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All inquiries to:
Global Antitrust Review (GAR)
Interdisciplinary Centre for Competition Law and Policy (ICC)
67-69 Lincoln's Inn Fields London
WC2A 3JB United Kingdom
Tel: + 44 (0)207 882 8122
Fax: + 44 (0)207 882 8223
Email: gar-icc@qmul.ac.uk
www.icc.qmul.ac.uk

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EDITORIAL MESSAGE

In line with the GAR's commitment to provide a forum for academic debate on matters of international competition law and policy, the 2021 volume consists of contributions discussing a diverse selection of prominent and controversial topics.

This volume has two interesting articles. The first article assesses the potential for the EU leniency regime's success against the advancing anticompetitive techniques of cartels and concludes that the EU leniency policy should be complemented by increased screening and awareness programmes to ensure the Commission is proactive in destabilising cartels of all scales and durations. The second article posits that EU Competition Law may have an untapped potential for the regulation of media conglomerates and the protection of media plurality in general. While it acknowledges that such an approach is not the perfect solution to such a complex matter, it believes that research into the area may provide a deeper understanding of the problem and offer novel, and often overlooked, solutions that require little legal reconstruction.

The journal is also complemented by two enlightening essays. The first essay examines the Competition Commission of India's approach towards the conduct of WhatsApp in comparison with other domestic regulators and identifies the most plausible course of action for the regulation of Big Tech's activities. The second essay delves into the relevant factors in digital platforms of app stores that amounts to the pricing abuses of margin squeeze, excessive pricing and discriminatory pricing, and analyses these factors constituting the abuses against the conduct of dominant app stores in question.

As always, we would like to specifically thank Professor Eyad Maher Dabbah, the director of the ICC, for his time, guidance and endless support.

We hope you will enjoy this volume, and we already look forward to receiving excellent contributions from all interested young scholars for the next one.

Editors

December 2021

AN ASSESSMENT OF THE EU LENIENCY POLICY AND THE FUTURE DIRECTION OF CARTEL COMBAT

Sally MacDonald[*]

This article assesses the potential for the EU leniency regime's success against the advancing anticompetitive techniques of cartels. The impact of leniency on detection and deterrence of cartel activity is examined, and the issues and inadequacies of leniency are dissected. Drawing comparisons with the US Corporate Leniency Policy, this article finds strengths and weaknesses in both leniency programmes and analyses the effectiveness of other mechanisms used to fight cartel activity. It is submitted that leniency is excessively relied upon by the European Commission and that the policy should be limited to a first-informant rule, with a second-informant exception. This restriction would restore the race to report whilst enabling all essential information to be gathered for a thorough investigation. Further, the EU leniency policy should be complemented by increased screening and awareness programmes to ensure the Commission is proactive in destabilising cartels of all scales and durations.

***Keywords**: Cartels, Informants, Leniency,*

[*] The author read for LL.M. in International Business Law at CCLS, Queen Mary, University of London. She can be reached at misssallymacdonald@gmail.com.

1. Introduction

The most harmful threat to competition, and the most difficult to detect, is the conduct of a cartel. A cartel agreement occurs in secret between rival firms through the exchange of sensitive information and the taking of certain actions so as not to compete in some way.[1] There is a rationale of self-protection underpinning the creation of cartels; competition in any form poses a threat and, often, a cartel is employed to block entry into the market or to impede product development. Preventing and prosecuting this type of activity is of the utmost importance to competition authorities, or else consumers will suffer the consequences. The fight against cartels originated with the Havana Charter of the World Trade Organisation, which attempted to establish global rules to control anticompetitive practices. The Charter was never signed, but aspects were incorporated into the General Agreement on Tariffs and Trade, which came into force in 1947. Today, the key piece of legislation criminalising cartel conduct in the EU is Article 101 of the Treaty on the Functioning of the European Union, which prohibits price-fixing, production restriction, market-sharing and collusive tendering. Discovering this conduct is aided tremendously by the Leniency Notice 2006, a crucial tool for the European Commission.

Leniency programmes have been instrumental in increasing the rate of cartel detection by rewarding cartel members or whistle-blowers for cooperating with the competition authority.[2] The ideal outcome of such a programme is the deterrence of firms forming cartels in the first place. To achieve success,

[1] A Heimler, 'Cartels in Public Procurement' (2012) 8 *Journal of Competition Law & Economics* 4, 849.

[2] European Commission, 'Cartels: Leniency' <https://ec.europa.eu/competition/cartels/leniency/leniency.html> accessed 11 February 2021.

strong sanctions are therefore a necessary component of an effective antitrust enforcement policy against hardcore cartels.[3] Fining firms for cartel conduct must be supplemented with punishments for individuals' participation in the conspiracy. These sanctions can take the form of substantial administrative fines or, in some countries, imprisonment. Thus, leniency provides cartelists with the opportunity to avoid being sanctioned by offering immunity and fine reductions.

Problems arise with leniency programmes when competition authorities fail to strike the right balance between incentivising self-reporting and punishing collusive behaviour. In the EU, there is an excessive use of leniency through the multiple-informant rule.[4] This contrasts with the regime in the United States, where only the first applicant receives leniency. Of course, with more informants comes more information, however this may be unnecessary and in lieu of proper investigation. The detriment is then that deterrence to cartelise decreases and the incentive to race to the Commission's door is reduced. Both the EU and the US are united in their difficulties resolving the private enforcement problem threatening a leniency policy's persuasiveness. In addition, with the advancements in technology, new techniques are bound to be used in cartel behaviour, endangering the viability of leniency policies. Leniency in the EU is arguably not sufficiently equipped to be able to adequately combat these problems and those on the horizon.

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[3] European Commission, 'Cartel Statistics' <https://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 11 February 2021.

[4] E Motchenkova and G Spagnolo, 'Leniency Programs in Antitrust: Practice vs Theory' (2019) Jan 1(2) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.

This article will first discuss the difficulties in detecting cartels and how leniency has a significant impact. The second chapter will focus more deeply on the regime in the EU before comparing with the functioning of leniency in the US. Weaknesses and prominent difficulties facing the EU leniency policy will be recognised and examined, with the final chapter of this article reflecting on how the policy can be adapted to secure its future success.

2. Cartels and Leniency

An agreement between competitors to fix prices, restrict supply, allocate markets or share sensitive information ultimately causes the greatest harm to consumers.[5] These types of agreements are the most outright anticompetitive behaviour, since they are direct agreements between competitors not to compete with each other. The agreements are horizontal, since they are between firms on the same level of the distribution chain. Some horizontal agreements can be beneficial to the industry and its consumers, for example a collaboration in research and development can reduce companies' costs, eventually resulting in lower prices to pay for consumers.[6] However, when a horizontal agreement distorts the market through its anticompetitive impact, the consumer can face unnecessary expense or unavailability of goods and services.[7] The firms to such an agreement constitute a cartel.

Cartels are highly difficult to uncover because they are essentially one big secret, often between multiple firms in an industry, and it is almost impossible

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[5] European Commission, 'Cartels: Overview' <https://ec.europa.eu/competition/cartels/overview/index_en.html> accessed 11 February 2021.

[6] European Commission, 'Antitrust: Horizontal cooperation agreements' <https://ec.europa.eu/competition/antitrust/legislation/horizontal.html> accessed 23 February 2021.

[7] European Commission (n 5).

for a consumer to detect their existence.[8] They often have long durations, sometimes spanning decades, with members entering and exiting. Competition authorities place a top priority on prohibiting hardcore cartels and must assess whether an agreement is pro- or anti-competitive. Cartels are complex, so finding evidence for each individual agreement or practice can be extremely burdensome, especially since evidence is often destroyed and paper trails are limited through the making of agreements orally.[9] As a result, national competition authorities (NCAs) must innovate and utilise various techniques and mechanisms in their pursuit to detect and prosecute cartelists. In the European Union, the European Commission uses the concept of a single overall agreement in prosecuting cartel members to combat the issue of cartel complexity. A joint classification can coordinate a collection of agreements and practices. For example, in *Polypropylene*, the cartel involved fifteen firms over many years. It did not matter that not every member attended every meeting, only that there was participation in the overall agreement.[10] Competition authorities have also recognised that cartels are 'inherently unstable' because the potential gains of cheating on an agreement are major.[11] This weakness has been exploited over the last few decades by NCAs around the world in the development of leniency policies.

