practice, 2021. Vol. 12., (1) 37.

[50] Beaudouin, Yauenn et al.: Merger Enforcement in Digital and Tech Markets: an Overview of the European Commission's Practice. Competition policy brief, December 2022. Available at: https://op.europa.eu/en/publication-detail/-/publication/e3e58b6d-7b68-11ed-9887-01aa75ed71a1/language-en/format-PDF/source-277442708.

[51] Tóth 2021c. 39.

[52] van den Boom, Jasper – Samranchit, Peerawat: Digital Ecosystem Mergers in Big Tech—A Theory of Long-Run Harm with Applications. Journal of European Competition Law & Practice, 2022. Vol. 13., (5) 365., 371.

[53] Case no. COMP/M.4731. (Google/DoubleClick), C(2008) 927 final, 2008.03.11.

[54] Tóth András: A technológiai óriások piaci megregulázásának versenyjogi mozgatói és aspektusai különös tekintettel a Digital Markets Act javaslatra. Versenytükör, 2021c. Vol. XVII., (2021/1) 52.

the explicit consent of users. In addition, Google is obliged to continue to provide free access to users' health and fitness data to competing software applications via the Fitbit web application programming interfaces – subject to the user's consent.[55] In hindsight, a similar commitment to refrain from combining personal data processed by Facebook and WhatsApp would have been a more effective solution instead of an *ex post* fine.

According to Pünkösty, competition law has occasionally overestimated consumer access to 'free services' and competition authorities have taken the risk of authorising potentially harmful mergers rather than blocking a merger that might not have a competitive impact.[56] Elsewhere, the author also points to the shortcomings of competition authorities often failing to recognise the long-term competitive and consumer harms that are difficult to quantify.[57]

3.3. Self-preferencing, prohibited product tying

In a 2017 decision, the Commission fined Google EUR 2.42 billion for abusing its dominant position in the search services market by positioning its own price comparison shopping service (Google Shopping) more favourably and displaying it more prominently on its general search results pages than competitors' similar services.[58] Following an appeal by Google, the General Court upheld the Commission's decision[59] and the appeal procedure before the Court of Justice is still pending.[60]

In 2018, the Commission imposed its highest ever competition fine of EUR 4.34 billion on Google for imposing unlawful restrictions on Android device manufacturers and mobile network operators since 2011 in order to entrench its dominant position in the general internet search market.[61] Based on the Commission's reasoning, unlawful tying of Google Search, Google Chrome and Play Store applications has denied competitors the opportunity to innovate and compete, and European consumers the benefits of effective competition in the now significant mobile sector. Similar to the Google Shopping case, the General Court largely upheld the Commission's evaluation[62] and the appeal procedure initiated by Google before the Court of Justice is currently in progress.[63]

4. The DMA and its criticisms

In order to ensure a unified approach when tackling the power of technology giants, the EU legislators recently adopted the Digital Markets Act[64] ('DMA'), which shall apply in all Member States from 2 May 2023. The DMA's premise is that the negative characteristics of online platforms, as identified in Section 3, combined with unfair practices by service providers, as assessed in Section 4, 'substantially undermin[es] the contestability of the core platform services, as well as impact[s] the fairness of the commercial relationship between undertakings providing such services and their business users and end users'.[65]

In case of gatekeepers, this justifies the introduction of *ex ante* regulation to complement the classical *ex post*, reactive competition regime, ensuring effective competition and fairness in digi-

[55] Case no. COMP/M.9660. (Google/Fitbit), C(2020) 9105 final, 2020.12.17.

[56] Pünkösty András: Versenyjogi megfontolások a technológiai óriások szabályozásával kapcsolatban. Az egyesült államokbeli és európai megoldási kísérletek összehasonlító elemzése. In Medias Res, 2021b. (2) 267.

[57] Pünkösty András: Merre tart az európai szintű platformszabályozás? – Áttekintés a platformok szabályozásának versenyjogi ösztönzőiről, valamint a fúziókontroll lehetséges fejlesztéséről. In: Török Bernát – Ződi Zsolt: Az internetes platformok kora. Budapest, 2022. NKE Ludovika Egyetemi Kiadó, 190.

[58] Case no. COMP/AT.39740. (Google Search (Shopping)), C(2017) 4444 final, 2017.06.27.

[59] Judgement of 10 November 2021, Google and Alphabet v Commission (Google Shopping), T-612/17, EU:T:2021:763.

[60] Google and Alphabet v Commission (Google Shopping) procedure, C-48/22 P.

[61] Case no. COMP/AT.40099. (Google Android), C(2018) 4761 final, 2018.07.18.

[62] Judgement of 14 September 2022, Google and Alphabet v Commission (Google Android), T-604/18, EU:T:2022:541.

[63] Google and Alphabet v Commission (Google Android) procedure, C-738/22 P.

[64] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[65] DMA Recital (2).

tal markets.[66] The DMA departs from the familiar competition law concepts of relevant markets and market shares.[67] Instead of drawn out, case-by-case fact-finding and costly economic evaluation, general *per se* rules are prescribed.[68] This rule-based approach[69] of the DMA aims to make regulatory intervention easier, cheaper and faster, as 'it is not for the authority to establish an infringement and impose a duty, but rather for firms to define how they intend to comply with the obligations'.[70]

The Commission shall designate an undertaking to be a gatekeeper if 'it (a) has a significant impact on the internal market; (b) provides a core platform service which is an important gateway for business users to reach end users; and (c) enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future'.[71] Indeed, this wording targets a wider spectrum of market players than merely undertakings of a dominant position.[72] Examples of core platform services include online search engines, video-sharing platform services, operating systems, web browsers, and online advertising services.[73] Such a taxative list may make the application of DMA inflexible and quickly outdated, as the extension of the scope to new services may take years.[74]

In a move similar to the German competition authority's Facebook decision, the DMA prohibits all gatekeepers from combining personal data from different services or processing data collected by third-party services for the purpose of providing online advertising without the users' consent.[75] Some argue that this is not a sufficient safeguard to ensure the competitive nature of data-driven markets and that gatekeepers should only be allowed to combine data from different sources to the extent necessary to fulfil a contract with users.[76]

Gatekeepers shall allow users to easily un-install any software application installed on the gatekeeper's operating system,[77] a requirement that is rooted in the lessons learned from the Google–Android case described earlier. Furthermore, gatekeepers shall not, in the ranking and related indexing and crawling, favour their own services and products over those of third parties[78] – in this case, the experiences of the Google Shopping case seem to be behind the provision.

Gatekeepers are also required to inform the Commission of any intended concentration 'where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data', regardless of whether the classical competition thresholds are met.[79] The Commission will inform the competition authorities of the Member State(s) concerned regarding the intended concentration, who may request the Commission to examine the concentration, even if the authori-

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[66] Assimakis P. Komninos: The Digital Markets Act: How Does it Compare with Competition Law? Available at: https://ssrn.com/abstract=4136146.

[67] Chirico, Filomena: Digital Markets Act: A Regulatory Perspective. Journal of European Competition Law & Practice, 2021. Vol. 12., (7) 496.

[68] Petit, Nicolas: The Proposed Digital Markets Act (DMA): A Legal and Policy Review. Journal of European Competition Law & Practice, 2021. Vol. 12., (7) 530.

[69] Kathuria, Vikas: The Rise of Participative Regulation in Digital Markets. Journal of European Competition Law & Practice, 2022. Vol. 13., (8) 539.

[70] Colomo, Pablo Ibáñez: The Draft Digital Markets Act: A Legal and Institutional Analysis. Journal of European Competition Law & Practice, 2021. Vol. 12., (7) 562.

[71] DMA, Article 3.

[72] Fernández, Cani: A New Kid on the Block: How Will Competition Law Get along with the DMA? Journal of European Competition Law & Practice, 2021. Vol. 12., (4) 271.

[73] DMA, Article 2, point 2.

[74] Teresa Rodríguez, de las Heras Ballell: Pivotal for success, critically assessed. VerfBlog, 2021. 1., 3.

[75] DMA, Article 5, point 2.

[76] Inge, Graef: A suggestion for strengthening the limits on personal data combination in the proposed Digital Markets Act. VerfBlog, 2021. 1.

[77] DMA, Article 6, point 3.

[78] Id. Article 6, point 5.

[79] DMA, Article 14.

sation would not be required under the laws of the requesting Member State(s).[80]

This novel notification requirement is clearly intended to reduce the cases of killer acquisitions described earlier. In the past, the Commission has cleared mergers that were later found to have had a profoundly negative impact on competition, such as the Google–DoubleClick case. However, it might be more efficient to revise merger control thresholds to 'capture low turnover/high transaction price acquisitions'.[81] It is also questionable, how much capacity the already overburdened Commission will have available to carry out such investigations.

In addition to the *ex ante* clearance of mergers, the powers of competition authorities to dismantle *ex post* monopolies created as a result of mergers gone wrong could also be strengthened. Breaking up technology giants is a more mainstream position in the US, with Senator Elizabeth Warren, for example, making the issue a central element of her 2020 presidential campaign.[82] In contrast, this approach might just create a number of smaller platforms, eventually consolidating into a singular one and holding the same dominant position as Google or Facebook now.[83]

5. Summary

Taking the form of economic regulation, the DMA may have 'major, maybe revolutionary, implications on some of the business models of the largest firms worldwide'.[84] The Commission is at the worldwide forefront of regulating new technologies. This might be a direct consequence of the EU's technological innovation falling well behind the pace of the economies of the United States and China. Thus, regulation of the digital age is the EU's way of finding its own voice and trying to catch up with its rivals.[85] Against this backdrop, there is little room for failures.[86]

However, the actual effects of the DMA are not yet clear. Some believe it 'leaves as many paths open as possible to innovative firms. This may be the best policy choice given the inherent unpredictability of innovation.'[87] Others have pointed out that the strict obligations imposed upon gatekeepers might have unintended negative consequences on innovation incentives and overall consumer benefits digital markets have to offer.[88]

One thing is certain: the complex problems raised by online platforms need complex legal solutions. The emerging new legal regime, which cuts across classical areas of law but incorporates their basic principles, is often referred to as 'platform law' or 'user protection law', with the core aim to curb 'platform power'.[89]

In addition to competition law measures, Tóth stresses the need for a coordinated application of media law, data protection law and consumer protection law.[90] Newman goes beyond the legal framework and considers it necessary to incorporate philosophical, psychological, economic and neurological perspectives in order to understand

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[80] Judgement of 13 July 2022, Illumina v Commission, T-227/21, EU:T:2022:447.

[81] Käseberg, Thorsten: The DMA – Taking Stock and Looking Ahead. Journal of European Competition Law & Practice, 2022. Vol. 13., (1) 2.

[82] Elizabeth, Warren: Break Up Big Tech. Available at: https://2020.elizabethwarren.com/toolkit/break-up-big-tech.

[83] Papp János Tamás: A közösségi média szabályozása a demokratikus nyilvánosság védelmében. Budapest, 2022. Wolters Kluwer, 243.

[84] Larouche, Pierre – de Streel, Alexandre: The European Digital Markets Act: A Revolution Grounded on Traditions. Journal of European Competition Law & Practice, 2021. Vol. 12., (7) 542.

[85] Tóth András: Az Európai Unió (szabályozási) útja a szuverenitás felé az adatalapú gazdaságban. Európai Tükör, 2021d. Vol. 24., (2) 29.

[86] Colomo, Pablo Ibáñez: New Times for Competition Policy in Europe: the Challenge of Digital Markets. Journal of European Competition Law & Practice, 2021. Vol. 12., (7) 492.

[87] Larouche, Pierre – de Streel, Alexandre: Will the Digital Markets Act Kill Innovation in Europe? CPI Columns, 19 May 2021. Available at: https://www.competitionpolicyinternational.com/will-the-digital-markets-act-kill-innovation-in-europe/. 6.

[88] Portuese, Aurelien: The Digital Markets Act: The Path to Overregulation. CPI Columns, 13 June 2022. Available at: https://www.competitionpolicyinternational.com/the-digital-markets-act-the-path-to-overregulation/.

[89] Ződi Zsolt: Az európai platformszabályozás jellegzetességei. Platformjog és felhasználóvédelem. In Medias Res, 2022b. (1).

[90] Tóth András: Médiaszabályozási indikációk az online figyelempiacok kudarcainak kiküszöböléséhez. In Medias Res, 2021e. Vol. X., (2) 294.

and effectively regulate the operation of 'attention markets'.[91]

The recent Opinion of the Advocate General Rantos of the Court of Justice of the European Union on the German competition case against Facebook described earlier, also foreshadows the proliferation of solutions across different fields of law. Rantos argues that 'a competition authority [...] may examine, as an incidental question, the compliance of the practices investigated with the rules of [the General Data Protection Regulation[92]]'.[93]

Coordinated actions by different authorities, while respecting the principle of *ne bis in idem*, are essential in this area, as to avoid divergent decisions on a single case.[94] The optimal allocation of tasks and responsibilities depends on the legal mandate of the given authorities, the need for technical expertise in the given case, the relative risks of regulatory capture and the overall administrative costs.[95]

A holistic legal approach is a prerequisite for effective legislation and enforcement. Such a view is increasingly gaining ground in professional discourse, to which this paper has also sought to contribute.

[91] John, M. Newman: Regulating Attention Markets. University of Miami Legal Studies Research Paper, 2019. Available at: https://ssrn.com/abstract=3423487.

[92] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation').

[93] Opinion of Advocate General Rantos of 20 September 2022, Meta Platforms and Others, C-252/21, EU:C:2022:704, 78.

[94] Mario Viola, de Azevedo Cunha – Shara, Montelone: Data protection, freedom of expression, competition and media pluralism. In Parcu, Pier Luigi – Brogi, Elda: Research Handbook on EU Media Law and Policy. Cheltenham, 2021. Edward 239.

[95] Lancieri, Filippo – Neto, Caio Mario S. Pereira: Designing Remedies for Digital Markets: the Interplay between Antitrust and Regulation. Journal of Competition Law & Economics, 2022. Vol. 18., (3) 614.

Bence Benke[1]

Work Harder, Compete Less? – Selected Developments of the Labour Market Through the Lens of Competition Law

***Abstract**: This paper is intended to draw attention to the need for competition law enforcement to develop best practice to address the abuses of monopsony in labour markets. It aims to provide an overview of the most relevant competition issues that may emerge in labour markets, while pointing out that the exercise of collective labour rights need not be in conflict with the requirements of fair competition. The latest developments refer to contemporary forms of employment, the adequate categorisation of which in each case is key to maintaining the balance of markets. This is followed by a look at anti-competitive agreements in the capacity of employer. Finally, the study also assesses efforts to eliminate non-compete agreements, which are a hindrance to the flourishing of both worker and consumer welfare. While labour market dimensions could also be of serious bearing in merger control, considering the case of single-company dominated towns, it is beyond the limits of this paper to explore this issue.*

Keywords: non-compete, collective labour law, no-poach, wage-fixing, monopsony.

1. Introduction

1.1. Preliminary considerations

The labour market has recently witnessed a revolutionary upsurge in competition law enforcement actions around the globe after having come systematically under the spotlight of competition law scholarship in a wide array of settings.

From the last quarter of the twentieth century up to the recent series of crises, mainstream economics had been leading a tendency to neglect labour markets in the spirit of a renaissance of laissez-faire capitalism.[2] In parallel, the impact of this period can be traced in the progressive decline in the labour share of GDP[3] accompanied by a nearly quadrupled increase in productivity relative to the compensation of an average worker[4].

Furthermore, it may be observed that the majority of key employers – as the examples of the tech giants have shown – are willing to go as far as they can when it comes to squeezing the most out of human resources. Google, side-by-side with an independent federal agency responsible for labour relations, successfully paved the way for its workers to organise themselves and obtained a prohibition on using the company's internal e-mail network for unionising purposes. In spite of the explicit language of the whistle-blower laws, workers may

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[2] *See* Bohle, Dorothee & Greskovits, Béla. (2007). Neoliberalism, Embedded Neoliberalism and neocorporatism: Towards transnational capitalism in Central-Eastern Europe. *West European Politics*, 30:3, 443-466.; *See also* Posner, Eric A. (2021). *'The Failure of Antitrust', How Antitrust Failed Workers*. Oxford University Press. (online edn, Oxford Academic, 19 Aug. 2021). Available at: https://doi.org/10.1093/oso/9780197507629.003.0003.

[3] Autor, David, Dorn, David, Katz, Lawrence F., Patterson, Christina & Van Reenen, John. (2017, May). The Fall of the Labor Share and the Rise of Superstar Firms. Working Paper 23396, *National Bureau for Economic Research*, Cambridge, MA., 1-3., 25-26. https://doi.org/10.3386/w23396.

[4] From 1979 to 2021. *See The Productivity-Pay Gap*. Economic Policy Institute. Available at: https://www.epi.org/productivity-pay-gap.

also be subject to arbitrary discipline, retaliation, or even wrongful termination if they speak up about their concerns. Once it was revealed through whistleblowing that Amazon forced its employees to work exposed to an unsafe environment during the Covid-19 pandemic, it was hardly surprising that the company would shortly afterwards dismiss the leaking employee. Likewise, an incident ended with the firing of a Google recruitment officer who dared to make an offer to an Apple engineer, after which Apple's CEO became aware of this and expressed his strong disapproval directly to the management of the rival IT company.[5]

All this points to the fact that one of the main ways in which workers are vulnerable and exploited to their employers is through the skewed dynamics between them in favour of the latter, but competition law can nevertheless help to address this imbalance by ensuring that there is a level playing field in the labour markets. As a matter of fact, there have recently been encouraging signs indicating that competition authorities are looking forward to taking a fierce stance against distortions of competition in the labour markets.

Back in 2016, Federal Trade Commission ("FTC") and Department of Justice of the United States released a single guidance declaring that from then on, it would be per se illegal and subject to criminal prosecution if companies agree not to recruit certain employees or not to compete on terms of compensation or other working conditions.[6]

Last year, the U.S. Department of Treasury has issued an exhaustive report compiled from research on competition in the labour market[7], and the FTC together with the U. S. Department of Justice launched a public inquiry into its merger review and guideline, requesting information in particular on the impact on labour markets[8].

Moreover, having found that around a fifth of US workers are locked into employment contract provisions that block them from later practicing their occupation at any competitor firm, the FTC is most recently moving to ban all forms of non-compete agreements in the US world of work.[9]

Simultaneously, in the European Union, Margrethe Vestager, the European Commissioner for Competition heralded a new era of cartel enforcement and expressed that, alongside the classic cartels, the EU would also pay close attention to unconventional buyer-side collusions – not only those concerning suppliers but also those that directly or indirectly depress the wages of employees.[10] Besides, starting from the premise that some developments in competition policy are potentially being embraced by the various regimes, it is also absolutely not inconceivable that the showdown over non-compete agreements in the US could have a knock-on effect on the policy discussions on the issue in the EU.

1.2. Aim of my essay

In the light of the foregoing, my essay will appraise the following issues that are relevant for competition law enforcement in the labour market.

First, I will provide an instructive and straightforward overview of the specific implications of disrupting competition in the labour market.

Second, I will explore in depth how EU competition law has interacted with the different aspects of organising among workers.

Third, I will identify the most prominent practices that have the potential to restrict competition in the labour market and examine which of

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[5] The cited instances are drawn from Hubbard, Sally. (2020). *Monopolies Suck: 7 Ways Big Corporations Rule Your Life and How to Take Back Control*. New York, NY: Simon and Schuster, 72-74.

[6] *See*: https://www.justice.gov/atr/file/903511/download.

[7] U.S. Department of the Treasury. (2022, March). *The State of Labor Market Competition*. Available at: https://9home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

[8] *See the official notice* at: https://downloads.regulations.gov/FTC-2022-0003-0001/content.pdf.

[9] *See the Notice of Proposed Rulemaking for Non-Compete Clause Rule* (NPRM) at: https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf.

[10] Vestager, Margaret. (2021, October 22). „*A new era of cartel enforcement*". Speech delivered at the Italian Antitrust Association Annual Conference. Transcript available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

these already fall within the competence of competition law.

Overall, I will examine whether interventions on behalf of fair labour markets are compatible with the objectives of competition law and what welcome steps might be expected from competition policy in the future.

2. Employers have a strong grip with buyer power in it

In the following, let me invite the reader to a brief overview on the microeconomic background of the issue to arrive at a common starting point. The labour market is basically conceived in a similar way to markets for goods and services, specifically in terms of the approximate correlation between the demand and supply curves. Hence, in a competitive market, it is their relative position that defines the price – in the present case, the wage –, that would be reached under conditions of effective competition.

The distinguishing feature is that employers are on the demand side and, given that the supply side is typically abundant, it is once again the undertakings that are inclined to concentrate. Should market power accumulate on the part of purchasers, the phenomenon is usually captured by the characteristics of a monopsonistic market or bargaining power[11]. Whereas monopsony as well as oligopsony can be used to describe any market structure in which demand is represented by only one or a limited number of operators, its application to the labour market is the most frequently encountered in the literature. This in turn implies that, if an employer of significant market power seeks to maximise its profits, it should determine the level of employment at the point where the curve representing the extra cost of employing an additional worker (*Marginal Cost*) meets the curve representing the revenue that can be realised by hiring one more worker (*Marginal Revenue Product*). Ideally, the latter would eventually run into the upward-sloping labour supply curve, and wages in the market would be set according to this intersection.[12]

It is easy to observe that monopsony power results not only in lower employment rates but also in lower wages. In a dynamic perspective, however, if numerous employers take advantage of their monopsonistic position, the whole of society suffers severe welfare losses through misallocation of labour and a considerable shift of income from workers to the benefit of all the employers.[13] Moreover, employers thus enjoy net gains that are still more meagre than the extent of deprivation they inflict on workers, entailing a suboptimal degree of aggregate welfare which the two groups jointly derive due to the absence of gains to be realised from further trade (*deadweight loss*).[14]

3. Collective labour law through the prism of competition law

With all this in mind, it stands to reason to ask why competition authorities might have faced a particular challenge in applying competition law to labour markets. Certainly, it could be argued that the interests of workers are first and foremost a matter of another area of law, perhaps social policy. Nonetheless, I shall take the liberty of acknowledging in the course of this essay that the provisions of competition law are already adequately suited to labour markets, without any alteration. If we think only of Article 101 (1) TFEU, its imperative is nothing less than to be prepared to pursue

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[11] *See more on the latter and how it differs*: Anchustegui, Ignacio Herrera. (2018, April 19). *Buyer power in agreements and abuse of market power cases: An overview of EU and national case law*, Concurrences, e-Competitions Buyer power in agreements and abuse of market power, Art. N° 86351. Available at: https://www.concurrences.com.

[12] *See* Manning, Alan. (2003). *Monopsony in Motion: Imperfect Competition in Labor Markets*. Princeton, NJ: Princeton University Press. Available at: https://doi.org/10.2307/j.ctt5hhpvk.

[13] Ashenfelter, Orley C., Farber, Henry, & Ransom, Michael R. (2010). Labor Market Monopsony. *Journal of Labor Economics*, 28(2), 203-210. https://doi.org/10.1086/653654.

[14] I.e., we are talking about a market failure, *see in more detail* Blair, Roger D., & Harrison, Jeffrey L. (2010). *Monopsony in Law and Economics*. Cambridge, UK: Cambridge University Press, 44. https://doi.org/10.1017/CBO9780511778766; *See also* Dobson, Paul, Chu, Alex & Waterson, Michael. (1998). *The welfare consequences of the exercise of buyer power*. London, UK: Office of Fair Trading, 12. Available at: https://www.researchgate.net/publication/37142835_The_welfare_consequences_of_the_exercise_of_buyer_power.

any conduct that may prevent, restrict or distort competition within the internal market.

3.1. Trust the unions, they are not a trust

Today, however, collective labour organising is exempted from competition law in the European Union as well as overseas. In the United States, labour was gradually being taken out of the anti-trust law. The Sherman Act (*1890*), albeit against the intent of it, had still been actively used by federal courts as a legal weapon to break strikes.[15] While the Clayton Act (*1914*) had already allowed for trade unionising, scholars of the time were convinced that it had been far from being capable of giving way to collective bargaining.[16] Effective immunity had not been acquired until somewhat later, through judicially created, "nonstatutory" route, which has already covered both sides of the labour market.[17]

Below, let us look at how the immunity of workers has been established in the case law of the Court of Justice of the European Union ("CJEU").

3.2. The wild card of competition is social rights

At first, a collective agreement is mainly defined as a contract negotiated between employers and trade unions which regulates not only the relationship between the parties but also the terms and conditions of employment for all employees covered by it. Above all, employees are not deemed to be undertakings within the ambit of competition law, and consequently, where a single firm reaches an agreement with its own employees collectively, the regulation of Article 101 TFEU is just as inapplicable as in the case of labour union organising amongst employees.[18]

A different situation could arise if account were taken of those industry-wide arrangements which are concluded collectively between all the employees and employers in a whole sector. Yet the CJEU in the *Albany* case deduced as a rule that the Treaties – which in their entirety are for the Court to interpret and enforce –, require the dialogue between management and labour to be fostered in the interests of a high level of employment and social protection. Accordingly, in order not to seriously undermine the social policy advocated by the TFEU, when such a dialogue takes the form of a collective agreement, it must be regarded as being, *"by virtue of their nature and purpose"*, excluded from the scope of competition law.[19] It is worth noting that the TFEU is not the only relevant treaty, as the EU Charter of Fundamental Rights guarantees the right to collective bargaining as well.[20] All in all, the *Albany* exception[21] demands not only that the agreement must be entered into the framework of collective bargaining between workers' organisations and employers' organisations (*nature*), but that the immunity is also strictly conditional upon the direct intention to improve employment and working conditions (*purpose*).[22]

The bottom line is that the justification for these collective arrangements not to be reckoned null and void by competition law is beyond question, whether it is firmly based on the sheer priority given to the improvement of the quality of life of wage-earners or whether on the conviction that the welfare of labour goes hand in hand with a boost in consumption, followed by an increase in demand for labour and so on, eventually resulting in a completely more competitive economy.

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[15] Hovenkamp, Herbert. (2022, August 21). The Invention of Antitrust. *U of Penn, Inst for Law & Econ Research Paper* No. 22-05, 107-108., *Southern California Law Review*, 2022. https://dx.doi.org/10.2139/ssrn.3995502.

[16] Hovenkamp, Herbert. (2022, December 5). Worker Welfare and Antitrust. *University of Chicago Law Review*, 2022, *U of Penn, Inst for Law & Econ Research Paper* No. 22-32, 3-5. https://dx.doi.org/10.2139/ssrn.4015834.

[17] *Id.* 4.

[18] At least as long as a trade union does not engage in an economic activity, in which case it will also fall within the scope of competition law.

[19] C-67/96. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*. ("Albany"). Judgment. ECLI:EU:C:1999:430, paras 54-64.

[20] *See Charter of Fundamental Rights of the European Union.* Article 28.

[21] The expression originates from Advocate General Fennelly, *see* C-222/98. *Hendrik van der Woude v Stichting Beatrixoord*. ("van der Woude"). Opinion of AG Fennelly. ECLI:EU:C:2000:226. para 30.

[22] C-413/13. *FNV Kunsten Informatie en Media v Staat der Nederlanden*. ("FNV Kunsten"). Opinion of AG Wahl. ECLI:EU:C:2014:2215, para 24.

3.3. Flexible working conditions call for flexible competition law

In recent years, however, due to factors such as the Covid-19 crisis and the rise of the digital economy, the labour market has been rendered more flexible and forms of employment such as remote and part-time working have been becoming more prevalent. It is therefore essential to mention the *gig economy*, which could be summarised as the contemporary trend towards the transformation of traditional employment relationships into *"temporary, short-term, freelance or project-based activities"*.[23] This trend also poses a series of new challenges for competition authorities, as it becomes increasingly complicated to assess competition in the virtual space and to determine the market position of individual players.

The question was raised of how it would develop in the light of competition law if an employers' representative organisation were to reach sectoral collective agreements with an employees' representative organisation which could include among its members some professionals who provide services as self-employed rather than as employees. Following the criteria laid down in *Albany* et seq., the Court has first pointed out that, since self-employed individuals would *prima facie* be undertakings, the representative body in relation to them could not be considered as the kind of trade union which the TFEU encourages to pursue social dialogue, but instead as an association of undertakings.[24]

Notwithstanding, the Court has recognised that *"in today's economy it is not always easy to establish the status of some self-employed contractors as »undertakings«"*[25] and highlighted that there is also no reason why the attribute of an independent trader cannot be lost. The Court has found that it is coherent with the established case-law, where the service provider in question *"[i]s entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking"*, he is also to be understood as forming an economic unit with that latter.[26] In addition, the Court has held that if such an operator does not exercise greater independence and flexibility, with particular regard to the time, place and content of his tasks, than workers performing the same activity, he is classified as *"false self-employed"* for competition law purposes by reason of the disguised employment relationship that prevails the provision of his service.[27]

As the CJEU has exempted such "*forced self-employed*"[28] contractors from the personal scope of Article 101, it has set a precedent that allows them to participate in collective labour agreements in the same way as employees, while the body representing them is also to be categorised according to the function it effectively fulfils.

Conversely, in its *Wouters* judgement, the Court has applied a similar logic, albeit not in the context of collective bargaining, when it has characterised the conduct of a professional association of liberal professions – by examining its regulatory act aimed at preventing its members from participating in multi-disciplinary partnerships – as economic activity and the organisation as an association of undertakings, thereby finding Article 101 to be applicable to them.[29]

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[23] Heinemann, Andreas. (2020). Kartellrecht auf Arbeitsmärkten. *Wirtschaft und Wettbewerb – Competition law and economics*, N°. 07-08, 371-382, 374.

[24] C-413/13. *FNV Kunsten Informatie en Media v Staat der Nederlanden*. ("FNV Kunsten"). Judgment. ECLI:EU:C:2014:2411, paras 28-29.

[25] As the procedure was a preliminary ruling, the Court might have been able to pronounce this in full agreement with the Advocate General, the defendant in the main proceedings and the European Commission as well. *See id.* para 32.

[26] *Id.* paras 32-33. and 36.

[27] *Id.* paras 31., 35-36. and 42.

[28] In the words used by Gábor Fejes, emphasising the existence of external factors that may influence the legal circumstances of the employment, *see* Fejes, Gábor. (2020). Munkavállalói önszerveződés, kollektív szerződések és munkáltatói megállapodások – a versenyjog górcsöve alatt. In: Pál Lajos – Petrovics Zoltán (Eds.), *Visegrád 17.0 A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai* (pp. 133-166.). Wolters Kluwer, Budapest.

[29] C-309/99. *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten.* ("Wouters"). Judgment. ECLI:EU:C:2002:98, paras 58., 63-64. and 71.

3.4. From chilling effect to the unfreezing of gig economy

This sort of flexible application of the law, however, may have created the appearance of uncertainty. *Wouters* still obscured whether it is some elevated governmental policy goals that can override the restraint of competition on its findings, or whether the case only applies where a Member State has conferred regulatory competence on a private entity.[30] In addition, as it had not been consistently determined who eventually fits into the subject circle that is allowed to participate in collective bargaining, this may have had a chilling effect[31] on the exercise of the fundamental right of labour, actually inducing some Member States to clarify the limits of the concept of employee by legislation or by issuing a guideline.[32] By contrast, the Hungarian Competition Authority ("GVH") appears to have preferred to stick to the form, since no cases have occurred in its proceedings where it would have reclassified "forced self-employed" contractors as employees on the grounds of the content of their assignment.[33] On balance, it was up to the European Commission to take a position.

The Commission has indeed issued a Guideline conveniently expanding the *Albany* exception to cover those – further sophisticating the term – *solo self-employed* people who are not employees but either in a situation comparable to workers[34] or in a weak negotiating position.[35] It is clear that the Commission has not only considered the changing nature of employment as a trend, but also from the perspective that in many cases external economic circumstances force jobseekers to commit themselves to a non-employment contract. Companies may tend to hire self-employed workers in order to avoid paying social contributions and to get rid of requirements that are specifically designed to shield employees.[36] It follows that it does make a difference in which status the job is occupied, since self-employed workers generally face a persistently higher risk of impoverishment and social exclusion.[37]

From a behavioural point of view, the inclusion of self-employed contractors under the collective bargaining exception is favourable precisely for the reason that otherwise employers would attempt to fill jobs with alternative employment in order to avoid being bound by collective agreements. Whilst there is another thought-provoking though, somewhat market fundamentalist resolution to the paradox surrounding collective bargaining which suggest that if competition law were to intensely tackle market power in labour markets, it could play a functionally equivalent role to collective agreements.[38]

4. Just no bargains – cartels in the labour market

What the conducts under this subheading have in common is that they do not implicate employees who may not even be aware of them. Companies are occasionally tempted to collude with each other to promote their own interests, and their workers may well be the ones to end up paying the price. It is important to recognise that monopsony power can be created not only through the actual

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[30] Wish, Richard & Bailey, David. (2018). *Competition Law* (Ninth). Oxford, UK: Oxford University Press. 138-141.

[31] The constitutional law phrase is borrowed from Daskalova, Victoria. (2022, October 7). *Rethinking Collective Bargaining for the Self-Employed: European Commission publishes Guidelines on Exemption and Non-Enforcement*. Kluwer Competition Law Blog. Available at: https://competitionlawblog.kluwercompetitionlaw.com/2022/10/07/rethinking-collective-bargaining-for-the-self-employed-european-commission-publishes-guidelines-on-exemption-and-non-enforcement.

[32] Notably Denmark and Ireland, *see in detail* Monti, Giorgio. (2021). Collective labour agreements and EU competition law: five reconfigurations. *European Competition Journal*, 17:3, 714-744, 721-726. https://doi.org/10.1080/17441056.2021.1930452.

[33] *See* Fejes (*supra* fn. 28), at 14.

[34] Including working in economic dependence, working side-by-side with workers and working through digital labour platforms.

[35] 2022/C 374/02. *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*. (2022, 09. 30.). European Commission.

[36] *See for instance in the case* C-256/01. *Debra Allonby v Accrington & Rossendale College and Others*. ("Allonby"). Judgement. ECLI:EU:C:2004:18, para 18.

[37] *See the graph from* Euractiv *based on the data of Eurostat* at: https://infogram.com/risk-of-poverty-or-social-exclusion-based-on-employment-status-or-economy-brief-1hxr4zxn1087o6y.

[38] *See* Monti (*supra* fn. 32), at 740-741.

concentration of employers, but also through the practice of agreements that constrain the room for manoeuvre of labour in the market. In what follows, I will present the wage-fixing and the no-poaching agreements as two distinctive examples of cartels in labour markets, which probably differ in the extent to which they are judged to be unfair by their perpetrators, but not in the detrimental effects on the competitiveness of workers.

4.1. "Times are tough for everyone right now. We all need to tighten our belts."

Even though collective agreements can be perceived as a form of price-fixing, as they usually include the joint settlement of the remuneration of the employees as a decisive part. However, it is worth recognising that collective agreements tend to set the floor rather than the ceiling in terms of pay for a given profession or sector which makes them a high-pass filter capable of absorbing the role of minimum wages.[39]

Wage-fixing agreements are entered into by different employers with the same profile, and usually achieved through an exchange of information between them, whereby they set a certain wage level above which they do not wish to go. However, it is primarily the higher wages that workers are competing for, so in the labour market such a price-fixing is a final barrier to price competition and must therefore be subject to the harshest competition law assessment. Besides, since this practice allows employers to pay their employees in identical jobs or occupations the same rates of wages, it also indirectly prevents competitors from luring each other's employees by offering higher wages.

4.2. Labour is an endangered species – stop poaching!

Well, if we have come to treat wage-fixing as a price cartel, then it would be appropriate to label no-poaching as a case of market partitioning.

One representative scenario is when otherwise rival employers agree not to solicit or cold call each other's employees, who are often in key roles in their companies and could provide a competitive advantage if they are managed to retain them.[40]

The other major occurrence is when it is precisely for high-turnover jobs that employers, whether rivals or belonging to the same franchisor, agree not to hire each other's employees – even if they volunteer –, with the aim of ensuring that these occupations remain low-paying on a permanent basis.[41]

In a very significant case involving a longlasting infringement, the GVH[42] ruled that the Association of Hungarian HR Consulting Agencies restricted competition among its members because, along with other unlawful agreements, its ethical code included a no-poach agreement that prohibited the active solicitation of employees in any consultancy position related to the recruitment or secondment services of another member company.[43] The agreement penalized parties who breach it with a countervailing fee, while generously allowing that if employees voluntarily applied for the job, their applications could be accepted without sanction. A specific subtype of no-poach agreement was also introduced by the code, notably the no-touch agreement, which is to be interpreted in the sense that it concerns recruitment agencies binds its members to ‚leave alone' the employee they have sorted and posted before, meaning that they may no longer contact them with further job offers.

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[39] For example, in Denmark, Sweden, Italy, Austria, Finland, there is no nationally set minimum wage, leaving it entirely to sector-specific collective bargaining.

[40] This has been illustrated by the collusion between Silicon Valley's dominant tech companies, *see* Case No. 1:10-cv-01629. *U.S. v. Adobe Systems, Inc. et Al.* (2010, September 24.). U.S. District Court for the District of Columbia. Competitive Impact Statement, available at: https://www.justice.gov/atr/case-document/competitive-impact-statement-0.

[41] *See more* Krueger, Alan B. & Ashenfelter, Orley C. (2018, July). Theory and Evidence on Employer Collusion in the Franchise Sector. Working Paper 24831. *National Bureau for Economic Research*, Cambridge, MA. https://doi.org/10.3386/w24831.

[42] Hungarian Competition Authority

[43] VJ-61-616/2017.

The parties subject to the procedure argued that there is not sufficiently solid and reliable experience to show that their conduct is generally accepted as conceptually anti-competitive by object. However, in the view of the Competition Council of the GVH, the conduct is not at all a novel type of infringement: the no-poach clause constitutes both an allocation of customers and markets, whereas the no-touch clause qualifies as a restriction of choice between sources of supply in addition to market sharing.

It is indeed striking that while wage-fixing agreements simply fall under competition law due to hardcore price-fixing of supply prices, no-poach agreements can be said to cause market disadvantages for even the participating undertakings themselves, as they horizontally foreclose each other from recruiting and hiring new workers on the labour market.

5. Should you keep your freedom on lease even after you quit your job?

5.1. Matches and mismatches

It seems very likely that there is also a functionally similar counterpart to no-poach agreements, which is to be conceptualised as the other side of the coin, since we often fail to spot the root of the problem, which is not hiding nowhere but right under our noses.

In the context of this paper, when we talk about a non-compete agreement or clause – also known as a *covenant not to compete* –, we are referring to a stand-alone clause between an employer and an employee, either as a separate contract or as part of an employment agreement, which extends for a specified period after the termination of the employment relationship the employee's obligation not to engage in any conduct during the employment which would harm or endanger the legitimate economic interests of their employer. In practice, however, this is translated into the former employee not being allowed to take up employment with the employer's competitors or to establish or participate in the operation of a company carrying on a similar sphere of activity.

Non-compete agreements are usually regulated by legislation, but within the EU, it is noteworthy that in Bulgaria, they are currently considered unconstitutional, while in some US states, such as California, North Dakota and Oklahoma, they are already legally unenforceable. Nonetheless, there is evidence that they are extremely widespread, for example in Denmark they bind one in three workers and are used not only in highly skilled positions but also in low-income jobs.[44] Detailed regulation is very diverse across the EU, with the maximum duration typically varying between 1 and 3 years, while for some occupations it can be up to 5 years, and in countries with larger territories geographical delimitation may be required. Even in states where there is no minimum amount of compensation for the duration, the court has the established power to adjust it to an appropriate amount depending on the individual circumstances. Although in several EU countries the validity of a non-compete agreement is subject to the condition of compensation, its minimum amount is still defined as just half of the average monthly earnings in Slovakia and the Czech Republic, for example, one third of the base salary in Hungary, while in Poland it is only 25% of the average earnings for the same period as the duration of the noncompete.[45]

5.2. In the US, they will not take it anymore

It is beyond dispute that such an arrangement is capable of vertically restricting the labour market, but we are confronted with the fact that this trick is used in negotiation with the employees, who again do not qualify as undertakings in the eyes of EU competition law. But the US FTC has now ventured to act big and is about to eliminate some 30 million of the employment relations provisions in question. While the FTC is seeking to functionally cover the forms of non-compete agreements,

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[44] *See* Colvin, Alexander J. S. & Shierholz, Heidi. (2019, December 10.). *Noncompete agreements*. Economic Policy Institute. Available at: https://www.epi.org/publication/noncompete-agreements.