2.1 The Importance of Leniency

Crimes are generally reported by the victims; it is not often that the perpetrator turns themselves in. But when it comes to cartels, the victims are typically

[8] European Commission, 'Delivering for consumers: Anti-competitive agreements' <https://ec.europa.eu/competition/consumers/agreements_en.html> accessed 11 February 2021.
[9] A Chirita, 'The Judicial Review of the European Union Industrial Cartels' (2015) 4 *German Journal of European Legal Studies* 407.
[10] *Polypropylene* (Case IV/31.149) [1986] OJ L230/1; [1988] 4 CMLR 347.
[11] Heimler (n 1) 850.

unaware.[12] Consumers noticing a price rise will not necessarily attribute this to cartel conduct. Accordingly, the easiest and most effective way of a cartel being detected is through one of the members disclosing its existence. Enabling this self-reporting does not require vast resources to collect data for analysts to sift through in search of a needle in a haystack. Instead, disclosure by a cartel member can be encouraged through leniency policies. Leniency policies provide a beneficial mechanism for both sides: in exchange for information and cooperation with competition authorities, cartel members are given immunity or reduced fines.[13] Generally, only the very first leniency applicants will receive the benefits, so the race to report is induced by the spreading of suspicion amongst the cartel members. There is practical destabilisation through a sort of domino effect, as members realise the cartel is likely to collapse and they want to pay the lowest fine possible, so the rush to step forward and apply for leniency begins. The result is a breaking down of the cartel, but also an increase in the information available for the competition authority's investigation, building a stronger case for successful prosecution.

Aside from the fundamental beneficial aspects, there are ancillary advantages that a firm can gain by applying for leniency.[14] One example of this is that a leniency application can be valuable to a firm's name and perception. The "coming clean" of applying for leniency and cooperating with the competition authority in the investigation can reduce the damage to a cartelist company's

[12] RM Abrantes-Metz and AD Metz, 'The Future of Cartel Deterrence and Detection' (2019) Jan 1(2) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.
[13] European Commission (n 2).
[14] OECD, 'Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels' <https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf> accessed 8 March 2021.

reputation, a consideration that is often underestimated. Consequently, leniency provides cartel members an effective way to exit the collusion.

2.1.1 The Impact of Leniency

The short- and long-term effects of leniency policies on cartel duration, both in terms of detection and destabilisation, have been widely researched. There is plenty of research to demonstrate the immediate rise in cartel discoveries after the implementation of a leniency policy leads to a flood of applications.[15] The reasoning behind the long-term impact of leniency is more debated and the reality is perhaps counterintuitive. If the number of detected cartels decreases in the long-term, it is questioned whether this demonstrates success or failure of the leniency policy. And if the average cartel duration increases, it is similarly suggested that this is not necessarily a sign of a failing programme.[16]

Borell, García, Jiménez and Ordóñez de Haro find that leniency policies have more success in the short-term, but present evidence that the decrease in discovery of cartels in the long-term is due to leniency's destabilisation and dissuasion effects.[17] For example, they demonstrate leniency policies to increase the average business executive's perception of the effectiveness of antitrust policies by an order of magnitude from 10 to 21 percent.[18] For this reason, Borrell et al describe leniency policies as 'weapons of mass

[15] JR Borrell, C García, JL Jiménez and JM Ordóñez de Haro, '25 Years of Leniency Programs: A Turning Point in Cartel Prosecution' (2019) Jan 1(2) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.
[16] JE Harrington and MH Chang, 'Modelling the birth and death of cartels with an application to evaluating competition policy' (2009) 7(6) *Journal of the European Economic Association* 1400.
[17] Borrell (n 15) 2.
[18] JR Borrell, JL Jiménez and C García, 'Evaluating antitrust leniency programs' (2014) 10(1) *Journal of Competition Law and Economics* 107.

dissuasion' for this increase in awareness, understanding and ultimate discouragement from conducting hardcore cartel activity. This then reflects in statistics as a gradual decline in the number of cartels uncovered years after leniency is introduced. Further, they find that the introduction of a policy often results in the uncovering of most cartels that have long gone undetected.[19] This means that the lifespan of the cartel is cut shorter from the introduction of leniency, demonstrating a short-term reduction in the average cartel duration, but a short-term increase in detection rates. Borrell et al also conclude that the sanctions imposed increased substantially with the introduction of leniency in the EU.[20]

Presenting a slightly different finding, Harrington and Chang use a model to demonstrate that the less stable cartels will immediately collapse when there is a change in policy that increases the probability of cartel conviction.[21] This means that, if a leniency policy is effective, then the average duration of a cartel increases and the likelihood of new cartels forming decreases in the short-term. The increase in duration is consequently because the weaker cartels cease to exist and are never discovered, but the cartels that do survive are the cartels that were and are stronger and more durable. This then shows in statistics as cartels having a higher average duration than in reality. However, Harrington and Chang also show that the average cartel duration can decrease in the long-term with the introduction of a leniency policy, since the more stable cartels will break up earlier than they would have without the presence of a leniency policy. Thus, they conclude that the long-term impact on duration is 'ambiguous'.[22] In comparison, Borrell et al conclude that the

[19] JM Ordóñez de Haro, JR Borrell and JL Jiménez, 'The European Commission's Fight against Cartels (1962-2014): A Retrospective and Forensic Analysis' (2018) 56(5) *Journal of Common Market Studies* 1087.
[20] Borrell (n 15) 8.
[21] Harrington (n 16).
[22] Borrell (n 15) 9.

long-term effect is a decrease in duration as compared to the duration of a cartel starting and ending before the introduction of a policy.

Regarding the effect of leniency policies on the revenue and profitability of a cartel, García observed data on Spanish firms, both cartelist and non-cartelist, from 1992-2014.[23] Her findings show that cartel activity increases a firm's revenues by an average of 19-26%, however there is little change to the firm's profit. Further, she discovered that, where the cartel lasted for 8 years or more, revenues increased by an average of 29-50% and profits increased by an average of 82-91.5%. This further confirms that only the strong and durable cartels see success. García then considered the impact of leniency policies on profitability and found that, where a member applied for leniency, the firms of the cartel had no increased revenues compared to non-cartelist firms. Where no member applied for leniency, the cartel had increased revenues in comparison. This could be because, where a firm does not incentivise its members with the increased profits, the members are more likely to blow the whistle. Or the reason could be that the leniency policy is effective in limiting a cartel's ability to overcharge. García also discovered that a firm is likely to last longer and unlikely to apply for leniency where the cartel has been profitable from the beginning,[24] further demonstrating that a robust cartel will outlast the fear induced by a leniency policy, meaning competition authorities must be proactive in deterring the birth of cartels and in detecting the most powerful cartel conduct.

In summation, this literature demonstrates that, broadly, the impact of leniency policies on weaker cartels is undeniably positive. The failing of

[23] C García, 'Cartelization: Is it worth it?' (PhD thesis, European University Institute 2018).
[24] ibid.

leniency policies surrounds the strong, sturdy and successful cartels. Generally, the effects of leniency become less clear-cut in the long-term and effective cartels can remain undiscovered.

3. Operation in the European Union

Cartel punishment provides billions to the EU budget and saves billions from leaving the pockets of consumers. The European Commission currently states that the highest fine it has imposed on a single firm was over €896 million, and the highest fine that has been imposed on all members of one single cartel was over €1.3 billion.[25] The Commission first introduced leniency in 1996, however this programme was revamped in 2002 and 2006. Between the first decision in 1998 and 2014, 94% of cases applied leniency. Further, in 70% of these cases the Commission's investigation was initiated by a leniency application. The number of sanctioned cartels increased significantly following the leniency policy's introduction, making it the Commission's most powerful tool for detecting and prosecuting cartels.[26] Cartel activity in the EU peaked during 1996, when approximately 47 active cartels were detected. Spikes in cartel detection reflect the introduction of leniency policies in 1996, 2002 and 2006. McGowan and Morgan explain that there should not be an expectation of increasing cartel decisions made by the Commission because this is unrealistic and does not align with a strong deterrent effect, as a successful programme should promote. Despite this, McGowan and Morgan demonstrate an improvement in the Commission's record of identifying and prosecuting since 2000.[27]

[25] European Commission (n 2).
[26] Borrell (n 15) 6.
[27] L McGowan and EJ Morgan, '"Today's Softness is Tomorrow's Nightmare": Intensifying the Fight against Cartels in Brussels and Bonn' (2012) 34(6) European Integration 603, 609.

3.1 Leniency Notice 2006

Cartels are defined under the Leniency Notice 2006 as 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour in the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors'.[28] However, this broad definition has further been confirmed to be non-exhaustive through its later incorporation into binding EU law under Article 2(14) of the Damages Directive 2014. In practice, the Commission has construed the definition so as to cover most secretive conduct by competitors to influence competition. For example, the definition included the exchange of reference prices in *Bananas*,[29] the coordinated timing for introducing new technologies in *Trucks*,[30] and the exchange of pricing intentions in *Smart Card Chips*.[31] Thus, it is demonstrable that the Commission has a developed case law recognising the evolving concept of a cartel to ensure all hardcore conduct can be captured.

To qualify for immunity or a fine reduction, a whistle-blower must meet certain requirements. This includes the cooperation requirement, as well as the termination of cartel involvement, unless the Commission states otherwise so as not to alert the other cartel members when inspections are pending. Further, the applicant must not have destroyed evidence in deciding

[28] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 (Leniency Notice), point (1).
[29] *Bananas* (Case COMP/39.188) [2009] OJ C189/12.
[30] *Trucks* (Case AT.39824) [2017] OJ C108/6.
[31] *Smart Card Chips* (Case AT.39574) [2017] OJ C27/17.

to apply for leniency. The whistle-blower must make a corporate statement containing key information such as names, positions, locations and descriptions of the cartel. This can be provided orally to avoid civil litigation problems. Absolute immunity is given to the first cartel member to blow the whistle.