[45] The data is drawn from the following summary: http://yust.ru/upload/iblock/4a5/meritas-guide-to-employee-non_compete-agreements-in-emea-2017.pdf.

including for example nondisclosure agreements, it also intends to interpret the concept of worker broadly, including those who have a relationship with their employer that does not involve direct payment, and specifically giving an exemption only to the franchisee-franchisor relationship.[46] As of the writing of this paper, the public comment period for the proposed rule is still running, and already a number of concerns have been raised about it, not only economic but also constitutional. Regardless, the FTC is seeking to grasp non-compete agreements from the angle of unfair methods of competition.

5.3. Cui prodest?

Employers typically insist on non-compete agreements because they want to secure the knowledge capital they have invested in their employees through various courses, trainings and other development opportunities. If the employee is able to put to good use the skills acquired through the inputs of one employer in another, the question of free-riding does arise, but at the same time the employee may have contributed his own experience and routine to the growth and success of the company that served as his previous workplace. While non-competes may indeed be able to effectively protect valuable information for the employer, such legitimate economic interests are already sufficiently satisfied by trade secret and intellectual property rights. In any case, it is foreseeable that as long as employers have the tool of a non-compete agreement at their disposal, they will be inclined to push for it.

Nonetheless, the FTC warns that the long-term effects of non-compete agreements go far beyond individual approaches. On the one hand, the obvious disadvantage to the mobility in the labour market of the affected workers also diminishes the ability of non-restricted job seekers to compete in a healthy competition for jobs in which they can perform at their best and receive the top pay. On the other hand, the prevalence of non-compete agreements is a major disincentive to innovation, as they reduce the flow of information and knowledge between firms and discourage entrepreneurship. The net effect is to reduce the willingness of businesses to compete for the best-qualified workers, who will have fewer opportunities to find jobs, worsening wages and working conditions, while the quality of products and services will fail to improve and prices will become less competitive.[47]

6. Conclusions

6.1. Synopsis

It is becoming more frequently postulated that – contrary to the formerly general belief – the labour market may not be "almost perfectly competitive" as it is[48], but rather there is evidence of an increasing degree of employer concentration, which in turn is directly related to lower wages.[49]

As we have seen, in applying them to labour markets, competition considerations routinely necessitate dissolving the boundaries of specific concepts of other branches of law in order to attain proportionalisation at the level of socio-economic roles.

Keeping the focus of competition law exclusively on consumer prices would leave them to compete at the expense of the labour market, thereby utterly eroding not only wages but also – as an extra burden that employers could be spared in the interests of cost efficiency – the very working conditions themselves.

The fact that competition policy is increasingly turning towards labour markets clearly reflects that there is a growing recognition that employees are key actors in economic and social stability, while improving competitiveness and protecting

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[46] *See* NPRM (*supra* fn. 9), at 115-116.

[47] The arguments are set out in the following US FTC Chairman's Statement: *Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses Commission*. (2023, January 5.). File Nº. P201200, Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.

[48] *See* Card, David, Cardoso, Ana Rute, Heining, Joerg & Kline, Patrick. (2016). Firms and Labor Market Inequality: Evidence and Some Theory. Working Paper 22850, *National Bureau for Economic Research*, Cambridge, MA. https://doi.org/10.3386/w22850.

[49] Azar, José, Marinescu, Iona & Steinbaum, Marshall I. (2017, December). Labor Market Concentration. Working Paper 24147, *National Bureau for Economic Research*, Cambridge, MA. https://doi.org/10.3386/w24147.

workers' rights to decent work, equal treatment and fair pay are not mutually exclusive.

6.2. Future prospects

All the indications suggest that there may be more than one potential issue in labour markets that cannot be addressed by any means but competition law, while there is also little doubt that sooner or later the CJEU will be dealing with cases in which labour market power is playing a crucial role.[50] Inevitably, the weight of labour market concerns in the palette of market distortions will have to be determined. If jurisprudence evolves to take full consideration of the capacity of undertakings to pay their workers less than their marginal productivity, this could bring about a profound change in the whole discipline. This would go a long way to widening the range of not only anti-competitive agreements but also abuse of dominance and merger control.

It may be that EU legislation should take steps to revise such an entrenched provision in employment contracts as the non-compete agreement. It goes without saying that the market conduct of competing operators can never be absolutely unlimited, since they would not be able to function efficiently unless they were to be involved in contractual relations which in one way or another constrain their behaviour on the market. Nevertheless, capital normally grants companies not only a great deal of freedom, not to mention the far-reaching opportunities to assert their rights, but also a duty to sustain a viable society for future generations. If we assume that the fundamental purpose of competition policy is to safeguard the typically weaker parties against the professional businesses, who are already supposed to be predestined for being more prudent in commercial life, then this concept should certainly be explored.

[50] A Commission spokesperson has just recently affirmed the announcement made by the Commissioner for Competition, stating that *"the Commission is actively looking into possible issues involving competition between undertakings in labour markets, e.g., wage-fixing and no-poach agreements."* – *See the article on* Euractiv at: https://www.euractiv.com/section/competition/news/non-compete-clauses-for-workers-will-the-eu-follow-the-us-lead.

Lili Bischof[1]

The Challenges of Integrating Sustainability Considerations into EU State Aid Law

***Abstract**: The European Green Deal set ambitious targets for making the EU economy sustainable. This study is sought to define to what extent EU State aid law can play a role in advancing the green transition by integrating sustainability considerations. In this context, the Commission has the possibility to differentiate environmental aid from any other types of aid during the compatibility assessment under Article 107(3)(c) TFEU. As regards the supportive integration, State aid law has the potential to encourage the granting of aid that is beneficial to sustainability. On the other hand, preventive integration is also achieved, albeit to a limited extent. However, in recent years, the EU has faced several unexpected crises with burning short-term problems, which outweigh the importance of sustainability. Therefore, it is important for both Member States and the EU to find a balance between long-term and short-term goals. Overall, State aid law is an incentive instrument for greening the European economy, which, combined with legally binding prescriptive rules and the commitment of Member States, can effectively contribute to the achievement of a sustainable economy.*

Keywords: State aid law, European Green Deal, sustainability, environmental aid, Article 107(3) TFEU.

1. Introduction

The central question of this study is how sustainability objectives can be reconciled with State aid law. In this context, I will examine the law of the European Union („EU") on State aid and the extent to which sustainability-enhancing rules are integrated into State aid law. After a brief introduction to the Green Deal[2], I will examine the role of Article 107(3) TFEU[3] where the focus will be on the question to which extent the European Commission („Commission") is able to take into account sustainability objectives during its assessment. In this context, the assessment is divided into two parts, first, dealing with supportive integration, which means the facilitation of the grant of aid contributing to the protection of the environment, and then with preventive integration, aiming to prevent the grant of an aid which has environmentally damaging impacts. After analyzing the possibility for integration, I will present EU case law that has played a significant role in the development of the law. The cases will also provide the reader with an insight into the actual implementation of the legislation on environmental assessment and the practical problems of environmental integration. To complete the assessment of current legislation and practice, I will shortly discuss how the recent extraordinary events, such as the COVID-19 pandemic and the energy crisis, – affected the implementation of the Green Deal as regards State aid control. Finally, I will examine the potential future directions that lie ahead of the European Union, which, with the mutual coop-

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[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, COM/2019/640.

[3] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

eration and commitment of Member States and EU institutions, offer the possibility for a higher degree of integration of sustainability into State aid law.

The continuous relevance of sustainability considerations from a competition law perspective is also reflected in the statements of Executive Vice-President Margrethe Vestager. In her recent speeches, the Commissioner explained that State aid law has an important role to play in achieving sustainability goals, since the purpose of public subsidies is to support the common good, to support processes that the private sector cannot achieve alone. However, a competitive and highly developed European economy can only be realised if the EU succeeds in achieving the green transition as soon as possible, which requires subsidies for activities that are essential for the transition.[4]

Furthermore - as regards the fundamental rights aspect of the topic -, since environmental protection is a task that can only be fulfilled if it is regulated and implemented comprehensively, the *ratio legis* of Article 37 of the Charter[5] and Article 11 TFEU requires that sectoral policies in non-environmental areas take into account not only their specific concerns but also their environmental impacts. The obligation to integrate must be taken into account when applying or interpreting any area of EU law, so the following rule can be formulated: EU law must in principle be interpreted in a way that is consistent with environmental requirements.

A general, universally accepted answer to the question of the extent to which competition law can take sustainability considerations into account has not yet been found. This is a matter that is alive and evolving, and the purpose of this study is to explore its current status and future directions as regards the control of State aids.

2. The Green Deal and its competition law aspects

Since 1973, the Commission has issued multi-annual environmental action programmes which set out the legislative proposals and targets for EU environment policy. The Commission presented the European Green Deal[6] in December 2019, an agenda for making the EU economy sustainable. To achieve this, all policy areas need to take account of environmental challenges, define modern growth strategies and make the transition fair and achievable for all. The key challenge is to make Europe's entire economy carbon neutral by 2050. This transformation must make Europe's economy not only more sustainable, but also more competitive and resilient.

In order to mobilise all relevant national and EU instruments to achieve this goal, the Commission has designed and on 1 February 2023 published the Green Deal Industrial Plan[7] („Plan"). The Plan is based on four pillars, one of which is ensuring faster access to sufficient funding. In this context, the Commission's goal is to make it easier for Member States to grant State aid required to accelerate the green transition.[8]

Nevertheless, one might ask: why is it necessary to integrate sustainability considerations into European State aid law? The role of competition law should be emphasised in the sense that environmental policy will only be effective if markets respond to new regulatory signals and incentives without distorting competition, and if companies are encouraged to innovate by competing intensively and fairly. EU State aid rules have green potential, as through this control, the level playing field can be preserved and innovative, resource-efficient companies can be rewarded. Properly regulated State aid granted for *"good"* purposes has

[4] Speech by Executive Vice-President Margrethe Vestager in the State aid High Level Forum of Member States, 25 January 2023. Available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-state-aid-high-0_en. Remarks by Executive Vice-President Vestager on the proposal for a State aid Temporary Crisis and Transition Framework, 1 February 2023. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_527.

[5] Charter of Fundamental Rights of the European Union.

[6] European Green Deal (fn 2).

[7] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final.

[8] See Section 2.2.1 of Green Deal Industrial Plan. To achieve this objective, the Commission intends to adopt the Temporary Crisis and Transition Framework for State aid, which is further discussed in Section 4.3 of this study.

many advantages. In practice, State aid granted in order to correct market externalities is able to efficiently tackle the division between social objectives and private production. State aid might be an effective incentive for firms to invest.[9] In terms of sustainability, R&D funding is central in the field of energy transition to achieve the goals of the Green Deal. Innovation can be as well constly as risky for large companies in the energy sector, that are not directly confronted with green consumer preferences.[10] For example, phasing out coal is a huge challenge for a coal-dependent region, with huge costs in terms of infrastructure investment and creating new job possibilities. Governments must therefore have the flexibility to provide support – including State aid - to facilitate a socially and economically viable transition from coal to clean sources of energy.[11] In these cases, State aid can go a long way in reducing uncertainty and promoting green initiatives.

Hence, the following section deals with the possibility of integrating sustainability considerations into the balancing test of the Commission under Article 107(3)(c) TFEU. The analysis is sought to highlight that the Commission has developed a framework that allows sustainability objectives to be integrated, although there is room for improvement in terms of the depth and width of the integration.

3. Integration by balancing: the compatibility of State aid with the internal market

According to the current legislation, if Member States decide to adopt a support scheme for sustainability purposes, they mostly remain subject to the rules of the TFEU applicable to State aid. Thus, if the measure does not qualify under the General Block Exemption Regulation[12] („GBER") - which will briefly be discussed in Section 3.1. -, the Commission has to assess whether the aid is compatible with the internal market according to Articles 107(2) or 107(3) TFEU.

According to the Commissions practice, environmental protection and energy aid measures are subject to an assessmnent under Article 107(3)(c) TFEU[13]. In line with Article 107(3)(c) TFEU, an aid might be implemented if two conditions, one positive and one negative are fulfilled: it facilitates the development of an economic activitiy and it does not impede the competitiveness of the internal market. From a sustainability perspective, this can be interpreted as meaning that the goals set out in the Green Deal are appropriate objectives for exemption[14]. As the Commission stated in the *Climate Change Levy* case, decrease of the total amount of greenhouse gases and sustainable use of energy sources are such objectives which are capable of making the aid compatible with the internal market.[15]

As the Commission has a very wide discretion in the application of the exceptions in Article 107(3) TFEU, it soon became clear that there is a need to make its interpretation of the law transparent and thus ensuring legal certainty. It is no coincidence that the Commission has issued a number of guidelines and communications intended to make case-law more predictable, which are not binding legal sources but are becoming increasingly important in practice. To the extent that these are in line with the provisions of the Treaties, the Commission limits its discretion and must

[9] González Xulia, Jaumandreu Jordi, and Pazó Consuelo: Barriers to innovation and subsidy effectiveness, RAND Journal of Economics, 2005, 946.

[10] Popovici Ana: Green Commitments for State Aid, Competition Policy Brief, 2021/3, 21–30.

[11] Delarue Juliette: State Aid Perspectives on the Coal-to-Clean Transition, European State Aid Law Quarterly, 2020/1, 105–107.

[12] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78.

[13] Communication from the Commission: Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, Official Journal C 80, 18.2.2022, p. 1–89, paragraph 7.

[14] Environmental considerations already formed a possibility for exemption before the Green Deal, see for example Nowag Julian: Environmental Integration in Competition and Free-movement Laws, Oxford University Press, Oxford, 2016, 117–118 and 182: *"The efforts to integrate environmental considerations started even before Article 11 TFEU was introduced into the Treaty. The first Community framework for environmental aids in 1974 had a particular focus on the polluter-pays principle."*.

[15] Commission Decision of 17 September 2003 on the exemption from the Climate Change Levy which the United Kingdom is planning to implement in respect of coalmine methane, 2004/50/EC, OJ L 10, 16.1.2004, p. 54–59, paragraphs 31–36.

abide by the communications and guidelines it has issued and published itself.[16]

However, before going into more details on the most relevant guidelines for the study, I would like to briefly describe the GBER which also covers environmental aid[17].

3.1. Sustainability related provisions of the GBER

It was in 2008 that the Commission has for the first time included provisions on environmental aid in the General Block Exemption Regulation.[18] In order to further simplify and make transparent the application of Article 107(3) TFEU, the Commission adopted the new GBER in 2014[19], which was part of the Commission's SAM package[20]. The GBER has been revised several times, most recently in 2021[21], but the Commission is now proposing a number of further adjustments as well[22]. On 9 May 2023, the Commission has endorsed the newest version of the GBER amendment, which will be formally adopted shortly[23]. One of the driving forces behind the revision appears to be the Commission's aim of "*broadening the possibilities for Member States to implement aid measures supporting the green and digital transition without prior notification and approval by the Commission*".[24]

Before the modernisation in 2014, several aid measures, such as waste management and recycling, energy efficiency in buildings and reductions or exemptions from environmental taxes, had to be notified to the Commission. As they became part of the GBER, Member States can adopt such measures without a prior notification.[25] Ongoing reforms have further broadened the scope of the GBER, making it possible to adopt investment aid for publicly accessible recharging infrastructure for zero and low emission road vehicles and more extensively for energy efficiency projects in buildings.[26] There are, however, some measures which remain outside the scope of the GBER, thus still subject to the supervision of the Commission, such as aid granted in the form of tradable permit schemes[27] and aid granted for carbon capture and storage[28].

The reason for broadening the scope of the GBER was that the Commission has recognised that the assessment of routine measures requires significant resources, yet the distortive effect of such measures is minimal. The Commission has therefore argued that its resources should be

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[16] Order of the General Court (First Chamber) of 23 November 2015, European Renewable Energies Federation (EREF) v European Commission, T-694/14, ECLI:EU:T:2015:915, paragraph 22.

[17] The term *"environmental aid"* is used in this study as it is defined in the Environmental Guidelines 2022. For this see paragraph 12 of the Guidelines: *"State aid granted to facilitate the development of economic activities in a manner that improves environmental protection"*.

[18] Section 4 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), Official Journal L 214, 9.8.2008, p. 3–47.

[19] Commission Regulation (EU) No 651/2014 (fn 12).

[20] On 8 May 2012, the Commission set out an ambitious State aid reform programme in the Communication on State aid modernisation. For this see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM), COM/2012/0209.

[21] Commission Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, C/2021/5336, OJ L 270, 29.7.2021, p. 39–75.

[22] Press release, 6 October 2021: State aid: Commission invites comments on draft proposal to further facilitate implementation of aid measures promoting the green and digital transition. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5027. State aid: Commission consults Member States on proposal for a Temporary Crisis and Transition Framework, 1 February 2023. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_513.

[23] See: https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en.

[24] Statement of Executive Vice-President Margrethe Vestager, 2021. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5027.

[25] Competition Policy Brief, 2014/16. Available at: https://ec.europa.eu/competition/publications/cpb/2014/016_en.pdf.

[26] Article 1 (19)-(21) of Commission Regulation 2021/1237 (fn 21).

[27] Tradable permit schemes set a cap or quota for pollution in a given area, and only allow actors in that area to pollute according to the quantity of permits they hold (see: https://environment.ec.europa.eu/economy-and-finance/ensuring-polluters-pay/tradable-permits_en.

[28] Carbon capture and storage is defined in Section 2.4. paragraph 19(13) CEEAG as *"a set of technologies that make it possible to capture the carbon dioxide (CO2) emitted from industrial plants, including process-inherent emissions, or to capture it directly from ambient air, to transport it to a storage site and inject it in suitable underground geological formations for the purpose of permanent storage"*.

devoted to assessing measures that pose a higher risk to competition and it can exercise State aid control more effectively if it focuses on measures that are unusual or larger.[29]

Some authors argue, however, that the wider scope of the GBER has a *"nudging"* effect on Member States.[30] It means that Member States tend to design aid measures on the basis of the GBER whenever possible rather than to await a long assessment procedure by the Commission. With other words, Member States would like to *"jump where the fence is lowest"*.[31] Conducting a credible market analysis and designing a measure that complies with the guidelines is a much more difficult task – *a higher fence*. The Commission is therefore able to influence Member States' aid schemes through the GBER.

While it is true that designing an aid scheme that is compatible under the Guidelines on State aid for climate, environmental protection and energy from 2022[32] („Environmental Guidelines or CEEAG") is more difficult and costly than an exemption under the GBER, it is still more advantageous for Member States to notify measures that the Commission will most likely authorize under the CEEAG than getting lost in the *"black box"* [33] of the Commission's general balancing test[34]. The CEEAG is therefore likely to play a role in the design of the new support schemes. Hence, in the next section, I will discuss some aspects of the Environmental Guidelines including its material scope and legal status as well as the common assessment principles.

3.2. The Environmental Guidelines

The Commission adopted the latest Environmental Guidelines in 2022.[35] The CEEAG is intended to inform Member States and market operators about the conditions for compatibility assessment of all notifiable aid for environmental purposes. The CEEAG has a clear focus on energy, taking into account the changes that have taken place during the last few years in the energy sector. Hence, they support the EU's aim to boost European renewable energy inventions and have a high focus on environmentally friendly and sustainable resources.[36] There are also new rules in the CEEAG for clean mobility[37] and for measures aiming to improve energy and environmental performance of buildings.[38]

First and foremost, I would like to highlight that there is a complementary relationship between the GBER and the CEEAG, whereby the CEEAG is applied only to State aid schemes not exempted from the notification obligation by the GBER. For instance, the revised CEEAG explicitly cover carbon capture and storage and tradable permit schemes[39] as well as it sets out general principles to

[29] Nicolaides Phedon: The New General Block Exemption Regulation: The Cornerstone of the State Aid Regime, 2014-2020, Lexxion, 10 July 2014. Available at: https://www.lexxion.eu/stateaidpost/the-new-general-block-exemption-regulation-the-cornerstone-of-the-state-aid-regime-2014-2020/.

[30] See, for example: Lillerud Katrine: Soft Law and Their Symbiotic Relationship with the Block Exemptions, EStAL Issue 3, 2021, 337-358; M Weaver Alexander: Convergence Through the Crisis: State Aid Modernization & West European Varieties of Capitalism, Columbia Journal of European Law, 2014. 587.

[31] Lillerud Katrine: Soft Law and Their Symbiotic Relationship with the Block Exemptions, EStAL Issue 3, 2021, 337-358. 344-345.

[32] Communication from the Commission: Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, Official Journal C 80, 18.2.2022, p. 1–89.

[33] See for black box: Nicolaides Phedon: Shedding Light into the ‚Black Box' of State Aid: The Impact of Hinkley Point C on the Assessment of the Compatibility of State Aid, European State Aid Law Quarterly (ESTAL) 20, no. 1 (2021), 4-14. 9.: *"the weighing of the positive and negative effects of State aid and their balancing are the ‚black box' of State aid in the sense that the conclusions of balancing exercises are presented with little, if any, explanation of why the positives outweigh the negatives."*.

[34] Banet Catherine: Legal Status and Legal Effects of the Commission's State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020), European State Aid Law Quarterly, 2020/2. 182.

[35] Communication from the Commission, C/2022/481 (fn 13). However, the first horizontal soft law tools in the area of environment saw their beginning already in the mid-1980s and the first separate Guidelines on Environmental Aid were adopted in 1994. They have been revised several times – in 2001, 2008 and 2014.

[36] Lillerud (fn 31) 345–346.

[37] These include acquisition and leasing of new and used clean vehicles as well as the deployment of recharging and refuelling infrastructure.

[38] Interreg Europe: New Environmental State Aid Guidelines. Available at: https://www.interregeurope.eu/news-and-events/news/new-environmental-state-aid-guidelines.

[39] Environmental Guidelines (fn 13) paragraphs 19(13), 211 and 256.

be applied in all environmental aid cases[40]. Moreover, most types of operating aid – which are, as a general rule, prohibited under EU law - can only be granted under the CEEAG[41].

A significant further innovation introduced in the CEEAG concerns a procedural aspect which is particularly desirable from a societal perspective. In light of the Green Deal commitments[42], the Guidelines introduce new provisions for public consultation in some categories of aid[43] and Member States also have to respond to the consultation summarising and addressing the input received.[44] This is unprecedented given that EU case law[45] has so far considered State aid notification procedure as a bilateral, diplomatic and confidential exchange of information between the notifying Member State and the Commission.[46]

However, it remains to be determined how the results of the consultations will be incorporated into the current procedural framework for assessing the compatibility of notified State aid.[47] Although Member States must provide access to their response as part of the notification to the Commission, the CEEAG remains silent on explicitly specifying the extent to which the Commission is obliged to take these into account.

After taking a closer look on the evolvement and scope, as well as the innovations and shortcomings of the CEEAG, the next section focuses on those common assessment principles, which form the basis for the Commission's assessment of environmental aid.

3.2.1. Common assessment principles of the CEEAG

Similar to other guidelines, the CEEAG requires a common set of principles to determine the compatibility of State aid with the internal market. Member States have to prove that the notified measure conforms with these principles. As it follows from Article 107(3) TFEU, the general test under the CEEAG is also described as a balancing test that compares positive and negative effects of the State aid. According to the positive condition, the aid has to facilitate the development of an economic activity, in which context the Commission also assesses the incentive effect of the aid and the absence of breach of any relevant provision of EU law. On the other hand, as regards the negative condition, the aid must not unduly affect trading conditions to an extent contrary to the common interest, whereby the Commission examines the need for the aid as well as its appropriateness and proportionality. The 2014 Guidelines added a new transparency requirement, which has been preserved by the new CEEAG as well.[48]

As regards the positive condition, the Environmental Guidelines state that they *"apply to State aid granted to facilitate the development of economic activities in a manner that improves environmental*

[40] Environmental Guidelines (fn 13) Section 3.

[41] Nowag (fn 14) 184–185.

[42] For this see section 2.2.5 of the Green Deal.
„All EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future. The Commission's better regulation tools provide a solid basis for this. Based on public consultations, on the identification of the environmental, social and economic impacts, and on analyses of how SMEs are affected and innovation fostered or hindered, impact assessments contribute to making efficient policy choices at minimum costs, in line with the objectives of the Green Deal. Evaluations also systematically assess coherence between current legislation and new priorities.
To support its work to identify and remedy inconsistencies in current legislation, the Commission invites stakeholders to use the available platforms to simplify legislation and identify problematic cases. The Commission will consider these suggestions when preparing evaluations, impact assessments and legislative proposals for the European Green Deal."

[43] In case of aid for the reduction, removal of greenhouse gas emissions and for the security of electricity supply, see Environmental Guidelines (fn 13) Sections 4.1.3.4 and 4.8.4.4.

[44] Environmental Guidelines (fn 13) paragraphs 101 and 350.

[45] Judgment of the General Court (First Chamber) of 14 May 2019, Commune de Fessenheim and Others v European Commission, Case T-751/17, ECLI:EU:T:2019:330, paragraph 37.

[46] Strenghtening public consultation in EU State aid law might be a new tendence, as it appears in other Guidelines as well. See for example Section 5.2.2.4.2. of the Broadband Guidelines (Communication From The Commission, Guidelines on State aid for broadband networks 2023/C 36/01, C/2022/9343, OJ C 36, 31.1.2023, p. 1–42).

[47] Hancher Leigh: Pre- Notifications, Preliminary Investigations and the Rights of Third Parties in State Aid Procedures – Beware of the Black Hole!, 29. July 2021, Guest State Aid Blog von Lexxion Publisher. Available at: https://www.lexxion.eu/stateaidpost/pre-notifications-preliminary-investigations-and-the-rights-of-third-parties-in-state-aid-procedures-beware-of-the-black-hole/.

[48] Environmental Guidelines (fn 13) paragraph 22.

protection".[49] This approach reflects the EU's goal of achieving both economic growth and sustainability. In this regard, the Guidelines explain that intervention can contribute to *"smart, sustainable and inclusive growth"50* in certain areas that would not develop without the aid. Hence, this shows that improving economic efficiency and enhancing sustainability can go hand in hand. An illustrative example for this is State aid granted for supporting circular economy: while the transition to a circular economy is a prerequisite for achieving the EU's 2050 climate neutrality target, it can also play a key role in creating a well-functioning market for secondary raw materials that will create jobs and eventually sustainable growth.[51]

Regarding the negative condition, the Commission focuses on the anti-competitive effects of the State aid. The requirement of necessity can be described as follows: an adequate level of environmental protection or an efficient internal energy market cannot be achieved by the market alone. However, the *"mere existence of market failures in a certain context is [...] not sufficient to prove the necessity of State aid"52,* since the Commission has to take into account other policy measures – such as sectorial regulation or the Union ETS – that might sufficiently address the market failure. This is also a relevant aspect when the Commission considers the appropriateness of the aid by requiring that the aid scheme should be designed in such a way that it does not jeopardise the effectiveness of any market-based mechanism. In this context, the polluter pays principle, which has been a general principle of environmental law since its very beginning, remains a key consideration: no aid may be granted if the beneficiary is liable for infringments of EU or national environment law. It is therefore not possible to circumvent this principle through State aid by *"exempting"* the polluter from the obligation to pay.[53] Finally, the aid is considered proportionate if its amount is limited to the minimum required to carry out the subsidised activity.[54]

The final step in the Commission's balancing test is determining whether the overall balance is positive. As regards the distortive effects of the aid, the Commission acknowledges that environmental aid *"by its very nature, tend to favour environmentally-friendly products and technologies at the expense of other, more polluting ones"55*. This is particularly advantageous since the Commission will only consider competitors that operate in a similarly environmentally friendly way in terms of distortive effects.[56] This can prevent the result of a predominance of negative impacts due to the competitive disadvantage - resulting from the support of other environmentally friendly competitors - of undertakings operating in a more environmentally harmful way.

The common assessment principles that appear in the CEEAG also form the basis for the different categories of aid covered by the Guidelines.[57] As shown above, this balancing test is detailed and seeks to limit restrictions on competition as far as necessary, while striving to improve the quality of the environment. In conclusion, both the GBER and CEEAG are tools for supportive integration in a way that they facilitate the grant of environmental aid.

3.3. Impacts of CJEU decision on the Hinkley Point C

Although the *Hinkley Point C* decision[58] did not result in a *prima facie* radical change in the

[49] Environmental Guidelines (fn 13) paragraph 12.
[50] Environmental Guidelines (fn 13) paragraph 9.
[51] Environmental Guidelines (fn 13) paragraphs 217–219.
[52] Environmental Guidelines (fn 13) paragraph 35.
[53] Environmental Guidelines (fn 13) paragraphs 34–42.
[54] Environmental Guidelines (fn 13) paragraph 47.
[55] Environmental Guidelines (fn 13) paragraph 65.
[56] Nowag (fn 14) 196.
[57] Nowag (fn 14) 191.
[58] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v European Commission, Case C-594/18 P, ECLI:EU:C:2020:742 and Judgment of the General Court (Fifth Chamber) of 12 July 2018, Republic of Austria v European Commission, Case T-356/15, ECLI:EU:T:2018:439.

Commission's assessment[59], it is still important as it has clarified the extent to which non-competition considerations can be taken into account by the Commission. The key objective of this Section is to present preventive integration through the impacts of the Hinkley Point C decision on the Commission's compatibility control. In order for the reader to get a full picture of this topic, I will begin with a brief introduction of the relevant parts of the case. I will argue in the second part that the judgment of the CJEU may have a positive impact on State aid control as it makes the assessment of the Commission more transparent. However, as it is discussed in the third part, it seems to strengthen the approach that the effective functioning of the internal market takes priority over environmental objectives. Given that this decision is rather complex and has implications for several aspects of State aid control, I find it important to underline that in this study I will only deal with those aspects that relate to sustainability.

In 2013, the United Kingdom notified the Commission a proposed aid for an undertaking building a new nuclear power station. One year later, the Commission decided to approve the long-term financial support scheme for the Hinkley Point C nuclear power station to be granted by the United Kingdom.[60] Austria challenged the decision before the CJEU, arguing that the Commission had failed to take into account the EU's environmental objectives. Austria's action was rather unprecedented because in the past 30 years Member States have never brought an action against a Commission Decision approving a State aid granted by another Member State.[61] Austria's main, sustainability related claims were that the investment in nuclear power was not in the common interest, generation of electricity from nuclear power was contrary to the EU's environmental rules and that the proportionality assessment was carried out inadequately by the Commission.[62]

The CJEU explained that since Article 107(3)(c) TFEU only requires that the aid facilitates the development of certain economic activities, Austria's argument that aids have to support an objective of common interest must be rejected.[63] As regards the second claim, the CJEU stated that Articles 11[64] and 194(1)[65] TFEU as well as Article 37 of the Charter[66] need to be taken into account when assessing compatibility of an aid in the nuclear energy sector as well.[67] Although the requirement to preserve and improve the environment is applicable, *"it cannot be regarded [...] as precluding, the grant of State aid for the constructon or operation of a nuclear power plant."68* Thirdly, in relation to the proportionality assessment, the CJEU found that the Commission has to take into account the negative effects of an aid on competition and trade between Member States, but must not consider negative effects other than those mentioned above.[69] In other words, the United Kingdom is free to determine the composition of the country's energy sources and environmental damage cannot be considered as a negative effect in this context.

Next, I would like to summarize the sustainability-related impacts of the judgment, taking into account both positive and negative effects. As regards the positive effects, the CJEU has explicitly stated that any aid that is contrary to EU environmental rules cannot be considered compatible with the internal market. This is an important

[59] Warning Rosa: Green' conditionality in State aid law, Competition Policy Brief, 2021/3. 34.

[60] Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C).

[61] Nicolaides (fn 29) 5.

[62] Case T-356/15 (fn 58) paragraphs 39 and 41; Case C-594/18 (fn 58) paragraph 42.

[63] Case C-594/18 (fn 58) paragraphs 18–21.

[64] According to Article 11 TFEU "*[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*".

[65] According to Article 194(1) TFEU *"[i]n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim […]'.*

[66] Article 37 of the Charter states that a *"high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*".

[67] Case C-594/18 (fn 58) paragraph 42.

[68] Case C-594/18 (fn 58) paragraph 49.

[69] Case C-594/18 (fn 58) paragraphs 79–80.

step forward and represents a move away from the previous approach of the CJEU according to which the Commission has no obligation to assess the compatibility of an aid which do not pursue environmental protection objectives with EU environmental protection rules.[70]

However, any environmentally harmful aid, which does not contravene a legal provision does not automatically classify as prohibited aid. Furthermore, possible environmental damages cannot be taken into account by the Commission when assessing the competition distortions caused by the aid. And since Member States have the right to grant aid to whatever area they want to develop, the Commission does not have the possibility to exclude those aids that are environmentally damaging through its proportionality assessment.

This leads us to the central question of this study, namely, the extent to which environmental considerations are integrated into EU State aid law. Based on the CJEU's decision, two forms of preventive integration can be distinguished, one of which offers the possibility of integrating environmental requirements, while the other does not. First, environmental rules in legally binding instruments, such as the EU Climate Law, must be taken into account by the Commission and it cannot authorise the grant of an aid that is in breach of such rules. Preventive integration is therefore achieved in this context. On the other hand, the Commission is not allowed to take into account further environmental considerations which are not declared in legally binding documents. Thus, this type of preventive integration has not yet been achieved.

In conclusion, given the range of binding legal instruments on environmental issues and the approach taken in the Hinkley Point C decision, I believe that a certain level of environmental integration has already been achieved. However, there are still a number of opportunities for EU policy makers and Member States, if they consider it desirable, to better integrate environmental considerations into State aid law. Before exploring the potential future directions, I will focus on the contribution of current legislation and practice to the Green Deal objectives in the next section, with a particular focus on the crises of recent years and the measures adopted in order to address them.

4. Achievement of the goals set by the Green Deal in crisis situations

Compared to other areas of competition law, the integration of environmental considerations into State aid regulation started several decades ago. State aid is one of the instruments available to Member States for avhieving the objectives of the Green Deal. However, the EU has recently faced a number of unexpected crises that left their marks on State aid control. The following parts aim to show the impact of these crises on the integration of sustainability considerations.

4.1. State aid policies during the COVID-19 pandemic

The outbreak of the coronavirus pandemic in 2020 had a significant economic impact in the EU as well. The economies of Member States have faced problems both on the supply side due to a major shutdown in production and on the demand side due to a fall in consumption. Therefore, Member States had to implement support measures for citizens and companies, including State aid, in order to provide support to their economy.[71] However, even in case of the pandemic, the legislative environment did not change, as Articles 107(2) and 107(3) TFEU gave the Commission sufficiently wide room for the required discretion in the temporary crisis.[72] Instead, the Commission reacted with more flexible *soft law* documents

[70] Judgment of the General Court (Second Chamber), 3 December 2014, Castelnou Energía, SL v European Commission, Case T-57/11, ECLI:EU:T:2014:1021, paragraph 187.

[71] Competition State Aid Brief, 2021/1. 1.

[72] Tóth Tihamér: Uniós és magyar versenyjog, [*Competition law of the European Union and Hungary*], Wolters Kluwer Hungary Kft., Budapest, 2020. 827.

and published the State Aid Temporary Framework in March 2020[73], which was intended to set out the possibilities Member States had under EU rules to allow their economies to recover from the crisis.[74] As a general rule, Member States decided on their own crisis management and State aid policy, while the Commission acted in a supervisory role to protect the internal market. However, the Commission was reluctant to set public policy objectives into the new rules and to make the authorisation of an aid conditional on meeting environmental criteria.[75]

Figure 1 below is a summary of the main features of the State Aid Temporary Framework and shows the large scale of aid policies pursued by Member States during this period. In total, the amount of State aid granted in 2019 was around EUR 130 billion[76], while State aid linked to COVID-19 amounted EUR 227.97 billion in 2020, covering around 59% of the total spending[77]. As of February 2022, the Commission approved national measures worth a total estimated budget of around EUR 3.17 trillion.[78]

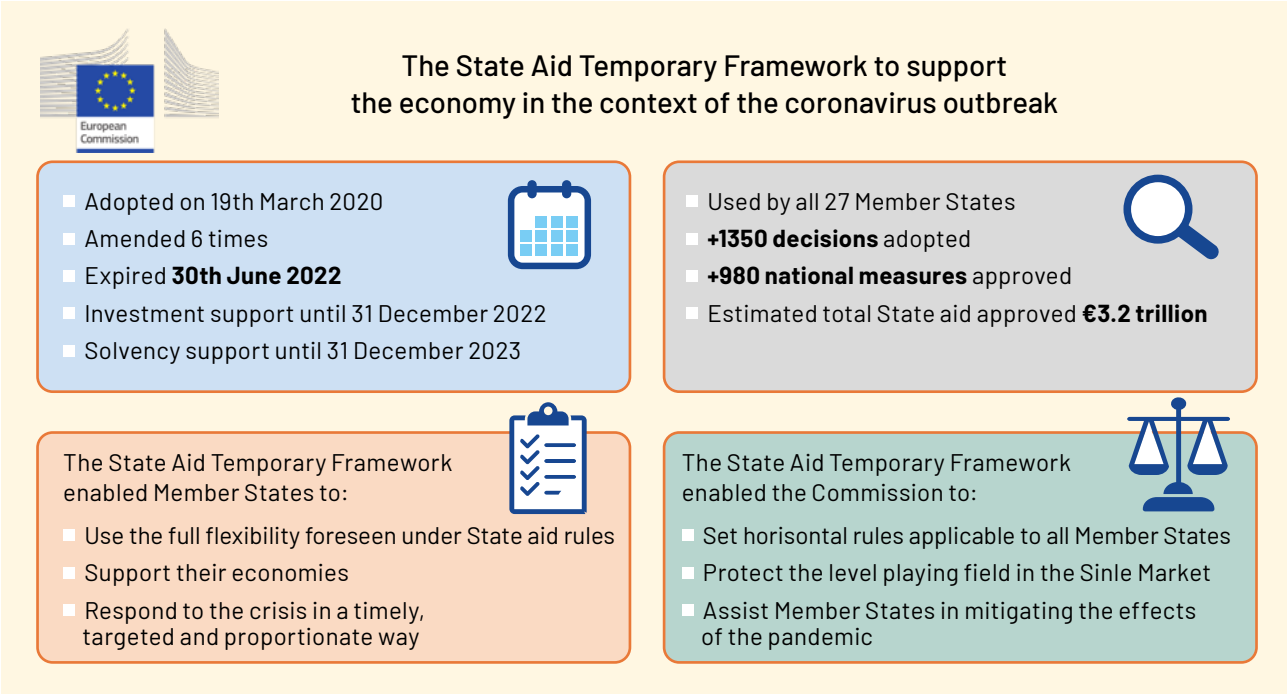

Figure 1 – State Aid Temporary Framework

Source: https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en *(last access: 20.02.2023)*

During this period, the crisis sidelined the need to better integrate environmental considerations into competition policy. Several State aids were granted for activities damaging the environment, mostly based on Article 107(3)(b) TFEU, which allows for State aid to remedy a serious disturbance in the economy of a Member State. Furthermore, since the Commission concluded that the

[73] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, C/2020/1863, Official Journal C 91I , 20.3.2020, p. 1–9.

[74] State Aid Temporary Framework, Point 11.

[75] Papp Mónika: A járványtól a gazdasági újjáépítésig: A Covid-19 állami támogatási szabályok kivezetése és az uniós helyreállítási források megérkezése [*From epidemic to economic reconstruction: the phasing out of the Covid-19 State aid rules and the arrival of EU recovery funds*], MTA Law Working Papers, Issue 2022/24. 8.

[76] State aid Scoreboard 2020, 14 June 2021, European Commission, DG Competition, 5.

[77] State aid Scoreboard 2021, 6 September 2022, European Commission, DG Competition, 10.

[78] Competition State Aid Brief, 2022/1. 2.

COVID-19 outbreak constitutes an *"exceptional occurrence"* within the meaning of Article 107(2) (b) TFEU, damages having a direct causal link with the pandemic could have been compensated by State aid.[79] One striking example for the relegation to the background of environmental integration is that the Commission allowed Member States to grant unprecedented financial support to keep airlines in the region afloat during the pandemic.[80] Despite the fact that aviation is one of the most polluting industries with a climate impact accounted for approximately 3.5 percent of total anthropogenic warming in 2018[81], State aid to airlines was approved in 16 Member States with a total value of around €31 billion[82], representing 1% of the total amount of COVID-19 related State aid, more than half of which was granted by Germany and France.

On the other hand, several railway companies also received State aid, most notable of which is the aid granted to Deutsche Ban, for a total amount of approximately EUR 853 million under Article 107(2)(b) TFEU[83]. In this respect, it should be noted that, with one exception, the fact that the aid granted to a railway company could also promote sustainability objectives was not a factor in the approval. Nevertheless, the one aspect where sustainability played a role was the period during which the aid could be granted. The Temporary Framework has not been extended beyond the set expiry date of 30 June 2022, with the exception of, among others, investment support towards a sustainable recovery, which could still be put in place until 31 December 2022 or even until December 2023 in some cases.[84]

Overall, it can be concluded that whether environmental considerations were taken into account when granting State aid was left entirely to Member States and the Commission did not prevent any aid being granted in contravention of such considerations. Preventive integration at EU level therefore did not operate during this period, and Member States were free to design their own aid policies to mitigate the impacts of the crisis - with or without environmental considerations. Nonetheless, supportive integration was partially achieved by allowing aid to be granted over a longer period of time in case of aid granted for sustainable recovery.

4.2. Implications of the energy crisis for State aid law

Following the recovery from the COVID-19 crisis, the EU economy faced new challenges. The restrictive measures against Russia and countermeasures caused serious difficulties for the economy and European companies faced problems such as disruptions in energy and raw material supplies and soaring energy and food prices.[85] As the EU recognized the need for solutions, the Commission adopted the Temporary Crisis Framework[86] („TCF") in March 2022, which will be in place until 31 December 2023.[87] Similar to

[79] European Commission Working Document: Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, page 18. Available at: https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf.

[80] Coronavirus Outbreak - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework, 16 January 2023. Available at: https://competition-policy.ec.europa.eu/system/files/2023-01/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf.

[81] Overton Jeff: The Growth in Greenhouse Gas Emissions from Commercial Aviation, Environmental and Energy Study Institute (EESI), Issue Brief, 1.

[82] Martín-Domingo Luis and Martín Juan Carlos: The Effect of COVID-Related EU State Aid on the Level Playing Field for Airlines, Sustainability, 2022/14, 1.

[83] The amount of aid was composed of 3 separate grant schemes:
https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4726;
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6308;
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4161.

[84] State aid: Commission will phase out State aid COVID Temporary Framework, 12 May 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2980.

[85] Competition State Aid Brief, 2022/3. 1.

[86] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2022/C 131 I/01 C/2022/1890 OJ C 131I , 24.3.2022, p. 1–17.

[87] State aid: Commission prolongs and amends Temporary Crisis Framework, 28 October 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6468.

the Temporary Framework used during pandemic, the TFC also provides flexibility for Member States to support companies that are seriously affected by the current energy prices. At the same time it intends to *"incentivise the green transition, while maintaining safeguards to ensure that aid remains targeted and proportionate"*.[88]

As regards State aid measures approved under the TFC, all Member States except for Bulgaria, have used the possibility to support companies active in energy-intensive sectors[89], in some cases authorizing aid promoting the transition to clean energy, but in other cases allowing aid to be granted to activities that have a negative impact on the environment.

The Commission's decision approving a German aid granted to compensate costs of operating lignite-fired power plants on stand-by[90] constitutes an example when aid was granted to an activity damaging the environment. The Commission authorised the aid on the basis of Article 107(3)(b) TFEU in view of the risk of gas shortage and the fact that the measure is proportionate and only has a limited impact on competition. In this regard, the Commission explained that the *"priority is to switch fuels towards clean energy sources, wherever technically feasible, in a timely and cost-effective manner. […] Natural gas substitution possibilities towards more carbon-intensive sources such as diesel or coal, will need to be temporarily deployed as well"*[91]. This decision seems to be in contrast to Germany's lignite phase-out strategy,under which Germany intends to compensate the early closure of lignite-fired power plants,[92] which, while crucial to achieving Europe's climate neutrality goals[93], has been overshadowed in this case by the need to address burning short-term problems.

On the other hand, the most striking example of promoting clean transition is allowing and incentivising aid for the production of renewable hydrogen, which the Commission has enabled for a number of Member States. The Commission assesses these measures under Article 107(3)(c) TFEU and the CEEAG. The use of hydrogen technology is an innovative sector that contributes to the objectives of the Green Deal and the REPowerEU Plan[94]. Accordingly, the Commission approved a German aid of EUR 1 billion to help an undertaking (Salzgitter Flachstahl GmbH) decarbonise its steel production processes by using hydrogen[95] and a Spanish measure in the amount of EUR 220 million to support the undertaking COBRA in production of renewable hydrogen[96]. The greatest achievement in promoting the use of hydrogen was the approval of the "IPCEI Hy2Use" project, which was jointly prepared and notified by thirteen Member States[97]. This project covers a wide part of the hydrogen value chain by supporting activities from construction of the necessary infrastructure through production and integration of hydrogen into the industrial processes. Member States will thus be able to provide up to €5.2 billion to 29 companies in public funding,

[88] Statement by Executive Vice-President Vestager on amendment to State aid Temporary Crisis Framework in context of Russia's war against Ukraine, 28 October 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6471.

[89] List of Member State measures approved under the State aid Temporary Crisis Framework, 16 January 2023. Available at: https://competition-policy.ec.europa.eu/system/files/2023-01/State_aid_TCF_decisions_0.pdf.

[90] State aid: Commission approves €450 million German measure to replace electricity generation amid Russian natural gas shortages, 30 September 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5919.

[91] Commission Press release from 30 September 2022 (fn 90).

[92] As regards this State aid the Commission decided to initiate the procedure laid down in Article 108(2) TFEU in its decision of 2 March 2021, C(2021) 1342 final, SA.53625. For critics against the decision, see: Koenig Christian, and Cesarano Carlos Deniz: State Aid Assessment of Complex Settlement Agreements: The European Commission's Opening Decision in the German Lignite Phase-out Case, European State Aid Law Quarterly, 2021/4. 560–571.

[93] Koenig (fn 92) 560.

[94] REPowerEU is a plan for *"reducing Europe's dependence on Russian fossil fuels by fast forwarding the clean transition and joining forces to achieve a more resilient energy system and a true Energy Union"*. See: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU Plan.

[95] Commission Press release, 4 October 2022 - https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5968.

[96] State aid: Commission approves €220 million Spanish measure to support COBRA in production of renewable hydrogen, 13 October 2022: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6017.

[97] These Member States are Austria, Belgium, Denmark, Finland, France, Greece, Italy, Netherlands, Poland, Portugal, Slovakia, Spain and Sweden.

which is expected to unlock additional €7 billion in private investments.[98] This is a significant step towards achieving the climate-neutrality objective and shows that State aid does have a role to play in promoting innovation.

Finally, it should also be mentioned that the Commission approved aid for a number of activities necessary to achieve clean transition and climate target, for instance aid to support roll-out of carbon capture and storage technologies[99] and aid to to promote green district heating[100].

4.3. The emergence of a global green subsidy race

The latest challenge EU economy has to face is to remain competitive in the emerging global green subsidy race, particularly in response to the Inflation Reduction Act (hereinafter: IRA) signed by President Biden in August 2022.[101] One of the main objectives of the IRA is to create a clean energy economy which will be promoted through subsidies. Most aid schemes require products to be manufactured, assembled or produced in the US[102] which puts EU companies at a disadvantage. In response, the Commission has announced that it will transform the TCF into a Temporary Crisis and Transition Framework[103] („TCTF") and on 9 March 2023, the Commission has adopted the TCTF[104], which is likely to bring the EU into the forefront of the global subsidy race. In fact, under paragraph 86 of the TCTF, the Commission may approve "matching subsidies", implying that in case of projects for which aid is available in a third country, additional aid may be granted to match the level offered in that third country, up to the extent necessary to realise the investment in Europe.[105] This opportunity seeks to persuade companies not to relocate into third countries, especially to the US, and thus to prevent European innovation from slowing down and falling behind.

In conclusion, a number of circumstances, such as the COVID-19 pandemic and the energy crisis have pushed sustainability into the background during the past three years. It should also be mentioned, however, that the emergence of green subsidy race represents a new challenge, which is beneficial in the sense that it could boost the role of sustainability considerations. This leads us to the next challenge that the EU has to face. While in the late 2010s, it seemed that environmental protection would be at the forefront of the policy of the EU and Member States in the next decade, these unexpected events have changed this trend and unfortunately, environmental considerations continue to play only a subordinate role. It seems highly possible that in the years to come, circumstances will continue to arise that will outweigh the importance of the climate crisis and that their short-term solution may even outweigh environmental objectives. It is therefore important for both Member States and the EU to find a balance between long-term and short-term goals, and not to over-emphasise one at the detriment of the other.

In the next section, possible future directions will be identified, categorised according to the extent to which they achieve deeper environmental integration. I will also consider which direction

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[98] State aid Press release, 21 September 2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5676.

[99] State aid: Commission approves €1.1 billion Danish scheme to support roll-out of carbon capture and storage technologies, 12 January 2023 - https://ec.europa.eu/commission/presscorner/detail/en/IP_23_128.

[100] State aid: Commission approves €1.2 billion Czech scheme to promote green district heating, 16 December 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7680.

[101] An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14., 117th Congress Public Law 169, 16 August 2022. Available at: https://www.govinfo.gov/content/pkg/PLAW-117publ169/pdf/PLAW-117publ169.pdf.

[102] Building a clean energy economy: A guidebook to the Inflation Reduction Act's investments in clean energy and climate action, January 2023, Version 2. Available at: https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf. See for example page 49 for Clean Vehicle Credit, where the rules require the final assembly to take place in the United States or page 75 for Clean Hydrogen Production Tax Credit, where eligible recipients are producers of hydrogen in the United States.

[103] State aid: Commission consults Member States on proposal for a Temporary Crisis and Transition Framework, 1 February 2023. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_513.

[104] Communication from the Commission: Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, 2023/C 101/03.

[105] State aid press release (fn 103).

seems the most likely to be chosen and implemented.

5. Future directions for the integration of sustainability objectives

The EU is already on the road of ensuring greater environment protection, but there are still opportunities for the future to strenghten the role of State aid law in this regard. I would like to present the possible pathways that could contribute to better integrating environmental requirements and thus achieve the objectives of the Green Deal.

First of all, it should be pointed out that it is necessary to distinguish between environmental rules[106] and environmental considerations[107]. Whereas the former is represented by the environment-related articles of the TFEU and the Charter, and now also by the European Climate Law as discussed in more detail below, the latter includes the general consideration of the environmental impact of for instance aviation and fossil fuel production.[108]

Taking into account this differentiation, Figure 2 illustrates different potential approaches for taking into account environmental requirements in the Commission's assessment procedure.

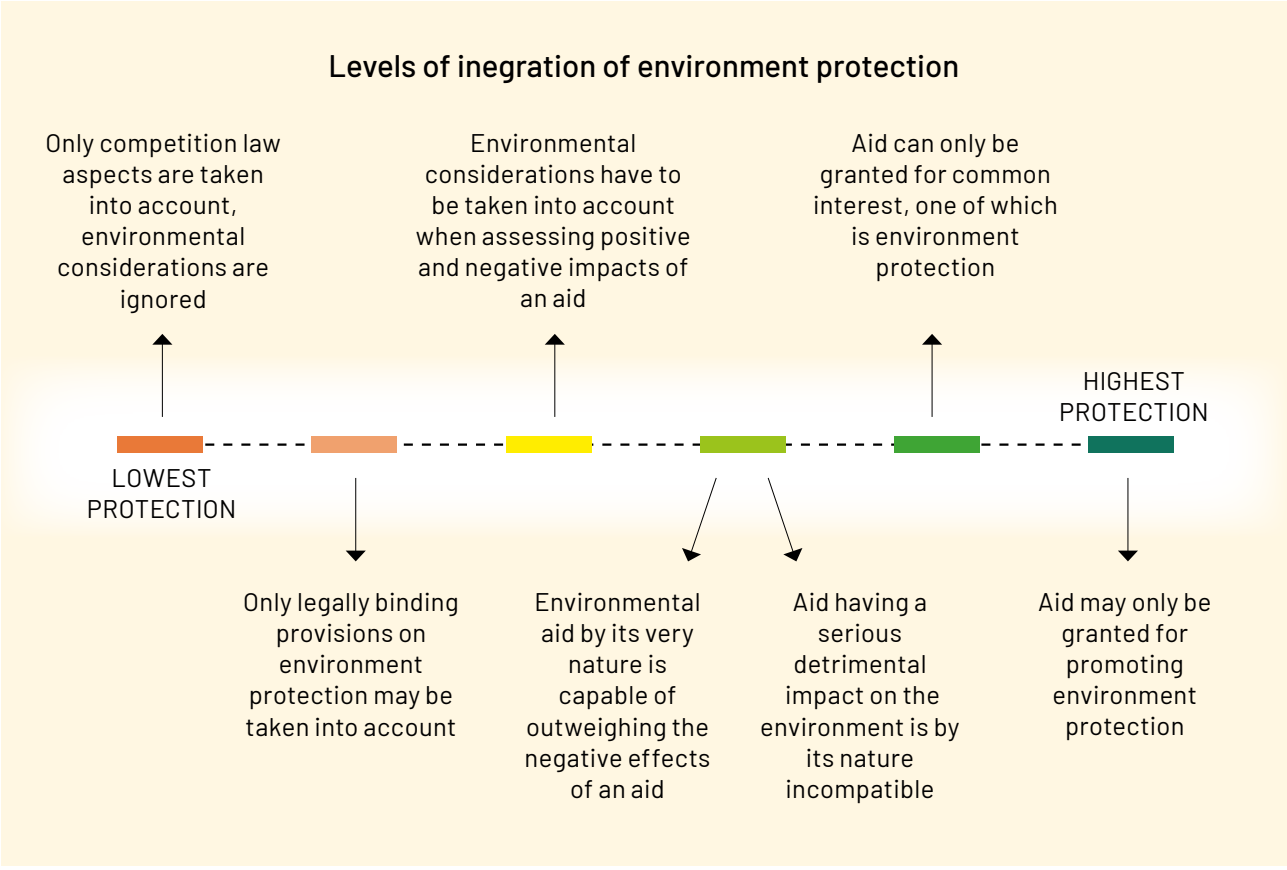

Figure 2 – Levels of integration of environment protection

Source: the Author

As it is shown in Figure 2, EU institutions, as well as Member States, have a number of options to shape their future practice. One such possible way is to include environmental targets in legally

[106] I use the term environmental rules to refer to provisions that are declared in legally binding EU instruments.

[107] The term environmental consideration refers to principles that affect sustainability and environmental protection but are not legislated.

[108] Warning (fn 59) 36.

binding rules. An important example of this is the so-called European Climate Law[109] which entered into force on 9 July 2021 and incorporates into law the net zero greenhouse gas emissions target for 2050. Consequently, as environmental rules must be taken into account in the assessment procedure, the Commission could not authorize the grant of an aid which is in violation of the Climate Law.[110] However, the practical implementation of this is not yet clear, nor is it simple to decide whether or not an infringement of the Climate law exists. It remains to be clarified how broadly the CJEU will interpret the provisions of the Climte Law and what requirements a proposed aid must meet to comply with these rules; guidelines on these would be explicitly needed for increasing clarity.

On the other hand, the case is different as regards activities that do not infringe environmental rules, but which by their nature involve detrimental environmental effects: for instance, granting aid to the production of fossil fuel and operation of airlines or lignite-fired power plants. In the balancing test, the Commission is not currently allowed to consider any negative effects other than those on competition and trade between Member States. Consequently, the Commission is not capable of preventing the grant of any aid with a detrimental impact on the environment. A considerable turning point would be the inclusion of environmental considerations in the compatibility assessment for non-environmental aid[111], thus excluding certain highly environmentally harmful aid or allowing aid that although might distort competition to some extent, has a more beneficial impact on the environment. A possible implication of this would be that Member States must attach environmental protection safeguards to their aid measures in order to compensate for negative impacts.[112] An illustrative and positive example of this is the aid scheme implemented by France, where Air France received aid under the condition that it should reduce the number of its domestic flights and shift traffic to less polluting alternatives such as rail.[113]

Although this second way forward would lead to a better integration of environmental requirements, there are also drawbacks and difficulties which hinder its realisation. First of all, it is important to note that in many cases it is difficult to determine the extent of the negative environmental impacts of an activity[114], and that these are often only discovered many years after the aid had been granted. Furthermore, the weight to be given to environmental impacts in the balancing test may also cause difficulties for the Commission which raises the question whether other horizontal objectives, such as social and cultural impacts, should also be taken into account, which would eventually make the balancing exercise non-transparent and unworkable.

From an environmental point of view, it would be ideal, as shown in Figure 2, if Member States could only grant aid that promotes environment protection. However, in this context, we should not forget that the purpose of State aid regulation is not primarily to promote sustainability, but to ensure the efficient functioning of the internal market. This is why it is important that EU competition policy is designed in a way that balances the integration of sustainability objectives with the protection of the internal market. Furthermore, EU law at its current status does not make it possible to implement such a legal provision since it is the Member States' exclusive competence to design and execute their individual State aid policies, even

[109] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, Official Journal L 243, 9.7.2021, p. 1–17.

[110] Warning (fn 59) 35–36.

[111] Musardo Vittoria: Green Deal and Incentive Effect: What Is Truly Environmental Aid? European State Aid Law Quarterly, 2021/2. 226–227.

[112] Lunenburger Simone, Holtmann Clemens and Delarue Juliette: Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State Aid, European State Aid Law Quarterly, 2020/4. 426–427.

[113] Commission Decision of 20.04.2020 on the aid measure SA.57082 (2020/N) – State aid to Air France.

[114] This is also illustrated by the case for aid to nuclear energy: some support this source of energy and that it is safe, clean, and sustainable, while others dispute that and classify it as one of the most damaging energy sources.

if they do not consider sustainability as one of the prior objectives.

Which is the direction that will actually be realised in the future? There is no definite answer to this question, but some encouraging signs can be identified, especially in light of the speeches of Executive Vice-President Vestager at the beginning of 2023.[115] According to these and the new TCTF, simplified provisions apply on all renewable energy technologies and it is also allowed to grant aid for "*productive investments in strategic sectors for the green transition.*"[116] This leads to the conclusion that, while maintaining the current level of integration, with other words, not moving to the next step as shown in Figure 2, supportive integration will be broadened by extending the rules to a wider range of environmentally beneficial activities, making it easier to incentivise these activities with State aid.

6. Conclusions

The analysis of the legal provisions regulating State aid, the case law of the CJEU, and the practice of the Commission was intended to present five main aspects.

Firstly, as regards Article 107(3)(c) TFEU, there is a possibility to differentiate environmental aid from any other types of aid during the compatibility assessment. Second, we need to distinguish between supportive and preventive integation. As regards supportive integration, EU State aid law has the potential to encourage the granting of aid that is beneficial to sustainability. In this context, soft law instruments play a major role, which were adopted by the Commission and are intended to guide Member States to notify measures that the Commission will most likely authorise. Thus, the GBER and CEEAG, which were revised in order to facilitate the implementation of the ambitious targets set by the Green Deal, might encourage Member States to integrate environmental considerations into their aid schemes. On the other hand, preventive integration refers to avoiding the grant of environmentally harmful aid, that is, to ensure that EU State aid law protects the environment from further damage.

This leads us to the third conclusion, namely, that to some extent there is a connection between the compatibility of an aid and the EU's climate and environmental rules. The aim of the analysis was to show that preventive integration is achieved when the aid to be granted is in conflict with environment protection law, while it is not achieved in the context of considerations that are not legally binding.

In general, the CEEAG declares that State aid rules have an important role in reaching Green Deal policy objectives and that environmental policy objectives should be taken into account while at the same time ensuring a level-playing field in the internal market.[117] The case-law of the CJEU and decisions of the Commission show precisely how this balancing test is applied, revealing a predominance of competition law considerations. From the point of view of the climate crisis, it might be questioned whether it is sufficient to strike a balance between the two objectives in order to achieve sustainability goals, or whether it is also necessary to ensure that environmental considerations are at the forefront of all compatibility assessments and influence their outcome. On the other hand, from the point of view of competition law, it must be taken into account that the original and main objective of competition law is to ensure a level-playing field on the internal market. The fourth conclusion is therefore that although the negative effects on the environment are only taken into account to a limited extent in State aid law, existing legislation and practice seem ideal for striking the right balance between these objectives. Furthermore, the adoption of the Climate Law offers a wide and positive range of options for the environmental rules to be taken into account in State aid control. In this respect, however, there is still a lack of clear interpretation and practice that would allow the incorporation of Climate Law requirements into compatibility

[115] See fn 4.
[116] See fn 4.
[117] Environmental Guidelines (fn 13) paragraph 4.

assessments, which seems to be an important task for the future.

Finally, it must be underlined that State aid control should not be conflated with State aid policy. The Commission has an exclusive competence deciding on aids that Member States intend to grant, while Member States are free to determine what policy areas they wish to subsidize and how they would like to achieve that. Therefore, while EU institutions intend to promote, through transparent and even incentive rules, that Member States take environmental considerations into account when designing State aid schemes, the final decision remains in the hands of Member States to design their own State aid schemes and to integrate environmental considerations into their policies. Overall, State aid law is an important incentive instrument for greening European economy, which, combined with legally binding prescriptive rules and the commitment and cooperation of Member States, can effectively contribute to the objectives of the Green Deal and the achievement of a sustainable economy.

Benjámin Bodansky[1]

Lessons from the Illumina/Grail Case – Implications and Challenges for National Competition Authorities and Companies

***Abstract**: The European Commission implemented its new application of Article 22 of the EU Merger Regulation for the first time in the Illumina/Grail case. Following the legal action by Illumina, the EU General Court held that the Commission had jurisdiction to examine the merger. The General Court also outlined some practical considerations for the future application of the Article. The recently issued Article 22 Guidance necessitates a new approach for both National Competition Authorities and companies involved in mergers potentially falling under the Article. This paper explores the practical challenges that National Competition Authorities and companies now face, with special regard to the relationship between the legal framework in the V4 countries and Article 22.*

Keywords: Illumina/Grail, merger control, Article 22 EUMR, case referral, V4 countries.

1. Introduction – The Novelty of *Illumina/Grail*

On 6 September 2022, the European Commission ("Commission") prohibited the acquisition of Grail by Illumina.[2] The novelty of the decision lies in the fact that the *Illumina/Grail* merger did not reach the notification threshold under either the EU Merger Regulation ("EUMR"), or the merger control legislation of any Member State.[3] Therefore, the undertakings involved did not expect any sort of merger control procedure, let alone a prohibitive final decision. The decision of the Commission to examine the merger is based on its new approach to the application of Article 22 EUMR ("Article 22"), which is summarized in a Commission Guidance released on 26 March 2021.[4] The Guidance and its application in the *Illumina/Grail* case has attracted widespread criticism, with some authors expressing concerns about legal certainty in future merger control cases.[5] Unsurprisingly, Illumina has decided to challenge the Commission's jurisdiction to review the merger. The General Court of the European Union ("General Court"), however, upheld the decision of the Commission in its judgment of 13 July 2022.[6]

Although Illumina has appealed the judgment,[7] it now seems to be a strong possibility that the new approach of the Commission is here to stay

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[2] Mergers: Commission prohibits acquisition of GRAIL by Illumina, Press Release, Brussels, 6 September 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[3] Case T-227/21, Judgment of the General Court (Third Chamber, Extended Composition), ECLI:EU:T:2022:447, paras. 9-10.

[4] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C/2021/1959 ("Article 22 Guidance").

[5] See for example: Salomé Cisnalde Ugarte - Melanie Perez - Ivan Pico: A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape, European Competition and Regulatory Law Review, 2022, Volume 6., Issue 1., pp. 17-23.

[6] Case T-227/21, Judgment of 2022. 07. 13. (*supra note* 3.).

[7] Appeal brought on 22 September 2022 by Illumina, Inc. against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, Illumina v Commission, Case C-611/22 P.

(as demonstrated below). Companies must therefore be aware that their mergers might come under scrutiny by the Commission, even if the turnover levels designated in the EUMR[8] – or in national merger control legislation – are not reached. This requires new considerations throughout the planning and execution of such transactions. National Competition Authorities ("NCAs") of EU Member States are also affected by this new approach. If the reinvented referral mechanism under Article 22 is to function properly, NCAs must increase their efforts to monitor mergers under their jurisdiction, including ones which do not reach the traditional notification thresholds. This paper aims to outline these practical challenges from the viewpoint of NCAs and companies.

In light of the foregoing, the paper will be structured as such:

Following (2) a brief summary of the Commission's new approach and the Judgment of the General Court, comes (3) an overview of the role of NCAs in Article 22 cases (3.1) on a general level and (3.2) with special regard to the V4 countries. This is followed by (4) takeaways for companies, including (4.1) the possibility of preliminary communication with the EC and the competent NCA in order to assess whether the merger in question may fall under Article 22 and (4.2) other practical considerations to be taken into account during the planning and execution of mergers. Finally, (5) conclusions are drawn.

2. The New Approach of the Commission – An Old Rule in a New Light

The EU Merger Regulation contains bright-line jurisdictional rules in order to clearly distinguish the jurisdiction of the Commission and that of the NCAs and to maintain the so-called one-stop shop principle.[9] Article 22 serves as a corrective mechanism to this system, allowing Member States to refer concentrations to the Commission, even if they do not have a Community dimension based on the turnover thresholds.[10] The Article was originally intended as a way to help Member States without a national merger control regime, but later developed into a method of ensuring effective examination of mergers, which could potentially have an effect in the wider EU market.[11]

2.1. The Article 22 Guidance and the *Illumina/Grail* Case

The most significant change in the new Article 22 Guidance is the decreased relevance of national notification thresholds. Prior to issuing the Guidance, the Commission discouraged the referral of concentrations by NCAs which did not meet the notification thresholds of a given Member State, assuming that such mergers would be unlikely to significantly impact the EU market.[12] However, the Commission has recently found that in today's markets, such concentrations might in fact pose significant competitions risks, especially in innovation-based industries, such as the digital and pharmaceutical sectors. The Commission has therefore decided to accept referrals under Article 22, even if the referring Member State(s) did not have initial jurisdiction to examine the merger.[13]

Based on this new approach, on 19 February 2021 (before the publication of the Article 22 Guidance), the Commission invited Member States to refer the *Illumina/Grail* merger for examination, resulting in a referral request by the French Competition Authority submitted on 9 March

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[8] See: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal of the European Union, L 024, 29/01/2004 P. 0001 – 0022, Article 1. paras. 2-3.

[9] Anne Looijestijn-Clearie - Catalin S. Rusu - Marc J.M. Veenbrink: In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation, Maastricht Journal of European and Comparative Law, 2022, Volume 29., Issue 5., pp. 550–571, p. 551.

[10] Council Regulation (EC) No 139/2004 (*supra note* 8) Art. 22. para. 1.

[11] Gianni De Stefano - Rita Motta - Susanne Zuehlke: Merger Referrals in Practice—Analysis of the Cases under Article 22 of the Merger Regulation, Journal of European Competition Law & Practice, 2011, Volume 2., Issue 6., pp. 537-550, p. 538.

[12] Looijestijn-Clearie – Rusu – Veenbrink (*supra note* 9) 553.

[13] Article 22 Guidance (*supra note* 4) paras. 9-11.

2021.[14] On 19 April, the Commission accepted the referral request.[15] On 28 April 2021, Illumina submitted an application to the General Court, challenging the Commission's decision to examine the concentration.[16] The General Court made its judgment on 13 July 2022. There are two significant substantive findings in the judgment, which will be relevant in all future Article 22 cases.[17]

2.2. Findings of the General Court

Firstly, Illumina disputed that the Commission had jurisdiction to examine the concentration. The company claimed that the Commission's new approach was based on a misinterpretation of Article 22, and referral requests made by Member States that do not have jurisdiction to review a given concentration – even though they do have a national merger control regime – may not be accepted.[18] Following a literal, historical, contextual and teleological interpretation of Article 22 and examining the applicant's arguments regarding legal certainty, subsidiarity and proportionality, the General Court rejected this claim.[19] This means that the new Article 22 Guidance, and its application in the *Illumina/Grail* case are not based on a *contra legem* interpretation of the EU Merger Regulation.

In the second plea, Illumina claimed that *"the referral request was made out of time and, in the alternative, that the principles of legal certainty and 'good administration' were infringed"*.[20] Based on the EUMR, *"a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned."*[21] Illumina argued that via several press releases and the procedures of non-EU competition authorities, the concentration had been made known to the French Competition Authority well before the letter of the Commission. In contrast, the Commission and France held that "made known" must be interpreted as the Member State having *"sufficient information to make a preliminary assessment as to the existence of the substantive conditions contained in [Article 22]"*.[22] Following a detailed interpretation of the relevant law, the General Court supported the latter stance.[23]

Regarding the principles of legal certainty and good administration, Illumina claimed that the Commission sent the letter to NCAs following an unreasonable delay, since it had been aware of the concentration for months at the time.[24] The Commission submitted that the 15 working days deadline only applies to referral requests by Member States, and in a general sense, it had acted within a reasonable time when sending the invitation letter.[25] The General Court emphasized that the Commission had received sufficiently detailed information about the concentration via a complaint on 7 December 2020, following which 47 working days had elapsed until the Commission sent the letter.[26] Based on this, the invitation letter was in fact sent within an unreasonable time. However, the General Court also emphasized that pursuant to case law *"infringement of the reasonable time principle, justifies the annulment of a decision […] only in so far as it also constitutes an infringement of the rights of defence of the undertaking concerned"*.[27] Consequently, the decision of the Commission to examine the merger was not

[14] Case T-227/21, Judgment of 2022. 07. 13. (*supra note* 3.) paras. 12-14.
[15] *Ibid.* para. 19.
[16] *Ibid.* para. 36.
[17] For a detailed examination of the entire judgment, see: Buránszki Judit: A Törvényszék T-227/21. számú, Illumina kontra Bizottság ügyben született ítélete, Versenytükör, 2022, Volume XVIII., Issue 2., pp. 87-101.
[18] Buránszki (*supra note* 17) 93.
[19] Case T-227/21, Judgment of 2022. 07. 13. (*supra note* 3.) para. 185.
[20] *Ibid.* para. 186.
[21] Council Regulation (EC) No 139/2004 (*supra note* 8) Art. 22. para. 1.
[22] Case T-227/21, Judgment of 2022. 07. 13. (*supra note* 3.) paras. 186-187.
[23] *Ibid.* paras. 214-215.
[24] *Ibid.* paras. 216-217.
[25] *Ibid.* para. 220.
[26] *Ibid.* para. 228.
[27] *Ibid.* paras. 239-240.

annulled on these grounds. However, the General Court's findings regarding the reasonable time principle may act as a warning to the Commission in future cases.

3. New Responsibilities - The Role of National Competition Authorities in Article 22 Cases

Should the EU Court of Justice uphold the judgment of the General Court regarding the new Article 22 Guidance, more cases similar to *Illumina/Grail* can be expected in the future. This means that NCAs will have an increased responsibility to monitor the markets and identify concentrations with potential anti-competitive effects, even if no notification is required pursuant to national or EU legislation. The past years have seen several Member States enact reforms to their merger control rules in order to extend their scope of their competence. It seems probable that the Article 22 Guidance and the judgment in the *Illumina/Grail* case will lead to further such efforts.

3.1. General Takeaways for National Competition Authorities

Although in practice, Article 22 cases are likely to remain a rarity,[28] based on the Article 22 Guidance the potential scope of application is quite broad. The Commission did highlight some industries in the Article 22 Guidance, but it also emphasized that the scope of cases that may potentially be referred under Article 22 is not limited to any specific economic sector.[29] NCAs may therefore consider referring any concentration which meets the criteria outlined in the EU Merger Regulation. That means any concentration that *"affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request"*.[30] With such a general definition, the question presents itself: how can NCAs effectively "catch" such mergers?

3.1.1. Monitoring Possible Article 22 Mergers

A possible way is the one we have already witnessed in the *Illumina/Grail* case. After having learnt about a concentration which may be a candidate for an Article 22 referral, the Commission may invite Member States to submit a referral request.[31] Although this is a relatively simple situation for an NCA, an important factor take into account is the referral deadline. As reaffirmed by the General Court, a detailed letter by the Commission constitutes the concentration being "made known" to the Member State. Therefore, after receiving such a letter, the competent NCA must abide by a strict 15 working days deadline to submit the referral request.

In the absence of such an invitation by the Commission, it is up to NCAs to learn of potential Article 22 concentrations. It is important to note that the Commission was not the first to realise that the traditional notification thresholds may not be sufficient to review all potentially anti-competitive mergers. Therefore, in recent years, several Member States adopted corrective rules in order to broaden the scope of their merger control regimes.[32] Some states, for example the UK and Slovenia, impose a notification obligation on merging companies based on their market shares.[33] Another approach, adopted by Germany and Austria, is about reviewing concentrations based on the value of the transaction.[34]

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[28] Jay Modrall: Illumina/Grail Prohibition: The End of the Beginning for EU Review of "Killer Acquisitions"?, Kluwer Competition Blog, 8 September 2022. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/.

[29] European Commission, Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases" Frequently Asked Questions and Answers (Q&A), ("Article 22 Q&A"). Available at: https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf. 1.

[30] Council Regulation (EC) No 139/2004 (*supra note* 8) Art. 22. para. 1.

[31] *Ibid.* Art. 22. para. 5.

[32] Nicholas Levy – Andris Rimsa – Bianca Buzatu: The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?, European Competition and Regulatory Law Review, 2021, Volume 5., Issue 4., pp. 364-379, p. 369.

[33] *Ibid.* pp. 369-370.

[34] Ugarte – Perez – Pico (*supra note* 5) 18.

This might be a particularly suitable way to find out about potential Article 22 candidates, as the Commission itself has also emphasized that in its assessment, it would take into account transactions where *"the value of the consideration received by the seller is particularly high compared to the current turnover of the target"*.[35] Finally, in Norway and Sweden, NCAs have the power to examine all acquisitions of companies in certain concentrated sectors due to either a general notification obligation, or by allowing the NCA to order parties to notify transactions that do not meet the relevant thresholds.[36] This approach is similar to the provisions of the recently enacted EU Digital Markets Act (DMA), which requires "gatekeeper" companies to inform the Commission about all of their acquisitions of *"core platform services or any other services provided within the digital sector"*.[37] With the digital sector being one of the highlighted industries by the Commission,[38] the application of the DMA and the Article 22 Guidance, combined with the reformed legislation of Member States will no doubt lead to the examination of mergers in the digital sector, which are not notifiable based on turnover thresholds.

NCAs may also learn of potential Article 22 concentrations if companies – either the ones involved in the merger, or third parties making a complaint – voluntarily provide information to the Authority. This option will be examined in detail in section 4.

3.1.2. Referrals Under the Article 22 Guidance

The aforementioned reforms allow NCAs to learn of and examine concentrations that would escape merger control procedures based on traditional turnover thresholds, but might have a significant anti-competitive effect. However, once such a merger is brought to the attention of an NCA, it must still decide whether it should review the transaction itself, or refer it to the European Commission. The basis of differentiation in this regard is the usual criterion in EU law: the NCA must assess whether the concentration could affect trade between Member States.[39] However, the notification of a merger in a Member State might also serve as an obstacle to another Member State to refer that merger to the Commission. As the Commission put it, *"where a transaction has already been notified in one or more Member States that did not request a referral or join such a referral request may constitute a factor against accepting an Article 22 referral"*.[40] This factor, combined with the aforementioned deadline makes it clear, that once an NCA learns about a potential Article 22 concentration, it must make a quick decision, lest the 15 working-day deadline elapses or another Member State initiates internal merger control proceedings.

Finally, a factor that makes it somewhat simpler for NCAs to effectively apply the new Article 22 Guidance is the European Commission's clarification that Member States may also refer transactions that have already been closed. This provides some additional time for NCAs to gather information when monitoring the market but there are limits to this option. The Commission emphasized that while cases must be judged independently, it would *"generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration"*.[41]

3.2. Falling Behind the European Trends? – The Legal Framework in the V4 Countries

As outlined above, certain reforms of national merger control legislation may help NCAs bring potential Article 22 concentrations within their scope. Particularly, rules which, in certain cases,

[35] Article 22 Guidance (*supra note* 4) para. 19.
[36] Levy – Rimsa – Buzatu (*supra note* 32) 370.
[37] REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and(EU) 2020/1828 (Digital Markets Act), Official Journal of the European Union, L 265, 12.10.2022, pp. 1-66. Para. (71).
[38] Article 22 Guidance (*supra note* 4) para. 10.
[39] Council Regulation (EC) No 139/2004 (*supra note* 8) Art. 22. para. 1.
[40] Article 22 Q&A (*supra note* 29) 2.
[41] Article 22 Guidance (*supra note* 4) para. 21.

oblige parties to notify concentrations, even if the target company does not reach any pre-determined turnover threshold, seem to be more and more widespread in Europe. Despite this trend, out of the V4 countries, only Hungary included such a provision in its merger control legislation. The national legal framework in the V4 countries might make it more difficult for these NCAs to effectively apply the new Article 22 Guidance.

3.2.1. Legal Framework in the Czech Republic, Poland and Slovakia

Slovakia, Poland and the Czech Republic all rely on traditional turnover thresholds in the determination of the scope of their merger control. In Slovakia, the Act on the Protection of Competition requires the turnover of at least two involved undertakings to reach certain thresholds for a notification obligation.[42] The Antimonopoly Office cannot investigate a concentration if the thresholds are not met.[43] Similarly, under Czech legislation, notification is mandatory if at least two undertakings reach turnover thresholds,[44] and the NCA may not handle cases without notification.[45] Finally, in Poland, the main rule of notification only takes into account the aggregate turnover of the undertakings involved, however, there are *de minimis* rules which would exclude many potential Article 22 mergers.[46] Overall, the merger control legislation in the three countries does not grant jurisdiction to the NCAs in cases where one of the involved undertakings is a start-up, or small innovator with significant future competitive potential.

3.2.2. Legal Framework in Hungary

In contrast, Hungary has adopted a corrective rule to its merger control legislation, which allows the Hungarian Competition Authority (GVH) to review certain concentrations that are not notifiable under the turnover-based main rule.[47] Companies have the opportunity to notify mergers that meet an objective and a subjective criterion.[48] The objective condition is a combined HUF 5 billion turnover, and the subjective condition is that *"it is not obvious that [the concentration] does not have a significant anti-competitive effect on the relevant market"*.[49] An important aspect of the rule is that it does not exclude mergers where the HUF 5 billion combined turnover can in large part (or in whole) be attributed to just one of the involved undertakings. On the surface therefore, it seems to be in line with the European Commission's purpose to review concentrations where a large firm acquires a start-up, or an innovative company with significant future competitive potential.[50]

However, the assessment of the subjective criterion raises some problems in relation to the purposes of the Article 22 Guidance. In a Communication, GVH clarified that companies are not required to submit a notification and can reasonably expect that GVH will not initiate merger control proceedings, if the market shares of the undertakings involved in the concentration do not exceed certain thresholds in relevant markets.[51] The problem with this approach is that it focuses on the present competitive power of the companies, while the Article 22 Guidance specifically highlights the importance of future competitive

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[42] ICLG, Merger Control Laws and Regulations Slovakia 2023, 2022.12.13, Section 2.4. Available at: https://iclg.com/practice-areas/merger-control-laws-and-regulations/slovakia.

[43] *Ibid.* section 3.3.

[44] Mergerfilers.com, Czech Republic, Confirmed up-to-date: 07/02/2023, para. 14. Available at: https://www.mergerfilers.com/guide.aspx?expertjuris=CzechRepublic.

[45] *Ibid.* para. 25).

[46] Mergerfilers.com, Poland, Confirmed up-to-date: 25/01/2023, para 14. Available at: https://www.mergerfilers.com/guide.aspx?expertjuris=CzechRepublic.

[47] For the main rule of notification in Hungary, see: Act LVII. of 1996 on the prohibition of unfair and anti-competitive market behaviour ("Tpvt."), 24. § (1). The quotes from Hungarian legislation and other documents were translated by the author.

[48] Bodócsi András: Az új fúziós rendszer bevezetése és első tapasztalatai, Versenytükör, 2017, Volume XIII. Issue 2. pp. 19-29., p. 26.

[49] Tpvt. (*supra note* 47) 24. § (4).

[50] For the focuses of the Commission, see: Article 22 Guidance (*supra note* 4) para. 19.

[51] GVH, 2/2018. és 3/2020. közleménnyel módosított 7/2017. közlemény az összefonódás-bejelentési kötelezettség, az összefonódás vizsgálatára irányuló versenyfelügyeleti eljárás megindítása, valamint az eljárás teljes körűvé nyilvánítása esetén alkalmazandó „nem nyilvánvalóság" feltételéről (egységes szerkezetben a módosító közleményekkel). (GVH communication), para. 37. Available at: https://www.gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/kozlemenyek/7_2017_egyseges-a-modositoval_2021re&inline=true.

potential and of companies which do not have significant market power yet, but have the potential to achieve it.[52] Therefore, the current application of this rule by GVH might not be perfectly suitable to effectively bring under its scope potential Article 22 concentrations.