There are also secondary benefits for the initial applicant to ensure their complete immunity. EU legislation protects immunity applicants from suffering any disadvantage in follow-on damages when compared with other cartelists. There is also protection granted to cooperative employees from criminal sanctions in any Member State. Beyond the initial immunity applicant, the Leniency Notice rewards further applicants in a cartel. Any member following the immunity applicant will be granted reductions in fines if they provide the investigation with further evidence of 'significant added value'. This caveat is essential to attempt to balance the discovery of a cartel against the genuine and appropriate punishment of its members. If the Commission has sufficient evidence for an inspection or decision, there is no benefit to be had by further members coming forward, so there is no need for any reward to be granted because there is no action to reward.

The first whistle-blower to follow the immunity applicant receives a 30-50% reduction, the second a 20-30% reduction, and any others up to 20% reductions. Most of the time in practice, a second whistle-blower (the first to follow the initial immunity applicant) will receive at least 40%, and commonly the highest possible reduction of 50%, as evidenced by the decisions of the Commission under the 2006 Fining Guidelines. Marvão and Spagnolo discovered a gradual increase in EU leniency reductions between 1998 and 2014, dubbed 'leniency inflation'.[32] For some years, increases on

[32] C Marvão and G Spagnolo, 'Should Price Fixers Finally Go to Prison? – Criminalization, Leniency Inflation and Whistleblower Rewards in the EU' (2018) <

reductions reached 60%, signifying perhaps excessive reliance on leniency and a reluctance to investigate, leading to reduced deterrence.

Companies have huge incentives to utilise leniency programmes upon discovering cartel activity, as savings can amount to billions, whether through complete immunity or reduced fines. For example, UBS AG saved €2.5 billion through immunity in *Yen Interest Rate Derivatives*,[33] MAN AG saved €1.2 billion in *Trucks*,[34] and Barclays saved €690 million in *Euro Interest Rate Derivatives*.[35] Further, an undertaking can receive another 10% reduction if they settle with the Commission. Regulation 622/2008 set up the settlement system to enable the faster resolution of investigations and prosecutions. A firm must admit liability and waive certain procedural rights to benefit from a 10% reduction on their final fine. The removal of procedural rights allows the Commission to remove certain procedural steps, saving time and money. The settlement mechanism implies a 'shorter, less detailed final decision' adopted and published by the Commission,[36] and is more suitable for a firm when most or all cartelists in the case have utilised leniency and cooperated. For example, in *Trucks*, companies saved a total of around €1.5 billion through applying for a fine reduction and cooperating with the investigation.[37] Of course, though, the settlement system is problematic for this reduction in fines and, as a consequence, a reduction in deterrence.[38]

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www.competitionpolicyinternational.com/should-price-fixers-finally-go-to-prison-criminalization-leniency-inflation-and-whistleblower-rewards-in-the-eu> accessed 10 August 2020.

[33] *Yen Interest Rate Derivatives* (Case AT.39861) [2017] OJ C305/10.

[34] *Trucks* (n 30).

[35] *Euro Interest Rate Derivatives* (Case AT.39914) [2019] OJ C130/11.

[36] A Papanikolaou, 'Leniency Will Remain an Essential Part of the EU's Cartel Enforcement Toolkit' (2019) Jan 1(2) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.

[37] *Trucks* (n 30).

[38] A Ascione and M Motta, 'Settlements in Cartel Cases' (2010) Munich Personal RePEc Archive Paper 24416 <https://mpra.ub.uni-muenchen.de/24416> accessed 20 August 2020.

Appeals from leniency applicants to the Commission on grounds of error have a success rate over 10%. In these cases, fine reductions have the chance of being increased further with seemingly very little risk of losing any leniency. Raising evidence of an applicant's great effort to cooperate is similarly successful.[39] Overall, the chance of a successful appeal is slim, but it seems worthwhile for a leniency applicant to consider submitting an appeal because of the much slimmer chance of suffering a loss.

3.1.1 Problems in Practice

Companies are disincentivised from coming forward through applying for leniency for multiple reasons, as raised by members of the private antitrust bar.[40] This includes uncertainty over whether the conduct is actually infringing competition law and, if so, whether such conduct is covered by the Leniency Notice. Papanikolaou, however, argues that antitrust lawyers have the ability to adequately advise clients on potential infringements, due to the substantial case law of the Commission in covering the developed concept of a cartel.[41] Moreover, this disincentive is also refuted by the existence of the Leniency Notice's permittance of hypothetical and anonymous applications. These applications can be submitted to the Commission for assessment to verify if the criteria for immunity would be met before any formal application is made.[42] Surprisingly, this sort of "draft" application is almost never used. It is unclear how, then, companies can complain of uncertainty when there is a mechanism in place to resolve any doubts.

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[39] PD Camesasca, J Ysewyn, T Weck and B Bowman, 'Cartel Appeals to the Court of Justice: The Song of the Sirens?' (2013) 4(3) Journal of European Competition Law & Practice 215, 218.
[40] Papanikolaou (n 36) 3.
[41] ibid 4.
[42] Leniency Notice, points (16)(b) and (19).

There are some doubts raised over whether a certain Member State would consider a leniency application differently to the Commission, but this concern is rectified by the European Competition Network (ECN) and the ECN+ Directive 2019/1. The Directive combats this uncertainty through clarifying the definition of a secret cartel and requiring all Member States to have immunity-granting and fine-reducing leniency policies in place for secret cartels. The main aim is to synchronise the concept for all ECN authorities and 'bring about a genuine common competition enforcement area' through the facilitation of enforcement tools.[43] Although the Directive allows NCAs to award leniency for other conduct, this broader scope should not discourage a leniency application for conduct appearing to be in the realm of a secret cartel.

Further, jurisdictional and case allocation issues are listed as discouraging for a company in coming forward to self-report. The Commission has always encouraged a company to send summary applications to each of the Member States involved when applying for leniency. The ECN+ Directive further emphasises this with the harmonisation of the leniency programmes among members. The acceptance of summary applications is reinforced by Article 22 of the Directive in cases where more than three Member States are concerned. Further, a full application cannot be required by a Member State if the Commission takes up the full case, and applications in other languages have a legal basis for acceptance. If the Commission passes all or part of the case to an NCA, the NCA can consider a full application if the applicant provides it within the time limit set by the NCA. This full application will then be considered as being made at the time of the summary application. Hence, the burden is placed on the applicant to remain vigilant and thorough

[43] European Commission, 'Antitrust: Empowering National Competition Authorities' <https://ec.europa.eu/competition/antitrust/nca.html> accessed 1 August 2020.

with their application and its scope. For example, in *Freight Forwarding*,[44] the applicant had first place for immunity under the Commission for rail and sea freight forwarding. However, the summary application for Italy did not mention road freight forwarding, so they missed out on a first-place position because another applicant had already applied under this sector. The provisions of the ECN+ Directive, particularly Article 22, provide a fair mechanism for members of cartels to be able to achieve leniency with less confusion than was previously the case. There is no handout of leniency and the process does not make it overly easy for the applicant, but the synchronisation simplifies and clarifies the steps an applicant must follow.

Another uncertainty that potentially disincentivises is the potential for national courts to bring criminal proceedings or for private damages actions to be sought. This concern is especially prevalent with the introduction of the Damages Directive 2014/104 and the caselaw recognition of cartel victims having the right to redress. Under Article 11(4), an immunity applicant is joint and severally liable 'to its direct or indirect purchasers or providers', and 'to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law'. Applying for leniency, of course, increases the likelihood of success for a private action, potentially jeopardising the purpose of leniency, outweighing its benefits with the risk of private damages. Critically, however, the Directive also explains that both settlement submissions and leniency statements cannot be ordered by national courts to be disclosed. This means that the information is unavailable to claimants, so it is more difficult for victims to receive their rightful compensation. It is argued that this is excessive protection for the cartelists, since it is at the expense of the victims. Accordingly, the non-disclosure perhaps is not the most effective way of

[44] *Freight Forwarding* (Case COMP/39.462) [2012] OJ C375/7.

protecting the leniency programme, since it does not maximise the primary deterrent effect of leniency.[45] Ultimately, there is a complicated unpredictability to calculate in deciding whether to self-report, but a cartelist company is not entitled to easy decision-making. The policy should be attractive, but still a mechanism for appropriate accountability.[46]

3.2 Comparisons with the Antitrust Law of the United States

The US Department of Justice's Antitrust Division developed the Corporate Leniency Policy of 1978 after a 'titan' of the bar approached the Division to offer evidence of completely unknown cartel activity in exchange for immunity from prosecution. The Division then collaborated with 'the international corporate world and the antitrust cartel defence bar', leading to the policy to be announced—and nervously laughed at—in April 1978.[47] The policy was later revised in 1993 and remains unaltered today because of its highly commended balance of trust against good faith. Klawiter even declares the policy as 'without question, the single most effective tool in the detection and prosecution of cartels ever devised by enforcers'.[48] The introduction of the policy and its revision years later were both questioned, however its huge success as an enforcement device has since proved sceptics wrong. The programme was not fully embraced until the 1996 case of *United States v Archer Daniels Midland Co* demonstrated its true potential when the limit of

[45] P Buccirossi, C Marvão and G Spagnolo, 'Leniency and Damages' (2015) Centre for Economic Policy Research Working Paper 10682 <https://ssrn.com/abstract=2566774> accessed 4 August 2020.
[46] Papanikolaou (n 36) 5.
[47] DC Klawiter, 'The US Corporate Leniency Policy: It is Time for a Renaissance' (2019) Jan 1(2) CPI Antitrust Chronicle <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.
[48] ibid 2.

the statutory corporate fine was increased from $10 million to $100 million.[49] The cartel defence bar had previously believed the limit of $10 million meant the policy was not strong enough for it to be considered and for competitors to turn against each other. The ten-fold change was permanent and persuaded leniency applications from various industries as a more accurate representation of an incentive to self-report.

Crucially, the US leniency programme only pardons the first applicant; following reporters receive no immunity or reduced fines. Theoretical literature finds this approach to be the most effective leniency mechanism.[50] This is because the more incentives there are, the more strategies there are, particularly the "collude and report" tactic as discussed by Chen and Rey.[51] Further, this system has been shown to lead to the biggest reduction in cartel price,[52] whilst increasing deterrence because of the much larger strategic risk and fear of being exposed.[53] The race for immunity is consequently heightened, which Harrington found to increase inflicted sanctions.[54] Theory is backed up empirically when looking at the data before and after the 1993 policy changes. Detection and deterrence rates increased when the 1993 policy introduced the first-informant rule.[55]

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[49] *United States v Archer Daniels Midland Co* 781 F Supp 1400 (SD Iowa 1991).
[50] Motchenkova (n 4) 5.
[51] Z Chen and P Rey, 'On the Design of Leniency Programs' (2013) 56 *Journal of Law and Economic*s 917.
[52] H Houba, E Motchenkova and Q Wen, 'The Effects of Leniency on Cartel Pricing' (2015) 15(2) *The BE Journal of Theoretical Economics* 351.
[53] G Spagnolo, 'Divide et Impera: Optimal Leniency Programs' (2004) Centre for Economic Policy Research Discussion Paper 4840 <https://ssrn.com/abstract=716143> accessed 3 August 2020.
[54] J Harrington, 'Optimal Corporate Leniency Programs' (2008) LVI(2) *The Journal of Industrial Economics* 215.
[55] N Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99(3) *American Economic Review* 750.

In contrast, the EU policy introduction in 1996, without such rule, does not reflect the same level of deterrent effect.[56] This is because the multiple-informant system reduces the enticement to race and report by offering most cartelists a fine reduction and encouraging "collude and report" strategies. However, the EU approach naturally allows for the collection of more evidence. Some critics suggest that the plea-bargaining system in the US counteracts the first-informant rule and its lack of information.[57] This system is widely popular for settling cartel cases; for example, in 2008 O'Brien found that during the previous two decades, over 90% of cartelist defendants admitted liability and signed plea agreements with the Division.[58] As with the settlement system in the EU, the plea-bargaining system saves time and money for the competition authority, however also leads to reduced fines and less of a deterrent effect.[59]

In the US there is also Leniency Plus, which was not a part of the 1993 policy, but first appeared in a 1999 speech by the Deputy Assistant Attorney General at the time. The idea behind Leniency Plus is that a whistle-blower can tag a member for undetected cartel activity in another market. The whistle-blower will receive a reduced fine for informing on the original cartel activity and complete immunity for the undetected cartel activities, provided they meet the standard requirements. This mechanism could be considered as an exception or extension of the first-informant rule, since a further informant can receive fine reductions, as in the EU. The key difference between the US and EU policies, however, is that the US is only rewarding for information on

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[56] S Brenner, 'An empirical study of the European corporate leniency program' (2009) 27(6) International Journal of Industrial Organization 639.
[57] Motchenkova (n 4) 6.
[58] A O'Brien, 'Cartel Settlements in the US and EU: Similarities, Differences & Remaining Questions' in C Ehlermann and M Marquis (eds), *European Competition Law Annual 2008 Antitrust Settlements under EC Competition Law* (Hart Publishing 2008).
[59] TJ Miceli, 'Plea Bargaining and Deterrence: An Institutional Approach' (1996) 3 *European Journal of Law and Economics* 249.

a separate cartel, for which the initial informant would receive full immunity for anyway. The reduction in fines for the original cartel essentially just incentivises the self-reporting of further collusive behaviour.

Leniency Plus also brings Penalty Plus, so if more cartel activity is uncovered after the company has plead guilty to the original cartel, there will be a sentencing enhancement. Effectively, a cartel member involved in numerous activities must disclose and benefit from Leniency Plus or else risk facing Penalty Plus. The incentive to fully unveil anticompetitive conduct and cooperate with the competition authority is consequently high because there is so much to lose. However, Penalty Plus becomes complicated where an employee of a company is involved in both original and additional cartel activity. For some of the collusive activity the employee receives leniency, but for others they are exposed to prosecution. In this scenario, it is imperative that a company can quickly and thoroughly understand the breadth of its possible exposure, again encouraging a complete confession. In the 2010s, a handful of major companies within the auto parts industry extensively used Leniency Plus, leading to the largest antitrust investigation, but also to allegations of coercion.[60] This manipulation reflects the potential for the excessive use of leniency under the EU policy; where numerous cartelists can benefit from reduced fines, there is a temptation to strategise and take advantage.

Whilst the US developed and expanded on its leniency programme, other jurisdictions began to form their own policies. The issue here is that the cost and complication of obtaining full leniency amplified rapidly, as applicants had to make multiple applications to the different competition authorities involved in the case. Despite this, US applications continued to increase and,

[60] Klawiter (n 47) 4.

over the decades, so did confusion. The US leniency programme is thus described as a 'victim of its own success,'[61] since the addition of new rules and numerous reinterpretations only made the application procedure more complex. Today, there is a vast decline in criminal antitrust enforcement. In recent years, the number of firms prosecuted, and the level of fines imposed, have deteriorated. In 2014, 25 corporations were charged with fines totalling $1.9 billion, yet in 2016 only 14 corporations were prosecuted for a sum of $453 million.[62] The optimist would say this is because the programme has done its job and cartel behaviour has cleared up as a result of companies wanting to avoid penalties. However, there has also been a decline in the number of leniency applications, which could be a consequence of the increasing difficulties in submitting a successful leniency application. This decline could therefore be linked to the decline in enforcement, since a leniency application is the most common way an investigation is started.

The US Antitrust Division has not changed the text of the Corporate Leniency Policy for over 25 years, seemingly holding onto some sense of pride that prevents them from refreshing the programme to make it more effective. After so many jurisdictions have joined in creating their own leniency programmes, Klawiter suggests a renewal of the Policy and argues the first step to revitalising the policy is by communication between the Antitrust Division leaders and the cartel bar leaders. He further suggests compliance as a condition for leniency, using the Hong Kong Competition Commission's proposal of a compliance programme as an example.[63] Requiring applicants to set up compliance programmes raises the awareness and training of employees, meaning it is more comfortable for them to later not be

[61] ibid.
[62] US Department of Justice Antitrust Division, 'Antitrust Division Workload Statistics FY 2009 – 2018' <www.justice.gov/atr/file/788426/download> accessed 3 August 2020.
[63] Klawiter (n 47) 5.

prosecuted. Instead, they can continue their employment without issue from the Antitrust Division. Fundamentally, however, a compliance programme requirement re-establishes compliance where it should be, at the centre of antitrust enforcement. Finally, Klawiter believes that the European Commission's approach has negatively influenced the US enforcement. He explains the EU approach as a 'more grudging acceptance of leniency applicants in a more impersonal system' that has caused the US to lose its enthusiasm for partnership between cartelist companies and the Division.[64] The positive approach of helping leniency applicants rather than creating more hurdles must be restored for a return to good faith on both sides.

As in the EU, companies in the US are discouraged from coming forward because of the uncertainty surrounding further action. The Sherman Antitrust Act 1890 allows victims of cartel activity to recover treble damages and holds conspirators joint and severally liable for the harm caused. Unlike in the EU, claimants are allowed access to leniency statements and any relevant documents, magnifying the threat for a potential leniency applicant. The disincentive to apply increased as civil actions grew in frequency and cost, until Congress recognised the concerns and passed the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) in 2004. The Department of Justice intended for ACPERA to encourage leniency applications by limiting civil penalties for cooperative applicants, so reduced liability from treble to single damages and removed joint and several liability for firms granted immunity through the leniency programme. There was, however, no change under ACPERA to claimants' access to documents and statements. ACPERA was set to expire in June 2020, but, instead, the sunset provision was repealed on the 25th of June 2020 by both houses of Congress. Currently, the reauthorisation of the statute is waiting to be signed by the President. The

[64] ibid 6.