Regarding procedural matters, the Hungarian legal framework is mostly in line with the purposes of the Article 22 Guidance. Even if the companies did not notify the merger – either because based on their assessment, it raised no anti-competitive issues, or because they purposefully tried to avoid examination by GVH – the Authority has the right to examine and potentially prohibit the concentration.[53] This option, however, is subject to a six-month deadline following the closing of the merger.[54] As outlined above, the Commission also established six months post-closing as a general timeframe following which it would likely not accept referral requests from Member States under Article 22. However, this is not a hard rule and the Commission also emphasized that *"[if] the implementation of the concentration was not in the public domain, this period of six months would run from the moment when material facts about the concentration have been made public in the EU"*.[55] Therefore, the Article 22 Guidance can actually present an opportunity for NCAs refer certain concentrations to the Commission, even if they did not learn about them in time to examine them based on internal legislation.

4. A Landscape of Increased Risks – A New Approach for Companies

The Commission's decision to examine the *Illumina/Grail* merger came as a surprise to many, not least the involved undertakings themselves. While Illumina is still fighting the decision, if the EU Court of Justice affirms the legality of the Article 22 Guidance, companies – especially ones in the digital and pharmaceutical sectors – must prepare for increased merger control risks linked to their transactions. However, there are some steps that undertakings can take, in order to better navigate these risks in the evolving landscape of European merger control.

4.1. Looking for Certainty – Preliminary Assessment by Competent Authorities

An important new challenge for companies is assessing whether their merger could be a potential candidate for a referral under Article 22. If they have doubts in this regard, communicating with the Commission or NCAs may be a good way to gain certainty. The Commission emphasized that it would welcome parties voluntarily coming forward with information about their transactions.[56] Some national merger control regimes also allow for the possibility of preliminary communication with the competent NCA.[57] In case companies wish to take advantage of this opportunity, they should consider which authority(s) to contact and exactly what information to disclose about their merger.

4.1.1. Preliminary Assessment by the European Commission

Although the Commission cannot unilaterally decide to examine a concentration under Article 22, it might send an invitation to NCAs to refer a merger, in case it learns of an Article 22 candidate. Therefore, voluntarily submitting information to the Commission can be a useful step for companies. This should be done via a case team allocation request submitted to the Merger Registry.[58] In such a case, the Commission would expect the parties to submit general information about

[52] See: Article 22 Guidance (*supra note* 4) para. 9. and para. 19.
[53] Tpvt. (*supra note* 47) 67. § (5).
[54] *Ibid.* 68. § (1) ca).
[55] See: Article 22 Guidance (*supra note* 4) para. 21.
[56] *Ibid.* para. 24.
[57] See e.g. Tpvt. (*supra note* 47) 43/L. §.
[58] White & Case, European Commission publishes practical information for merging parties on how to seek guidance about Article 22 referral, 20 December 2022. Available at: https://www.whitecase.com/insight-alert/european-commission-publishes-practical-information-merging-parties-how-seek-guidance.

the parties involved, information about the transaction's relationship to the substantive criteria of Article 22, details of interactions with NCAs and even certain transaction documents.[59] This indicates that the Commission is only willing to give a preliminary assessment on agreements which are already concluded. The Commission specifically emphasized that it would not assess hypothetical future concentrations.[60] If parties submit sufficient information to make a preliminary assessment, the Commission, where appropriate, will inform them *"that it does not consider that their concentration would constitute a good candidate for a referral under Article 22"*.[61] While there is no specific deadline for the Commission to make its assessment, it will aim to get back to the parties within five working days from their submission.[62]

4.1.2. Preliminary Assessment by NCAs

Besides the Commission, parties to a concentration may also submit information to NCAs in order request a preliminary assessment of the transaction. While the Commission plays a decisive role in Article 22 cases, it is ultimately up to NCAs to decide whether they would submit a referral request, making their assessment crucial to the involved companies.[63] A possible advantage of submitting information to NCAs can be the triggering of the 15-working-day referral deadline.[64] However, in order for the concentration to be considered "made known" to an NCA, companies must make sure to provide all the information necessary to make a proper assessment of whether the concentration might meet the criteria of Article 22.[65] Ultimately, if parties to a transaction wish to be absolutely certain about the timeline of a possible Article 22 referral, they can even submit information for preliminary assessment in all EU Member States, to trigger the deadline in each country.[66] Preliminary communication with NCAs might prove especially useful in Member States which have adopted special jurisdictional rules in their merger control legislation.[67] In case of uncertainty, NCAs may indicate what further information they may need in order to make a preliminary assessment.[68]

4.2. Other Considerations for Merging Parties

With the new Article 22 Guidance, companies must increase their efforts to carry out risk assessments in relation to their planned mergers.[69] Although there are no industry-specific restrictions in the Guidance, certain transactions might have an especially high chance of being caught by an Article 22 referral. The main focus of the Commission appears to be the digital and pharmaceutical sectors, due to their innovative and dynamic nature.[70] Similarly to the *Illumina/Grail* case, companies acquiring startups and smaller innovative companies which do not (yet) have high revenue should prepare for a referral.[71] According to the Commission, *"[s]imilar considerations apply to companies with access to or impact on competitively valuable assets, such as raw materials, intellectual property rights, data or infrastructure*".[72] The size of the transaction – effectively a case where the

[59] Article 22 Q&A (*supra note* 29) 6-7.
[60] *Ibid.* p. 7.
[61] Article 22 Guidance (*supra note* 4) para. 24.
[62] Article 22 Q&A (*supra note* 29) 8.
[63] *Ibid.* p. 11.
[64] Baker McKenzie, EU Merger Control: A New Policy enables post-closing reviews of deals even where no national filing thresholds are met, 6 April 2021, p. 4. Available at: https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95N-MLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAVfnLVn2ghRGAF90b1zpsbi&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAe%2FILx1Yos8tQ%3D&fromContentView=1.
[65] Article 22 Guidance (*supra note* 4) para. 28.
[66] White & Case (*supra note* 58).
[67] See e.g. GVH communication (*supra note* 51) para. 39.
[68] Bodócsi (*supra note* 48) 26.
[69] Baker McKenzie (*supra note* 64) 4.
[70] Ugarte – Perez – Pico (*supra note* 5) 20.
[71] Baker McKenzie (*supra note* 64) 1.
[72] Article 22 Guidance (*supra note* 4) para. 9.

purchasing price is particularly high compared to the turnover of the target – may also be an important factor.[73]

Although parties to a concentration may consider whether they might be at risk of an Article 22 referral, the new Guidance still increases overall uncertainty.[74] However, the Guidance, combined with the judgment of the General Court at least provides some clarity regarding the procedural aspects of the revised policy of the Commission. As outlined above, the 15-working-day referral deadline for NCAs can become a crucial factor for companies when planning the timeline of their transactions.[75] However, even if a concentration initially goes unnoticed, NCAs still have the opportunity to refer it to the Commission post-closing. The Commission highlighted six months after closing as a general deadline for accepting such a referral, which might somewhat improve legal certainty, but this should not be taken as a hard rule.[76] Finally, perhaps the most radical possible disruption in the timeline of a merger is the suspension obligation: in case of a referral request accepted by the Commission, parties must suspend the deal to the extent it has not closed.[77]

Due to the aforementioned risks, companies at risk of a referral should consider the implications during the drafting of the M&A transaction documents. In order to avoid disputes, parties should aim to agree on the allocation of risks and conditions.[78] Such considerations could include cooperation clauses on engaging with the European Commission (and NCAs), as well as adjusting timelines – particularly long-stop dates – in the sale and purchase agreements.[79]

Finally, while the Article 22 Guidance presents a great risk to many companies, it can also be a useful tool in certain cases. The Commission highlighted that besides the involved undertakings, third parties may also come forward with information regarding possible Article 22 concentrations.[80] This provides an opportunity to challenge the transactions of competitors. In case of contacting the Commission, third parties may send information to the Head of Unit of the merger unit in charge of the relevant industry/sector.[81] To the extent of their knowledge, they should include *"all the information available regarding the criteria of Article 22(1) of the Merger Regulation and the other factors set out in the Article 22 Guidance and the Notice on Case Referrals"*.[82] While such contact by a third party does not oblige the Commission to act,[83] this might still be a useful way to challenge rivals' deals.[84]

5. Conclusion – Keeping up with the Developments

Although the appeal before the EU Court of Justice is still pending, as things stand, the new Article 22 Guidance seems to be an economic reality,[85] with severe legal implications. The Commission was quick to apply it in an actual case – so quick, in fact, that it did not even wait until the release of the Guidance before it sent the letter to

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[73] UGARTE – PEREZ – PICO (supra note 5) 21.

[74] *Ibid.* p. 23.

[75] Gavin Bushell, How Illumina-ting: the EU Merger Regulation and the brutal operation of power under Article 22 EUMR, Kluwer Competition Law Blog, April 20, 2021. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2021/04/20/how-illumina-ting-the-eu-merger-regulation-and-the-brutal-operation-of-power-under-article-22-eumr/.

[76] *Ibid.*

[77] Baker McKenzie (*supra note* 64) 4.

[78] Allen & Overy, llumina GRAIL- General Court gives green light to below-threshold merger referrals, 21 July 2022, p. 5. Available at: https://www.allenovery.com/en-gb/global/news-and-insights/publications/illumina-grail-eu-general-court-gives-green-light-to-below-threshold-merger-referrals.

[79] Bushell (*supra note* 75).

[80] Article 22 Guidance (supra note 4) para. 25.

[81] Article 22 Q&A (*supra note* 29) 9.

[82] *Ibid.*

[83] Article 22 Guidance (supra note 4) para. 25.

[84] Bushell (*supra note* 75).

[85] *Ibid.*

Member States, inviting them to refer the *Illumina/Grail* concentration. Taking into account other recent cases,[86] it seems clear that the Commission is willing to go to great lengths to find new ways of protecting competition, particularly when it comes to mergers involving innovative companies. NCAs and companies need to pay close attention to these developments to be able to keep up with the developments of European merger control.

5.1. Conclusions for National Competition Authorities

NCAs have to increase their efforts to monitor the market. Although Article 22 now clearly applies to concentrations that are not notifiable under national rules, legislative reform can still help NCAs examine potentially relevant mergers. Several Member States have already enacted such corrective rules in recent years, which appears to be in line with the strategy of the Commission. However, the V4 countries are somewhat lagging behind in this regard: Poland, Slovakia and the Czech Republic still rely on turnover thresholds that have to be reached by at least two involved undertakings. And while Hungarian legislation does have a relevant provision, its application needs to be modernised in order to match the policy of the Commission.

5.2. Conclusions for Companies

Companies, on the other hand, need to carry out thorough risk assessment before their mergers. Voluntarily providing information to the Commission and NCAs can be a useful step in this regard. The risk of an Article 22 also has to be addressed in the transaction documentation. Finally, companies must be aware that their merger might come under scrutiny, even after it has closed.

Overall, the new Article 22 Guidance contributes to an increasingly complex – and according to some authors, fragmented and uncertain[87] – regulatory landscape. With the many challenges presented, the most efficient thing that NCAs can do is to try and assure the unified application of the new policy across the European Union. Companies, meanwhile, have to prepare for increased transaction costs and attempt to avoid disputes arising from unexpected Article 22 referrals.

[86] See e.g. Case M.7932 (Dow/DuPont), Decision C(2017) 1946, 27.3.2017; Case M.7275 (Novartis/Glaxosmithkline Oncology Business) Decision C(2015)538, 28.1.2015.

[87] UGARTE – PEREZ – PICO (supra note 5) 23.

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EU Competition Policy Changes in the Challenging Digital Era

***Abstract**: As digital platforms flourished, a widespread consensus emerged that ex-ante legislation must be implemented against a specific group of giant online platforms to promote fair competition. The Digital Markets Act was created as an innovative, complementary rule to address the difficulties the EU competition authorities encountered due to dominating, so-called "gatekeeper" platforms, along with additional objectives put forth by the European Commission. The study aims to shed light on these new goals and the potential factors that drove the Commission's decision to a policy change to better control the digital market. It also seeks to address issues with enforcement and potential regulatory overlaps between the DMA and EU competition law.*

Keywords: DMA, digital economy, gatekeeper platforms, European Commission, ex-ante regulation.

Introduction

Digital platforms are a time sink,[2] and looking at the increased time (and money[3]) spent on the internet, thanks to the broad range of its functions, from online shopping to engaging in digital hubs, it is clear that the digital sphere offers a new market for competition. The inevitable existence of platforms in the digital revolution necessitates their activities to be subject to up-to-date regulation since digitalisation, as a continuous process, brings new challenges to the digital market and competition regulation, thus may enable dominant platforms to abuse their position. Platforms can become powerful due to two critical market failures in the digital space, concentration and aggregation, which puts them in a position of dominance.[4] However, they serve as essential intermediaries to open up new markets that were previously impractical.[5] Having exclusive access to a significant amount of data also gives gatekeepers control over the ecosystem and the ability to charge significantly more for their intermediary services. They can set challenging requirements for entry and access to the market and exclusive dealing regulations that forbid sellers from

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[2] The global internet penetration average rate was roughly 64.4%, and the average daily hours spent online is about 6.6 hours worldwide. In 2021, the typical Italian spent 25 hours monthly on Facebook and 773 minutes monthly on platforms hosted by Google. In 2020, Booking.com was the leading online travel agency in Germany since only this website was used by one-third of Germans to plan their vacations online. Sources of the statistics: Ani Petrosyan: Italy: monthly time spent on leading websites 2021, Statista, 7 July 2022, and Global Internet Penetration Rate by Region 2023, Statista, 14 February 2023 https://www.statista.com/statistics/1068649/italy-monthly-time-spent-on-leading-websites/; Kate Davies: Leading online travel agencies Germany 2019-2020, Statista, 14 December, 2022 https://www.statista.com/statistics/452984/travel-agencies-most-popular-online-platforms-germany/.

[3] Global retail e-commerce sales were estimated to be at 5.2 trillion dollars in 2021. By 2026, this amount is expected to have increased by 56%, totalling roughly 8.1 trillion dollars. Stephanie Chevalier: Global Retail E-Commerce Sales 2026, Statista, 21 September 2022 https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/.

[4] Bertin MARTENS: An Economic Perspective on Data and Platform Market Power, SSRN Electronic Journal, 22 March 2021, 13, https://doi.org/10.2139/ssrn.3783297.

[5] Martens (fn 4) 13.

advertising their offers on platforms. As Martens described, "*[p]latforms are both a blessing and a curse in the data economy*."[6]

However, policymakers did not express much concern about high concentration in digital markets for long because many believed that digital winners faced competition "*for* the market" or from outside players hoping to succeed tomorrow. After all, Google surpassed AltaVista (whose primacy lasted one year), Facebook defeated MySpace, and they have enjoyed primacy for over a decade.[7] The internet's early competitive dynamics are no longer relevant, and the tenacity of today's digital leaders has raised questions about whether they have managed to escape the tight competition. A global consensus appeared that ex-ante legislation must be taken against a particular subset of behemoth online platforms to promote competition.[8] Hence, the European legal framework also needed a shift in competition policy. Alongside new aims set out by the European Commission ("Commission"), an innovative, complementary regulation, the Digital Markets Act ("DMA") was born to respond to the challenges faced by the EU competition authorities due to dominant, so-called 'gatekeeper' platforms.

This paper seeks to answer what drivers led to this policy change and what goals the Commission introduced to regulate the digital market. Moreover, it aims to answer the question of enforcement challenges and possible regulatory overlaps of the DMA with EU competition legislation. However, the paper will not try to give a solution to the challenges, and it will not conclude with any further predictions considering that, because policies change, predictions would be unreasonable.

My qualitative research, conducted with a deductive approach, consists of three main parts. First, it will discuss the changes in competition policy responding to the economy digitalisation process; then, it will continue presenting the goals of EU competition law in the challenging digital era. Lastly, it will examine the DMA's scope, enforcement challenges, and regulatory overlaps. The descriptive analysis method will help lay the foundation of the research[9] The primary sources that underpin my analysis are the Commission report titled Competition policy for the digital era published in 2019,[10] as well as Ezrachi's research on competition law goals and the digital economy.[11] Both works discuss the need for new goals in the European digital competition regulation. Guiseppe Colangelo's 'The European Digital Markets Act and Antitrust Enforcement' paper also served as a basis for my research since it discussed the question of DMA enforcement. Besides the primary sources, I gathered information from various academic sources, institutional and expert reports and the case law of the European and other international courts.

I chose the EU's new digital market regulation and the reason behind the latest policy change in EU competition law responding to the digital era's challenges as my topic for the issue's relevance. Its relevancy is evident because the future is digitalised economy, and that future would be only safe with a well-regulated digital market.

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[6] Martens (fn 4) 13.

[7] There are several reasons for digital leadership's extraordinary durability. Digital marketplaces, for instance, have characteristics of "tipping markets" or markets with a small number of players. These characteristics are the result of a combination of factors, including (a) consumer inertia; (b) increasing returns to scale (because recommendation algorithms get better with more users); (c) low marginal costs; and (d) strong direct and indirect network effects. Mario Mariniello és Julia Anderson: Regulating Big Tech: The Digital Markets Act, Bruegel. The Brussels-Based Economic Think Tank (blog), 14 December 2021, https://www.bruegel.org/blog-post/regulating-big-tech-digital-markets-act.

[8] New platform regulations are inevitable and required in every substantial legal framework. The EU, and the two most significant common law systems, the UK and the US legislators, agree that this intervention is needed, although their approach might differ, especially concerning enforcement. In all, there is a widespread consensus that ex-ante legislation must be taken against a particular subset of behemoth online platforms to promote competition and fairness. Thomas Tombal: 'Ensuring Contestability and Fairness in Digital Markets through Regulation: A Comparative Analysis of the EU, UK and US Approaches', European Competition Journal 2022, (18, no.3)468–500, 465, https://doi.org/10.1080/17441056.2022.2034331. See also: András Pünkösty: Merre tart az európai szintű platfromszabályozás? In Az internetes ptalfromok kora (ed. Török –Zsődi), Ludovika Egyetemi Kiadó, 2022. 176–192.

[9] Nicholas Walliman: *Research Methods: The Basics: 2nd edition*, London, Routledge, 2010, 10.

[10] Jacques Crémer-Yves-Alexandre de Montjoye-Heike Schweitzer: Competition Policy for the Digital Era. - Final Report, European Commission, B-1049 Brussels: Publications Office of the European Union, 2019, https://data.europa.eu/doi/10.2763/407537.

[11] Ariel Ezrachi: EU Competition Law Goals and the Digital Economy, SSRN Scholarly Paper, 2018.

1. EU competition policies: a response to the new digital era

This chapter presents the legislative background of the EU's competition and briefly presents the EU's transition to a new digital world. After discussing the changes in competition policy in the economy digitalisation process, it will analyse the goals and methodologies of EU competition law to respond to the challenges in the digital era.

1.1. The starting point of EU Competition Law

Since this paper aims to present a broader context of its legal base of EU competition law, it does not start with highlighting Articles 101 and 102 of the Treaty on the Functioning of the European Union[12] ("TFEU"). Rather, it first presents the values on what EU competition law is based. In accordance with Article 2 of Treaty on European Union[13] ("TEU"), the "*Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities*." All Member States share these values in a society that values diversity, non-discrimination, tolerance, justice, solidarity, and gender equality.[14] The Union's objectives include advancing "*the well-being of its peoples*",[15] "*establishing an internal market*", and fostering "*the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress*"[16] and guaranteeing "*an open market economy with free competition*"[17] among others.

Competition policy is one of the many tools to advance and support the abovementioned objectives.[18] Pursuant to Protocol No. 27, which is annexed to the EU Treaties, the internal market, as provided in Article 3 of the TEU, "*includes a system ensuring that competition is not distorted.*"[19] Even though EU competition law has been interpreted and clarified through case law and official publications throughout the years, it has been consistently held that EU competition law also guards "*not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.*"[20] According to the Court of Justice of the European Union (CJEU), market competition is protected "*as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.*"[21]

Additionally, promoting European market integration is an authentic indigenous goal.[22] Given that "*the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers*," the Commission has emphasised the complementary nature of this objective.[23] The Treaty-based competition rules must be interpreted in the light of the broader normative principles of Europe in addition to these fundamental goals because their nature is constitutional.[24]

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[12] Treaty on the Functioning of the European Union [2012] OJ C 326, 26.10.2012, 47–390.
[13] Treaty on European Union [2012] OJ C 326, 26.10.2012, 13–390.
[14] Article 2 of the TEU.
[15] Article 3.1 of the TEU.
[16] Article 3.3 of the TEU.
[17] Articles 119, 120, 127, 170, 173 of TFEU.
[18] Ariel Ezrachi: EU Competition Law Goals and the Digital Economy, SSRN Scholarly Paper, 2018, 3.
[19] 12008M/PRO/27 - EN, OJ L 115, 09.05.2008, 0309 - 0309.
[20] Communication from the Commission-Notice: Guidelines on the Application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, 97–118, paragraph 13. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2807%29.
[21] Judgement of 6 October 2009, *GlaxoSmithKline Services Unlimited*, C-501/06, P and C-513/06 P, and *European Association of Euro Pharmaceutical Companies (EAEPC)*, C-515/06 P, and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar)*, C-519/06 P, Joined cases C-501/06 P, C-513/06 P, C-515/06 P C-519/06 P, paragraph 63.
[22] CVCE.EU by UNI.LU: The Spaak Report (21 April 1956) - From the Messina Conference to the Rome Treaties (EEC and EAEC), https://www.cvce.eu/en/education/unit-content/-/unit/1c8aa583-8ec5-41c4-9ad8-73674ea7f4a7/dee61d43-7dc3-4383-a3dc-eb1e9f2e78db.
[23] Commission (fn 20) paragraph 13.
[24] Ezrachi (fn 11) 3.

1.2. Changes in competition policy responding to the economy digitalisation process

When it comes to anti-competitive practices, the European competition regime is in charge of regulating, as it allows the Directorate-General for Competition of the European Commission the authority to look into and, if necessary, sanction cartels, dominant practices, and anti-competitive mergers on a European scale while also outlawing unjustifiable state aid provided by member states.[25] Primary and secondary EU laws control competition policy, and ex-post enforcement is the main feature of that policy's regulatory framework.[26] The expansion of digital technologies is fuelling a "*new global industrial revolution*."[27] Consequently, a digital transformation occurred in business operations with the arrival of giant digital platforms capable of dominating their respective platform ecosystems.[28] However, those platforms may restrict competition by limiting access to core markets.[29] The same is the case in the Single European Market. The current business practices of the digital giants, such as the 'Big Five' (Google, Amazon, Meta, Microsoft, and Apple), put free and fair competition in jeopardy.

Moreover, an absence of effective EU-level regulation increases the likelihood of market fragmentation. The 'Big Five' and a few smaller platform companies generate considerable wealth for themselves and the economies in which they operate—however, the profound political implications of their market power challenge policymakers to develop appropriate responses.[30] It was clear that an update to the Commission's position on the EU competition law's renewal was required[31] since the slow-moving competition policy tools are ill-equipped to address these digital concerns thoroughly.[32] In January 2019, Commissioner Vestager claimed that competition policy could not fully address new difficulties and that it was unclear whether existing regulations should be reinterpreted or new regulations should be added.[33] According to the logic of the single market, additional regulations may be required to guarantee contestability, justice, and innovation, as well as the possibility of entering the market and public interests beyond economic or competitive factors.[34]

The shift in approach mentioned before meant the basis for a legislative proposal, the DMA, introducing a form of ex-ante regulation to supplement the Commission's ex-post competition enforcement.[35] However, why did the Commission propose completely new legislation instead of updating the existing ones? In their article 'Digital Single Market and the EU Competition Regime: An Explanation of Policy Change' Michelle Cini and Patryk Czulno also asked this question and investigated what policy changes caused the European Commission to aim to boost its traditional ex-post competition enforcement against online

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[25] Michelle Cini-Patryk Czulno: Digital Single Market and the EU Competition Regime: An Explanation of Policy Change, *Journal of European Integration* 2022, (44, no. 1) 41–57, https://doi.org/10.1080/07036337.2021.2011260.

[26] Cini-Czulno (fn 25) 42.

[27] European Commission: Shaping Europe's Digital Future, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/shaping-europes-digital-future_en.

[28] Cini-Czulno (fn 25) 41.

[29] European Commission: Statement by EVP Vestager: Proposal on Digital Platforms, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_2450.

[30] Cini-Czulno (fn 25) 41.

[31] European Commission: Shaping competition policy in the era of digitisation - Competition, 5 March 2019, https://ec.europa.eu/competition/information/digitisation_2018/conference_en.html.

[32] Mariniello-Anderson (fn 7).

[33] Commission (fn 25); In 2020, the Commission considered introducing a 'New Competition Tool' (NCT) to preserve undistorted competition in the internal market. By completing the current EU competition rules, the NCT would enable the Commission to address any remaining competition issues that are not covered or cannot be addressed efficiently. Moreover, the NCT would not include fines, would primarily permit prompt preventative action, and would let the Commission deal with the underlying causes of the identified competition issue. According to the logic of the single market, additional regulations may be required to guarantee contestability, justice, and innovation, as well as the possibility of entering the market and public interests beyond economic or competitive factors. European Commission, Directorate-General for Competition, Heike Schweitzer: The new competition tool: its institutional set up and procedural design: expert study, Publications Office, 2020, 4, https://data.europa.eu/doi/10.2763/060011.

[34] European Commission (fn 31).

[35] European Commission (fn 31).

platforms with ex-ante regulation.[36] They looked into four potential change drivers, which serve to explain the Commission's decision to support a new regulatory approach, thereby advancing integration in this policy area: (1) the proposed legislation's political, industrial, and digital contexts; (2) the Commission's own experience applying competition law to contest the market power of online platforms; (3) expert opinions and recommendations; and (4) the impact and views of advocates and stakeholder lobbyists.[37]

The authors found that the Commission's experience enforcing competition laws in digital marketplaces has not been positive.[38] While this was not a sufficient motivator of change, it was significant that the Commission doubted its ability to control online platforms alone through competition policy. Even when formal decisions were made, enforcement was complicated, slow, and not consistently effective. [39]

Moreover, while experts' opinions differed on whether there should be new legislation and their recommendations regarding, for instance, what structure the new regulation should take if needed, [40] in the end, a substantial majority backed stricter competition regulations. [41] However, some were not in favour of possible new legislation. For instance, the 'Crémer Report'argued in over the past sixty years, EU competition rules have been offering a solid foundation for preserving competition in a wide range of market environments.[42] They contended that despite the "revolution" in digital technology, the fundamental objectives of competition law do not require revision. They added that the competition law doctrine has changed and responded to various issues and changing circumstances case by case based on strong empirical evidence. At the same time, coherent enforcement has been made possible by the enduring fundamental principles of EU competition laws. Additionally, they expressed their confidence in the fact that the fundamental principles of competition law, as embodied in Articles 101 and 102 of the TFEU, continue to offer a solid and sufficiently adaptable foundation for defending competition in the digital era.

Cini and Czulno concluded on the third investigated potential driver of policy change that despite allegations of corporate lobbying power within the Commission, the Commission's lack of information reliance[43] and split interests in the industry worked against the dominance of large digital platforms.[44]

In all, Cini and Czulno concluded in their mentioned article that the policy shift stemmed from opening both internal and external policy windows and from a consensus among advisers and experts in favour of ex-ante regulation and member state rejection of other reform choices, and this consensus affected the approach of the decision-makers in the Commission.[45] In contrast, despite their reputation as lobbying heavyweights, the giant digital platforms could not defend their interests and block the proposal of a new draft regulation.[46] They also concluded that the political, industrial, and digital environments were conducive to policy change.[47]

Experts also expressed the necessity for a new approach to competition policy in the UK and Germany. A UK government-commissioned

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[36] Policy change is described in the article mentioned above as implementing a new governance framework and a revised market integration approach. Cini-Czulno (fn 25) 43.

[37] Cini-Czulno (fn 25) 51.

[38] Cini-Czulno (fn 25) 51.

[39] Cini-Czulno (fn 25) 51.

[40] Cini-Czulno (fn 25) 51.

[41] Cini-Czulno (fn 25) 51.

[42] Crémer- de Montjoye- Schweitzer (fn 10) 3.

[43] Cini-Czulno (fn 25) 51 and see more in David Coen: 'Lobbying in the European Union: Institutions, actors, and issues', Oxford University Press, 2021, https://doi.org/10.1093/oso/9780199589753.003.0001.

[44] Cini-Czulno (fn 25) 51.

[45] Cini-Czulno (fn 25) 51.

[46] Cini-Czulno (fn 25) 51–53.

[47] Cini-Czulno (fn 25) 51.

Expert Panel first introduced an ex-ante strategy to open competition in digital markets in March 2019: the 'Furman Report'.[48] In this report, Furman recommended that the UK adopt a proactive approach that creates and upholds a clear set of regulations to limit anti-competitive behaviour by the most powerful digital platforms while eliminating structural barriers preventing effective competition.[49] It was suggested that digital platforms holding a Strategic Market Status should be subject to specific obligations independently from assessing a competition law infringement. As a result, the UK government has committed to implementing a new national ex-ante regime for digital markets, similar to what the Furman Report originally proposed. [50]

Moreover, Andreas Mundt, president of the German competition authority ("Bundeskartellamt"), emphasised the need for a new policy.[51] He expressed that since "*traditional abuse control can entail a lengthy process*," he believes that "*a certain degree of regulation and a strict application of competition law, including stringent merger control, is needed in order to prevent a "tipping" of markets*".[52] The GWB, one of the most progressive competition laws in the world, has been updated by the Bundeskartellamt since 2017 to keep up with the digital economic transformation.[53] Its 10th amendment, with the newly introduced Section 19a, brought the most significant change: the modernisation of abuse control.[54] This clause enables the Bundeskartellamt to step in more forcefully when major digital enterprises threaten the marketplace.[55] When this paper was written, the Bundeskartellamt had ongoing procedures against digital gatekeepers such as Google (Alphabet), Amazon and Apple. [56]

2. Goals of EU competition law in the challenging digital era

The goals of EU competition law collectively embody the European competition law ethos.[57] This diversity is not without difficulty or contention; the different objectives have not always been spelt out. This chapter presents a few, sometimes different, ideas on the new objectives of EU competition law stemming from digitalisation. The Crémer Report stated that particular platforms, digital ecosystems, and data economy characteristics require the adaptation and improvement of established concepts, doctrines, and methodologies, as well as competition enforcement.[58] In Ezrachi's opinion, the objectives of the European Competition Law are not restricted to but primarily focused on consumer welfare.[59] Besides that, the author identified several other goals of EU competition law, as well, and examined how they might mutate in the context of the digital economy.

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[48] Jason Furman: Unlocking Digital Competition - Report of the Digital Competition Expert Panel, 2019, 3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[49] Furman (fn 48) 2.

[50] GOV.UK: Government Response to the CMA Digital Advertising Market Study, GOV.UK, https://www.gov.uk/government/publications/government-response-to-the-cma-digital-advertising-market-study. (29 January 2023).

[51] Andreas Mundt-Thomas Vinje: Giving back to digital consumers, Concurrences, February 2022, N° 1, Art. N° 105066.

[52] Mundt-Vinje (fn 51).

[53] Bundeskartellamt: Digital Economy, https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html (26 February 2023).

[54] Section 19a of the GWB, regarding abusive conduct of firms of paramount significance for competition across markets. The official English translation is available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (25 February 2023).

[55] Bundeskartellamt (fn 53).

[56] Bundeskartellamt: Digital Economy - Ongoing proceedings against large digital companies (as at: 01/2023), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Downloads/List_proceedings_digital_companies.html;jsessionid=37F5D8ED01B9C2D-7F22E9F020530A566.1_cid381?nn=10321672. (26 February 2023).

[57] Ezrachi (fn 11) 3.

[58] Crémer-de Montjoye-Schweitzer (fn 10) 3.

[59] Ezrachi (fn 11) 3.

2.1. Consumer welfare

Consumer welfare and well-being have always been vital objectives of EU competition law.[60] Also, in the digital economy, the welfare effects on various customer groups can be discussed using the concept of consumer welfare,[61] and as such, it can effectively address digital markets since they typically have multiple sides.[62] The Crémer Report also emphasised the importance of the consumer welfare standard. In their view, the term broadly refers to all "users", which is especially important in the digital economy, where platform policies also impact "business users."[63] The Commission stated in its General Guidelines that "*the concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers who use the products as an input, wholesalers, retailers, and final consumers, i.e., natural persons acting for purposes which can be regarded as outside their trade or profession.*"[64]

Moreover, given the likelihood of error costs in a rapidly changing world, reconsidering the timeframe and the standard of proof is unavoidable.[65] Due to technological advancements and shifting business strategies, consumer welfare may face other new challenges, such as the increased use of the tracking and third-party tracking services and their impact on the concentration of power and the ability to take advantage of consumers.[66] Another illustration that has recently sparked much discussion is the degradation of privacy by market leaders and how that affects consumer welfare. When the Bundeskartellamt began legal action against Facebook in 2016 on the grounds that it might have abused its market dominance by violating data protection laws, it was a significant step toward resolving these issues.[67]

2.2. Special responsibility of dominant undertakings

EU competition law (and within that Article 102 of the TFEU) "*is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.*"[68] In the GlaxoSmithKline Services Unlimited v Commission case, the CJEU held that Article 101 of the TFEU "*aims to protect not only the interests of competitors or consumers, but also the market structure and, in so doing, competition as such.*"[69] The broader prism provided by the protection of an "effective competition structure" has significant effects in the context of the digital economy.[70] It offers a distinct mandate for intervention that will not immediately affect clients, and it enables the courts and competition authority to stop actions that would distort competition in digital markets.[71] This does not imply stricter enforcement necessarily; instead, it suggests a more thorough and perhaps practical

[60] Commission (fn 20) paragraph 33.

[61] Digital platforms like Google, Facebook, and Amazon have significantly increased consumer welfare. See more: Mike Walker: Competition policy and digital platforms: six uncontroversial propositions, European Competition Journal, 2020, (16.1) 1–10, https://doi.org/10.1080/17441056.2020.1730063.; According to research, it would cost an average US customer more than $17,500 to give up internet search access for a year, and the average Facebook user would need to receive compensation of $40 to $50 per month to cancel their subscription. Erik Brynjolfsson-Felix Eggers-Avinash Gannamaneni: Using Massive Online Choice Experiments to Measure Changes in Well-Being, National Bureau of Economic Research,1050 Massachusetts Avenue Cambridge, MA 02138, 2018, 22. 30.

[62] Ezrachi (fn 11) 6.

[63] Crémer-de Montjoye-Schweitzer (fn 10) 3.

[64] Commission (fn 20) paragraph 84.

[65] Crémer-de Montjoye-Schweitzer (fn 10) 3.

[66] Sebastian Schelter-Jérôme Kunegis: Tracking the Trackers: A Large-Scale Analysis of Embedded Web Trackers, Proceedings of the International AAAI Conference on Web and Social Media, 4 August 2021, (10, no.1): 679–82, https://doi.org/10.1609/icwsm.v10i1.14769.{\\i{}Proceedings of the International AAAI Conference on Web and Social Media} 10, sz. 1 (2021. augusztus 4.

[67] Bundeskartellamt: Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

[68] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc.*, Case 6-72. European Court Reports 1973 -00215, ECLI:EU:C:1973:22, paragraph 26.

[69] *GlaxoSmithKline Services Unlimited*, C-501/06 (fn 17) paragraph 63.

[70] Ezrachi (fn 11) 8.

[71] Ezrachi (fn 11) 8.

examination of the impacts on the digital landscape.[72] The focus is on the effects of online platforms, intermediaries, and other economic actors on the competition process. Although it is widely acknowledged that not every exclusionary effect harms competition,[73] unjustified distortions may call for intervention. The focus on the competitive process draws attention to potential applications of networks, platforms, or data pools as barriers to entry or growth or as a way to raise competitors' costs. Data plays a more significant role in market development and growth, emphasising its value as a parameter in market analysis and the potential for distorted competition.[74]

The consideration of choice in the digital market is also evident. By increasing friction and utilising deception, it can be used to determine the ability of dominant players to reduce consumer choice while maintaining the appearance of abundance. The same applies when monopolising businesses limits competitors' access by engaging in anti-competitive behaviour or reducing interoperability. The perfect examples of these two types of distortion to competition are the Google Search (Shopping) case[75] and the decision of the Commission regarding Google's Android-related actions.[76] EU competition law provides appropriate intervention benchmarks in these circumstances.[77] Moreover, the viability of downstream markets, end consumers, and input providers may be negatively impacted by the actions of bottleneck digital players when upstream effects are taken into account.[78]

2.3. Efficiencies and innovation

Ezrachi also highlighted in his research efficiencies and innovation as goals to consider when regulating the digital market. Why? Innovation is essential to market competition, so it should be promoted, supported and fostered by competition law.[79] Innovative market-stimulating tactics increase consumer welfare, which may help balance out declining marginal returns.[80] However, apprehending dynamic changes is challenging for enforcement in the digital age, and methodological restrictions may make it more challenging to identify how particular behaviours affect innovation. It can be difficult to tell pro-consumer innovation from harmful innovation.[81] On the one hand, some have called for a more laissez-faire approach in the case of merger review because ex-ante intervention may stifle innovation.[82] The risks associated with large networks, data pools, and platforms, as well as their effects on rival innovators, adjacent markets, market-entry, the eradication of potential competition, and the market's tilting in favour of the combined entity, have prompted some, however, to call for closer examination.[83]

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[72] Ezrachi (fn 11) 8.

[73] Judgement of 27 March 2012, *Post Danmark A/S v Konkurrencerådet,* C-209/10 , paragraph 20.

[74] András Pünkösty: Versenyjogi megfontolások a technológiai óriások szabályozásával kapcsolatban, In Medias Res, 2021/2, 4, 253.

[75] Summary of Commission Decision of 27 June 2017 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case AT.39740 — Google Search (Shopping), C(2017) 4444 (2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01).

[76] Summary of Commission Decision of 18 July 2018 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case AT.40099 — Google Android, Notified under Document C(2018) 4761, 2019/C 402/08, 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC1128%2802%29.

[77] Ezrachi (fn 11) 9.

[78] Ezrachi (fn 11) 9.

[79] Ezrachi (fn 11) 11; European Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements', OJ C 11, 14.1.2011, p. 1–722, paragraphs 119-122; Roger Alford: The Role of Antitrust in Promoting Innovation [presentation], 2018, King's College, London, United Kingdom, 2, 3,10. https://www.justice.gov/opa/speech/file/1038596/download.

[80] Ezrachi (fn 11) 11.

[81] Thibault Schrepel: Predatory Innovation: The Definite Need for Legal Recognition, SSRN Scholarly Paper, 2017, https://papers.ssrn.com/abstract=2997586."plainCitation":"Thibault Schrepel, „Predatory Innovation: The Definite Need for Legal Recognition", SSRN Scholarly Paper (Rochester, NY, 2017. július 1.

[82] Alford (fn 73) 2.

[83] Ezrachi (fn 11) 11

2.4. Plurality, democratic values and economic freedom

When businesses distort markets and information flows and ultimately impact consumers' freedom, the value of plurality, democratic values, and freedoms may support intervention. It is noteworthy that stealth, one of the hallmarks of online dystopia, is a characteristic that relates to the expanding means for pursuing unwary users. These include a wide range of sophisticated techniques that allow businesses to covertly collect user data, combine offline and online data, target and influence user behaviour, and influence public opinion.[84] The values mentioned above make intervention easier when there are search engine manipulation effects. Examples include the effects of search engine manipulation, search suggestions, and ranking biases. Due to their potential causal connection to the outcomes of political elections,[85] these phenomena have only recently come to light. However, tools used to increase network and applications through behavioural manipulation are illustrative,[86] and sophisticated manipulation through filtering and ordering may go largely undetected.[87] The exercise of power over the design and functionality of the user interface may impact user freedom and perception in a space increasingly dominated by a small number of powerful online gatekeepers.[88]

2.5. Fairness and other goals

In the context of the digital economy, fairness may also have a significant impact. It guides the nature of interactions among customers, service providers, and online platforms as an abstract norm. It might favour intervening when dominant online providers engage in discriminatory practices that result in almost-perfect price discrimination. When false information spreads online and encourages or results in the distortion of competition, it may be used to justify intervention. It also might come into play when improper data handling and protection or privacy violations result in unfair competition or exploitation.[89] Commissioner Vestager also emphasised the necessity for fairness in competition law.[90] However, whether fairness has anything to do with competition law, a field generally linked with economic efficiency rather than social justice, is a subject that has scholars and lawyers on edge.[91] The EU's state-aid laws are meant to prevent governments from giving companies unfair advantages, not to push corporations to "*pay their fair share of tax*"[92], according to Vestager's critics, who also claim that her fight for fairness has no place in enforcement, particularly when it comes to her investigation of multinational tax agreements.[93]

However, the digital world may raise other crucial issues. On the one hand, market limits might not be as well defined as in the economy before digitalisation and might shift very quickly.[94]

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[84] Zeynep Tufekci: Opinion-Facebook's Surveillance Machine, The New York Times, 19 March 2018, https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html.