Department of Justice fully supports the continuation of ACPERA, citing the Antitrust Division's commitment to the Corporate Leniency Policy and reporting that the Division's prosecutions between 2010 and 2019 have resulted in over $9 billion worth of fines and over 250 individual incarcerations.[65] The Department recognised the deterrent effect of treble damages on committing cartel activity, but also the deterrent effect of civil exposure on self-reporting, implying that ACPERA allows for a balance of both. Most noteworthy, however, is that there is no amendment included in the reauthorisation of the statute.

Leniency applicants do not find out if they will receive ACPERA benefits until after the liability stage of a trial. This means that ACPERA is often essentially pointless, since most cases do not even make it to trial. The Act exists to reduce some of the worries of a potential leniency applicant, but it is unable to offer any incentive for an applicant to come forward. There is no protection or guarantee, so a self-reporter is expected to expose themselves to an enormous risk and hope for the best. Taladay explains that, for this reason, the 2004 Act is not serving its purpose.[66]

Moreover, because there are very few cases regarding the interpretation of ACPERA, there is very little guidance on how the cooperation obligation must be satisfied. This means that a leniency applicant cannot ever be sure that they are collaborating sufficiently in order to ultimately secure the benefits. One of the limited pieces of guidance offered by caselaw is that the

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[65] Department of Justice Office of Public Affairs, 'Department of Justice Applauds Congressional Passage of Reauthorization of The Antitrust Criminal Penalty Enhancement and Reform Act' (2020) Press Release 20-594 <www.justice.gov/opa/pr/department-justice-applauds-congressional-passage-reauthorization-antitrust-criminal-penalty> accessed 25 August 2020.

[66] JM Taladay, 'Why Acpera isn't Working and How to Fix it' (2019) Jan 1(2) CPI Antitrust Chronicle, 2 <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.

purpose of ACPERA must be upheld in its implementation. For example, in *Morning Star Packing*,[67] the court held that ACPERA extended beyond Sherman Act claims, confirming the purpose of ACPERA to encourage self-reporting through limiting civil exposure. Moreover, caselaw has made it clear that the cooperation obligation is limited, as the case of *In re Sulfuric Acid Antitrust Litigation* held that unreasonable and untimely cooperation requests are not imposed by ACPERA.[68] Crucially, caselaw also confirms that an applicant is only entitled to a judicial determination of the satisfaction of ACPERA requirements after a trial, which, of course, might never happen. An early determination was offered in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*,[69] but only because the claimants wanted to confirm that the defendants had not met their cooperation obligations.

Considering ACPERA was enacted to encourage leniency applicants, its current failure is demonstrated through the consistent risk and uncertainty that an applicant must face. The comfort that ACPERA seeks to deliver has only a small chance of ever being granted to the applicant, and long after they have filed for leniency. There is no support from ACPERA at the time an applicant decides to self-report or not, therefore ACPERA cannot possibly be fulfilling its purpose of encouragement and is fatally flawed. Taladay suggests that there should be a rebuttable pre-trial presumption to indicate whether an applicant will eventually receive the ACPERA benefits. Not only would this reassure the applicant, but it would also strengthen the purpose of ACPERA for settlement negotiations.

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[67] *Morning Star Packing Co v SK Foods LP* WL 379774 (ED Cal 2015).
[68] *In re Sulfuric Acid Antitrust Litigation* 231 FRD 320 (ND III 2005).
[69] *In re Aftermarket Automotive Lighting Products Antitrust Litigation* WL 4536569 (CD Cal 2013).

Currently, a claimant can use the tactic of creating uncertainty over ACPERA to undermine a leniency applicant's position. Such a presumption can be clarified at the start of the case and then rebutted if the defendant does not meet its obligations. Ultimately, this would shift some of the risk from the leniency applicant to the other defendants, as the Act intended.[70] The claimant's position would not be compromised, as cooperation would still be enforced and the information would still have to be passed over for the defendant to ultimately receive ACPERA benefits. If anything, the presumption would more solidly bind the defendant to cooperating in the case. Furthermore, the scope of ACPERA is not reduced through this rebuttable presumption; the presumption merely provides a mechanism for ACPERA to actually work.

3.3 Concluding the Contrast

The key differences between the US and EU policies appear to originate from the former's first-informant rule and the latter's multiple-informant rule. The EU regime is only optimal regarding the amount of information collected through the numerous leniency applications made for the same cartel case. This, in turn, means there is a lower public litigation cost as compared to the US, since there is a greater chance for the conviction of the entire cartel. The major drawback of the multiple-informant system is that sanctions are reduced along with deterrence. Some critics support the EU rule despite the negative impact on deterrence, since it can be necessary to collect evidence from numerous firms to increase the likelihood of convicting every single

[70] Taladay (n 66) 6.

cartel member,[71] since firms hold asymmetric information.[72] This was recognised in the OECD 2012 Policy roundtable report,[73] but it is still not so clear as to what is stopping the Commission from adopting a first-informant rule.[74] Spagnolo finds the first-informant rule to maximise deterrence, however concedes that in some cases, where one informant cannot provide enough to allow for a full investigation and conviction of the entire cartel, it would be best to award partial leniency to a second informant.[75] If it is optimal to offer leniency to multiple firms, the question then switches to a deliberation of how many. Perhaps the answer depends on the size, damage and overall extent of the cartel.

If the Commission stands by the multiple-informant rule, then making leniency statements and other information available to victims seeking to claim damages could be considered to refocus the policy onto deterrence, rather than making things easier for cartelist applicants. In the US, these statements and documents are disclosed, but ACPERA is in place with the intention of protecting the immunity applicant, despite the Act's failings. Effectively, the US Antitrust Division concentrates its efforts on providing complete immunity for the first leniency applicant, maintaining the race to report more strongly and emphasising the deterrent effect of leniency. Amendments to ACPERA could clarify this further to truly achieve these goals. On the other hand, in the EU, the Commission seems to be more lenient than is necessary to conduct successful investigations and prosecutions. This weakens the race and also the deterrence, since a cartelist firm can be almost

[71] K Charistos and C Constantatos, 'On Leniency and Markers in Antitrust: how many informants are enough?' (2016) University of Macedonia Department of Economics Discussion Paper 2/2016 <http://aphrodite.uom.gr/econwp/pdf/dp022016.pdf> accessed 30 August 2020.
[72] M Blatter, W Emons and S Stitcher, 'Optimal Leniency Programs When Firms Have Cumulative and Asymmetric Evidence' (2018) 52 *Review of Industrial Organization* 403.
[73] OECD, 'Leniency for subsequent applicants' (Policy Roundtable Report 2012).
[74] Motchenkova (n 4) 9.
[75] Spagnolo (n 53).

certain they will receive some kind of fine reduction. The deterrence is further diluted by the non-disclosure of evidence to cartel victims in their pursuit of private damages.

The immunity applicant is prevented from further private action yet withholding evidence from the victims seems to go too far in protecting the perpetrators. Currently, the EU regime is undermining the deterrent effect of leniency and reducing the incentive to race to the authorities by offering excessive benefits to cartelists. Allowing immunity to the first applicant, then fine reductions for a second applicant with vital information seems to be, theoretically and empirically, the best approach. Similarly, total protection should be available and guaranteed for the immunity applicant regarding private damages, however information should be available to victims so that they are able to obtain justice more easily. Any further leniency is excessive and defeats the law's goal of punishing hardcore anticompetitive conduct.

4. Future Prospects

Some major jurisdictions have reported at international discussions a decline in the number of cartel leniency applications filed. However, this is not necessarily alarming or a suggestion of the "fall" of leniency programmes.[76] It is possible that declines in leniency applications were bound to happen should the programmes be successful in deterring firms from committing cartelist conduct. Another argument explains that there are cyclical trends of leniency applications due to action in a specific industry that leads to cases reaching a peak before declining to zero. Although, more cynically, there is the possibility that the decline in leniency applications does not reflect a

[76] J Ywesyn and S Kahmann, 'The decline and fall of the leniency programme in Europe' (2018) 1 Concurrences 44.

decline in cartel activity, and that cartelists have simply left the "smoke-filled room".[77]

Eric Van Ginderachter, director of the Commission's Cartels Directorate, explained that the idea that 'leniency carrots are sweet, and cartel sticks are heavy' needs to be reinforced if leniency is to continue its success.[78] This is a global problem, since there is awareness of leniency policies, so if cartels are to exist at all then they are likely to be a lot more stable. For example, the South African Competition Commission recognised the diminishing efficacy of leniency policies over time,[79] regardless of the policy meeting the International Competition Network (ICN) Checklist for Efficient and Effective Leniency Programmes.[80] Improvements made to the South African policy were initially considered to be the reason for the increase in leniency applications in 2009, however there has recently been a decline in applications and an increase in cartel investigations, suggesting leniency policy improvements were not connected to the 2009 influx. Ngobese argues that the uptake of leniency depends 'on the strength of relationships between firms and ability of competition authorities to independently detect cartels.'[81] As a result, a strong ICN standards-meeting leniency policy is not enough. For example, the initial scare caused by the introduction of a leniency programme by any competition authority creates mistrust and concern that

[77] Papanikolaou (n 36) 2.
[78] E Van Ginderachter, 'Cartel Workshop' (International Competition Network, Tel Aviv, 16 October 2018).
[79] M Ngobese, 'Implications of Regional Cooperation on Country Specific Corporate Leniency Policies' (2019) Jan 1(2) CPI Antitrust Chronicle, 2 <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.
[80] International Competition Network, 'Checklist for Efficient and Effective Leniency Programmes' <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CWG_LeniencyChecklist.pdf> accessed 30 July 2020.
[81] Ngobese (n 79) 4.

the cartel is going to be exposed, especially where inter-cartelist relations are weak.