[85] Robert Epstein-Ronald E. Robertson: The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections, Proceedings of the National Academy of Sciences, 18 August 2015, (112, No. 33): E4512–21, https://doi.org/10.1073/pnas.1419828112.

[86] Tristan Harris: Tristan Harris: How a handful of tech companies control billions of minds every day, TED Talk, https://www.ted.com/talks/tristan_harris_how_a_handful_of_tech_companies_control_billions_of_minds_every_day.

[87] Alex France-Cass R. Sunstein:'#Republic: Divided Democracy in the Age of Social Media, Ethical Theory and Moral Practice, 1 November 2017, (20, No. 5): 1091–93, https://doi.org/10.1007/s10677-017-9839-5.

[88] Ezrachi (fn 11) 16.

[89] Ezrachi (fn 11) 15.

[90] See more in Fatma El-Zahraa Adel: Fairness in EU Competition Policy: Significance and Implications. An Inquiry into the Soul and Spirit of Competition Enforcement in Europe,/Damien Gerard-Assimakis Komninos-Denis Waelbroeck (dir.), Concurrences Review, 2021, (N° 1-2021): 263–64.; Practical Law Competition: Speech by Margrethe Vestager on Fairness and Competition, Practical Law, 5 March 2018, https://uk.practicallaw.thomsonreuters.com/w-013-4977?transitionType=Default&contextData=(sc.Default)&-firstPage=true.

[91] Lewis Crofts: Vestager's 'Fairness' Mantra Rattles through EU Competition Law, LexisNexis, 15 November 2016, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/vestagers-fairness-mantra-rattles-through-eu-competition-law.

[92] European Commission (fn 25).

[93] Crofts (fn 91).

[94] Crémer-de Montjoye-Schweitzer (fn 10) 3.

Accordingly, some insist that in digital markets, there should be a greater emphasis on theories of harm and the identification of anti-competitive strategies rather than a lesser emphasis on market definition analysis.[95] On the other, the emergence of the digital age necessitated the development of new metrics for accurately measuring market power.[96] Market power, often associated with the idea of an "unavoidable trading partner" and occasionally referred to as "intermediation power" in the context of platforms, can exist even in a fragmented market.[97] Additionally, if data that market entrants are not able to get access to offers a significant competitive advantage, its possession may result in market dominance; thus, any discussion of market power must consider the sustainability of any differential access to data that the presumed dominant firm has over its competitors on a case-by-case basis.[98]

Nevertheless, in 2019, Commission President von der Leyen emphasised in her political guidelines, among other things, the necessity for Europe to take the lead in the transition to a new digital world.[99] She stated that from 2019 through 2024, the Commission would concentrate on three primary goals to ensure that digital solutions support Europe's path to digital transformation that upholds European democratic ideals and fundamental rights and benefits people.[100] The three key objectives are the following: (a) technology that works for people, (b) a fair and competitive economy, and (c) an open, democratic and sustainable society.[101] These primary objectives support a robust and competitive single market "*where enterprises of all sizes and industries may compete on equal terms*".[102] Moreover, it will do so while mastering and reshaping technology considering European values.[103] An additional goal of the von der Leyen Commission is to place Europe in a position to establish the global conversation's trends. [104]

3. A new era in EU regulation in the digital market: the Digital Markets Act

The Commission decided to use a new tool, the DMA, to regulate the behaviour of platform businesses in the digital market. However, this notion did not originate with the EU but started with the UK's Digital Competition Expert Panel Report, the Furman Report. Only after this report, a proposal for ex-ante legislation for significant online platforms serving as gatekeepers, the DMA, was made public by the European Commission in December 2020,[105] opposed to the opinion of the special advisors on competition policy for the digital era claiming that regulation was unnecessary because modernised and strengthened competition law would be sufficient to ensure fairness and contestability in digital markets.[106]

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[95] Crémer-de Montjoye-Schweitzer (fn 10) 3–4.

[96] Crémer-de Montjoye-Schweitzer (fn 10) 4.

[97] Crémer-de Montjoye-Schweitzer (fn 10) 4.

[98] Crémer-de Montjoye-Schweitzer (fn 10) 4.

[99] Ursula von der Leyen: Political Guidelines for the next European Commission 2019-2024 ; Opening Statement in the European Parliament Plenary Session 16 July 2019 ; Speech in the European Parliament Plenary Session 27 November 2019, Directorate-General for Communication (European Commission), LU: Publications Office of the European Union, 2020,13, https://data.europa.eu/doi/10.2775/101756.

[100] European Commission: Shaping Europe's Digital Future, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/shaping-europes-digital-future_en.

[101] European Commission (fn 100) 3.

[102] European Commission (fn 100) 3.

[103] European Commission (fn 100) 3.

[104] von der Leyen: Speech in the European Parliament Plenary Session 27 November 2019 (fn 99) 37.

[105] MEMO/COM (2020) 842 final/15.12.2020: Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussles, 15 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0842&from=en.

[106] Crémer-de Montjoye-Schweitzer (fn 10) 3.

3.1. The scope and implementation of the DMA

With the Commission's proposal in 2020,[107] a new regulatory framework: the DMA, was born. Article 114 of the TFEU, which gives legislators the authority to adopt measures intended to approximate national regulations and prevent regulatory fragmentation in the internal market, serves as the legal foundation for the DMA. The regulation entered into force on November 1, 2022, and became applicable six months after, on May 2, 2023.[108] Two overarching goals of the DMA are to "*ensure contestability and fairness for the markets in the digital sector in general*."[109] The DMA addresses two problems: high entry barriers and gatekeepers' anti-competitive practices. It aims to solve these issues by designating online gatekeeper platforms and regulating their behaviour specifically.

The DMA targets providers of a closed list[110] of "core platform services"[111] (CPS) who meet the "gatekeeper" threshold.[112] The European Commission, on the other hand, has the authority to extend this closed list by conducting a market investigation. Furthermore, 'core platform service' can refer to any of the following: (i) online intermediation services; (ii) online search engines; (iii) online social networking services; (iv) video-sharing platform services; (v) number-independent interpersonal communication services; (vi) operating systems; (vii) cloud computing services; and (viii) advertising services provided together with any of the CPSs listed in points (i) to (vii).

Ultimately, the Commission proposed a "three criteria test" after considering various policy options for the gatekeeper threshold. Specifically, an online platform will be considered to be a gatekeeper if it meets the following three cumulative criteria: (1) it significantly affects the internal market; (2) it runs a core platform service that acts as a crucial gateway for business users to reach end-users; and (3) it currently holds or can reasonably be expected to hold an established and stable position in its operations.[113] However, if three other quantitative "presumption thresholds"[114] are met, which have been established to simplify the evaluation of the existence of a gatekeeper position, it is assumed that the three qualitative criteria are satisfied. So, when a provider of CPSs reaches the quantitative thresholds, the DMA creates a rebuttable presumption that the qualitative criteria are satisfied. The first qualitative criterion is defined quantitatively as an annual turnover of €7.5 billion or a market capitalisation of €75 billion, providing the same CPS in a minimum of three EU Member States (first quantitative threshold). The second threshold is met if the CPS has at least 45 million monthly active end-user base and 10.000 yearly active business users. The third quantitative threshold is only met if the second criterion has been met over three consecutive years. However, the potential gatekeepers can "manifestly call into question" the assumption and present evidence that they should not be designated as gatekeepers because of exceptional circumstances despite meeting all the requirements.[115]

[107] Commission (fn 105).
[108] Article 54 of the DMA.
[109] Recital 7 of the DMA.
[110] Article 17 of the DMA.
[111] Article 2.2 of the DMA. See articles 2.5 to 2.11 for the definitions of each of these services.
[112] Article 3.1 of the DMA.
[113] Article 3.1 of the DMA.
[114] Article 3.2. of the DMA.
[115] Article 3.5 of the DMA.

Table 1: Qualitative criteria and quantitative thresholds for gatekeeper designation[116]

Qualitative criteria (Article 3.1 DMA)	Quantitative thresholds (Article 3.2 DMA)
1. The undertaking has a significant impact on the internal market.	1. The undertaking has either an annual turnover above EUR 7.5 billion in each of the last three financial years or market capitalization or equivalent fair market value above EUR 75 billion in the last financial year and it provides the same CPS in at least three Member States of the European Union.
2. The undertaking provides a CPS, which is an important gateway for business users to reach end users.	2. The CPS has at least 45 million, monthly active end users and at least 10,000 active business users located or established in the EU.
3. The undertaking enjoys an entrenched and durable position.	3. Threshold (2.) above relating to the CPS has been met in each of the last three financial years.

Moreover, the Commission would continue to have the authority to withdraw (or establish) "gatekeeper" status through qualitative assessment.[117] Articles 9 and 10 of the DMA also contemplate the potential of suspending or excluding a "gatekeeper" from one or more commitments. Additionally, the Commission would be able to modify the thresholds in response to technological advancements[118] and carry out market research to identify new gatekeepers.[119] It is essential to highlight that the DMA does not "prescribe specific outcomes" but seeks to safeguard the competition within the internal market.[120] Thus, the Commission does not propose to govern big tech as natural monopolists, since being successful is not illegal, but rather to ensure that it never has to.[121] Then why are online gatekeepers a source of concern? Because the strategies that guarantee their success may become illegal. The DMA would control the behaviour of gatekeepers while pressuring them to proactively open up to more competition. Articles 5 to 7 of the DMA list the obligations and prohibitions, and they are based on current competition law decisions. As of March 2024, all obligations will be enforceable on designated "gatekeepers." Those who violate the obligations face penalties of up to 10% of their annual turnover, and repeat offenders risk being broken up. The Commission may also revise Articles 5 and 6 responsibilities and prohibitions through delegated acts, and with the help of this clause, the DMA will be "future-proof."[122]

3.2. Enforcement challenges and regulatory overlap

Notwithstanding the DMA's rationalisation and legal grounding, there is a risk that the European legal system may become more fragmented than it was in the pre-DMA era due to "*[i]ntersection with the substance and scope of EU competition law*".[123] Despite the initiative's potential, it is currently unclear how the DMA fits into the broader regulatory system.[124] This uncertainty is perpetuated by the DMA's distinction from sector-specific regulation and the fact that it is not a competition law tool from a formal point of view.[125] As Commissioner Vestager emphasises that the DMA is "[…] *not a competition law instrument*" in one of her

[116] Table made by the author. Source: White & Case LLP, https://www.whitecase.com/sites/default/files/2022-11/the-digital-markets-act-alert-tab-v3.pdf.

[117] Article 4 of the DMA.

[118] Recital 22 of the DMA.

[119] Article 19.3 of the DMA.

[120] Mariniello-Anderson (fn 7).

[121] Mariniello-Anderson (fn 7).

[122] Article 12 of the DMA.

[123] Giuseppe Colangelo: The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse, SSRN Scholarly Paper, 19 May 2022, Rochester, NY, 3, https://doi.org/10.2139/ssrn.4070310.; Pinar Akman: Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, SSRN Electronic Journal, 2021, 2, https://doi.org/10.2139/ssrn.3978625.

[124] Belle Beems: The DMA in the broader regulatory landscape of the EU: an institutional perspective, *European Competition Journal*, 10 October 2022, 2, https://doi.org/10.1080/17441056.2022.2129766.

[125] Beems (fn 124) 2.

speeches,[126] the EU legislators do not regard the DMA as a component of "traditional" competition legislation.[127] However, since the DMA shares the objectives and legal interests of EU competition law,[128] the upcoming European regime appears to conflate regulation and antitrust by blurring the line between their features and objectives.[129]

Moreover, the DMA's ex-post enforcement necessitates a thorough, case-by-case analysis of frequently complex circumstances.[130] The European Commission has extensive investigative and enforcement authority under the DMA.[131] In contrast to the usual decentralised or parallel antitrust enforcement at the national level, the DMA seeks to centralise its implementation and enforcement at the EU level.[132] Nonetheless, the DMA is founded on the explicit premise that the platform economy faces particular difficulties and systemic problems that the application of competition law alone cannot satisfactorily resolve.[133] In its Preamble, the EU legislator acknowledged that the DMA's goals complement those of the competition laws; thus, traditional antitrust laws remain relevant in addition to the DMA's supplementary role.[134] Nonetheless, their applicability should not impact the obligations placed on gatekeepers by the legislation and their uniform and efficient implementation.[135]

While the DMA forbids Member States from placing additional restrictions on designated gatekeepers to ensure competitive and fair markets, it does not prevent Member States from placing restrictions based on EU or even domestic competition laws if it complies with Regulation (EC) No. 1/2003.[136] For instance, it is feasible to impose duties simultaneously under the DMA and Section 19a of the German Competition Act, which is directed at similar platforms.[137] At best, this parallel imposition weakens the internal market; at worst, it results in incompatibility. As a result, the issue that arises at the point where the DMA and competition law regulations cross is the potential for legal issues to occur when the DMA and competition law rules are applied concurrently, including potential violations of the ne bis in idem principle.[138]

Summary

First, this study discovered that four potential change drivers influenced the Commission's decision to support a new regulatory approach: (i) the political, industrial, and digital contexts; (ii) the Commission's own experience using competition law to challenge the market dominance of online platforms; (iii) professional opinions and recommendations; and (iv) the influence and viewpoints of advocates and stakeholder lobbyists.[139] Although there were conflicting views on whether additional legislation was necessary, a large majority supported tighter competition laws.[140] It was discovered that the policy change resulted from

[126] Margrethe Vestager: Competition in a Digital Age, European Internet Forum, 17 March 2021, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age .

[127] Beems (fn 124) 3.

[128] Heike Schweitzer: The art to make gatekeeper positions contestable and the challenge to know what is fair: a discussion of the Digital Markets Act proposal, Zeitschrift für Europäisches Privatrecht, 202, (No. 3), 503–544.

[129] Colangelo (fn 123) 4.

[130] Recital 5 of the DMA.

[131] Recital 80 of the DMA.

[132] Colangelo (fn 123) 4.

[133] Colangelo (fn 123) 3.

[134] Alexandre de Streel-Pierre Larouche: The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution, Concurrences Review, s1 May 2021, (No. 2-2021), 55.

[135] Colangelo (fn 123) 4.

[136] Recital 10 and Article 1.6 of the DMA; Article 3.2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ L 148, 11.6.2009, 1–4, http://data.europa.eu/eli/reg/2003/1/2009-07-01.

[137] Section 19a of the GWB (fn 48).

[138] Akman (fn 123) 3.

[139] Cini-Czulno (fn 25) 51.

[140] Cini-Czulno (fn 25) 51.

member states rejecting other reform options and a consensus among advisors and experts favouring ex-ante regulation resulting in the birth of the DMA.[141] Also, it concluded that policy change was supported by the political, business, and technological environments.[142]

Second, it concluded that the welfare and well-being of consumers are the main emphases of EU competition law, as the Crémer Report also emphasises its importance since online platforms have considerably improved customer well-being.[143] By focusing on potential uses of networks, platforms, or data pools as roadblocks to entry or growth or as a tool to raise competitors' costs, EU competition law seeks to defend the market structure and competition,[144] and data can be a helpful element in market analysis and potentially create unfair competition. As Ezrachi highlighted, the value of plurality, democratic principles, and economic freedom may warrant intervention when firms distort markets and information flows and eventually affect consumers' freedom.[145] The ability of dominant businesses to limit customer choice while keeping the image of abundance can be assessed by considering choice in the digital market, which is crucial.[146] In these situations, EU competition law offers acceptable intervention standards, and goals to consider when regulating the digital market include efficiency and innovation.[147] In the digital era, it can be difficult for enforcers to recognise dynamic changes, and methodological limitations might make it impossible to distinguish between innovation that benefits consumers and innovation that harms them.[148] According to Commissioner Vestager, fairness is also a crucial component of the EU's legislative framework for competition, although it is controversial.[149]

The von der Leyen Commission emphasises that Europe must bear the leadership in navigating the shift to a new digital era while promoting a strong and vibrant single market.[150] A new regulatory structure, the DMA, was created to complement its ex-post competition enforcement against online platforms with ex-ante regulation addressing two problems: high entry barriers and the anti-competitive behaviour of gatekeepers.[151] It is directed at suppliers of "core platform services" on a restricted list who satisfy the "gatekeeper" standard, as determined by a "three criteria test", so that it (i) significantly affects the internal market, (ii) it runs a core platform service, and (iii) it currently holds or can reasonably be expected to hold a stable position.[152] By initiating a market investigation, the Commission may broaden this list. The three qualitative requirements are considered if three additional quantitative "presumption thresholds" are reached.[153] By regulating gatekeepers' actions and aggressively encouraging them to become more open to competition, the DMA hopes to protect competition within the internal market. The requirements and prohibitions listed in Articles 5 to 7 of the DMA will be binding on selected "gatekeepers." Repeat offenders run the prospect of being disbanded, and penalties for violations can reach 10% of the offender's yearly turnover. The Commission can craft the DMA "future-proof" by amending Articles 5 and 6's obligations and prohibitions by delegated acts.[154]

[141] Cini-Czulno (fn 25) 51–53.
[142] Cini-Czulno (fn 25) 51.
[143] Crémer-de Montjoye-Schweitzer (fn 10) 3.
[144] GlaxoSmithKline Services Unlimited, C-501/06 (fn 17) paragraph 63.
[145] Ezrachi (fn 11) 15.
[146] Ezrachi (fn 11) 8.
[147] Ezrachi (fn 11) 11.
[148] Ezrachi (fn 11) 11.
[149] von der Leyen: Speech in the European Parliament Plenary Session 27 November 2019 (fn 99) 37.
[150] Speech by Margrethe Vestager (fn 90).
[151] Recital 7 of the DMA.
[152] Article 3.1 of the DMA.
[153] Article 3.2 of the DMA.
[154] Article 12 of the DMA.

The study's final finding was that the DMA project has potential. Still, because it differs from sector-specific regulation and relies on ex-post enforcement, it is unclear how it fits into the larger regulatory structure. Under the DMA, the Commission has broad investigative and enforcement powers and is working to centralise its application and enforcement at the EU level. If it complies with Regulation (EC) No. 1/2003, it does not exclude Member States from imposing restrictions based on national or EU competition legislation.[155] When the DMA and competition law regulations are enforced simultaneously, this could result in legal problems, including possible violations of the ne bis in idem principle.[156]

[155] Recital 10 and Article 1.6 of the DMA; Article 3.2 Council Regulation (EC) No 1/2003 (fn 136).
[156] Akman (fn 123) 3.

Dóra Ripszám[1]

Use of Evidence in Competition Supervision Proceedings in Hungary
Evidence from Secret Information Gathering

Abstract: *There are provisions on cartels in a number of areas of law, such as public procurement law, competition law and, last but not least, criminal law. The competition supervision proceedings initiated in connection with the cartel and the criminal proceedings show an extraordinary number of points of connection. Criminal proceedings are often preceded by the initiation of competition supervision proceedings, but it is even more important that the evidence uncovered in criminal proceedings can also be used in competition supervision proceedings. Evidence gathered in criminal proceedings through secret information gathering may be used in the competition supervision procedure if the criminal court has established the legality of such information collection, the evidence concerned has been lawfully provided, and the party was able to learn about it in the competition supervision procedure and submit its comments.*

Keywords: cartel, secret information gathering, competition supervision proceedings, Agreement in Restraint of Competition in Public Procurement and Concession Procedures, inquiries.

"(1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.
(2) Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers."[2]

1. Introduction

Recent developments have shown that the Hungarian Competition Authority ("GVH") can now convict infringing companies on the basis of secret recordings, making it much easier to prove infringements of competition law. In recent years, there have been two important changes that clearly rewrite the previous evidence of competition law: on the one hand, from January 2021 according to the amendment of the Competition Act, GVH may also use secret recordings made by natural or legal persons to prove an infringement, and on the other hand, according to a Curia judgment, a secret eavesdropping recording obtained in the context of criminal proceedings can also be used in administrative proceedings. These innovations significantly facilitate the problem of proving cartels.[3] The topicality of my research topic also lies in the novelty of these two amendments, since their impact on jurisprudence is only unfolding.

Article 101(1) of the Treaty on the Functioning of the European Union provides that *"[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as*

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[2] Article M of the Fundamental Law of Hungary (25 April 2011).

[3] Deloitte: Titkos felvételek alapján is büntethetők a kartellező cégek (Cartel companies can also be punished based on secret recordings) https://www2.deloitte.com/hu/hu/pages/jog/articles/titkos-felvetelek-buntetheto-kartellezo-cegek.html.

their object or effect the prevention, restriction or distortion of competition within the internal market […]".[4] According to the Article 102, "*[a]ny abuse by 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.*"[5]

Part One of the Competition Act defines various competition prohibitions,[6] Section 420 of the Criminal Code lays down fact of Agreement in Restraint of Competition in Public Procurement and Concession Procedures. Hungarian criminal law regulates the punishable actions restricting competition in a single fact.

The ECN+ Directive states that *"[e]vidence is an important element in the enforcement of Articles 101 and 102 TFEU. NCAs should be able to consider relevant evidence, irrespective of whether it is written, oral, or in an electronic or recorded form. This should include the ability to consider covert recordings made by natural or legal persons which are not public authorities, provided those recordings are not the sole source of evidence. This should be without prejudice to the right to be heard and without prejudice to the admissibility of any recordings made or obtained by public authorities. Similarly, NCAs should be able to consider electronic messages as relevant evidence, irrespective of whether those messages appear to be unread or have been deleted."*[7]

With my research, I would like to use legal interpretation as a tool for law enforcement in the field of the use of evidence gathered in criminal proceedings through secret information gathering in competition supervision proceedings. The study is descriptive and based on secondary research, for which I have used both primary and secondary sources. In the course of my research, I primarily reviewed the relevant domestic and international legal sources, judgments, decisions and studies related to the topic. My aim is to provide a comprehensive regulatory overview of the use of evidence collected during the course of criminal proceedings in the course of secret information gathering in competition supervision proceedings in Hungary.

In my study, firstly, the relationship between the competition supervision procedure and criminal proceedings will be outlined, then the evidence that can be used in the competition supervision procedure will be presented, with particular regard to the evidence uncovered during the criminal proceedings, then the question of the legality of the secret information gathering and the transfer of data obtained in criminal proceedings will be discussed, and finally I am dealing with the question of the accessibility of the evidence form secret information gathering.

2. Relationship between competition supervision proceedings and criminal proceedings

In the case that we examine an area of law in connection with a specific legal institution or legal phenomenon, we must also pay attention to the relationship of the examined area to other areas of law, and whether it has any effect on other areas of law.[8]

There are provisions on cartels in a number of areas of law, with the exception of constitutional law, public procurement law, competition law and, last but not least, criminal law.

Pursuant to the Public Procurement Act *"[w]here a contracting authority experiences an obvious breach of the provisions set out in Article 11 of the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices; hereinafter referred to as: the 'CA'), as well as the provisions set out in Article 101 of the*

[4] Article 101(1) TFEU.

[5] Article 102 TFEU.

[6] Prohibitions in Part One of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices: Prohibition of Unfair Competition (Chapter II), Prohibition of Unfair Manipulation of Business Decisions (Chapter III), Prohibition of Agreements Restricting Economic Competition (Chapter IV), Prohibition of Abuse of a Dominant Position (Chapter V), Control of Concentration of Undertakings (Chapter VI).

[7] Directive (EU) 2019/1 of the European Parliament and of the Council (11 December 2018), Recital (73).

[8] Juhász Ágnes: Közbeszerzés a versenyjog határán, Miskolci Jogi Szemle, 2010. 135.

TFEU or it has a sound reason to assume it in the course of its procedure, the contracting authority shall notify the Hungarian Competition Authority thereof in accordance with the provisions of the CA regarding notification or complaint."[9]

The Public Procurement Act establishes two cases of the contracting authority's obligation to notify: in one case, it is a matter of a noticeable understanding of the provisions of competition law, while in the other case it is a suspected cartel (that is, the contracting authority undertakes the relevant competition law violation thoroughly). The text of the legislation raises the question: when should the violation be considered obvious? According to the ministerial explanatory memorandum of Act CVIII of 2008,[10] the existence of concrete evidence makes the infringement apparent.[11] Based on the judgment of the Curia, there are reasonable grounds for suspecting collusion by the fact that the tenderers, who are in principle independent of each other, calculated works that are technically complex, demanding and less complex, and therefore obviously less costly, with a difference of the same proportion and the same proportion within a tender.[12]

It is essential that, despite the fact that the obligation to indicate is laid down in the Public Procurement Act and the subject of the obligation is the contracting authority within the meaning of the Public Procurement Act,[13] it is based on an infringement of competition law detected in the course of the public procurement procedure, the rules for notifying the contracting authority are no longer contained in the Public Procurement Act, but in the Competition Act.[14] The submission of a complaint or report does not automatically result in the initiation of a competition supervision procedure, the GVH orders an investigation in the event that the detected activity, behavior or condition is Competition Act (or the provisions of the Competition Act and the EU competition law), the conduct of the procedure falls under the competence of the GVH and the protection of the public interest makes the action of the office necessary.[15] It is also important that the competition supervision procedure initiated on the basis of the contracting authority's signal does not suspend the ongoing public procurement procedure.[16]

The Hungarian Competition Authority ex officio orders an investigation into the alleged existence of market practices within its competence, prohibited by the EU competition rules and Competition Act, such as unfair manipulation of business decisions, abuse of a dominant position and restrictive economic competition, as well as infringements falling within its competence under other laws (abuse of significant market power, unfair commercial practices).[17]

According to the Criminal Procedure Act, *"(1) Any person may file a crime report regarding a criminal offence subject to public prosecution. (2) A member of an authority, a public officer, and, if required by law, a statutory professional body shall file a crime report regarding a criminal offence subject to public prosecution it becomes aware of in its official competence or in his official capacity, respectively.*"[18]

In view of the above, the contracting authority is therefore obliged to report the cartel detected in a public procurement procedure to the Hungarian Competition Authority (but, as we have seen, it can also initiate the procedure *ex officio*), a member of

[9] Section 36(2) of the Act CXLIII of 2015 on Public Procurement.
[10] Ministerial explanatory memorandum of Act CVIII of 2008 amending Act CXXIX of 2003 on Public Procurement.
[11] See Juhász (7. lj.) 146.
[12] Kf.III.37.522/2019/10.
[13] Sections 5-7 of Public Procurement Act define the scope of contracting authorities.
[14] See Juhász (7. lj.) 146.
[15] GVH: Versenyfelügyeleti eljárás (Competition supervision proceedings) https://www.gvh.hu/jogi_hatter/gvh_eljarasrendje/versenyfelugyeleti_eljaras.
[16] See Juhász (7. lj.) 146.
[17] GVH: Versenyfelügyeleti eljárás (Competition supervision proceedings) https://www.gvh.hu/jogi_hatter/gvh_eljarasrendje/versenyfelugyeleti_eljaras.
[18] Section 376 of Act XC of 2017 on the Code of Criminal Procedure.

which - in view of the fact that GVH is an authority with national competence[19] - is obliged to file a complaint if it can be assumed that the act in question constitutes the facts of the Agreement in Restraint of Competition in Public Procurement and Concession Procedures.

Competition law, as a set with its own entity and independent professional law, is surrounded on all sides. The line separating the boundaries is sometimes very narrow, so it is not always easy to judge whether we are still on the ground of competition law, or already on the basis of administrative law, civil law or criminal law, not to mention that the provisions of the branch of law and the specialised branches can be applied side by side and collectively,[20] what is more, the initiation of criminal proceedings is usually preceded by a complaint by the competition authority and its notification to the investigating authority.[21]

The Constitutional Court in its decision referring to the practice of the European Court of Human Rights, the Court of Justice of the European Union, General Court and the Constitutional Court, emphasized that the outcome of official proceedings in cartel cases for the person subject to the proceedings in many respects it may result in similar disadvantages to a criminal conviction, however, in competition cases, the Economic Competition Authority decides on the guilt of non-natural persons.[22]

3. Usable evidence in the competition supervision proceedings

On 4 February 2019, the ECN+ Directive entered into force, which gave Member States two years to transpose its provisions into national law. In the spring of 2019, the Ministry of Justice, which is responsible for the codification of the field of law, started to develop the standard text transposing the Directive with the involvement of experts from the Hungarian Competition Authority.[23]

Act XIX of 2020 introduced the possibility of proof by hidden recordings in the Competition Act.[24]

The procedural provisions of the Directive, which define the evidence use and access possibilities of the national authorities, aim to standardize and strengthen the powers of investigation, so it was justified to express the possibility of access to electronically stored data and information independent of its availability[25], and to settle the use of hidden recordings taken by a non-authority as evidence[26]. In that case, the ECN+ Directive clarified that national competition authorities should be allowed to use the recordings at their disposal as evidence. However, Section 16 of of Act XIX of 2020 also lays down a limitation as a kind of guarantee rule in relation to the usability of hidden recordings, according to which they cannot be the sole evidence of infringement.[27]

The Competition Act states that *"[a]ny evidence that is suitable for the clarification of the facts of the case may be used incompetition supervision proceedings."* A covert recording made by natural

[19] GVH: A hivatal jogállása, szervezete (Legal status and organisation of the Office) https://www.gvh.hu/gvh/gvh_jogallasa_szervezete.

[20] Békés Ádám: A fogyasztók érdekeit és a gazdasági verseny tisztaságát sértő bűncselekmények (Crimes affecting consumers' interests and the fairness of economic competition) In: Polt Péter (ed.): A Büntető Törvénykönyvről szóló 2012. évi C. törvény Nagykommentárja, OPTEN, Budapest, 2016, 1464. Quote: Szabó Zsolt Tibor: Egy új törvényi tényállás szükségességéről – avagy a „versenyt korlátozó megállapodás a közbeszerzési és a koncessziós eljárásban" bűncselekmény margójára (The need for a new statutory situation – or the 'Agreement in Restraint of Competition in Public Procurement and Concession Procedures' – to the margins of the offence), Pro Futuro, 2019. 99.

[21] Szabó (18. lj) 99.

[22] Kf.IV.37.468/2019/17.

[23] Nagy Krisztina - Orbán Szilvia: A felkészülés jegyében – az ECN+ irányelvet átültető rendelkezések ismertetése (In the spirit of preparation - description of the provisions transposing the ECN+ Directive), Versenytükör, 2020. 46.

[24] Act XIX of 2020 on the amendment of certain acts in connection with the entry into force of Act CVII of 2019 on bodies with special status and the status of their employees and for the purpose of harmonising legislation.

[25] Section 17 of Act XIX of 2020.

[26] Section 16 of Act XIX of 2020.

[27] See Nagy - Orbán (21. lj.) 49.

or legal persons can be taken into account if it is not the only evidence of the violation. *"Evidence obtained by the Hungarian Competition Authority or any other authority by the violation of any legal regulation shall not be admissible as evidence."28*

According to the Competition Act Explanatory Memorandum, the ECN+ Directive recognised that the prevalence of digital recording technologies combined with the public policy objective of increasing the enforcement efficiency of competition authorities are arguments that make it necessary to regulate the usability of hidden recordings made by the defendants. The provision is necessary mainly because, in the digital age, the competition authority can obtain facts and data that could not be used until now during an on-the-spot inspection. National competition authorities have followed different enforcement practices as regards the use of hidden recordings made by natural or legal persons who are not public authorities as evidence in competition supervision proceedings. The ECN+ Directive clarifies that it should be possible to take into account as evidence a hidden recording made by natural or legal persons where it is not the sole evidence of an infringement, thereby striking a balance between the interest of the competition authority in obtaining evidence and the right of the defendants to a fair trial, as it ensures that GVH continues to have to use the usual thoroughness to establish an infringement to reveal the facts of the case.[29]

In my study, I will go on to review the special rules for evidence collected in the course of secret information gathering in criminal proceedings.

Secret information gathering is an intrusion into the privacy of the person affected by it.[30] According to the Criminal Procedure Act, *"[t]he use of covert means a special activity carried out by authorised organs in the criminal proceedings without the knowledge of the persons concerned, as such means restrict the fundamental rights of persons to the privacy of homes, personal secrets, the confidentiality of correspondence, and the protection of personal data."*[31]

4. Legality of the secret information gathering

The Competition Act states that *"[e]vidence obtained by the Hungarian Competition Authority or any other authority by the violation of any legal regulation shall not be admissible as evidence."*[32], thus, the most important condition for the use of evidence from secret information gathering in criminal proceedings is that the secret information is collected lawfully.

It is also clear from the ruling of the Court of Justice of the European Union that a review of the legality of evidence from secret information gathering is relevant for the assessment of evidence.[33]

Covert means may be used by authorised organs for the purpose of carrying out their law enforcement tasks as defined by the law applicable to them only in accordance with the rules set out in Act XC of 2017.[34]

According to the Curia, the review of the legality of evidence from secret information gathering, the procedural regime under which the court may carry out such an examination, and whether the administrative court has the legal authority to examine it, is of importance for the assessment of evidence.[35]

The review of the legality of evidence from secret information gathering is important because the use of unlawfully obtained evidence is, in the view of the Curia, incompatible with the principle of due process, even if the guarantees otherwise apply.[36] In this regard - as we have seen - the

[28] Section 64/A(1) of the Competition Act.
[29] Justification of the Competition Act.
[30] Kf.IV.37.468/2019/17.
[31] Section 214(1) of the Criminal Procedure Act.
[32] Section 64/A(1) of the Competition Act.
[33] Decision no. 3291/2021. (VII. 22.) of the Constitutional Court.
[34] Section 214(2) of the Criminal Procedure Act.
[35] EBH2018. K.1.
[36] Kf.IV.37.468/2019/17.

Competition Act also lays down a ban.[37] In accordance with the principle of national procedural autonomy, in the absence of Union law on this subject, it is for the domestic legal order of each Member State to designate the competent court or tribunal and to lay down the procedural rules for bringing an action before the courts with a view to ensuring that the rights of individuals deriving from Union law are protected.[38] The procedure for examining the legality which may take place - therefore, by virtue of the autonomy of the Member States (point [113] of the judgment in the Akzo Nobel case) - does not fall within the scope of EU law.[39]

In view of the fact that the secret information gathering precludes the possibility of an effective remedy, verification of the legality of obtaining evidence should take place only within the framework of criminal proceedings. The Curia points out that the investigating judge decides ‚only' on the possibility of using the results of the secret information gathering as evidence in criminal proceedings - the so-called ‚open extraction procedure' - but this is not yet sufficient to make them freely usable in tax authority proceedings, because – according to the Act XC of 2017 – "*[a] fact originating from a means of evidence may not be taken into account as evidence if the court, the prosecution service, the investigating authority, or another authority referred to in paragraph (2) acquired the given means of evidence by way of a criminal offence, a material violation of the procedural rights of a person participating in the criminal proceeding, or in any other prohibited manner.*" (previously, Section 78(4) of Act XIX of 1998 on Criminal Procedure contained this clause). This provision serves as a procedural sanction for an infringement of the law in the taking of evidence, and therefore the court must also examine with particular care the circumstances in obtaining the evidence when making a decision on the merits, i.e. it ultimately decides on the legality of the evidence used.[40]

It also follows from the foregoing that the review of the legality of evidence from secret information gathering can only be carried out by the criminal court on the basis of a statutory mandate, and that the courts dealing with administrative matters do not have the right to do so.[41]

It is clear from the judgment in WML case (C-419/14 [ECLI:EU:C:2015:832]) that, by considering the use of evidence from parallel unsealed criminal proceedings to be admissible, it also does not support the requirement for an administrative procedure to use evidence only if a final decision has already been taken as to its acquisition - and legality .[42]

5. Legality of the transfer of data obtained in criminal proceedings

Pursuant to the Competition Act, "*[t]he provisions of this Act shall apply to competition supervision proceedings. The provisions of the GRAP Act shall apply to competition supervision proceedings if expressly provided for in this Act.*

(2) The provisions of the GRAP Act shall apply, in accordance with the provisions of this Act, to […]

d) inquiries"[43]

The authority may inquiry another organ or person if the particulars or documents required in the course of the proceedings are held by another person.[44] The Administrative Procedure Act although it does not expressly regulate international legal assistance, paragraph 25 also constitutes a legal basis for international, foreign inquiry. According to the Administrative Procedure Act's grounds, the law uses the term requested organ

[37] Section 64/A(1) of the Competition Act.

[38] Case C-550/07 P – Judgment of the Court (Grand Chamber) of 14 September 2010: Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, ECLI:EU:C:2010:512.

[39] Kf.IV.37.468/2019/17.

[40] EBH2018. K.1.

[41] EBH2018. K.1.

[42] Kopácsi István: Bizonyítékok felhasználhatósága versenyfelügyeleti eljárásban (Use of evidence in competition supervision proceedings), Versenytükör, 2018. 30.

[43] Section 46 of the Competition Act.

[44] Section 25(1) of the Act CL of 2016 on the Code of General Administrative Procedure.

instead of the requested authority, thus covering a wider scope than the scope of the Administrative Procedure Act, so that it is possible to contact not only an authority, but also an organization or person (foreigners) that is not a public authority. In order to clarify the facts of the case, it is not uncommon in practice, for example, to ask courts for data and information in court files.[45] So the Administrative Procedure Act creates the possibility of the GVH approaching a court.

To the extent and for the period required for performing its tasks, the court, the prosecution service, a notary, a court bailiff, the national tax and customs authority, a probation officer, a preventive probation officer, the investigating authority, an administrative authority, a governmental audit organ, the National Authority for Data Protection and Freedom of Information, the police organ performing internal crime prevention and crime detection tasks, the counterterrorism police organ, and the commander exercising employer's rights over a soldier defendant may inspect the case documents of the proceeding.[46] In case of domestic inquiry the authority, government or municipal body subject to inquiry to provide data or documents - unless this is precluded by the act of law governing the protection of the data concerned - shall make available the personal data or privileged information that is necessary to comply with the inquiry to the Hungarian Competition Authority.[47]

In view of the above, in connection with the transfer of data secret information gathering, the authorization is granted in accordance with the Hungarian rules by the Administrative Procedure Act, the Competition Act and the Criminal Procedure Act.

6. Requirement to know the evidence collected during the secret information gathering

The Fundamental Law of Hungary states that *"[e]veryone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."*,[48] *"[e]veryone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act"*.[49] Pursuant to this, the parties have the right to fair proceedings both in official proceedings and in administrative proceedings.[50]

The Constitutional Court in its decision no. 6/1998. (III. 11.) held that the ‚fair trial' is a quality that can only be judged in the light of the whole and the circumstances of the proceedings, and therefore, despite the absence of certain details and the observance of all the detailed rules, the procedure may be unfair or unjust or not fair. This was confirmed by decision no. 3102/2017. (V. 8.) (Justification [17] point), and decision no. 20/2017. (VII. 18.) (Justification [16] point) of the Constitutional Court.[51]

Related to the above is the rights of the defence, which includes the right of the parties to know, comment on and offer evidence of the infringements alleged against them.[52]

The Curia held that evidence collected in criminal proceedings by secret information gathering may be used in competition proceedings if the party to the competition proceedings has been

[45] Barabás Gergely – Baranyi Bertold – Fazekas Marianna (ed.): Nagykommentár az általános közigazgatási rendtartásról szóló 2016. évi CL. törvényhez (Commentary on Act CL of 2016 on the Code of General Administrative Procedure).
[46] Section 101(1) of the Criminal Procedure Act.
[47] Section 64/B(5) of the Competition Act.
[48] Article XXIV(1) of the Fundamental Law of Hungary.
[49] Article XXVIII(1) of the Fundamental Law of Hungary.
[50] Kf.IV.37.468/2019/17.
[51] Decision no. 3254/2018. (VII. 17.) of the Constitutional Court.
[52] Kf.IV.37.468/2019/17.

able to acquaint himself with it and to submit his observations thereon.[53]

In summary, the principle of fair trial applies in administrative proceedings when the parties have the opportunity to know and comment on evidence collected in secret gathering information gathering.

7. Summary

The Hungarian Competition Authority can now convict infringing companies on the basis of secret recordings, making it much easier to prove infringements of competition law. In recent years, there have been two important changes that have a great impact on the evidence of competition law: on the one hand, according to an amendment to the Competition Act, from January 2021, GVH may also use hidden recordings made by natural or legal persons to prove an infringement, and on the other hand, according to a Curia judgment, a secret wiretapping recording obtained in the context of criminal proceedings can also be used in administrative proceedings. These innovations are intended to help prove cartels.[54]

Agreement in Restraint of Competition in Public Procurement and Concession Procedures

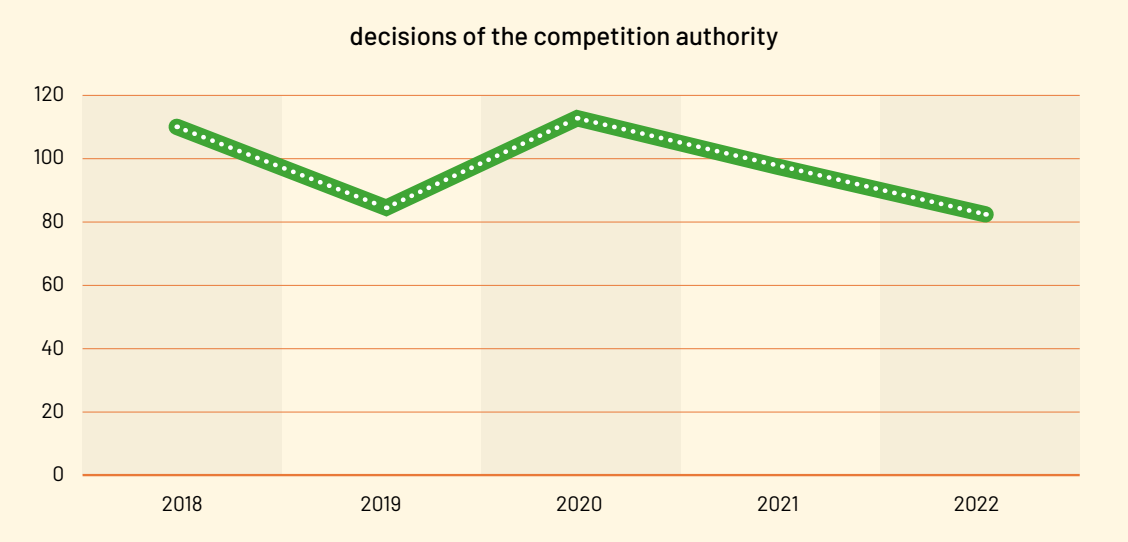
	2018	2019	2020	2021	2022
Budapest	1	1	15	0	0
Pest	0	0	1	0	0
Jász-Nagykun-Szolnok	0	0	4	0	0
Baranya	0	0	0	0	3

In the figure above, Agreement in Restraint of Competition in Public Procurement and Concession Procedures committed between 2018 and 2022 distribution of its implementation can be seen in a regional and annual breakdown based on the Unified Investigation Authority and Prosecutor's Office Crime Statistics.

It is very difficult to draw a long-term conclusion from the above figure, given that even in 2021, for example, not a single violation took place, twenty cases came to light in 2020, however, it can be concluded that the capital can be considered the hotbed of the cartel.

[53] Tóth András: A magyar versenyügyek 2010-2020 közötti bírósági felülvizsgálatának tapasztalatai (Experience of judicial review of Hungarian competition cases in 2010-2020), Iustum Aequum Salutare, 2021.

[54] Deloitte: Titkos felvételek alapján is büntethetők a kartellező cégek (Cartel companies can also be punished based on secret recordings) https://www2.deloitte.com/hu/hu/pages/jog/articles/titkos-felvetelek-buntetheto-kartellezo-cegek.html.



The figure above is based on GVH data, the data cover all types of cases from mergers to infringing advertisements, so they do not necessarily fall under the concept of a cartel. The number of competition supervision proceedings conducted by GVH far exceeds that of cartel prosecutions. As we have already seen, although the competition supervision procedure is closely related to the criminal procedure, it is not necessarily inherent.

According to the Curia – and at the same time, I would summarise my study – that evidence collected in criminal proceedings by secret information gathering may also be used in competition proceedings, provided that the legality of such collection of information has been established by the criminal court and that the party in the competition proceedings has been able to become aware of it and to submit its observations thereon.[55]

Based on the judgment of Curia, it is not unlawful to use evidence lawfully obtained in the context of parallel and unfinished criminal proceedings, possibly through the secret information gathering, in the context of an administrative procedure, provided that the guarantees of a fair trial are respected.[56]

In my study, I first outlined the relationship between the competition supervision procedure and the criminal procedure, pointing out that the two proceedings are closely related and their parallelism is not excluded. After that I presented the evidence that can be used in the competition supervision procedure, with particular secret information gathering, than with the evidence uncovered during the criminal proceedings, then the question of the legality of the secret information gathering and the transfer of data obtained in criminal proceedings has been discussed, and finally I was dealing with the question of the accessibility of the evidence form secret information gathering.

The interpretation of law in legal literature (which is also called scientific interpretation) - compared to the interpretation of legislators and law enforcers - does not have any binding force, despite this, its impact can be significant both on legislation and on the law enforcement. The legal interpretation of legal literature can be carried out by anyone who analyzes the provisions of criminal law with a scientific need, and the result can take the form of many different forms: for example, it can be textbooks, studies, scientific articles, expert opinions issued by research institutes, but it also includes the justification of criminal law legislation.[57]

[55] See Tóth (51. lj.).

[56] Hargita Árpád – Zavodnyik József: A büntetőeljárásban végzett titkos információgyűjtés révén feltárt bizonyítékok felhasználhatósága a versenyfelügyeleti eljárásban (Usability of evidence revealed through the secret collection of information in criminal proceedings in competition supervision proceedings), Közbeszerzési jog, 2021.

[57] Balogh Ágnes – Tóth Mihály (eds.): Magyar Büntetőjog. Általános rész (Hungarian Criminal Law. General part), Osiris Kiadó, Budapest, 2015. 448.

Kozma Gábor Levente[1]

Quid pro quo: a személyes adat mint ellenszolgáltatás[2]

Quid pro quo: Personal Data as Counter-Performance

***Abstract**: With the emergence of the data-driven economy, consumers, in most cases, no longer pay for digital content and services, but provide their personal data as consideration. The Digital Content Directive regulates contracts for the supply of digital content or services and extends its scope to situations personal data is provided in exchange for digital market services. This raises, however, the question whether the conflicting rules of private law and data protection law can coexist under such circumstances. This article addresses the question whether personal data can be regarded as a contractual counter-performance under Hungarian private law.*

Tárgyszavak: személyes adat, ellenszolgáltatás, szerződési jog, Digital Content Directive.
Keywords: personal data, counter-performance, contract law, Digital Content Directive.

1. Bevezetés

A Big Data és az adatosítás folyamatának megértésével kapcsolatban a szerzők gyakran hivatkoznak a 20. század jeles közgazdásza, Joseph Schumpeter munkáira.[3] Schumpeter a gazdaság húzóerejeként az innovációt jelölte meg, amelyet a meglévő erők és anyagok újszerű kombinációjának tekintett. Az erőforrásokat új módon összeillesztő piaci szereplők, az innováció éllovasai lépéselőnybe kerülnek, és kiszorítják a piacról azokat, akik nem „haladnak az idővel", nem igyekeznek újító megoldásokat kitalálni, felhasználni. Végső soron Schumpeter szerint ebben áll az innovációnak mint teremtő rombolásnak a szerepe.[4]

Az adatok gazdasági célú hasznosításának felismerése egyértelműen ilyen innovációnak tekinthető. Mindez odáig vezetett, hogy a már-már elcsépeltnek nevezhető állítás, miszerint az „adat az új olaj", az elmúlt években egy hasonlóan hangzatos kijelentéssel párosult, miszerint az adat egyben az új „digitális fizetőeszköz" is.[5] Az adatok mélyen áthatják a 21. századi piacgazdaságot, az üzleti modellek széles skálája alapozza működését az adatok gyűjtésére és feldolgozására. Laudon szerint ennek a folyamatnak a kezdete egészen régre tehe-

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[2] A cikk a szerzőnek a 36. Országos Tudományos Diákköri Konferencia Polgári jog III. tagozatában I. helyezést elért dolgozatán alapul., és a Kulturális és Innovációs Minisztérium ÚNKP 22-2 kódszámú, Új Nemzeti Kiválóság Programjának Kutatási, Fejlesztési és Innovációs alapból finanszírozott szakmai támogatással készült.

[3] Bőgel György: A Big Data ökoszisztémája. Budapest, Typotex Kiadó, 2015, 41.

[4] Bőgel György: A schumpeteri „teremtő rombolás" módjai az infokommunikációs iparban. Közgazdasági Szemle, 2008/LV, http://www.borbelytiborbors.extra.hu/SZTEAJK/2_5/04vszbogel.pdf (letöltés: 2023. 04. 02.), 344.

[5] Staudenmayer szerint, ha az adatot még nem is tekinthetjük a „ma fizetőeszközének", az valószínűleg a „holnap", de facto fizetőeszköze. (Reiner Schulze – Dirk Staudenmayer: EU Digital Law. Article-by-Article Commentary. Baden-Baden, Bloomsbury, 2020, 70.) Hacker szerint gazdasági értelemben a személyes adatok szolgáltatása már régóta a vételár funkcionális megfelelőjének tekinthető. (Philipp Hacker: Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. 2019. 06. 10., 47.; illetve Carmen Langhanke – Martin Schmidt-Kessel: Consumer Data as Consideration. Journal of European Consumer and Market Law, 2018, 218.).

tő, rámutat, hogy a személyes adatok piaca már az 1990-es évek elején kialakult.[6] Napjainkra ugyanakkor az adatosítás folyamata eddig soha nem látott mértékben felgyorsult. Egyes becslések szerint 2016-ban és 2017-ben a világon addig létező összes adatmennyiség 90 százalékának megfelelő adat került előállításra.[7] Társadalmunk egyre inkább adatalapúvá válik, a piaci szereplők pedig ennek megfelelően az adatgyűjtésre alapozzák piaci stratégiájukat.

Utóbbi állítás a digitális piacon olyannyira igaz, hogy a vállalkozások az esetek többségében a digitális tartalmakat, illetve digitális szolgáltatásokat már nem is vételár ellenében nyújtják a fogyasztóknak, hanem olyan zéróáras üzleti modellben működnek, ahol a fogyasztók személyes adata jelenik meg a vételár megfelelőjeként. A személyes adat a digitális piacon egyfajta kiaknázatlan értéket jelent, amelynek feldolgozásával a vállalkozások jelentős profitot generálhatnak.

Az erre épülő piaci gyakorlat elterjedésével párhuzamosan megalkotásra került az EU/770/2019 irányelv[8], amellyel a jogalkotó célja az volt, hogy az úgynevezett digitális tartalom szolgáltatására vagy digitális szolgáltatásra irányuló szerződésekkel („digitális szolgáltatásra irányuló szerződés") összefüggésben biztosítsa a fogyasztók számára a kellékszavatossági jogok gyakorlásának a lehetőségét.[9] A DCD-irányelv úttörő jellegű megoldása ugyanakkor az, hogy annak hatálya az olyan jogviszonyokra is kiterjed, ahol a fogyasztók személyes adataik szolgáltatását vállalják a vállalkozás részére. Így bár átfogóan nem szabályozza, de jogilag elismerte azt az óriási számban előforduló életviszonyt, amelynek keretében a vételár fizetése helyett a fogyasztó személyes adata képezi az ellenszolgáltatást.[10] A DCD-irányelvben lényegében a magánjog jelenik meg a digitális piac szabályozásának egyik új eszközeként.[11]

Az európai jogalkotó a DCD-irányelv megalkotása során azzal a problémával szembesült, hogy amennyiben szerződési jogi szempontból átfogóan kívánja szabályozni az adatalapú digitális piaci modelleket, úgy azokra a jogviszonyokra is ki kell terjeszteni a jogszabály hatályát, ahol a fogyasztó vételár helyett a személyes adatait szolgáltatja a vállalkozás részére. A személyes adatok a digitális piac olyannyira meghatározó komponenseivé váltak, hogy gyakran már-már elmosódik a határvonal aközött, hogy egy vállalkozás pénz vagy éppen személyes adat ellenében nyújtja a szolgáltatásait.[12]

A jogszabály tehát azt a jelentős lépést teszi meg, hogy felismeri az ilyen ügyletek létét. A DCD-irányelv rendelkezéseit elsősorban a 373/2021. Kormányrendelet és részben a Polgári Törvénykönyvről szóló 2013. évi V. törvény („Ptk.") ültette át a hazai jogrendszerbe.

Jelen tanulmány központi kérdését a DCD-irányelv személyes adatokra vonatkozó rendelkezéseinek átfogó vizsgálata jelenti. Erre azért kerül sor, hogy a hazai magánjog szempontjából kísérletet tegyek azon jogi struktúra felvázolására, amelyben elképzelhető, hogy a fogyasztók személyes adata ellenszolgáltatásként jelenjen meg egy szerződéses viszonyban. A kutatás szükségszerűen túlterjeszkedik a DCD-irányelven: a hazai polgári jog eszköztárát fogom igénybe venni, kitekintéssel az adatvédelmi jogra. Mint azt látni fogjuk, a hazai jogrendszer szempontjából olyan konstrukciót kell kialakítani, amely mind a polgári jogi, mind az adatvédelmi szabályoknak megfelel, így ez a szemléleti dualizmus az egész tanulmányt végigkíséri.

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[6] Kenneth C. Laudon: Markets and Privacy. Communications of the ACM, 39/9, 1996. 09. 01., 92.

[7] Schulze – Staudenmayer (5. lj.), 69.

[8] Az Európai Parlament és a Tanács (EU) 2019/770 irányelve (2019. 05. 20.) a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések egyes vonatkozásairól (EGT-vonatkozású szöveg), Digital Content Directive, „DCD-irányelv", https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:32019L0770&from=SL (letöltés: 2023. 04. 02.).

[9] 373/2021. (VI. 30.) Kormányrendelet a fogyasztó és vállalkozás közötti, az áruk adásvételére, valamint a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések részletes szabályairól, https://net.jogtar.hu/jogszabaly?docid=a2100373.kor, „373/2021. Kormányrendelet", 19–27. §.

[10] Schulze – Staudenmayer (5.lj.), 61.

[11] Fontos kiemelni, hogy a DCD-irányelv nem az első európai uniós kísérlet a digitális piac szabályázására.

[12] Schulze – Staudenmayer (5.lj.), 70.

2. A DCD-irányelv és a digitális szolgáltatásra irányuló szerződés

Wendland akként fogalmaz, hogy az uniós jogalkotó addig ismeretlen területekre lépett a DCD-irányelv megalkotásával.[13] Valóban, a DCD-irányelv a technológiai fejlődésre igyekszik reflektálni, emellett pedig – ahogy Vékás Lajos rámutat –„fehér foltokat" tölt ki az uniós anyagi szerződési jog területén azzal, hogy kellékszavatossági és hibás teljesítéshez kapcsolódó jogokat biztosít a digitális szolgáltatásra irányuló szerződésekkel kapcsolatban.[14] Ugyanakkor az ilyen szerződések tipizálását, illetve annak részletszabályainak a kialakítását a tagállamok nemzeti jogrendszerére hagyja.[15]

A következőkben a DCD-irányelv személyes adatokra vonatkozó rendelkezéseit kívánom bemutatni. Mindenekelőtt a digitális tartalom szolgáltatására vagy digitális szolgáltatás nyújtására irányuló szerződések jogi tárgyát kell meghatározni.

2.1. Digitális tartalom és digitális szolgáltatás mint a jogviszony tárgya

A DCD-irányelv és a 373/2021. Kormányrendelet két központi fogalommal operál: ezek pedig a „digitális tartalom" és a „digitális szolgáltatás". Digitális tartalomnak minősül a digitális formában előállított vagy szolgáltatott adat.[16] A digitális szolgáltatás pedig olyan szolgáltatás, amely lehetővé teszi a fogyasztó számára, hogy adatokat hozzon létre, kezeljen, tároljon vagy azokhoz hozzáférjen.[17] Szintén az utóbbi kategóriába tartozik az a szolgáltatás, amely lehetővé teszi a fogyasztó és a szolgáltatás más igénybevevői által feltöltött vagy létrehozott digitális adatok megosztását, illetve az azokkal való egyéb interakciót.[18]

A 373/2021. Kormányrendelet és a DCD-irányelv rendkívül tágan határozza meg az új szerződéstípus jogi tárgyát, így ide sorolhatóak a számítógépes programok, alkalmazások, videó-, audio- és zenefájlok, digitális játékok, e-könyvek és egyéb e-kiadványok.[19] A digitális szolgáltatások körébe az olyan szolgáltatásként nyújtott szoftverek tartoznak, mint a videó- és audiomegosztás és egyéb tárhelyszolgáltatás, szövegszerkesztés és játékok felhőalapú szolgáltatás keretében, valamint a közösségi média.[20]

2.2. Vételár vagy személyes adat?

A digitális szolgáltatásra irányuló szerződések szempontjából különbséget lehet tenni aközött, hogy a fogyasztó a digitális tartalom igénybevételéért vagy a digitális szolgáltatás nyújtásáért milyen ellenszolgáltatást teljesít. A jogviszony egyik résztvevője, a vállalkozás arra vállal kötelezettséget, hogy digitális tartalmat szolgáltat vagy digitális szolgáltatást nyújt a fogyasztó részére, amelyért cserébe az utóbbi vételárat fizet, illetve arra vállal kötelezettséget, vagy pedig személyes adatot szolgáltat, illetve vállalja, hogy személyes adatot szolgáltat a vállalkozás részére.[21]

A tanulmányban csak az utóbbi esetkörrel kívánok foglalkozni. A fogyasztó oldalán ugyanis ekkor a személyes adatok szolgáltatása vagy azok szolgáltatására való kötelezettségvállalás jelenik meg kvázi ellenszolgáltatás formájában. A DCD-irányelv megalkotása során a kritikák elsősorban a fogyasztó személyes adatait ellenszolgáltatásként kezelő technikára irányultak. Így az Európai Adatvédelmi Biztos a 4/2017-es véleményében kifejtette, hogy a személyes adatokat nem lehet egyszerű „áruként" kezelni. A DCD-irányelv szabályozási logikáját, amely lényegében a fizetőeszköz funkcionális alternatívájaként kezeli a fogyasztók sze-

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[13] Matthias Wendland: Sonderprivatrecht für Digitale Güter. Die neue Europäische Digitale Inhalte-Richtlinie als Baustein eines Digitalen Vertragsrechts für Europa. ZVglRWiss, 2019/118, https://www.jura.uni-muenchen.de/personen/p/wendland_matthias/aktuelle-publikationen/sonderprivatrecht.pdf (letöltés: 2023. 04. 02.), 216.

[14] Vékás Lajos: Az uniós fogyasztói szerződési jog megújítása és az új irányelvek átültetése. Magyar Jog, 2021/2. 65.

[15] DCD-irányelv (8. lj.), (24).

[16] 373/2021. Kormányrendelet (9. lj.), 4. § 5.

[17] 373/2021. Kormányrendelet (9. lj.), 4. § 4.

[18] 373/2021. Kormányrendelet (9. lj.), 4. § 4.

[19] DCD-irányelv (8. lj.), (19).

[20] DCD-irányelv (8. lj.), (19).

[21] 373/2021. Kormányrendelet (9. lj.), 1. § (3) bekezdésének a) pontja.

mélyes adatait, a szervkereskedelemhez hasonlította. Ahogy fogalmazott, az a tény, hogy a személyes adatok iránt kereslet van, nem jelentheti azt, hogy ezt az állapotot jogilag legitimálni kell.[22]

Az egész DCD-irányelvet áthatja egyfajta balanszírozás a személyes adatok alapjogi aspektusából adódó védelme (alapjogi megközelítés), illetve a személyes adatok gazdasági tranzakciókban ellenszolgáltatásként való megjelenése között.[23] Ezt mi sem példázza jobban, minthogy a jogalkotó kvázi a vételár alternatívájaként kiterjeszti a DCD-irányelv hatályát a személyes adatok szolgáltatására,[24] de az irányelv preambuluma akként fogalmaz, hogy a „személyes adatok védelme alapvető jog, és ezért a személyes adatok nem tekinthetők árunak".[25] Az irányelv végső szövege a javaslattal szemben egyáltalán nem is használja az „ellentételezés" kifejezést.

Ez az ellentmondásosnak tűnő helyzet nagyban az Európai Adatvédelmi Biztos hivatkozott álláspontjára vezethető vissza, amely az eredetileg „bátrabban" fogalmazó irányelvjavaslat adatvédelmi szempontú újragondolását tette szükségessé.

2.3. Hogyan szolgáltatható a személyes adat?

Az olyan digitális szolgáltatásra irányuló szerződésekben, ahol a fogyasztó a személyes adatait szolgáltatja (a DCD-irányelv megfogalmazása szerint a vállalkozás „rendelkezésére bocsájtja"), lényegében ez a mozzanat tekinthető ellenszolgáltatásnak.

A konkrét jogviszonyban a személyes adat szolgáltatása Hacker szerint két aktus formájában teljesülhet: az adatkezelési hozzájárulás megadásával vagy adattranszfer útján.[26] Az utóbbi fogalmon Hacker azt érti, amikor a fogyasztó adatokat ad át vagy eltűri az azokhoz való hozzáférést a vállalkozás részéről. Az érintett adatkezeléshez adott hozzájárulása egy, a GDPR[27] 6. cikk (1) bekezdésében meghatározott adatkezelési jogalapok közül. Az adatkezelési hozzájárulás az érintett írásbeli vagy szóbeli nyilatkozattal tett önkéntes, konkrét, tájékoztatáson alapuló és egyértelmű hozzájárulása az adatkezeléshez.[28] Az adatkezelési hozzájárulás abban az esetben megfelelő, amennyiben az a GDPR 4. cikk 11. pontjában foglaltaknak, valamint a 7. és a 8. cikk feltételeinek megfelel.[29] A DCD-irányelv megfogalmazása az adatkezelési hozzájárulás kifejezett említése híján az adattranszferhez áll közelebb.[30]

Ugyanakkor fontos kiemelni, hogy az adatkezelés jogszerűségéhez minden esetben szükséges az, hogy a GDPR-ban megjelenő jogalapok közül valamelyik biztosított legyen, így annak teljesülése az adattranszfer jogszerűsége szempontjából is irányadó. Mint azt a későbbiekben bemutatom, a digitális szolgáltatásra irányuló szerződésekkel kapcsolatban kizárólag a GDPR 6. cikk (1) bekezdés a) pontja szerinti adatkezelési hozzájárulás alkalmazható. Ebből adódóan az adatkezelési hozzájárulás, amely polgári jogi szempontból ügyleti jellegű jognyilatkozatnak tekinthető,[31] a fogyasztó számára egyfajta tűrési kötelezettséget eredményez, a vállalkozásnak pedig megteremti az adatkezelés lehetőségét.

Ezen állítást elfogadva látható, hogy az adattranszfer önmagában értéktelen volna az adatkezelő

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[22] Az Európai Adatvédelmi Biztos 4/2017-es véleménye, European Data Protection Supervisor: Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, 2017. 03. 14., https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf (letöltés: 2023. 04. 02.), 7.

[23] Konstantina Samara: Selling Personal Data: The Legal Framework and Nature of Personal Data Selling Transactions under GDPR; in: Maria Tzanou: Personal Data Protection and Legal Developments in the European Union. Hershey, Pennsylvania, IGI Global, 2020, 47.

[24] DCD-irányelv (8. lj.), 3. cikk (1) bekezdés.

[25] DCD-irányelv (8. lj.), (24) preambulum.

[26] Hacker (5. lj.), 160.

[27] Az Európai Parlament és a Tanács (EU) 2016/679 rendelete (2016. 04. 27.) a természetes személyeknek a személyes adatok kezelése tekintetében történő védelméről és az ilyen adatok szabad áramlásáról, valamint a 95/46/EK rendelet hatályon kívül helyezéséről (általános adatvédelmi rendelet; EGT-vonatkozású szöveg; „GDPR"), https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32016R0679 (letöltés: 2023. 04. 02.).

[28] GDPR (27. lj.), (32).

[29] Christopher Kuner – Lee A. Bygrave – Christopher Docksey – Laura Dreschler (eds.): The EU General Data Protection Regulation (GDPR). A Commentary. Oxford University Press, 2020, 315.

[30] Ugyanakkor a DCD-irányelv adatvédelmi jogszabályokkal való összeütközése esetén mindig az utóbbinak van elsőbbsége. DCD-irányelv (8. lj.), (48).

[31] Czapári Dóra: Személyes adatok felhasználására vonatkozó szerződés lényeges elemei. Polgári Jog, 2021/11–12., 13.

számára, hiszen az nem teremt számára felhasználási lehetőséget, ugyanis az adatkezelési hozzájárulás hiányában az adatkezelés nem lesz jogszerű. A vállalkozás gazdasági érdeke éppen ezért ahhoz kapcsolódik, hogy az érintett az adatkezelési hozzájárulás megadásával jogilag lehetőséget teremtsen személyes adatai kezelésére. Ezzel egyező álláspontot képvisel a jogirodalomban Langhanke és Schmidt-Kessel is.[32] A magyar polgári jog szempontjából is ez a hozzájárulás lehet az, amely hasznosíthatóvá teheti a fogyasztó személyes adatait.[33] Ebből adódóan álláspontom szerint a digitális szolgáltatásra irányuló szerződések esetében az adatkezelési hozzájárulás megadását célszerű az ellenszolgáltatás megnyilvánulási formájának tekinteni. Adatvédelmi szempontból ezáltal biztosítható, hogy az érintett (fogyasztó) a jogviszony egész létciklusa alatt ellenőrzése alatt tarthassa az adatkezelést.

2.4. Az adatkezelés jogalapja a digitális szolgáltatásra irányuló szerződések vonatkozásában

A digitális tartalmat szolgáltató vagy digitális szolgáltatást nyújtó vállalkozásra értelemszerűen kiterjed a GDPR hatálya, hiszen azok adatkezelőként személyes adatok kezelését végzik. Jogszerű adatkezelésre kizárólag a GDPR-ban meghatározott megfelelő jogalap szerint kerülhet sor, amelyeket a 6. cikk állapít meg.

Amennyiben az adatvédelmi rendelkezéseket a felek magánautonómiáján alapuló kötelmi jogi viszonyok közé kívánjuk illeszteni – márpedig a digitális szolgáltatásra irányuló szerződések esetén kétségkívül ez a cél –, úgy olyan jogintézményt kell felhasználni a GDPR szabályrendszeréből, amely logikájában közelít ahhoz. Álláspontom szerint a digitális szolgáltatásra irányuló szerződések esetén éppen ezért a GDPR 6. cikk (1) bekezdés a) pontja szerinti adatkezelési hozzájárulás képezheti a megfelelő jogalapot.

A szakirodalomban olyan álláspont is felmerült, miszerint az adatkezelési jog és a magánjog kapcsolatára tekintettel a digitális szolgáltatásra irányuló szerződések esetén nem kellene különbséget tenni a fogyasztó szerződés megkötésére irányuló ügyleti nyilatkozata és a GDPR szerinti hozzájárulása között.[34] Gondolkozhatnánk akként, hogy mindkét nyilatkozat azonos joghatást vált ki, hiszen a két akaratnyilatkozat együttesen képes megteremteni a személyes adatok hasznosításának lehetőségét. Ez az álláspont ugyanakkor nem fogadható el az adatvédelmi jog szempontjából, hiszen az megköveteli, hogy a hozzájárulás megadására minden más jognyilatkozattól elkülönülve kerüljön sor.[35] Ezzel egyezően mutat rá Metzger, hogy különbséget kell tenni a személyes adat szolgáltatására vonatkozó szerződéses ígéret és az adatkezelési hozzájárulás megadása, valamint az ígéret teljesítése között.[36]

Azért szükséges az adatkezelési hozzájárulást az adatkezelés jogalapjává tenni a digitális szolgáltatásra irányuló szerződések vonatkozásában, mert ez az a jogintézmény, amely leginkább garantálni tudja, hogy az érintett ne veszítse el rendelkezési lehetőségét a személyes adatai felett. Ezáltal képes megteremteni az összeköttetést a szerződési jog és az adatvédelmi jog eltérő szabályozási logikája között. Az adatkezelési hozzájárulás önkéntességéhez ugyanis az is hozzátartozik, hogy az érintett bármikor visszavonhatja adatkezelési hozzájárulását. Ezáltal a fogyasztó számára olyan monopolhelyzet biztosított, amely révén bármikor véget vethet a személyes adatok hasznosításának. Ez a konstrukció, bár nehezen illeszthető be a polgári jog dogmatikájába, adatvédelmi szempontból a digitális szolgáltatásra irányuló szerződések kiemelt fontosságú jellemzője lehet.

2.5. Koncepcionális kérdések és problémák

A DCD-irányelv hazai jogba való átültetése elsősorban a Ptk.-n kívül ment végbe. Ezzel kapcso-

[32] Langhanke – Schmidt-Kessel (5. lj.), 220.

[33] Erről bővebben lásd a személyes adatok forgalomképességére vonatkozó fejezetet.

[34] Samara (23. lj.), 52.

[35] GDPR (27. lj.), 7. cikk (4) bekezdés.

[36] Axel Metzger: A Market Model for Personal Data: State of Play under the New Directive on Digital Content and Digital Services. In: In: Sebastian Lohsse – Reiner Schulze – Dirk Staudenmayer (eds.): Data as Counter-Performance – Contract Law 2.0? Münster Colloquia on EU Law and the Digital Economy V, 2020, 34.

latban eltérő álláspontok alakultak ki a szakirodalomban. Fazekas Judit arra a koherenciazavarra hívja fel figyelmet, amely a 373/2021. Kormányrendeletben való transzformáció következtében állt elő a hibás teljesítés szabályozásával kapcsolatban.[37] A hibás teljesítés miatti kellékszavatossági igényeket a Ptk. szabályozza, ugyanakkor a 373/2021. Kormányrendelet megalkotásával a jogalkotó indokolatlanul megbontotta a hibás teljesítésből eredő objektív szavatossági igények homogén szabályozási rendjét.[38] Ezzel a kellékszavatossági szabályok tekintetében kétszintű szabályozási struktúra jött létre, amelynek szabályait részben a Ptk., részben pedig a 373/2021. Kormányrendelet tartalmazza. Szilágyi Ferenc szerint a DCD-irányelv az európai digitális szerződési jog alapköveit fekteti le, amelynek Ptk.-ba való megjelenítése szükségszerűen a jelenlegi dogmatika koncepcionális átgondolását tette volna szükségessé, ezért szerinte a megfelelő utat választotta a jogalkotó a Ptk.-n kívüli szabályozással.[39]

Az implementáció során a Ptk. szabályaiban is történt egy módosítás, méghozzá a (2a) bekezdés beiktatásával a kellékszavatossági jogokat szabályozó 6:159. § rendelkezései közé. Ebben a körben szükséges röviden kitérni arra, hogy a DCD-irányelv megoldásai milyen dogmatikai kérdéseket vetnek fel a fogyasztói szerződésekkel kapcsolatban. Mindenekelőtt fontos kiemelni, hogy kellékszavatosság csak visszterhes szerződésekhez kapcsolódhat,[40] ezáltal a személyes adatnak mindenképpen ellenszolgáltatásként kell megjelennie a konkrét jogviszonyban, hiszen ez a feltétele a kellékszavatossági jogok gyakorlásának. A kellékszavatossági jogok szempontjából ugyanis nincs relevanciája annak, hogy az ellenszolgáltatás milyen formában kerül teljesítésre, de ingyenes szerződéshez nem kapcsolódhat.[41]

A személyes adat nem tekinthető dolognak, de értékkel bír, és a gyakorlati tapasztalatok alapján gazdasági tranzakció tárgyává válhat. A fogyasztói szerződésekkel kapcsolatos koncepcionális probléma abban áll, hogy a magasabb szintű fogyasztóvédelem csak akkor biztosítható a fogyasztó számára, ha a felek között visszterhes szerződés jön létre, amely viszont a felek ilyetén megállapodását feltételezi. A vállalkozások érdeke ahhoz fűződhet, hogy a felek közötti jogviszonyt ingyenes szerződésnek minősítsék, hiszen ezáltal kikerülnének a DCD-irányelv hatálya alól. Emiatt a hazai jogalkotó ilyen irányú szabályozása szükséges a fogyasztók védelme érdekében.[42]

Tartalmilag a személyes adat csak ellenszolgáltatásként jelenhet meg a felek közötti jogviszonyban, hiszen egyoldalúan kógens szabályok védik a fogyasztó pozícióját, ami visszterhes fogyasztói szerződések esetén lehetséges. Azáltal, hogy a Ptk.-ba beiktatásra került a digitális tartalom szolgáltatására vagy digitális szolgáltatás nyújtására irányuló szerződésekkel kapcsolatos kellékszavatossági jogokra vonatkozó szabály, lényegében elismerésre került, hogy a személyes adatok szolgáltatása révén egy visszterhes szerződés jön létre a felek között. Ambivalens módon a fogyasztók védelme a személyes adatok gazdasági jelentőségének elismerésével biztosítható.

3. A személyes adat mint ellenszolgáltatás

Láthattuk tehát, hogy a digitális gazdaság üzleti modelljei a vételár mellett vagy helyett a fogyasztók személyes adataira építenek, amelyek értékkel bírnak és profitot generálnak a számukra. Az is megállapításra került, hogy a DCD-irányelv hatálya kiterjed az olyan digitális szolgáltatásra irányuló szerződésekre, ahol a fogyasztó személyes adatokat szolgáltat a számára. De mégis, hogyan

[37] Fazekas Judit: A fogyasztóvédelmi jog digitális transzformációjának újabb eredményei – avagy az áruk, a digitális tartalmak és a digitális szolgáltatások hibás teljesítéséről szóló irányelvek és transzpozíciójuk. In: A Jog–Állam–Politika Ünnepi különszáma a 70 éves Kukorelli István tiszteletére, Győr, 2022, 129.

[38] Fazekas (37. lj.), 129.

[39] Szilágyi Ferenc: The Implementation of Directives 2019/770 and 2019/771 in Hungary, Journal of European Consumer and Market Law, 2021/6, 272.

[40] Farkas Attila László: Ptk. 6:159. §. In: Wellmann György (szerk.): Polgári jog V/VI. – Kötelmi jog. Első és Második Rész. Negyedik, átdolgozott, bővített kiadás. A Ptk. magyarázata V/VI. HVG-Orac Kiadó, Budapest, 2021, 489.

[41] Farkas (40. lj.), 489.

[42] DCD-irányelv (8. lj.), (24).

válhat az információs önrendelkezési jog ellenére ellenszolgáltatás tárgyává a fogyasztók személyes adata? Jelen fejezet célja ezen kérdés áttekintése.

3.1. Do ut des: szolgáltatás a kötelmi jogban

A kötelmi jogi szerződések kétoldalú, viszonos szerződések, ahol két kötelezettség áll egymással szemben, hiszen az egyik a másiknak az ellenértéke.[43] Egy szolgáltatás akkor tekinthető visszterhesnek, ha az egyik szolgáltatással szemben olyan ellenszolgáltatás áll, amely a szolgáltató fél érdekeinek kielégítésére irányul, és értékét tekintve lényegében egyensúlyban áll a szolgáltatással.[44] Az ilyen helyzetekben az egyik fél éppen annak érdekében kötelezi magát egy szolgáltatás teljesítésére, hogy saját érdekeire rendelt ellenszolgáltatást biztosíthasson magának.[45]

A digitális szolgáltatásra irányuló szerződés esetében megállapítható, hogy a fogyasztó digitális tartalmat vagy digitális szolgáltatást szeretne igénybe venni, amíg a vállalkozás a fogyasztó személyes adatait hasznosítaná. Megteheti a fogyasztó, hogy annak alapjogi védelme ellenére, gazdasági hasznosítás céljából rendelkezzen a személyes adataival? Ehhez a személyes adatok forgalomképességéről kell nyilatkozni.

3.2. A személyes adat forgalomképessége

A forgalomképesség a dolgok és más javak azon tulajdonságát jelenti, hogy azokon vagyoni jellegű jogosultságok létesülhetnek, és ezek a jogosultságok át is ruházhatók,[46] így a fogalom a személyes adatok körében, lényegében az azok feletti hasznosítási jogosultság átruházásának lehetőségét jelentené. Attól, hogy valami nem minősül a Ptk. 5:14. §-a értelmében dolognak, még lehet forgalomképes, vagyis felette a piaci viszonyok közvetítésével a kizárólagos hasznosítási privilégiumokat bíró jogosult személye változhat.[47]

Értelmetlen „ellenszolgáltatásról" beszélni mindaddig, amíg a személyes adatok forgalomképességének kérdése nem tisztázott. A jog ugyanis a vagyoni javak, illetve jogok egy körét forgalomképtelennek minősíti, és ezáltal a gazdasági jellegű tranzakciók köréből is kizárja. Amennyiben ez a személyes adatokra is igaz, úgy szóba sem jöhetne az, hogy a felek a személyes adatok szolgáltatását szerződési kötelezettség tárgyává tegyék.

3.2.1. A forgalomképesség személyiségi jogi megközelítése

Czapári Dóra rámutat, hogy a személyes adatok forgalomképessége nagyban függ a személyiségvédelem szabályozásától.[48] A személyes adatok védelmét a Ptk. is biztosítja, ugyanakkor azokat nem kezelhetjük hermetikusan zárt rendszerben: a személyes adatok forgalomképességének megítélése során a személyiségi jogi rendszer egészének koncepciójából kell kiindulni. A személyiség és a személyiségi jog morális értékelést is hordoz, így végső soron a társadalom értékítéletét jeleníti meg az, hogy a jog a személyiség mely aspektusainak forgalomképességét fogadja el.[49] Mint azt látni fogjuk, a személyes adatok forgalomképességének a gondolata illeszkedik abba a folyamatba, amelyet a személyiségi jogok kommercializálódása[50] elnevezéssel illetnek.

Schultz Márton szerint azokban az országokban, ahol a szocialista berendezkedés nem vetette vissza sem a személyiségi jogok magánjogi védelmét, sem a gazdasági fejlődést, ott fokozatosan bekövetkezett az, hogy a jogrendszerben elismerték a személyiségi jogok vagyoni értékét, illetve annak hasznosíthatóságát.[51] Langhanke hasonlóan fogalmaz, szerinte ugyanis a személyes adatok gazdasá-

[43] Eörsi Gyula: Kötelmi Jog. Általános Rész. Budapest, Nemzeti Tankönyvkiadó, 2002, 51.
[44] Eörsi (43. lj.), 51–52.; Vékás Lajos: Szerződési Jog – Általános Rész. Budapest, ELTE Eötvös Kiadó, 2019, 73.
[45] Eörsi (43. lj.), 52.
[46] Menyhárd Attila: Dologi jog. Budapest, Osiris Kiadó, 2007, 72.
[47] Menyhárd Attila: Forgalomképes személyiség? In: Menyhárd Attila – Gárdos-Orosz Fruzsina (szerk.): Személy és személyiség a jogban. Budapest, Wolters Kluwer. 2016, 69.
[48] Czapári (31. lj.), 7.
[49] Menyhárd (47. lj.), 66.
[50] Schultz Márton: A személyiségi jogok vagyoni értéke és tárgyiasulása. Budapest, Orac Kiadó, 2022.
[51] Schultz Márton: A vagyoni értékű személyiségi javak szabályozási problematikájának kérdései. A tárgyiasulás alapú vagyoni személyiségvédelem, Infokommunikáció és Jog, 2020/2, 16.

gi célú hasznosítása semmiben sem különbözik a személyiségi jogok egyes aspektusainak kommercializálódásától.[52]

Ennek megfelelően először szükséges megemlékezni arról, hogy a magyar és a kontinentális jogrendszerben követett álláspont szerint a személyiségvédelem az emberi méltóság védelmén nyugszik.[53] Az eltérő koncepcionális kiindulópont az, amely nagyban megkülönbözteti egymástól az európai és az amerikai személyiségvédelmet. Utóbbi jogrendszerben ugyanis a személyiségvédelem szempontjából az egyén döntési és rendelkezési szabadsága kerül előtérbe,[54] amely ezáltal nem képezi akadályát annak, hogy a személyiség egyes aspektusai vételár ellenében más számára átruházhatóak legyenek, méghozzá a szerződési szabadságból adódóan.[55]

A kontinentális jogrendszerben a személyiségi jogok emberi méltóságból való származtatása miatt tűnik első ránézésre nehézkesnek annak a kimondása, hogy a személyiség lényeges elemét képező személyes adatok vagyoni joghatású digitális szolgáltatásra irányuló szerződések tárgyává tegyék. Ugyanakkor a kontinentális jogrendszerek személyiségvédelmét az adatalapú gazdaság szereplőinek üzleti gyakorlata jelentősen kikezdte az elmúlt években.