Consequently, the cartels of today are likely founded on very strong relationships, since the risk of whistleblowing is well-known. Thus, current cartels are likely to be a lot more stable. The European Commission has developed tools over the years to increase the success of the leniency programme by increasing the risk of cartelists being caught, thereby forcing them to come forward of their own accord and inducing applications. For example, the 2017 anonymous whistle-blower tool introduced online has already led to investigations.[82] There are further changes and advances the Commission could and should make to increase leniency's role in cartel discovery.

4.1 Lack of Harmonisation

When jurisdictions want to cooperate, the harmonisation, rather than standardisation, of leniency policies is crucial. Policies need to be able to work together; they do not need to be the same. For example, Member States of the South African Development Community (SADC) have a high degree of harmonisation between policies, so joint investigations are facilitated well. The SADC Cartels Working Group produced a catalogue of information to clarify differences and propose changes to the various provisions.[83] This cataloguing could be similarly created in the EU. The problem in the EU is that there is no way of making one leniency application to ensure leniency across all Member States, since each Member State has its own competition

[82] European Commission, 'Cartels: Anonymous Whistleblower Tool' <http://ec.europa.eu/competition/cartels/whistleblower/index.html> accessed 25 July 2020.
[83] Ngobese (n 79) 6.

authority. This means that in order to get full immunity, a leniency applicant must apply to each Member State concerned, be the first to do so and provide sufficient new information to the authority. In figuring out which authorities to apply to, an applicant may not consider every Member State that will become involved or they may end up tipping off Member States that would have never gotten involved and spark further investigations. Further, the applicant must be sure to list every possible infringement, as made clear in the *Freight Forwarding* case,[84] or else miss out on leniency for certain conduct.

Evidently, there is a lot of thorough work for an EU leniency applicant to do to be able to mitigate the huge risks they face by self-reporting. Although the ECN+ Directive will partially aid this issue by synchronisation, Ritz and Marx believe the problem will remain until there is a central office for leniency applications.[85] This burden only gets larger with the similarly onerous cooperation requirements. The obligation on leniency applicants to fully cooperate often means they must conduct an expansive internal investigation. The potential issue here is that other problems could arise in other business areas, expanding the investigation further.[86] However, this is an issue only increased by the amount of wrongdoing committed by the applicant. There must be a balance that prevents the process of seeking leniency excessively easy for cartelist criminals, yet also prevents potential applicants from being put off by a convoluted system and opting for the easier option of hoping that the cartel remains undiscovered.

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[84] *Freight Forwarding* (n 44).
[85] C Ritz and L Marx, 'Leniency Carrots and Cartel Sticks – A Practitioners' View on Recent Trends and Challenges Presented by The EU Leniency Program' (2019) Jan 1(2) CPI Antitrust Chronicle, 7 <www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/winter-2019-volume-1-number-2> accessed 3 December 2019.
[86] CRA Swaak and R Wesseling, 'Reconsidering the leniency option: if not first in, good reasons to stay out' (2015) 36(8) *European Competition Law Review* 346, 351.

4.2 Private Enforcement

In both the EU and the US, leniency applicants are common easy targets for damages claims, however both take different approaches to alleviating the concern for forthcoming cartelists. If there is no separate policy in place, private enforcement can bring back the risk that the leniency application was made to avoid, since a leniency policy only provides leniency regarding the competition authority's proceedings. In the EU, the Damages Directive significantly reduces this risk, but only for the recipient of immunity. Following applicants do not receive the protections of the Damages Directive, which could lead to a risk-benefit calculation that decides against filing for leniency. This could render the multiple-informant rule useless, as the applicants to follow the first informant are exposed to huge private damages claims. But, of course, this is part of the deterrent objective to encourage the race to be the first to report. In the US, ACPERA is in place to provide the same protection for an immunity applicant, however the Act fails to provide the encouragement intended. The private enforcement problem is lessened by the EU rule that does not allow the disclosure of leniency statements and documents, protecting cartelists and increasing the difficulty for victims seeking compensation.

This rule is not in place in the US, where documents are available to claimants. The US regime would be optimal if ACPERA could operate to serve its proposed purpose. Reflecting upon the EU, it is more appropriate in terms of justice for victims that information is disclosed. However, another aspect to the private enforcement problem is that competition authorities are considered untrustworthy in handling information contained in leniency applications, meaning the information could become public anyway. Advocate General J Mazák gave the opinion in *Pfleiderer* that the victims of a cartel should be able to access leniency documents in order to seek

compensation, except for self-incriminating corporate statements.[87] This is a reflection of the European Convention on Human Rights and the right not to incriminate oneself, as covered in *Orkem v EC*.[88] However, the EC can and must oblige cartelists to give this information for the purposes of an investigation.[89]

4.3 New Problems

Paper trails are disappearing, meaning so is the evidence of intent necessary to prosecute for illegal collusion. Cartelists should be expected to harness the advancements of technology and utilise more sophisticated methods of communication. This requires that cartel detection techniques are similarly advanced to counter the reduction in direct evidence. Cartels are no longer organised through conversations in "smoke-filled rooms" and instead are developing in complexity regarding form, market and elaboration. New types of collusion, such as market spoofing, are being identified at increasing rates. New markets, such as cryptocurrency, present new opportunities for easy distortion, since the market is unfamiliar, unregulated and complex, meaning authorities are still learning the distinction between normal operation and collusive behaviour. In financial and commodities markets, collusion is aided by the increased transparency from real time trading and few dominant market players. Conduct can be more easily monitored, and deviations more readily punished, increasing the longevity and success of the cartel. Further, illicit gains from financial derivatives provide additional incentives and

[87] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, Opinion of AG Mazák, paras 25-32.
[88] Case 374/87 *Orkem v Commission of the European Communities* [1989] ECR 3283, para 34.
[89] Chirita (n 9) 439.

opportunities through a multiplier effect. These transactions are so intricate that regulators face difficulties in sensing the misconduct.

Although increases in big data and algorithm sophistication present opportunities for cartel detection techniques to develop, there is also the concern that pricing algorithms present an opportunity to more easily tacitly collude because of the change in the dynamics of competition. In many industries, the change will lead to the equality of prices and perfect competition, however in industries with a higher chance of cartel behaviour, pricing algorithms may facilitate the monitoring and punishment of an agreement. Competition authorities must research data and algorithm developments to better understand the likelihood of anticompetitive effects. What is definitively known is that leniency programmes will not sufficiently deter and detect this collusion.

Furthermore, there is the possibility of cartels becoming more stable and successful from these advancing tools. The mechanism of leniency requires a cartel member to evaluate the benefits of reporting the cartel and the benefits of participating in the cartel, then conclude that the former outweighs the latter. This of course means that the more successful the cartel, the more likely it is that the member will not self-report. Estimated gains of the cartel are often far, far larger than the fines they must pay. Thus, as harm to the market increases, leniency policies decrease in effectiveness. Although, if the potential penalty level can offset the potential gains of participating in the cartel, then a cartelist will calculate that leniency is the better option. The prospect of incarceration can be a powerful deterrent for businesspeople considering entering into a cartel agreement. But for some, a short prison sentence for a couple of years is perhaps not sufficient to prevent

anticompetitive activity, since losing a few years in jail may be considered immaterial if it means many more years can be spent enjoying the vast earnings from a cartel. Increasing penalties can therefore be considered as a tactic to counteract the problem of highly successful cartels maintaining secrecy because of a lack of incentive under leniency. The challenge is finding and justifying a high enough penalty. However, future reforms could strengthen the balance of leniency and punishment through finding evidence of senior management's knowledge and cover-up of the cartel conduct as a reason for increasing fines.[90]

4.4 Complements to Leniency

Leniency programmes are somewhat an anomaly in criminal law, as they detect by waiting for the guilty to come forward. Many competition authorities rely heavily on leniency programmes and do not utilise proactive measures to screen and monitor the market. The question is therefore whether this passive law enforcement can continue and whether future advances in technology could lead to new techniques dominating the detection of cartels. The Office of Fair Trading explained in its 2006 Committee of Public Accounts Report that it 'should start a greater proportion of investigations on its own initiative, rather than waiting for a relevant complaint'.[91]

Over the past decade, screening has had large successes.[92] Abrantes-Metz and Metz argue that screening complements leniency well, demonstrating that screening possible cartels is usually followed by successful applications for

[90] Papanikolaou (n 36) 6.
[91] Committee of Public Accounts, *Enforcing competition in markets* (HC 2005-06, 841).
[92] Abrantes-Metz (n 12) 3.

leniency. For example, economists implemented screens which flagged collusion in the LIBOR scandal, leading to leniency applications being made. Flagging through the screening of Euribor led to investigations in other markets. Moreover, as harm to the market increases, the effectiveness of screening increases, as patterns become easier to match. This means that screening becomes even more vital in detecting the more successful cartels. As discussed earlier, leniency policies are successful in clearing out the weaker cartels almost immediately after implementation. Consequently, it is argued that leniency programmes should be used in conjunction with empirical screening methods to uncover the breadth of cartels of varying harm. The drawback of screening techniques is their resource-intensiveness. However, with developments in technology, data is becoming more available and algorithms are being improved, so the expense is decreasing. Increasing the prevalence of screening, therefore, would be an effective boost for leniency.