3.2.2. A forgalomképesség adatvédelmi és erkölcsi aspektusai

A GDPR rögzíti, hogy a természetes személyek számára biztosítani kell azt, hogy a személyes adataikkal maguk rendelkezhessenek.[56] Így felmerülhet az az értelmezési lehetőség, hogy ez a rendelkezési jogosultság kiterjed-e arra is, hogy az érintettek a személyes adataikat gazdasági tranzakciók tárgyává tegyék. A válasz közel sem egyszerű, hiszen ezzel a gyakorlattal kapcsolatban erkölcsi és adatvédelmi problémák egyaránt felmerülhetnek.

Erkölcsi oldalról a problémát leginkább az jelentheti, hogy milyen indokok alapján legitimálható egy olyan piaci modell, amely gyakorlatilag termékként kezeli a személyes adatokat. A személyes adatok más aspektusainak vagyoniasodásához hasonlóan nehéz egyértelműen ilyen indokokat azonosítani.[57]

Adatvédelmi szempontból fontos kiemelni az Európai Adatvédelmi Testület 2/2019-es iránymutatását, amelyben a testület teljes mértékben elutasította a személyes adatok forgalomképességének lehetőségét. Az iránymutatás értelmében, „*tekintettel arra, hogy az adatvédelem az Alapjogi Charta 8. cikkében biztosított alapvető jog, és figyelembe véve, hogy az általános adatvédelmi rendelet egyik fő célja, hogy biztosítsa az érintettek számára, hogy az őket érintő információkkal maguk rendelkezhessenek, a személyes adatok nem tekinthetők forgalomképes árucikknek. Még akkor is, ha az érintett hozzájárulhat a személyes adatok kezeléséhez, e megállapodás révén nem mondhatnak le az alapvető jogaikról*”.[58] A DCD-irányelv is hangsúlyozza, hogy a személyes adatok nem tekinthetőek árunak.[59]

Ugyanakkor az adatalapú gazdaság vonatkozásában a technológiai fejlődés okozta változások bizonyos mértékben az adatvédelmi szabályrendszer újragondolását teszik szükségessé. Álláspontom szerint jelenleg nagyobb társadalmi érdek fűződik ahhoz, hogy a jogalkotó ezen folyamatokra a szabályozás eszközével reagáljon és felismerje (egyben elismerje), hogy a digitális világban sok esetben a vételár alternatívájaként jelenik meg a személyes adat. Mindezt különösen az azonos szintű fogyasztóvédelem megteremtésének szükségessége indokolja az ilyen jogviszonyokkal kapcsolatban.

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[52] Langhanke – Schmidt-Kessel (5. lj.), 219.
[53] Menyhárd (47. lj.), 65.
[54] Menyhárd (47. lj.), 65.
[55] Samara (23. lj.), 35.
[56] GDPR (27. lj.), (7).
[57] Menyhárd (47. lj.), 77.
[58] Az Európai Adatvédelmi Testület 2/2019-es iránymutatása, European Data Protection Board: 2/2019 iránymutatás a személyes adatoknak az általános adatvédelmi rendelet 6. cikke (1) bekezdésének b) pontja szerinti kezeléséről az érintettek részére nyújtott online szolgáltatások összefüggésében, 2.0 változat, 2019. 10. 08., https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines-art_6-1-b-adopted_after_public_consultation_hu.pdf (letöltés: 2023. 04. 02.), 54.
[59] DCD-irányelv (8. lj.), (24).

3.2.3. Akkor hogyan hasznosítható a személyes adat?

Az adatvédelmi rendelkezések mellett „sziszifuszi munkának" tűnhet a személyes adatok forgalomképességének igazolására tett kísérlet. Ennek ellenére valamilyen módon magyarázatot kell adni arra, hogy a digitális szolgáltatásra irányuló szerződések esetén a fogyasztók személyes adatai miként jelentkezhetnek ellenszolgáltatásként.

Menyhárd Attila rámutat, hogy a right of publicityhez hasonló, dologi hatályú védelemmel biztosított forgalomképes jogosultság elismerése nem illeszkedik a magyar polgári jog dogmatikai rendszerébe.[60] Ugyanakkor a Ptk. tartalmaz olyan rendelkezéseket, amellyel a jogosult hozzájárulhat személyisége egyes attribútumainak felhasználásához, amely akár ellenszolgáltatás ellenében is történhet. E körben a Ptk. 2:42. § (3) bekezdésre és a képmással és hangfelvétellel kapcsolatos hozzájárulást szabályozó 2:48. § (1) bekezdésre szükséges utalni. Ezekben az esetekben a jog a felhasználás engedélyezését monopolizálja, hogy a felhasználást csak a jogosult hozzájárulásával tekinti jogszerűnek.[61] Sőt, egyes személyiségi jegyek felhasználásával kapcsolatban olyan jogszabályi rendelkezések is vannak a magyar jogban, amelyek kifejezetten ellenszolgáltatás fejében teszik lehetővé a személyiségi jegy felhasználását kereskedelmi célokra.[62] Ez történik például az arculatátviteli szerződés alapján, amellyel a sportoló vagy sportszövetség nevének, képmásának, illetve jelvényének felhasználására válik jogosulttá a felhasználó.[63]

A Ptk. 2:43. § e) pontja szerinti személyes adatok védelméhez fűződő jog kapcsán analóg módon arra az eredményre juthatunk, hogy az egyének az adatvédelmi rendelkezések teljesülése mellett hozzájárulhatnak személyes adataik gazdasági célú kezeléséhez. Azáltal, hogy a GDPR lehetőséget teremt az érintettnek arra, hogy hozzájáruljon az adatkezeléshez, lényegében megteremti a lehetőséget arra, hogy az érintett olyan esetekben is jogszerűvé tegye az adatkezelést, ahol egyik-másik – az ő akaratnyilvánításától függetlenül alkalmazható – jogalap sem áll fenn. Ezért álláspontom szerint a felek megállapodhatnak arról, hogy a személyes adat szerződéses ellenszolgáltatásként jelenjen meg a konkrét jogviszonyban.

Ez a hozzájárulás semmi esetre sem lehet teljeskörű. Egyrészről vannak olyan, az adatvédelemhez kapcsolódó jogosultságok, amelyekről érvényesen nem mondhat le az érintett. Ilyen például a GDPR 7. cikk (3) bekezdés alapján biztosított jogosultság arra nézve, hogy az adatkezelési hozzájárulását visszavonja. Egy ilyen rendelkezés ugyanis érvénytelen lenne.[64] Ez következik a Ptk. 6:101. §-ából is, amelynek értelmében a fogyasztó és vállalkozás közötti szerződésben semmis a fogyasztónak a jogszabályban megállapított jogáról lemondó jognyilatkozata. Másrészről a DCD-irányelv rendelkezései alapján a fogyasztó sohasem veszti el az ellenőrzést a személyes adatai fölött, hiszen az adatkezelésnek bármikor véget vethet az adatkezelési hozzájárulás visszavonásával.[65]

A teljes lemondást engedélyező szabályozási környezet eliminálná a hazai személyiségvédelemből annak erkölcsi aspektusát, és kizárólag vagyoni alapokra helyezné azt. Ez a magyar személyiségi jog dogmatikai sajátosságai mellett nem kívánatos. A hangsúly a forgalomképesség szempontjából éppen ezért azon van, hogy az adatkezelő által folytatott tevékenység mindenképpen megfeleljen a GDPR rendelkezéseinek. Ekkor a fogyasztó hozzájárulása legitimálhatja a személyes adat felhasználását. A különbség a személyiség más aspektusaihoz viszonyítva, hogy az ilyenkor adott hozzájárulás részletszabályait a Ptk.-n kívül, a GDPR szabályai között kell keresni.

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[60] Menyhárd (47. lj.), 79.

[61] Menyhárd (47. lj.), 76.

[62] Czapári (31. lj.), 14.

[63] Sportól szóló 2004. évi I. törvény, 35. § (3) bekezdése.

[64] Langhanke – Schmidt-Kessel (5. lj.), 221.; valamint Andreas Sattler: Personenbezogene Daten als Leistungsgegenstand, JuristenZeitung, 72/21, 2017, 1039.

[65] Fryderyk Zoll: Personal Data as Remuneration in the Proposal for a Directive on Supply of Digital Content. In: Reiner Schulze – Dirk Staudenmayer – Sebastian Lohsse: Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps. Münster Colloquia on EU Law and the Digital Economy II. Baden-Baden, Nomos, 2017, 187. Az, hogy ez milyen hatást gyakorol a felek között létrejött szerződésre, a következő fejezetben kerül elemzésre.

3.3. Visszterhes, de mégsem egyenértékű

Ahogy arra korábban már utaltam, a DCD-irányelv végső változata már egyáltalán nem használja az „ellentételezés" kifejezést a személyes adatokkal összefüggésben. Mindeközben egyértelmű, hogy az irányelv elismeri a személyes adatok kommercializálódását és azok árujellegét.[66] Ahogy Szilágyi Ferenc hangsúlyozza, a DCD-irányelvet a személyes adatokon alapuló piaci modellek felismerése hívta életre, de nem azért, hogy piacot hozzon létre a fogyasztók személyes adatainak.[67]

A DCD-irányelv célja ehelyett a kellékszavatossági jogok gyakorlásának a megteremtése a digitális piacon. Ugyanakkor ahhoz, hogy ez ténylegesen megtörténhessen, a felek között szerződéses viszonynak kell fennállnia.[68] A DCD-irányelv 3. cikk (1) bekezdése szerint ugyanis „ez az irányelv minden olyan szerződésre alkalmazandó (…)".[69] A felek közötti kapcsolat minősítése a nemzeti jogrendszerek feladata. A fogyasztóvédelmi rendelkezések érvényesülése érdekében szerződésnek szükséges tekinteni a felek közötti kapcsolatot abban az esetben is, ha a fogyasztó a személyes adatait szolgáltatja a vállalkozásnak.

Ilyenkor egy visszterhes és nem ingyenes szerződéses kapcsolat jön létre a felek között. A szakirodalomban léteznek olyan módszerek, amelyek révén megbecsülhető a személyes adatok gazdasági értéke, de ezek az eredmények mindig csak hozzávetőleges értéket mutatnak.[70] A DCD-irányelv értelmében a személyes adat nem tartozik az „ár" fogalma alá, ebből következően az árat nem lehet „személyes adatban meghatározni".[71] A személyes adatok konkrét tranzakcióban betöltött értékének a vizsgálata azért nem szükséges, mert a felek között nem szinallagmatikus viszony jön létre.

A fogyasztó szolgáltatásának egyedisége miatt szükségtelen a szolgáltatás és ellenszolgáltatás egyenértékűségének vizsgálata, hiszen az, hogy a szerződés visszterhes, nem jelenti egyben azt is, hogy a felek között szinallagmatikus kapcsolat jött létre. A szolgáltatás egyediségére tekintettel a digitális szolgáltatásra irányuló szerződés az olyan szerencseelemet tartalmazó szerződéstípusokhoz közeledik, mint például a tartási szerződés. Az ilyen szerződések esetében a szerencseelem miatt szükségtelen a szinallagma fennállásának vizsgálata. A digitális szolgáltatásra irányuló szerződés a Ptk. által szabályozott vagyoni viszonyokon belül nem az áruviszonyok közé illeszkedik, hanem sokkal inkább olyan egyéb csereviszonynak tekinthető, ahol a két fél közötti jogtárgyak cseréje mindkét fél számára pozitív, de nem feltétlenül matematikailag egyenlő módon történik.[72]

4. Az adatkezelési hozzájárulás visszavonása

A DCD-irányelv megalkotása során a jogalkotó arra törekedett, hogy a jogszabály megfeleljen a GDPR követelményeinek, mégis fellelhetőek bizonyos feszültségi pontok a jogszabályok között.

Miután az előző fejezetben felvázoltam, hogy milyen körülmények között képzelhető el a személyes adatok gazdasági hasznosítása, jelen fejezetben a szakirodalomban leggyakrabban megjelenő kérdést kívánom elemezni: méghozzá, hogy milyen hatást gyakorol a felek közötti digitális szolgáltatásra irányuló szerződésre, ha a fogyasztó az adatkezelési hozzájárulását visszavonja. Az érintettet a GDPR 7. cikk (3) bekezdése alapján megilleti az a jog, hogy a korábban adott adatkezelési hozzájárulását bármikor visszavonja. Ez a jogosultság értelemszerűen kihat a digitális szolgáltatásra irányuló szerződésre, hiszen ezáltal megszűnik az adatkezelés jogalapja. Az adatvédelmi jog szempontjából a hozzájárulás visszavonásának a jogha-

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[66] Szilágyi Ferenc: Personal Data as Consideration for the Facebook Service. Case Note on Facebook Ireland Ltd. v Gazdasági Versenyhivatal (Hungarian Competition Authority) (Case BH2022.24). Journal of European Consumer and Market Law 11, 2022/4, 154.

[67] Szilágyi (66. lj.), 154.

[68] Metzger (36. lj.), 30.

[69] DCD-irányelv (8. lj.), 3. cikk (1) bekezdése.

[70] OECD: Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value, OECD Digital Economy Papers, No. 220, Paris, 2013, https://www.oecd-ilibrary.org/exploring-the-economics-of-personal-data_5k486qtxldmq.pdf?itemId=%2Fcontent%2Fpaper%2F5k486qtxldmq-en&mimeType=pdf (letöltés: 2023. 04. 02.), 18.

[71] Szilágyi (66. lj.), 158.

[72] Csehi Zoltán (főszerk.): 2013. évi V. törvény a Polgári Törvénykönyvről kommentárja. Magyar Közlöny Lap- és Könyvkiadó. Budapest, 2021, 40.

tása ugyanis az, hogy az adatkezelés nem folytatható többé, kivéve, ha az adatkezelőnek a 6. cikk (1) bekezdés a) pontjában meghatározott mellett más jogalap is a rendelkezésére áll.[73] A személyes adatok kvázi ellenszolgáltatási jellege – ahogy azt korábban már bemutattam – ugyanakkor kizárólag az adatkezelési hozzájáruláson alapuló adatkezeléssel kapcsolatban képzelhető el.

Fontos megjegyezni, hogy az adatkezelési hozzájárulás visszavonása pro futuro vált ki joghatást, ezáltal a korábbi adatkezelés nem válik jogszerűtlenné, de alternatív jogalap nélkül a korábban begyűjtött és kezelt adatot törölni kell.[74] A GDPR ezen jogintézménye azért is különösen fontos a digitális szolgáltatásra irányuló szerződésekkel kapcsolatban, mert ez teszi alkalmassá az adatkezelési hozzájárulást mint jogalapot arra, hogy az érintett számára biztosítsa a személyes adatai feletti ellenőrzést. A hozzájárulás visszavonásáról nem mondhat le érvényesen az érintett, méghozzá a Ptk. 6:101. §-ából következően.

A GDPR preambuluma szerint a hozzájárulás önkéntességéhez azon túl, hogy annak megadásakor az érintett rendelkezik a valós vagy szabad választási lehetőséggel, az is hozzátartozik, hogy módjában áll a hozzájárulás anélküli megtagadása vagy visszavonása, hogy ez a kárára válna.[75]Az Európai Adatvédelmi Testület 5/2020 iránymutatása értelmében az utóbbi feltétel azt jelenti, hogy az adatkezelőnek díjmentesen, illetve a szolgáltatási szint csökkentése nélkül lehetővé kell tennie a jog gyakorlását.[76]

4.1. Pacta sunt servanda?

Ha a vállalkozás nem gyűjtheti és kezelheti többé a fogyasztó személyes adatait, úgy az általa nyújtott szolgáltatás ellenszolgáltatás nélkül marad. Ez lényegében szemben áll a szerződés Ptk.-ban meghatározott definíciójával, miszerint a szerződésből kötelezettség keletkezik a szolgáltatás teljesítésére és jogosultság a szolgáltatás követelésére,[77] vagyis a pacta sunt servanda elv is megkérdőjeleződhet. Vajon szerződésszegést követ el a fogyasztó azzal, hogy a GDPR által biztosított jogosultságát gyakorolja? Szankcionálható ezzel összefüggésben? Hogyan illeszthető be egy olyan szolgáltatás a magánjogi dogmatikába, ahol már a szerződéskötéskor is létezik egy olyan speciális felmondási jog az egyik fél számára, amelyet bármikor és bármilyen hátrányos következmény nélkül gyakorolhat?

Mindenekelőtt fontos leszögezni, hogy az adatvédelmi jogi rendelkezéseknek megfelelően nem merülhet fel az érintett szankcionálása. Ennek oka egyrészről, hogy a DCD-irányelv kifejezetten tételezi a GDPR elsőbbségét bármely összeütközés esetén.[78]

Langhanke és Schmidt-Kessel erre tekintettel javasolják azt, hogy a személyes adatok szolgáltatására vonatkozó kötelezettséget egyfajta természetes kötelemként kellene felfogni.[79] Ez azt eredményezné, hogy a személyes adat szolgáltatása szerződési kötelezettség tárgyát képezné, de az nem volna kikényszeríthető bírói úton. A természetes kötelem sajátja, hogy a felek tartoznak egymásnak, ugyanakkor a felelősség a tartozás teljesítéséért nem áll fenn.[80] Ebből következően a vállalkozás nem követelhetné a személyes adatok szolgáltatását, de a természetes kötelmek dogmatikai sajátosságai alapján

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[73] Kuner – Bygrave – Docksey – Dreschler (29. lj.), 351. Fontos hangsúlyozni, hogy az adatkezelő hallgatólagosan nem térhet át egy másik jogalapra, hanem az átláthatóság elve, illetve a GDPR (27. lj.) 13. és 14. cikke szerinti tájékoztatási kötelezettségnek megfelelően köteles az érintettet tájékoztatni. Jóri András (szerk.): A GDPR Magyarázata. HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2018.

[74] Eugenia Politou – Efthimios Alepis – Constantinos Patsakis: Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions, Journal of Cybersecurity, 2018/4, 7.

[75] GDPR (27. lj.), preambulum (42); valamint Kuner – Bygrave – Docksey – Dreschler (29. lj.), 351.

[76] Az Európai Adatvédelmi Testület 5/2020 iránymutatása, European Data Protection Board: 5/2020 Iránymutatás az (EU) 2016/679 rendelet szerinti hozzájárulásról, 1.1 verzió, 2020. 05. 04., https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_hu.pdf (letöltés: 2023. 04. 02.), 27.

[77] Ptk. 6:58. §-a.

[78] DCD-irányelv (8. lj.), (48).

[79] Langhanke – Schmidt-Kessel (5. lj.), 221.

[80] Csehi (72. lj.), 171.

az önkéntes teljesítés sem volna visszakövetelhető.[81] Ez a megközelítés egybevág azzal, hogy az adatkezelési hozzájárulás pro futuro válthat ki joghatást.[82] Probléma azáltal merül fel, hogy alternatív jogalap hiányában az adatkezelőnek az addig begyűjtött adatokat törölnie kell. Ezáltal az ilyen személyes adatok mégiscsak „tartozatlan fizetésnek" minősülnének, amely nem felel meg a természetes kötelmek dogmatikai sajátosságainak.

Sattler emellett arra hívja fel a figyelmet, hogy Langhanke és Schmidt-Kessel koncepciójának elfogadása adatvédelmi szempontból kiszolgáltatottá tenné az érintetteket.[83] Ez ugyanis arra késztetné a vállalkozásokat, hogy az adatkezelési hozzájárulás megszerzését követően „aki kapja, marja" alapon annyi adatot gyűjtsenek az érintettről, amennyit csak tudnak, ezzel kárpótolva magukat a kikényszeríthetőség hiányáért.[84] Olyan hamis ösztönzőként hatna ez a felfogás, hogy a vállalkozásoknak az lenne az érdeke, hogy a hozzájárulás esetleges visszavonását megelőzően gazdaságilag minél inkább kiaknázzák az adatokat, harmadik félnek történő értékesítéssel.[85]

Zoll álláspontja szerint azáltal, hogy az érintett bármikor visszavonhatja adatkezelési hozzájárulását, valójában nem is a személyes adat az, ami *per se* a szerződési kötelezettség tárgyát képezi, hanem a fogyasztó kötelezettsége, hogy eltűrje az adatkezelést.[86] Ez a megközelítés lényegében azonos az általam elfogadott értelmezéssel, miszerint az adatkezelési hozzájárulás megadása – és az ehhez kapcsolódó tűrési kötelezettség – képezheti a fogyasztó szolgáltatását. Zoll mindazonáltal a digitális szolgáltatásra irányuló szerződést egyfajta tartós szerződésnek fogja fel, ahol az adatkezelési hozzájárulás visszavonása felmondásként értékelhető.[87]

4.2. Felmondás?

Az adatkezelési hozzájárulás visszavonásával kapcsolatban a minősítési nehézséget az okozza, hogy a GDPR preambuluma értelmében az érintett akként kell tudnia gyakorolni az adatkezelési hozzájárulás visszavonásának jogát, hogy az a kárára válnék.[88] Tekintettel arra, hogy a visszavonást követően a személyes adatok kezelésére a jövőben már nem lesz lehetőség, így szerződési szempontból kézenfekvőnek tűnne a nyilatkozatot a szerződés felmondásával azonosítani, ugyanakkor nincs ilyen kifejezett rendelkezés sem a GDPR, sem a DCD-irányelv szabályai között.[89] A megoldást annak eldöntése jelentené, hogy a két jog gyakorlása egyenlőnek tekinthető-e egymással. Amennyiben igen, úgy a DCD-irányelv 17. cikkében megjelenő kötelezettségek terhelik a fogyasztót, vagyis a szerződés felmondására vonatkozó rendelkezések lennének az irányadóak. Eszerint a fogyasztó köteles volna tartózkodni a digitális tartalom vagy a digitális szolgáltatás használatától, és ezek elérhetővé tételétől harmadik felek számára. Ebben az esetben a használat lehetőségének elvesztése nem jelentkezne káros következményként, hiszen arra a fogyasztó szándékának is ki kellett terjedni az adatkezelési hozzájárulás visszavonásakor. Ezzel gyakorlatilag a GDPR rendelkezéseiből következne a felmondás lehetősége, így a fogyasztó jogszabály rendelkezései alapján válna jogosulttá a felmondásra.[90]

Fordított esetben, vagyis amikor a fogyasztó a felmondási jogát gyakorolja, Twigg-Flesner szerint úgy kell tekinteni, mintha ezzel együttesen az adatkezelési hozzájárulását is visszavonta volna, lévén a fogyasztóknak ilyen elvárása fűződik a felmondás gyakorlásához.[91] Nem olyan egyértelmű ugyanakkor, hogy a fogyasztó a visszavonásával a szerző-

[81] Csehi (72. lj.), 171.
[82] Kuner – Bygrave – Docksey – Dreschler (29. lj.), 169.
[83] Sattler (64. lj.), 1040.
[84] Sattler (64. lj.), 1040.
[85] Sattler (64. lj.), 1040.
[86] Zoll (65. lj.), 184.
[87] Zoll (65. lj.), 184.
[88] GDPR (27. lj.), preambulum (42).
[89] Langhanke – Schmidt-Kessel (5. lj.), 144.
[90] Ptk. 6:213. § (1) bekezdése.
[91] Schulze – Staudenmayer (5. lj.), 286.

dést is meg kívánja szüntetni.[92] Megoldást jelenthet az, ha a felek a digitális szolgáltatásra irányuló szerződésben rendezik a kérdést, így például kikötik, hogy az adatkezelési hozzájárulás visszavonása felmondásnak fog minősülni a felek közötti jogviszonyban. Ekkor azonban újfent az a probléma merül fel, hogy mindez nem válik-e az érintett kárára.

Az adatkezelési hozzájárulás visszavonása jelenleg az egyik megoldatlan kérdés a digitális szolgáltatásra irányuló szerződésekkel kapcsolatban. Ennek oka, hogy a DCD-irányelv célja a kellékszavatossági jogok biztosítása a fogyasztók számára,[93] így a jogszabály nem is tartalmaz olyan rendelkezéseket, amelyek a vállalkozás számára lehetővé tennék a szerződés megszüntetését. A felvázolt koncepciók közül, véleményem szerint, a felmondás joga az, amely a leginkább elfogadhatónak tekinthető konkrét szabályozás hiányában, hiszen az adatvédelmi rendelkezések szerződéses keretek közé helyezése egy ilyen megoldáshoz közelíthet leginkább. Ugyanakkor ez egy olyan joghézag, amelyet a jogalkotónak kellene megszüntetnie olyan módon, hogy egyaránt megfeleljen a magánjogi és az adatvédelmi szabályozásnak.

5. Összegzés

A tanulmány törekvése az volt, hogy bemutassa azokat a problémákat, amelyeket az adatalapú gazdaság és a digitális piac üzleti modelljei felvetnek az adatvédelmi jog és a hagyományos polgári jogi dogmatika szempontjából. A DCD-irányelv szinte biztosan az elkövetkező évek egyik legfontosabb, úttörő jellegű újítását honosította meg az európai szerződési jogban azáltal, hogy kiterjesztette a hatályát az olyan jogviszonyokra, amelyekben a fogyasztók személyes adat szolgáltatását vállalják kvázi ellenszolgáltatásként a digitális tartalmak vagy digitális szolgáltatáshoz való hozzáférés ellenében.

A jog számára nehézséget jelent a technológiai fejlődés okozta változások lekövetése. Mindazonáltal nem szabad hátat fordítani a jelenleg zajló folyamatoknak. Idealisztikus elképzelésnek tartom azt a szigorúan alapjogi megközelítést, amely tagadja, hogy a személyes adatok egyre inkább ellenszolgáltatásként jelennek meg a digitális világban. Azt gondolom, hogy a tagadás helyett a piaci gyakorlat jogszabályi keretek közé szorítása jelentené a helyes utat. Ezért minél előbb szükség volna egy a digitális szolgáltatásra irányuló szerződésekre vonatkozó szabályrendszer kialakítására, amely képes lenne érvényt szerezni a jelenlegi és az új technológiához igazított adatvédelmi szabályozásnak is. Miként rendelkezhetne és gyakorolhatna ellenőrzést a személyes adatai kezelése felett az érintett, ha jelenleg nem egyértelmű, hogy milyen joghatást gyakorol a digitális szolgáltatásra irányuló szerződésre az adatkezelési hozzájárulás visszavonása?

A DCD-irányelv vonatkozó rendelkezéseinek bemutatása mellett kísérletet tettem annak felvázolására, hogy milyen keretek között lehetne elképzelni a személyes adatok hasznosítását. Rámutattam, hogy a személyes adatoknak értéke van, és a magyar polgári jog keretei között is elképzelhető, hogy az adatkezelési hozzájárulás megadásával a személyes adatok bizonyos mértékig gazdaságilag hasznosíthatók legyenek. Az elkövetkező évek valószínűleg a polgári jog intézményeinek bizonyos fokú átgondolását tehetik szükségessé. Mindemellett látható, hogy a hatályos polgári jog jelenlegi állapotában is képes reflektálni a technológiai változásokra.

[92] Langhanke – Schmidt-Kessel (5. lj.), 222.
[93] Vékás (14. lj.), 219.

Szilvási Evelin[1]

Kapuőrök árnyékában – *A Digital Markets Act szürkezónája a non-gatekeeperek szemszögéből*

In the shadow of the gatekeepers – The Digital Markets Act's grey area from the perspective of non-gatekeepers

***Abstract**: The paper examines the Digital Markets Act and highlights four grey areas with possible solutions to address them. The first grey area is the wrong understanding of the digital world. The paper proposes to change the way we approach the digital phenomena. The second grey area is the gatekeeper, which is the main subject of the DMA, is not in fact the key concept. The real subject is the designated gatekeeper, which may later become a gatekeeper, suspended gatekeeper and exempted gatekeeper. The third grey area is the transfer of investigations in order to ensure that ne bis in idem double sanctioning is not applied. To overcome the fourth grey area, the legislator needs to provide guidance for the development of rules for the national gatekeepers, which should give Member States similar ex-ante powers as the DMA.*

Tárgyszavak: kapuőr, digitális szemléletváltás, digitális szabályozás, mesterséges intelligencia, digitális piacok.
Keywords: gatekeeper, digital transformation, digital regulation, artificial intelligence, digital markets.

1. Bevezetés: A digitális piacok szabályozásának jelene

A digitális nagyvállalatok sikeres hatósági felügyelete még mindig az elmúlt évtizedek egyik legnagyobb kihívását jelenti a versenyjog számára. A szabályozás szükségképpen le van maradva a piaci verseny felügyeletének ellátása során felmerülő problémákhoz képest. Az Európai Parlament és a Tanács („Parlament és Tanács") az utóbbi években ugyan kissé megkésve, de elkezdte a digitális piacokra irányuló szabályozási struktúrája kidolgozását. Így került az Európai Unió versenyhatóságaként is működő Európai Bizottság („Bizottság") asztalára többek között a 2020 júliusától kötelezően alkalmazandó ún. platform to business rendelet[2] („P2B rendelet"), a 2022. november 16-án hatályba lépő digitális szolgáltatásokról szóló rendelet[3] („DSA") és a jelen tanulmányban vizsgált, 2022. november 1-jén hatályba lépett digitális piacokról szóló rendelet[4] („DMA") is. A várakozások szerint az új szabályozás lépést tud majd tartani a rohamosan változó piaci körülményekkel a jogbiztonság, átláthatóság és a személyhez fűződő alapjogok tiszteletben tartása mellett. A DMA szabályait 2023. május 2-tól kell alkalmazniuk az érintett vállalkozásoknak, ezért a piaci tapasztalatokból csak később tud majd tovább építkezni a jogalkotó.

[1] Joghallgató, Pázmány Péter Katolikus Egyetem, e-mail: szilvasi.evelin@gmail.com. A cikk a szerzőnek a 36. Országos Tudományos Diákköri Konferencia Fogyasztóvédelmi és Versenyjogi tagozatában I. helyezést elért dolgozatán alapul.

[2] Az Európai Parlament és a Tanács (EU) 2019/1150 rendelete az online közvetítő szolgáltatások üzleti felhasználói tekintetében alkalmazandó tisztességes és átlátható feltételek előmozdításáról, HL L 186/57, 2019. 06. 20. https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A32019R1150 (letöltés: 2022. 11. 01.).

[3] Az Európai Parlement és Tanács (EU) 2022/2065 rendelete a digitális szolgáltatások egységes piacáról és a 2000/31/EK irányelv módosításáról, HL L 277/1, 2022. 10. 19., https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:32022R2065 (letöltés: 2022. 11. 01.).

[4] Az Európai Parlement és Tanács (EU) 2022/1925 rendelete a digitális ágazat vonatkozásában a versengő és tisztességes piacokról, valamint az 2019/1937/EU és a 2020/1828/EU irányelv módosításáról (digitális piacokról szóló jogszabály), HL L 265/1, 2022. 09. 14., https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:32022R1925 (letöltés: 2022. 11. 01.).

Jelen tanulmány kutatási témája a digitális piacokról szóló rendelet esetleges hiányosságait boncolgatja szubjektív vélemény formájában, öt szürkezónára koncentrálva. A tanulmány első két fejezete kísérletet tesz a digitális szabályozásban használt fogalmak tisztázására és a DMA személyi hatályának egyszerűbbé tételére. A harmadik és a negyedik fejezet a Bizottság és a tagállami versenyhatóságok közötti hatásköri kérdéseket boncolgatja. Az uniós relevanciával bíró nagyvállalatok ellen jelenleg tagállami szinten folytatott eljárások jövőbeli helyzete nem tisztázott, ahogyan azon tagállami gazdasági versenyre veszélyt jelentő piaci szereplők helyzete sem, amelyek nem akadnak fenn a DMA rostáján. A tanulmány ezt a négy szürkezónát próbálja új perspektívából megvilágítani, amely nézőpont segítségével talán közelebb kerülhet a jogalkotó és a jogalkalmazó a szürkezónák eredményes feloldásához.

2. Miért nem világos a digitális piacok szabályozása?

A digitalizáció az elmúlt évtizedek során globális méreteket öltött, mialatt a jogalkotás nagyrészt államok szerint fragmentált maradt. Berke Barna, az Európai Unió Törvényszékének egykori bírája már 2003-as tanulmányában[5] felhívta a jogalkotó figyelmét a tagállami és a közösségi jog összehangolásának szükségére, azonban erre azóta sem került teljes mértékben sor. A digitális kor hajnalán, 2008-ban Richard Whish, a londoni King's College jogász emeritus professzora Versenyjog című könyvének hatodik kiadásában[6] úgy fogalmazott a kötet kiadásai között eltelt idő alatt tapasztalt versenyjogi fejlődés ütemét érzékelve, hogy szinte évente újraírhatná a közel ezer oldalas monográfiát. Felvetette a határokon átívelő nemzetközi jogrendszer igényét,[7] amiről 2022-ben már mint meglévő versenyjogi struktúráról beszélhetett a kartellek vonatkozásában.[8]

A szabályozás két szempontból is különösen nehéz a digitális piacon. Egyrészt a digitális korban működő vállalkozások piaci magatartásában összefonódik a versenyjog, a fogyasztóvédelem, az adatvédelem és még számos olyan ágazatspecifikum[9], amelyek hatással vannak a társadalomra, így szabályozásra szorulnak.[10] Ezért az ágazati szabályozások helyett egyre inkább előtérbe kerülnek a problémaközpontú, több jogágat magában foglaló joganyagok, mint a DMA vagy a DSA rendelkezései.

Másrészt a klasszikus jogalkotás és alkalmazás a jogbiztonság követelményét szem előtt tartva mélyreható vizsgálaton, piacelemzésen és mindezek értékelésén alapul, így a jogalkotás a piacon tapasztalt magatartásokra utólag reagál. Az ex post szabályozás legnagyobb hátránya főleg a digitális piacon érzékelhető, ahol az in integrum restitutio szinte semmilyen esetben sem lehetséges. Többek között ezekből a tényekből következett a Parlament és a Tanács részéről az igény egy új szemléletű szabályozás kidolgozására. A digitális piacok szabályozásakor a jogalkotó észrevette az új fogalmak iránti igényt a digitális kor új vállalkozásait illetően. Azonban az alapfogalmak meghatározása során nem került a figyelem középpontjába, hogy a digitalizáció átrendezte a klasszikus erőviszo-

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[5] Berke Barna: A versenyjogi harmonizációtól az EU új jogérvényesítési rendszeréig, Társadalom és Gazdaság 2003, 25/1, 160–162.

[6] Richard Whish: Versenyjog (a hatodik angol nyelvű kiadás magyar fordítása), Budapest, HVG-Orac Kiadó, 2010.

[7] *„A jövőre nézve az lesz a valódi kérdés, hogyan fejlesszünk ki olyan nemzetközi rendszert, amely meg tud birkózni a piaci globalizációból fakadó versenypolitikai kérdésekkel."* Whish (6. lj.), 467.

[8] Richard Whish: Horizontal Agreements, V. Magyar Versenyjogi Fórum, Budapest, 2022. 09. 06., https://www.gvh.hu/pfile/file?path=/gvh/rendezvenyek/v.-magyar-versenyjogi-forum/prezentaciok/prezentacio_richar_whish&inline=true (letöltés: 2022. 11. 01.).

[9] Az Európai Parlament és a Tanács rendelete a mesterséges intelligenciára vonatkozó harmonizált szabályok (a mesterséges intelligenciáról szóló jogszabály) megállapításáról és egyes uniós jogalkotási aktusok módosításáról (2021/0106/COD-javaslat), 2021. 04. 21., https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A52021PC0206 (letöltés: 2022. 11. 01.).

[10] 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Tpvt.), https://net.jogtar.hu/jogszabaly?docid=99600057.tv; 2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról (Fttv.), https://net.jogtar.hu/jogszabaly?docid=a0800047.tv; Az Európai Parlament és a Tanács (EU) 2016/679 rendelete a természetes személyeknek a személyes adatok kezelése tekintetében történő védelméről és az ilyen adatok szabad áramlásáról, valamint a 95/46/EK rendelet hatályon kívül helyezéséről (általános adatvédelmi rendelet; EGT-vonatkozású szöveg), https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32016R0679; Az Európai Parlament és a Tanács 2000/31/EK irányelve a belső piacon az információs társadalommal összefüggő szolgáltatások, különösen az elektronikus kereskedelem, egyes jogi vonatkozásairól (e-ker), https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A32000L0031.

nyokat. A továbbiakban ezekre az erőviszonyokra szándékozom rámutatni, aminek segítségével egy új perspektívából szemlélhetjük a piacvezető digitális vállalkozások egy szűk, kiemelt körét, ami talán segítséget nyújthat ahhoz, hogy milyen szabályozási módszerrel lenne érdemes a digitális vállalkozások kiemelt szereplőit jogkövető magatartásra bírni.

2.1. A digitalizáció fogalmainak jelentősége

A jogalkotást egy olyan felfedezéshez lehet hasonlítani, ahol már létező, de még névtelen dolgoknak kell nevet adni. A névadás a már létező tulajdonságok alapján kell, hogy történjen, hiszen csak afelett tudunk hatalmat gyakorolni, amit ismerünk és meg tudunk határozni, azaz nevén tudunk nevezni. Ehhez pedig – mivel nincs új a nap alatt – analógiaként a legkézenfekvőbb a már meglévő fogalmainkból kiindulni, ennyiben a digitális világot a fizikai világhoz hasonlíthatjuk.

A klasszikus piacon az állam mint harmadik piaci szereplő meghatározására nincsen szükség, hiszen az államok fennhatósága területi alapon működik. A digitális piacon viszont olyan hatalom jut a digitális teret biztosító vállalkozásoknak, ami felveti a kérdést, hogy vajon nevezhető-e ez a fajta hatalom digitális kormányzati szerepnek? Az összehasonlítás kedvéért nevezzük a digitális teret biztosító vállalkozásokat digitális államnak. Ez nem azt jelenti, hogy önálló fennhatósággal és államot illető jogosultságokkal lehet felruházni a digitális teret nyújtó vállalkozásokat, mert a digitális világ védendő alanyai egyben a fizikai világ alanyai, tehát a digitális állam mindig is állami fennhatóság alá fog tartozni. Jobb fogalom híján tehát jelen tanulmány értelmezésében a digitális állam olyan vállalkozás, amely biztosítja a digitális területet: a digitális közszolgáltatásokat és a digitális infrastruktúrát.

2.1.1. A digitális állam területe

Területét tekintve a digitális világ nem a fizikai területi elosztások szerint működik. A digitális világ piaca a digitális piac, amely az internetkapcsolattal válik láthatóvá. Egyetlen globális „piactér" létezik, ahol a felhasználók főszabályként ugyanolyan jogokkal és kötelezettségekkel lépnek a digitális világba a fizikai világ minden pontjáról. Előnyei közé sorolható az online munkavégzés, vásárlás és kommunikáció megjelenése, ami megkönnyítette a határon átnyúló kapcsolatok fenntartását és bizonyos mértékig globalizálta a társadalmat. Hátránya ugyanakkor, hogy a *world wide weben,* azaz a világhálón jelenleg nincs állami felügyelet. Online tér, digitális felhasználói minőség és elektronikus úton megvalósuló bűncselekmények viszont vannak, amelyek mind anyagi, mind erkölcsi hátrányt tudnak okozni a társadalom számára.[11] A digitális állam miközben globális szolgáltatást nyújt, úgy választ székhelyet, hogy a választott ország kedvező adózási és adatvédelmi feltételeket nyújtson számára. Érdekes kettősség van a digitális tér és az azt szabályozó joganyag között is. A digitális tér globális, a terület és a joganyag azonban széttagolt.

2.1.2. A digitális állam alanyai

A digitális világ védendő alanyai egyben a fizikai világ alanyai. A digitális világban azonban nem jelennek meg az identitásbeli különbségek, aminek oka egy egészen egyszerű törvényszerűséggel magyarázható. Ha valamely online felületen regisztrációba kezdünk, szinte minden esetben találkozunk nemi, területi, nyelvi és korosztályos besorolásunkat lehetővé tevő kérdésekkel, ugyanis a digitális világ alanyai a felhasználók ebbéli hovatartozásukat illetően megkülönböztethetetlenek, ebből kifolyólag az információk önkéntes megadása nélkül egyenlőnek számítanak. Ez egyrészt egybecseng a ma divatosnak számító egyenlőséget hirdető gondolatokkal, másrészt számos veszélyt is rejt magában. Elég csak belegondolni a gyermekek számára elérhető, nem korosztályuknak szánt, vagy épp jogellenes, de elérhető tartalmak létébe, vagy a felügyelet nélküli online vásárlás lehetőségébe, ami fizikai üzletben – az alany korát sejtve – nem fordulhatna elő. Az alanyok tevékenységéből származó adatmennyiség értékes adatgazdaságot hozott létre, ami a digitalizációval egyenes arányosságban vált egyre fontosabbá számunkra. A digitális állam lassan több személyes és online vásárlási és

[11] Valentiny Pál: Piaci és kormányzati kudarcok. Az iparpolitikai és a versenypolitikai beavatkozások változó kapcsolata, Verseny és szabályozás 2019, KRTK Közgazdaság-tudományi Intézet, Budapest, 116–145.

hírfogyasztási szokásokat rögzítő adattal rendelkezik rólunk, mint maga az állam, amelynek állampolgárai vagyunk. Az adatbiztonság felügyelete a széttagolt állami hatóságok kezében van, viszont a biztonságos digitális teret a digitális vállalkozások teremthetik meg.

Az Európai Unió is felismerte a digitálisan gyűjthető adat jelentőségét, ezért 2020-ban az Európai adatstratégia[12] elfogadásával 2028-ra egy egységes adatpiac létrehozását tűzte ki célul, amit az Adatkormányzási rendelet javaslata követett.[13] Az adatgazdálkodás központosítása a Bizottság szerint szerepet fog játszani többek között az energiahatékonyság növelésében és a forgalom optimalizálásában is. Vajon az uniós adatbázisok el fogják valaha érni a digitális államok által gyűjtött adatokból származó egyre pontosabb mérési eredményeket, vagy szükség lesz az állami entitások és a digitális állam együttműködésére az adatok közös felhasználása érdekében? A kérdést az elkövetkezendő évek jogalkotási tapasztalatai minden bizonnyal tisztázni fogják.

Összességében a digitalizáció által egy újfajta térhódítás zajlik a szemünk előtt, amelyben a társadalom hol önként vesz részt, hol a munkalehetőségek megtartása miatt nincs más választási lehetősége. A digitális nagyhatalmak külső látszata, vállalkozási minősége azonban megköti az államok kezét az egységes és hatékony szabályozás létrehozására, hiszen a sokkal összetettebb, félig állami, félig cégszerű alakzattal eddig nem kellett szembenézni sem jogi, sem gazdasági oldalról. Akár sikerre vezető felismerést is hozhatna a digitális nagyvállalatok szabályozásában, ha a jogalkotó nem csupán vállalkozásként, hanem – digitális teret, közszolgáltatást és infrastruktúrát is nyújtó – digitális államként tekintene azokra. Ennek köszönhetően a platformszabályozás az államközi kapcsolatok során alkalmazott szabályozási technikák alkalmazásával akár teljesebbé is válhatna.[14] A digitális terület és társadalom globális jelenléte miatt pedig véleményem szerint nem észszerű a digitális állam székhely szerint történő szabályozásának fenntartása.

3. A digitális állam piacvezető paradoxona

Ahhoz, hogy világossá váljon a digitális piacok koncentráltságának oka, először az a kérdés vizsgálandó, hogy mi a különbség a digitális államok és az üzleti felhasználók között. A lehetséges válaszok egyike közé tartozhat az a felvetés, hogy a digitális állam üzemeltethet „digitális állami tulajdonú vállalkozást", de fő állami funkciója a digitális terület, közszolgáltatás és infrastruktúra biztosítása marad. A digitális állam piacvezető paradoxona talán abban keresendő, hogy ha már egy csomópont, azaz digitális állam kialakult, akkor hiába várunk versenytársra, nem lesz rá felhasználói igény, ami fejlesztené, hiszen senki sem fog egy kevésbé fejlett infrastruktúrára átállni.[15]

Ilyen vállalkozás lehet pl. a Google. Ha valaki a Google leányvállalatának platformján (YouTube-on) meg akarja hallgatni Dvořák IX. „Új világ" szimfóniáját, nem kell megtanulnia a hosszú „url" kódot[16], mint a betárcsázós internet[17] korában. Helyette virtuálisan belép egy digitális államba (Google) egy webböngésző segítségével (Goog-

[12] A Bizottság közleménye az Európai Parlamentnek, a Tanácsnak, az Európai Gazdasági és Szociális Bizottságnak és a Régiók Bizottságának: Európai adatstratégia, 2020. 02. 19., https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:52020DC0066&from=EN (letöltés: 2023. 03. 17.).

[13] Az Európai Parlament és a Tanács rendelete az európai adatkormányzásról (2020/0340/EU, Adatkormányzási rendelet, EGT-vonatkozású szöveg), 2020. 11. 25., https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:52020PC0767&from=EN (letöltés: 2023. 03. 17.).

[14] P2B-rendelet (2. lj.); Firniksz Judit: Rangsorolás – Új szabályozási igény a platformok és az információs túlterheltség korában, Verseny és szabályozás, 2022, https://kti.krtk.hu/wp-content/uploads/2022/01/vesz2021_6-FirnikszJ.pdf (letöltés: 2023. 03. 21.), 2. lábjegyzet (166. oldal).

[15] Lina M. Khan: Amazon's Antitrust Paradox, The Yale Law Journal, 2017/126, https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf (letöltés: 2022. 11. 01.), 755.; Robert D. Atkinson – Michael R. Ward: The Flawed Analysis Underlying Calls for Antitrust Reform: Revisiting Lina Khan's "Amazon's Antitrust Paradox", Information Technology & Innovation Foundation, https://itif.org/publications/2023/03/01/flawed-analysis-underlying-calls-for-antitrust-reform-revisiting-lina-khans-amazons-antitrust-paradox/, 2023. 03. 01. (letöltés dátuma: 2023. 03. 21.).

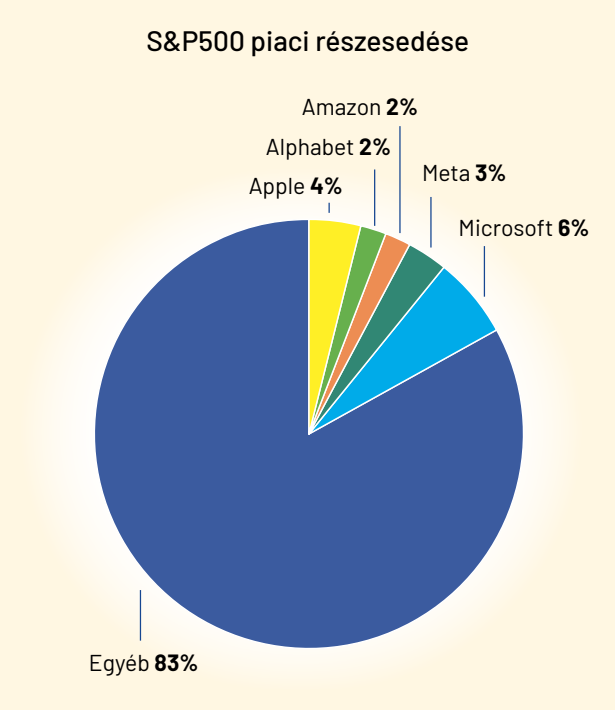
[16] Antonín Dvořák: IX. szimfónia „Az Új Világból" (Herbert von Karajan vezényletével). Url: (Letöltve: 2022.11.01.).

[17] 1996-ban a keresőszolgáltatások előtt úgy lehetett használni az internetet, ha valaki fejből tudta a weboldalak címeit, mert nem volt kapcsolódási pont, ami összekösse a keresés tárgyát a releváns találatokkal.

le Chrome), ahol az adatait mint egy államhatáron, „elkérik ellenőrzésre és dokumentálják” (datafikáció, adatosítás). A keresőszolgáltatás (Google Search) mint digitális autópálya a YouTube-hoz vezeti, ahol ugyancsak a keresőbe írja be az *új világ* szókapcsolatot, és csupán a keresési találatok közül kell kiválasztania az előadást.

A Google mesterséges intelligencia alapú keresője azért tudja biztosítani a folyamatos, egyre pontosabban szűrt találati eredményeket, mert a felhasználók az állandó használattal egyre több keresési szokás tapasztalatával gazdagították a felületet. A mesterséges intelligencia működésére érdekes megközelítést nyújt a Barabási Albert-László által kidolgozott hálózatelmélet[18], amely szerint a Google keresőjéhez hasonló csomópontok nélkül az internet újra kereshetetlen lexikonná válna.[19]

A digitális állami minőségért nagyon kevés vállalat tud versenybe szállni, és még szűkebb kör mondhatja tartósan magáénak. A globális piacnak köszönhetően az USA-hoz hasonlóan a piacvezetők Európában is nagyrészt a GAFAM[20]-ból, vagy hálózataikból kerülnek ki. Legismertebb akvizíciói: Google: YouTube, Motorola; Amazon: Warner Bros., Twitch; Facebook: Instagram, WhatsApp; Apple: Shazam, Siri; Microsoft: LinkedIn, Skype, Hotmail. A verseny torzításának megakadályozása vajon abban az esetben is működhet, ha fennáll a digitális államok piacvezető paradoxona? Egy tavalyi felmérés szerint Franciaországban pl. 1028 válaszadó 69%-a érezte úgy, hogy alternatívák hiányában kénytelen a GAFAM cégek szolgáltatásait igénybe venni, de amikor pl. a konkurens DuckDuckGo keresőszolgáltatás piaci részesedését elemezték, Franciaország csupán 0,6%-a volt rendszeres használója, ahogy a norvég Telenor által fejlesztett Opera keresőszolgáltatásnak is 4% alatti az uniós forgalma.[21]



1. ábra: GAFAM S&P 500 tőzsdeindex szerinti piaci részesedése

A felmérésből következtetni lehet arra, hogy bár a kutatásban részt vevő személyek túlnyomó többségének van választási lehetősége, mégis inkább a kényelmet és a rövidtávú megtérülést helyezik előtérbe választásaik során. Nem fognak áttérni a már eleve magas színvonalon működő keresőszolgáltatásról egy jelen állapotban gyengébb fejlesztésre még akkor sem, ha az a feltörekvő vállalkozás európai bázisú és nagy számú felhasználó segítségével jelenthetne valós konkurenciát a piacvezető számára.

3.1. Az adatosítás problémája

A keresőszolgáltatás a felhasználók adataiból tanulva fejlődik. Ebből következik a datafikáció paradoxona, azaz minél kevésbé dokumentálja az adatainkat egy digitális állam, annál kevésbé lesz biztonságos a szolgáltatása a jó információk meg-

[18] Barabási Albert-László: *Behálózva – A hálózatok új tudománya.* (Budapest, Open Books, 2022) 331.

[19] Ibid. 130.; 56.

[20] Az S&P 500 az USA-ban tőzsdén jegyzett 500 nagyvállalat részvényeinek teljesítményét követi nyomon, amelynek jelenleg 17%-át a GAFAM teszi ki.

[21] Statista: Do you personally feel that you are forced to use the services GAFAM companies due tot he lack of alternatives from other countries, especially from Europe?, 2021. 04., online felmérés (CAWI), résztvevők száma: 1028 fő, https://www.statista.com/statistics/1233549/expectation-level-french-web-users-personal-data-storage-by-sector/ (letöltés: 2022. 11. 01.); Statista: Search engine market share of DuckDuckGo from July 2019 to March 2023, by selected regions and countries, 2021. 09., https://www.statista.com/statistics/1220046/duckduckgo-search-engine-market-share-by-region/ (letöltés: 2022. 11. 01.).

találása szempontjából. Az adatbázisok értékével pedig egyre több entitás van tisztában.[22]

A Facebook például a felhasználók közvetlen és közvetett aktivitásából származó adatait arra használja, hogy minél személyre szabottabb hirdetések jelenjenek meg a felhasználó felületén. Ezeket a felhasználói analitikákat aztán továbbértékesíti az üzleti felhasználók számára, így származik bevétele az önként és ingyenesen megosztott felhasználói adatokból és a böngészési szokásokból. Így már érthető, miért volt félreérthető állítás a Facebook részéről a magyarországi indulásától, 2010. január 1-től használt „ingyenes és az is marad" kampányszlogen. A Gazdasági Versenyhivatal („GVH") 2016-ban vizsgálatot indított a megtévesztő kereskedelmi gyakorlat ellen,[23] ami 2019 augusztus 12-ig a nyitóoldalán, október 23-ig pedig már csak a súgóközpontjában hirdette a szolgáltatás ellenérték nélküli korlátlan használhatóságát. A szlogen ugyan a pénzbeli ingyenességre utalt, de az adatok értékéről hallgatott, ami legalább akkora, ha nem nagyobb értékkel bír, mint egy előfizetés. A GVH nem adatvédelmi kérdést vizsgált, hanem fogyasztóvédelmi hatáskörében eljárva a fogyasztók megtévesztésére alkalmas üzleti kommunikáció oldaláról közelítette meg a problémát.

A jövőre nézve kérdés marad, hogy az ingyenesség vajon csupán pénzbeli értékben lesz mérhető, avagy eljut a digitális gazdaság arra a pontra, hogy az adat mint – akár fizetőeszköz – belép a közvélekedés tudatába, megváltoztatva ezzel az eddig ismert valutákról alkotott elképzeléseinket.

3.2. A játékelmélet hatékonysága a digitális piacok szabályozásában

Az ausztrál versenyhatóság 2019-ben tette közzé a Digitális piacok vizsgálatáról[24] szóló tanulmányát, amelyben nem csak saját hatáskörébe tartozó ügyeket elemzett, hanem számos európai példát is figyelembe vett álláspontjának kialakításához. Az ausztrál jogalkotó 2021-ben végül egy játékelméleten alapuló szabályozást alkotott meg a kompromisszum kikényszerítésére[25], amivel sikeresen lépett fel a digitális platformok ellen.

A szabályozást[26] a Google, a YouTube és a Facebook üzleti felhasználókkal kötött hirdetéseinél tanúsított egyoldalú árszabási gyakorlat indukálta. A játékelméletre közvetlenül nem hivatkozik ugyan a jogalkotó, de struktúrájából tisztán lehet érezni a magyar gyökerekkel is rendelkező elmélet[27] hatását. Ennek nyomán Ausztráliában, ha egy üzleti felhasználó hirdetést szeretne közzétenni a platformon, első lépésként tárgyalási lehetőséget kell kapnia az egyoldalú szerződési feltételek helyett. A tárgyalás során csak olyan szerződés kerülhet rögzítésre, amely az üzleti felhasználóra nézve kedvező feltételeket biztosít. A játékelmélet szerinti szabályozás lényege, hogy amennyiben nem sikerül a tárgyalás során kedvező ajánlatot kicsikarni a befolyással rendelkező platformtól, akkor a szerződéskötés már nem a platform és az üzleti felhasználó között fog megkötttetni. Ilyen esetben automatikusan belép a jogviszonyba egy külső, mindkét féltől független szervezet, aki egy pénzügyi oldalt is rendező szabályozási csomagot állapít meg a felek számára. Ez készteti a platformokat az előzetes megállapodásra, amely még így is előnyösebb kimenetelű lehet, mint a második szcenárió, amely

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[22] Például a 45/2014. (II. 26.) Kormányrendelet a fogyasztó és a vállalkozás közötti szerződések részletes szabályairól, https://net.jogtar.hu/jogszabaly?docid=a1400045.kor (letöltés: 2022. 11. 01.), (1a).

[23] A GVH VJ/85/2016. számú ügye (Facebook-ügy).

[24] Australian Competition & Consumer Commission: Digital Platforms Inquiry. Final report, 2019, https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf (letöltés: 2022. 11. 01.).

[25] A kompromisszum kikényszerítése a legmegfelelőbb kifejezés az ausztrál játékelméleten alapuló szabályozás jellemzésére. Ha ugyanis az egyik fél nem akar kompromisszumot kötni, nagyobb veszteség kilátásba helyezésével rá lesz kényszerítve a nem kötelező, de hasznos önkéntes kompromisszumkötésre.

[26] The Parliament of the Commonwealth of Australia, House of Representatives: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021. A Bill for an Act to amend the Competition and Consumer Act 2010 in relation to digital platforms, and for related purposes, 2021. 03. 02., https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf;fileType=application%2Fpdf (letöltés: 2023. 03. 21.).

[27] Kóczy Á. László: A Neumann-féle játékelmélet, Közgazdasági Szemle, 2006/LIII., http://epa.oszk.hu/00000/00017/00122/pdf/02koczy.pdf (letöltés. 2022. 11. 01.), 31–45.

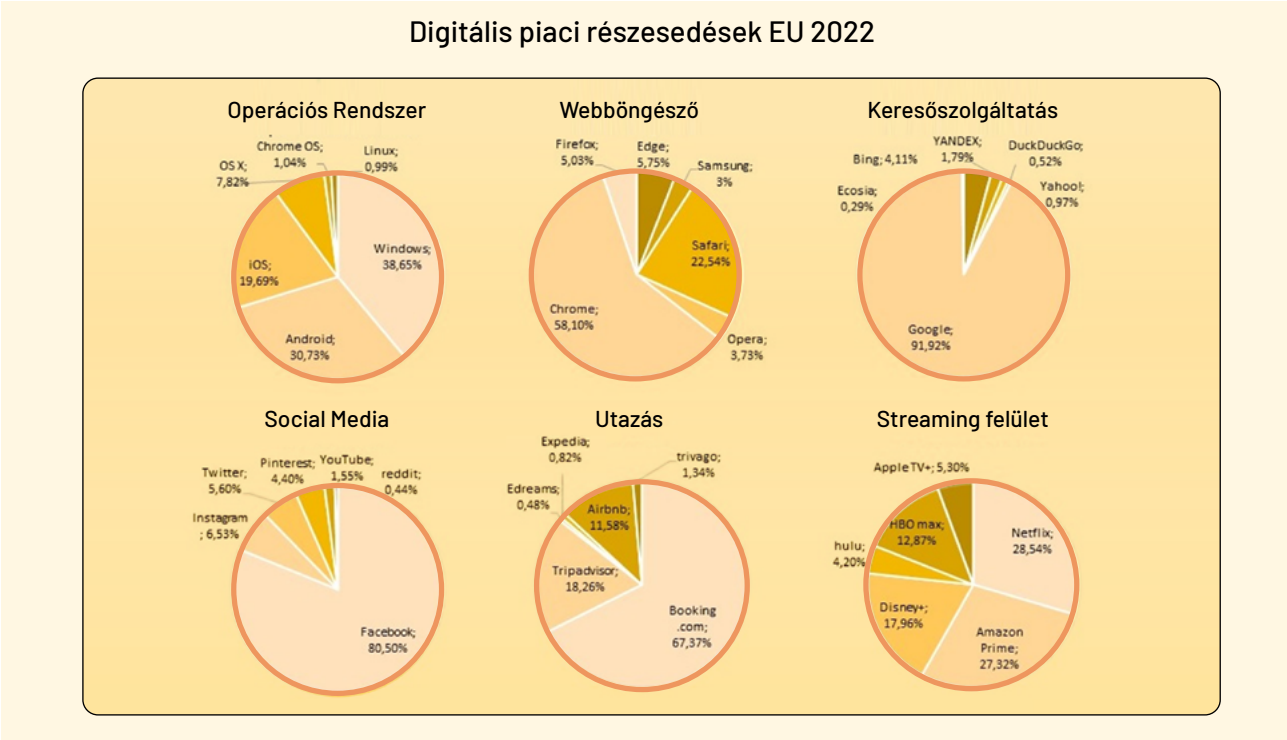
során egyiküknek sem lenne joga a feltételek utólagos átalakítására.[28]

A piacvezető platformok és a játékelméleten alapuló szabályozási lehetőségek működő és sikeres dinamikája talán az egyik leghatékonyabb módja a digitális piaci szereplők tisztességes keretek között tartásának.

3.2.1. A digitális piacok meghatározása

A legtöbb kapuőr jelölt erőfölénnyel rendelkezik a digitális piacon, de a szektorok elválasztása, vagy a bevétel és az erőfölény közötti párhuzam szerinti szabályozás közel sem lenne olyan hatékony mint a kapuőr jelöltek digitális államként kezelése.

A diagramokon feltüntetett piacok a vállalkozások bevétele és az általuk üzemeltetett online platformok látogatottsága szerint kerültek összeállításra, aminek a listája még így sem fedi teljes mértékben az uniós digitális piaci helyzetet.[29]



2. ábra: SimilarWeb Ltd. https://www.similarweb.com/corp/research/ (Adatok utolsó frissítésének dátuma: 2022.11.01.)

Az operációs rendszerek közül pl. az összehasonlítás a laptop-telefon-táblagép hármas rendszerére épült, de más piaci erőviszonyok rajzolódnának ki, ha csak a telefonon használt szoftvereket vennénk figyelembe.

A DMA viszont a tagállami kapuőr jelöltek helyzetéről nem rendelkezik, ami ugyan nem akad fenn az unió rostáján, de egy tagállami digitális piacon jelentős versenytorzító erőfölénnyel rendelkezhet.

4. Tagállami ex ante hatáskör a tagállami kapuőrökkel szemben

Jó eséllyel tagállami kapuőrnek minősülhetne pl. a GVH által 2021-ben vizsgálat alá vont Adevinta Classified Media Hungary Kft. az általa üzemeltetett használtautó.hu és jófogás.hu platformok miatt.[30] A GVH-hoz számos bejelentés érkezett 2021-et megelőzően is, amelyben a felhasználók, azaz a használtautó-kereskedők a számukra előny-

[28] Saheli Roy Choudhury: Facebook cuts deal with Australia, will restore news pages in the coming days, 2021. 02. 22., CNBC, https://www.cnbc.com/2021/02/23/facebook-to-restore-news-pages-for-australian-users-in-coming-days.html (letöltés: 2022. 11. 01.).

[29] Piacelemzés nyilvánosan elérhető pénzügyi beszámolók és a SimilarWeb Ltd. adatai alapján, https://www.similarweb.com/corp/research/ (az adatok utolsó frissítésének dátuma: 2022. 11. 01.).

[30] A Gazdasági Versenyhivatal VJ/35/2021. számú ügye (Adevinta-ügy).

telen kedvezmény- és szolgáltatásrendszert kifogásolták.

A potenciális versenykorlátozó magatartás ellen azonban a DMA-hoz hasonló ex ante hatáskör hiánya miatt a klasszikus ex post szabályozás nem volt alkalmas arra, hogy a GVH a jogsértő erőfölény kialakulását megakadályozza, ezért csak az erőfölény kiépülése után, 2021-ben tudta megindítani versenyfelügyeleti eljárását, amikor már rendelkezésre álltak a szükséges információk a piacelemzés lefolytatásához.

Pedig nem lenne idegen a magyar jogalkotó számára sem az ex ante hatáskör bevezetése a GVH részére. A 2005. évi CLXIV. törvény a kereskedelemről („Kertv.") tartalmaz egy analógiát a DMA 3. cikkének (2) bekezdése szerinti kvantitatív küszöbszámok alapján történő erőfölény ex ante meghatározását illetően. A Kertv. 7. § (3) bekezdése ugyanis így fogalmaz: „*A jelentős piaci erő fennáll a beszállítóval szemben, ha az adott vállalatcsoport – ideértve a számvitelről szóló 2000. évi C. törvény szerinti anya- és leányvállalatok összességét, közös beszerzés esetén pedig a beszerzési szövetséget alkotó vállalkozások összességét – kereskedelmi tevékenységéből származó előző évi konszolidált nettó árbevétele meghaladja a 100 milliárd forintot.*"

Ezen kívül a (4) bekezdés egy kapuőr jelöltekre hajazó passzust tartalmaz: „*A (3) bekezdésben meghatározottakon kívül akkor is fennáll a kereskedő jelentős piaci ereje, ha a piac struktúrája, a piacra lépési korlátok léte, a vállalkozás piaci részesedése, pénzügyi ereje és egyéb erőforrásai, kereskedelmi hálózatának kiterjedtsége, üzleteinek mérete és elhelyezkedése, kereskedelmi és egyéb tevékenységeinek összessége alapján a kereskedő vállalkozás, vállalatcsoport, illetve beszerzési szövetség a beszállítóval szemben egyoldalúan előnyös alkuhelyzetben van vagy abba kerül.*"

Jó példával szolgálhat az ex ante tagállami szabályozás bevezetésére az Egyesült Királyság szabályozási struktúrája, ahol a kapuőri státusz helyett a stratégiai piaci helyzetű platformok fogalma került bevezetésre. Az uniós szabályozással összevetve eltérő az uniós gondolkodás a kapuőr kategória meghatározását illetően. Ebben az esetben nem egy univerzális szabályozással szembesülnek az érintett kapuőr jelöltek, hanem minden stratégiai piaci helyzetben lévő vállalkozás egy platformra szabott magatartási kódex szerint kell megfelelnie a kötelezettségeknek, ami lehetőséget nyújt a tagállamoknak minden egyedi eset önálló értékelésére és a hatékony, de igazságos magatartási kötelezettségek kialakítására.[31]

A hazai Kertv. 7. § (5) bekezdése is tartalmaz egy hasonló állítást, azonban itt egy önszabályozó etikai kódex megalkotására kötelesek a vállalkozások a beszállítók javára, amiben nem csupán a kötelezettségek, a szankciók, azaz az abban foglaltak megsértése esetén alkalmazandó eljárásrend kialakítására is kötelesek.

4.1. A fordított bizonyítási teher követendő példája

Németország is iránymutató példával járt a Parlament és a Tanács előtt a digitális platformok szabályozása kapcsán, ugyanis egy hibrid versenyjogi modellt alkalmaz, fordított bizonyítási teherrel.[32] Ez azt jelenti, hogy amíg az uniós szabályozás érvényesíti az általa kirótt kötelezettségeket és minősíti a vállalkozást, addig Németországban a versenyhatóság egy megdönthető vélelmet állít fel, amit a vállalkozásnak lehetősége van megcáfolni, majd a hatóság ez alapján végzi el a vállalkozás minősítését. Az értékelés során szempont pl. a vállalkozás egy vagy több piacot érintő befolyásának nagysága, pénzügyi és egyéb forrásainak minősége, a vállalkozás vertikális integrációja és más kapcsolódó piaci tevékenységeinek befolyása, a versenyjogilag releváns adatokhoz való hozzáférésének szintje és a közvetítői jogköri minősége is. Németország az ausztrál szabályozással egy időben, 2021-ben vezette be a versenyjogi digitalizációs törvényét, így példaként szolgálhatott az uniós rendeletek megalkotásához.

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[31] Anne C. Witt: Platform regulation in Europe – per se rules to the rescue?, Journal of Competition Law & Economics, 2022/18, https://deliverypdf.ssrn.com/delivery.php?ID=592098125026001087117083106067124025031062030036027094096097120077111113023126125022002118044037105004117018026004028117120112026048010030044101007079011094074029103034086015093094072064102087024114116101000125010119105006094112019120025077097029069025&EXT=pdf&INDEX=TRUE (letöltés: 2022. 11. 01.).

[32] A német versenytörvény, a Gesetz gegen Wettbewerbsbeschränkungen, 1998. 08. 26., https://www.gesetze-im-internet.de/gwb/ (letöltés: 2022. 11. 01.), 19a szakasza.

Két követendő különbség maradt a DMA szabályozásának ellenpólusaként. A német szabályozás az előzetes tilalmak előírását a kapuőr jelölteknek címezte, tehát azoknak, akik még nem bizonyítottan erőfölényes vállalkozásoknak számítanak. Így könnyebben meghatározható a digitális piaci szereplők számára is a rendelkezés hatósugara és alanyi köre. A német jogalkotó kapuőr jelölt alanyát az a deklaratív végzés hozza létre, amely kimondja, hogy a kapuőrnek „piacokon átívelő kiemelt jelentőségűnek" kell lennie.

A német és az angol szabályozás is tartalmaz egy közös pontot, ugyanis a DMA éves, illetve két éves felülvizsgálati időintervallumától eltérő határidővel dolgoznak. Mindkét esetben öt éves felülvizsgálati időtartam áll a hatóságok rendelkezésére.

5. A kapuőr jelöltek tagállami precedensei

Kérdéses marad a német Facebook-ügy tagállami ítélete is, amely jelenleg uniós előzetes döntéshozatali eljárás alatt áll, és valószínűleg a DMA szabályainak alkalmazása előtt nem fog ítélet születni a kérdésben.[33] A 2016-ban indult versenyfelügyeleti eljárás során a német versenyhatóság, a Bundeskartellamt a Facebook, az Instagram és a WhatsApp gyakorlatát vizsgálta, ugyanis a platformok sértették a végfelhasználók információs önrendelkezéshez fűződő jogát.

Utólag elemezve a Bundeskartellamt ítélet nem kezelte a mára Meta néven működő Facebook problémás összefonódásait, ugyanis a WhatsApp felvásárlásakor azt a megalapozatlan információt szolgáltatta a Bizottságnak, hogy nem integrálhatóak a WhatsApp-ról származó személyes adatok a Facebook profilképzési metodikájába. Utólag természetesen kiderült, hogy a közös profilalkotásnak nincsen akadálya, így ugyan bírságot ki tudtak szabni, de a fúzió végbement.

A DMA szabályozásában tehát fő kérdés lesz a tagállami kapuőrök szabályozási környezetének kialakítása mellett a tagállami ügyek átadási útjának tisztázása is, hiszen az unió hatáskörébe vonta ugyan az uniós digitális piacot érintő kapuőr jelölteket, azonban a jelenleg is folyó vizsgálatok irányát nem rendezte. Ez nem csupán hatásköri rendezetlenséget okozhat, hanem a párhuzamos eljárások miatt sértheti a *ne bis in idem,* azaz a kétszeres ítélkezésből fakadó kettős szankcionálás tilalmát is.

6. A digitális piac sebességének hatása a jogalkotásra

A tagállami kapuőrök helyzete és az uniós méretű kapuőrök ellen folyó ügyek átadási útjának tisztázása mellett a szűk határidő indikálja a következő kérdést, ami a Bizottság DMA alapján folytatott eljárásainak várható időtartamával kapcsolatos. A jogalkalmazók piaci változásokra adott gyors reakciója kulcskérdés lesz a jövőben, érdemes ezért a hatóságok reakciójának sebességére nagyobb figyelmet fordítani.

6.1. A felfüggesztett kapuőrök kivételes státusza

Az ex ante hatáskörön, a felmentett kapuőrök játékelméletszerű szabályozásán és az ideiglenes intézkedésen felül rendelkezésre áll még egy lehetőség a DMA-ban a digitális piacok szereplőivel szemben hatékonyabb fellépésre. A DMA a kapuőrök és a felmentett kapuőrök mellett harmadik alanyi körként a felfüggesztett kapuőrökről rendelkezik.

A felfüggesztett kapuőri státusz akkor jelenik meg, ha a kapuőr jelölt igazolni tudja, hogy a megfelelés rajta kívül álló rendkívüli körülmények miatt veszélyeztetné a fennmaradását, gazdasági életképességét az Európai Unióban. Ezt nevezi a DMA 9. cikke felfüggesztő határozatnak. A DMA a kötelezettségek teljesítésének felfüggesztését csak olyan mértékben és időre engedélyezi, amennyire feltétlenül szükséges a kapuőr fennmaradását fenyegető veszély elhárításához. A Bizottság DMA szerint hozott felfüggesztő határozatát az engedményt megalapozó rendkívüli körülmények azonosításával indokolja.

[33] B6-22/16 Facebook-ügy; Bundeskartellamt prohibits Facebook from combining user data from different sources – Background information on the Bundeskartellamt's Facebook proceeding, 2019. 02. 07., https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6 (letöltés: 2022. 11. 01.).

6.1.1. A felfüggesztő határozat reakciósebessége

Azok a platformok, amelyek megkapják ezt az engedményt, éves felülvizsgálat alá esnek a felfüggesztés követelményeinek fennállása vonatkozásában. Ha ez a vizsgálat nem erősíti meg a felfüggesztés további fenntartásának szükségét, akkor átminősülhetnek kapuőrnek. A DMA a felfüggesztés meghozatalára a hiánytalan, indokolással ellátott kérelem kézhezvételétől számított három hónapot jelöl ki. Ez a határidő azonban nem köti a Bizottságot. A jogalkotó úgy fogalmaz, hogy „a Bizottság törekszik arra", hogy a végrehajtási aktust haladéktalanul, de legkésőbb három hónap alatt zárja le. A felfüggesztés három hónapos eljárási határidőre törekvésén túl a DMA tartalmaz egy sürgős esetekben alkalmazható rövidített eljárási lépést is.

A Bizottság a kapuőr indokolt kérésére ugyanis ideiglenesen felfüggesztheti valamely kötelezettség alapvető platformszolgáltatásra történő alkalmazását, már a felfüggesztő határozat meghozatala előtt. Ilyen kérelem bármikor benyújtható és teljesíthető a Bizottság értékeléséig. A kérelem előrevetíti a Parlament és a Tanács hajlandóságát az azonnali piaci reakciókra, amelyre nagy szükség van a digitális fejlődés ütemére tekintettel.

A felfüggesztés elbírálása előtt a Bizottság valószínűsíthetően nem fog kapuőrökre vonatkozó kötelezettségek megszegéséből fakadó jogsértést megállapítani, viszont a felfüggesztési eljárás időtartama a Bizottság kapacitásának függvénye. Így vagy egy kihasználható hézag marad a korlátlan számmal kérhető ideiglenes felfüggesztések intézménye, vagy a Bizottságnak más tervei vannak az elbírálás reakciósebességének növelésére.

6.1.2. Az előzetes vizsgálat Bizottságra gyakorolt várható hatása

A DMA ráadásul a 8. cikk (3) bekezdésében rögzíti a megfelelésre irányuló előzetes vizsgálat lehetőségét is, ami a felfüggesztési minősítés lerövidítésére szolgál, tehát a jogalkotó egy további lehetőséget biztosított a beadható kérelmek számának felduzzasztására. A kapuőr jelölt felkérheti a Bizottságot, hogy előzetes vizsgálat keretén belül állapítsa meg, hogy azok az intézkedések, amelyeket a 6. és a 7. cikknek való megfelelés biztosítása érdekében végrehajtani szándékozik vagy már végrehajtott, elég hatékonyak-e a kritériumok betartásához. A Bizottság mérlegelési jogkörébe tartozik az ilyenfajta előzetes vizsgálat megindításának kérdése, de tekintettel kell lennie az egyenlő bánásmód, az arányosság és a megfelelő ügyintézés elvének követelményére.

Feltételezhető, hogy amint a Bizottság első ízben megadja az előzetes vizsgálat lehetőségét, úgy további esetekben is nagyobb valószínűséggel tarthatnak rá igényt. Felmerül emellett még annak a kifogásnak a lehetősége, hogy amennyiben egy kapuőr jelölt csupán látszólag tesz lépéseket a szankciók betartása érdekében, de hatását tekintve nem éri el a hatóság által kívánt eredményt, úgy a jogsértés következménye elkerülhető lesz-e azzal az indokkal, hogy a Bizottság még nem bírálta el az előzetes vizsgálatra, vagy az ideiglenes felfüggesztésre vonatkozó kérelmét, ezáltal a jogsértés ténye nem volt nyilvánvaló a vállalkozás számára.

6.2. A DMA többletkötelezettségeire adott tagállami reakciók

A DMA hatálybalépését követő időszakkal kapcsolatban még kialakulóban van a nemzeti versenyhatóságok álláspontja, de jelenleg az az általános vélemény, hogy a DMA nem jelent majd teljesíthetetlen többletkötelezettséget nemzeti hatáskörben, mert a jelen szabályozási környezet nagyrészt megegyezik a DMA által vallott célokkal, és nem láthatók olyan törekvések, amelyek a felügyeleti feladatokat nemzeti hatáskörbe akarnák delegálni.

6.2.1. Fragmentált vagy együttműködő digitális piacok feletti őrködés?

Ezáltal viszont joggal merül fel az a kérdés, hogy a Bizottság hatáskörében tartott jogalkalmazási aktusok megvalósítására tervez-e az uniós hatóság felállítani egy, az International Competition Networkhöz („ICN", versenyhatóságok nemzetközi hálózata) vagy az Organisation for Economic Co-operation and Developmenthez („OECD", gazdasági együttműködési és fejlesztési szervezet) hasonló külön szervezeti egységet, vagy egy nem intézményesített versenyhatóságok közötti együttműködést. Az ICN a versenyhatóságok informális

nemzetközi együttműködésének színtere. A 2001 októbere óta működő hálózatot 14 joghatóság alá tartozó versenyhatóság alapította, amelyhez a GVH 2002 januárjában csatlakozott.[34]

Az OECD pedig a tagországok versenyhatóságainak tevékenységét fogja össze a Competition Committee-ben, azaz a Versenybizottságában, valamint két további munkacsoportjában.[35] A szervezet az aktuális szakmai kérdéseket kerekasztalok és meghallgatások formájában vitatja meg a tagállami versenyhatóságok tapasztalatai nyomán, a jelentősebb versenypolitikai kérdésekkel kapcsolatban pedig ajánlásokat vagy követendő joggyakorlatokat tesz közzé.[36]

Nemzetközi együttműködés hiányában túlterheltséget jelenthet majd a Bizottság számára, ha a kapuőr jelöltek felfüggesztésre és előzetes vizsgálatra vonatkozó kérelmei sorra érkeznek meg az uniós versenyhatósághoz, főleg, ha a vizsgálat kezdeményezése esetleg felmentési okot is eredményezhet az esetleges jogsértések szankcionálására. Erre vonatkozó kérdéseinkre a DMA alkalmazásának első éveiben választ fogunk kapni.

7. A kapuőrök árnyékában megbúvó konklúzió

A DMA által teremtett új alanyi struktúráról összegzően elmondható, hogy a kapuőri minősítés közel sem vált olyan egyértelművé, mint az elsőre várható lett volna, aminek oka a digitális világ fogalmi zavaraiból adódik.

Alkalmazhatóbbá válna a szabályozás a valóban használt kapuőr jelölt fogalom megnevezésével – amelyre a tanulmányban megnevezett digitális állam fogalma lenne helyénvaló – és a jelenlegi kapuőr fogalmának a felmentett és a felfüggesztett kapuőri minősítések mellé helyezésével, amit a jogszabály struktúrája valóban alá is támaszt.

A jelen állapot fenntartása esetén a digitális vállalkozások nem feltétlenül tudják majd önállóan eldönteni a szabályozás rájuk eső szegmensét, ami érthető, hiszen a kötelezettségek listája a gyakorlatban többféleképpen értelmezhető.

Az értelmezési különbségek peres eljárások tömkelegét vonhatják maguk után. Ezzel nem csak a Bizottság kapacitása telítődne, hanem egy olyan értelmezési lavinát indíthatna el, aminek köszönhetően a vállalkozások piaci helyzete és a szankcionálás állása eltávolodhat egymástól. A gyakorlatban ez azt jelenti, hogy amíg egy adott probléma vizsgálat alatt áll, a jogsértés megállapításáig a piac gyors fejlődése miatt a magatartás szankcionálása hatását veszítheti.

A Bizottságnak mindenekelőtt tisztáznia kell a jelenleg is folyó tagállami vizsgálatok átadási útját a *ne bis in idem* kettős szankcionálás tilalmának érvényesülése érdekében. Ezen felül útmutatást kell adnia a tagállami kapuőrökre vonatkozó egységes szabályozási struktúra kidolgozásához, amelyek a tagállamok kezébe is hasonló ex ante hatáskört kell adjanak a DMA-hoz hasonlóan.

A digitális stratégia fejlesztéséhez az uniós példákon túl érdemes folyamatos elemzés alá vetni a világ különböző pontjainak szabályozását is. Fejlődni ugyanis csak a folyamatos kérdések feltevésével lehet, hiszen a probléma feltárása és megfogalmazása az első lépés a megoldás felé.

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[34] GVH: ICN, 2006. 11. 27., https://www.gvh.hu/gvh/nemzetkozi_kapcsolatok/nemzetkozi_szervezetek/icn/4262_hu_icn (letöltés: 2022. 11. 01.).

[35] Working Party No.2: Competition and Regulation; Working Party No. 3 Co-operation and Enforcement.

[36] GVH: OECD, 2021. 05. 06., https://www.gvh.hu/gvh/nemzetkozi_kapcsolatok/nemzetkozi_szervezetek/oecd/oecd (letöltés: 2022. 11. 01.).