In the rigging of LIBOR, it could be argued that the structure practically encouraged abuse. Daily rates were generated and submitted voluntarily by the participating banks and the average then calculated and administered by the British Bankers' Association. This average would set the interest rate for large banks to borrow in the interbank market. The incentive to manipulate the information submitted was therefore clearly huge. A similar structure was in place for the London Gold Market Fixing case, in which the interested parties were also the administrators. Perhaps it is only hindsight making it blatantly obvious that separate exchanges should have set these benchmarks, but to prevent analogous harm in the future it is critical that important structures are proactively reviewed and strengthened in defence of potential collusion.

Other possible techniques for competition authorities to implement include compliance programmes to raise awareness amongst employees and better their understanding of the market screening that takes place. Awareness has the potential to reap additional benefits if both consumers and authority officials also have a greater understanding of what to look for to detect collusion. Notably, the awareness amongst employees has even more critical importance regarding pricing algorithms, since a lack of understanding can lead to corporations using algorithmic practices to collude. Strong internal deterrence and detection programmes lower the costs and resources placed on competition authorities by shifting them to the corporations. To offset this expense and encourage strong compliance programmes, corporations could be incentivised by reduced fines.

Although leniency programmes can mitigate the fines and criminal prosecution for partaking in a cartel, executives still face high personal and professional repercussions.[93] Thus, corporate leniency could be developed to provide larger incentives for executives to come forward. The professional risk is, more importantly, a deterrent for whistle-blowing employees because of the potential to lose their job and reputation in the industry, which could lead to the whistle-blower being unable to provide for their family. Whistle-blowers will become increasingly important as paper trails disappear and detailed insider knowledge is necessary to prosecute. Monetary incentives through whistle-blower programmes have been successful for the US Securities and Exchange Commission, so it is argued that competition authorities should follow. Moreover, Stucke discusses that there are three races for leniency: between the cartel's firms, between the cartel companies

[93] D Klawiter and J Driscoll, 'A New Approach to Compliance: True Corporate Leniency for Executives' (2008) 22(3) Antitrust 77.

and their employees, and between cartel participants and whistle-blowers.[94] The latter race, between cartel participants and whistle-blowers, he finds to be unsatisfactorily utilised. Advancing the incentive for whistle-blowers to race to report, potentially through the offering of a financial bounty, could lead to the detection of cartels that would never be disclosed by the firms or their employees. Further, Stucke submits that a whistle-blower policy is less morally problematic than a leniency policy, since often the whistle-blower has not committed the crime and are rewarded instead of the offenders.[95]

Financial incentives, however, introduce questions of credibility. Multiple competition authorities utilise whistle-blower policies, often offering hefty rewards. For example, in Hungary, a natural person who provides essential written evidence in return will receive 1% of the total fines imposed on the cartelists.[96] This reward is capped at 50 million HUF, equivalent to around £130,000. The UK has a similar policy, at the sole discretion of the Competition & Markets Authority (CMA). The CMA aims to be fair in rewarding a whistle-blower, however they will not bargain and are not compelled to give a reason for rejecting offers of information. This reward is capped at £100,000.[97] Thus, the potential gain for a whistle-blower is substantial. The financial incentive is the reason the US Government Accountability Office is primarily against a competition whistle-blower

[94] ME Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing 2015).
[95] ibid.
[96] Hungarian Competition Authority, 'Regular questions about the cartel informant award' <www.gvh.hu/en/other/6429_en_regular_questions_about_the_cartel_informant_reward.html> accessed 27 August 2020.
[97] Competition & Markets Authority, 'Rewards for Information About Cartels' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888951/InforInfo_rewards_policy.pdf> accessed 27 August 2020.

policy, due to the perceived threat to credibility.[98] In the US, rewards are paid to informants for evidencing other crimes, namely fraud against the federal government and violations of securities and tax laws. It is unclear why cartelist informants are not similarly paid. Perhaps there is no urgent need, as most of the Department of Justice's antitrust cases are initiated by a corporate leniency application.[99] The Department explains that witnesses receiving criminal leniency are more credible than witnesses receiving a financial reward because those receiving leniency must 'publicly admit criminal wrongdoing and subject their company to civil liability'.[100] Stucke summarises that, for a whistle-blower policy, the larger the reward, the more the incentive, but the greater the issue of credibility.[101]

Beyond financial bounties, Stucke illustrates that it is not necessarily the monetary reward that is the primary motivation for a whistle-blower. The seriousness of the perceived wrongdoing and its attribution to the violator, as opposed to attribution to an external factor, is more effective in prompting the blowing of the whistle.[102] Unfortunately, because the victims of a cartel are less obvious, the severity of the crime can be underestimated and, consequently, people are less likely to report it. Stucke concludes that a whistle-blowing policy should therefore be complemented by a strengthening of the moral standpoint against cartels and by encouraging internal whistleblowing 'as part of an ethical organisational culture'.[103]

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[98] United States Government Accountability Office, 'Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection' (Report to Congressional Committees 2011), 45 <www.gao.gov/assets/330/321794.pdf> accessed 25 August 2020.
[99] ibid 60.
[100] ibid 40.
[101] Stucke (n 81).
[102] ibid.
[103] ibid.

As a result, there are numerous possible complements to the leniency system in the EU. Fundamentally, a foundation could be built by cataloguing the differences across the Member States to aid harmonisation, unless and until there is a central office for leniency applications. The Commission must take a more proactive approach in screening and monitoring the market, particularly with the advances in technology and the new ways cartel behaviour will take place. Also, the Commission can enforce a greater understanding across consumers, authority officials and company employees and executives. Compliance programmes with the incentives of fine reductions should be implemented to help develop an internal culture of pro-competition. This would also enable whistleblowing to take place more easily.

5. Conclusion

The Commission has indisputably observed vast success in detecting cartels since the implementation of the leniency policy. There is no other tool as effective in uncovering and prosecuting such harmful anticompetitive behaviour. However, factors that could affect the persuasiveness of applying for leniency in the EU are becoming apparent. Further, both increases in awareness of leniency and developments in tactics and technology mean that the cartels of today are likely to be much more robust, with stronger relationships connecting the members. As a result, there are limits to the EU leniency regime as it currently stands, and changes are imperative if it is to continue a path of success. The long-term effects of a leniency policy are uncertain when it comes to cartel duration. Weak cartels are immediately dismantled, but surviving cartels become less likely to break up as time goes on. This concern is only heightened by the advances in technology that allow a cartel to thrive.

Fundamentally, this article submits that the EU should adapt its leniency policy to a first-informant rule, with the exception of cases where a second informant is vital. Permitting further leniency applications is practically futile and infringing on the deterrent effect. The strength of the US Corporate Leniency Policy in this regard demonstrates the accuracy of theoretical and empirical evidence which demonstrates that a first-informant rule is optimal. Limiting the number of applicants to receive leniency down to one, and in exceptional circumstances two, informants reinforces the race to report to the Commission, most effectively supports the prevention of cartel conduct and helps to clarify even beyond the leniency system.

Currently, the ambiguity surrounding just how much leniency an applicant will actually receive is a potential threat to the number of applications filed. This is because it is particularly unclear if a firm awarded leniency will face private claims for damages. Liability here is limited by the Damages Directive for immunity recipients, but the confusion lies for any applicants to follow and receive fine reductions. The declines in the US for both enforcement and application rates serve as a warning for the EU. The failures of ACPERA are revealing the severity of the private enforcement concern, as potential immunity applicants are left unassisted and bewildered. Although the EU is more successful in this regard, it is perplexing that further applicants are protected through the withholding of information from victims seeking compensation. The EU should follow the US and permit the availability of these documents but protect the immunity applicant to more efficiently balance leniency against punishment and, thereby, deterrence.

The surviving cartels will most likely become so strong that leniency programmes will not be able to help in their detection. Cartel members will only become more aware of the risk of a member filing for leniency that, if a

cartel is to exist, it will be founded on unwavering ties. Consequently, leniency must be complemented with further tools and adaptations to reduce the outcome of advancing cartelist techniques. The Commission currently overly relies on leniency to initiate most cartel investigations to the extent that too much leniency is awarded. Again, a first-informant rule with a second-informant exception is ideal, as it will encourage the active scrutiny from competition authorities. This proactivity should also be carried out by an increase in screening. Not only can this encourage more leniency applications, but the initiative will also become critical in uncovering the most hardcore cartels, which tend to survive without a leniency application being made. The detection of patterns becomes more obvious for severe cartelist behaviour, meaning screening increases the breadth of cartels that competition authorities are able to detect. This development in understanding extends beyond matching patterns, as markets, structures and new technology will also be more thoroughly comprehended. From understanding, the Commission can then develop approaches suited to the detection of specific cartel conduct. Increased understanding is not only beneficial to the authorities, as awareness amongst companies and their employees can lead to a culture of avoiding collusive conduct and being able to call it out more readily.

Whistle-blowers should be supported by a more defiant stance against anticompetitive behaviour, not necessarily by increased financial bounties. Understanding the existence and severity of cartelism is more crucial in effecting pro-competition and motivating employees to internally report. Such compliance programmes can be encouraged through the incentive of reduced fines to deflect some of the action and costs from the authorities and onto the firms themselves.

Ultimately, the Commission rule must be confined to allow only one immunity recipient, and potentially a second recipient of fine reductions, to reinforce the race to report. Only then can leniency statements and documents be released for use in private damages claims, with the first and possible second informants receiving further immunity and fine reductions respectively. Instead of awarding further leniency to any following applicants, the Commission should implement screening and awareness techniques to counteract the limitations of leniency and become proactive in investigation and prosecution.

‘THIS IS EXTREMELY DANGEROUS TO OUR DEMOCRACY’: CAN EU COMPETITION LAW SAFEGUARD MEDIA PLURALITY?

Ryan Mullen[*]

Following the conglomeration of mass media by media moguls, there have been increasingly growing concerns as to the impact of these conglomerates on media plurality and media freedom in general. The topic is heavily researched, and many scholars have put considerable effort into evaluating media regulatory law to attempt to create an equitable solution. However, competition law has often been overlooked as a potential avenue for media governance and little in-depth research has had it has its focus. This work posits that EU Competition Law may have an untapped potential for the regulation of media conglomerates and the protection of media plurality in general. While it acknowledges that such an approach is not the perfect solution to such a complex matter, it believes that research into the area may provide a deeper understanding of the problem and offer novel, and often overlooked, solutions that require little legal reconstruction.

Keywords*: Media Plurality, EU Competition Law, Media Conglomerates*

[*] The author read for LL.B and LL.M in Law at Newcastle University, Newcastle-upon-Tyne. He can be reached at R.Mullen27@hotmail.co.uk.

1. Introduction

Democracy is the foundation and lifeblood of many modern western societies, offering vast direct benefits on not only the economy but also indirect growth through public health and education.[1] Yet democracy is fragile.[2] Anything more than a whisper, and it may vanish.[3] The mass communications media is often seen as the connective tissue of democracy;[4] the most effective means for the executive to communicate and inform the public to their good and for the public to hold the executive accountable. Both democracy and media exist not only in parallel, but in addition rely on each other in a complex relation of interdependencies.[5] Each work tirelessly to hold the other accountable and ensure both remain impartial in their pursuit of promoting and protecting democratic values. However, the very aspect which allows mass media to function effectively – its ability to reach the masses with immediacy – may also be used to undermine democracy and influence the public for personal gain. This negative influence may have the unforeseen consequence of turning democracy's hoist rope into its noose.

To counteract this, regulatory intervention in the media is vast, both at a national and supranational level, and exists in many forms, degrees, and levels

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[1] Matthew Baum and David Lake, 'The Political Economy of Growth: Democracy and Human Capital [2003] 47(2) American Journal of Political Science 333.
[2] S E Eisenstadt, 'The Paradox of Democratic Regimes: Fragility and Transformability' (1993) 16(3) Sociological Theory 211; Andrew Rawnsley, 'Democracy is more fragile than many of us realised, but don't believe that it is doomed' (*The Guardian*, 21 January 2018) <https://www.theguardian.com/commentisfree/2018/jan/21/democracy-is-more-fragile-than-many-of-us-realised-but-do-not-believe-that-it-is-doomed> accessed 30 July 2020.
[3] Richard Harris, *Gladiator* (2000).
[4] Richard Gunther, *Democracy, and the Media: A Comparative Perspective* (Cambridge University Press 2000), 1.
[5] Joseph Trappel, Werner A Meier, Leen d'Haenens, *Media in Europe Today* (Intellect 2011).

of desirability from the public.[6] Surveys within this regulatory field show that there are several objectives which media regulation aims to pursue.[7] One of the increasingly relevant, and perhaps most influential and attractive, aims is media plurality. Media plurality is intrinsically connected with freedom of expression. To ensure a democracy's connective fabric, the multiplicity of viewpoints expressed through these freedoms must have effective and legitimate representation and reproduction.[8] It is here that the media sector has a duty to ensure a diversity of media supply and a diversity of media content available to the public,[9] if only in the sense that to fail here would lead to further scrutiny and harsher regulations. Despite this, evidence has shown that the media market tends towards concentration and results in media conglomerates.[10] Tied closely to this conglomeration, incidents such as numerous controversial media segments ordered by the Sinclair Broadcast Group in the US,[11] whose identical scripts to over 100 stations ironically echoed the words 'this is extremely dangerous to our democracy', as well as controversies in UK newspaper ownership,[12] continue to garner attention and

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[6] Fabrizio Barzanti, 'Governing the European Audiovisual Space: What Modes of Governance can Facilitate a European Approach to Media Pluralism' (EUI Working Paper RSCAS 2012/49 2012), 1.

[7] E M Barendt, *Broadcasting Law: A Comparative Study* (Oxford: Clarendon Press 1995), 3-10.

[8] M Luciani, 'La libertà d'informazione nella giurisprudenza costituzionale' (Politica del diritto 1989) 605, 606.

[9] Gillian Doyle, *Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media* (SAGE 2002), 12.

[10] Daniël Biltereyst, 'Media Conglomerates' in *The International Encyclopaedia of Communication VI* (Blackwell 2008), 2824-2830.

[11] Lucia Graves, 'This in Sinclair "the most dangerous US company you've never heard of"' (The Guardian 17 August 2017), <https://www.theguardian.com/media/2017/aug/17/sinclair-news-media-fox-trump-white-house-circa-breitbart-news> accessed 30 July 2020.

[12] Media Form Coalition, 'Who Owns the UK Media?' (Media Reform Coalition 12 March 2019), <https://www.mediareform.org.uk/wp-content/uploads/2019/03/FINALonline2.pdf> accessed 30 July 2020; Ben Gelblum, 'Two Billionaires now Own Half the Top 10 Daily Newspapers warns Corbyn as Mail owner buys the i', (The London Economic, 19 November 2019), <https://www.thelondoneconomic.com/news/media/two-billionaires-now-own-half-the-top-10-daily-newspapers-warns-corbyn-as-mail-owner-buys-the-i/29/11/> accessed 30 July 2020.

create media pluralism concerns. The increasing focus on media moguls,[13] some of whose influence has been found to 'promote unprofessional and unethical practices' through loyalty,[14] has raised questions on how to effectively manage the impact that highly-concentrated media markets have on media plurality and thus on democracy.

Some commentators argue that competition law may be appropriately placed to tackle such problems.[15] The aim would not be to supplant ad-hoc regulatory interventions– as these still have a crucial and primary role in securing media plurality – but to bolster and further protect regulatory gaps. In this role, competition law can work to pre-emptively prevent market concentration by taking media plurality concerns into consideration in merger reviews, or by controlling and limiting dominant media outlets to ensure they do not use their dominant position to push a biased agenda to their unrivalled viewership. While four common arguments are put forth to refute this,[16] which shall be subsequently explored, competition law may still have an unexplored and untapped potential. Whereas some argue that such an extension stretches the limits[17] of the Treaty on the Functioning of the European Union (TFEU),[18] this article forwards the argument that, by ensuring relevant assessments are conducted properly, EU competition law may safeguard the pluralism without overstepping its legal scope. Indeed, as Bania effectively suggests, the chance of 'action with far-reaching implications under other branches of EU law is

[13] Des Freedman, 'Media Moguls and Elite Power' [2015] Goldsmiths PERC Paper Series 2; John Street, 'Conglomerate Control: Media Moguls and Media Power' in John Street, *Mass Media; Politics and Democracy* (Palgrave Macmillan 2001).
[14] ELIAMEP, *Media freedom and independence in 14 European countries: A comparative perspective* (Comparative Report 2012), 146-147.
[15] Konstantina Bania, 'The Role of Media Pluralism in the Enforcement of EU Competition Law' (European University Institute Thesis, 5 November 2015).
[16] Ibid, 7.
[17] Barzanti, (n, 6), 15.
[18] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

low' and therefore it may be the only realistic avenue for pluralism in the EU.[19]

This article shall be divided into three key sections. Section 2 shall explore and emphasise the merits of the research to ensure that the foundation the article rests upon is strong and stable. This analysis shall first offer a theoretical background of the notion of media pluralism, why it must be protected, and how modern studies show it to be in danger. Through this analysis, it will be made clear that media plurality requires further legal, political, and social reform to ensure it does not become democracy's downfall. In addition, this section will engage with the reasons behind the choice of competition law as its protector, as opposed to another channel of regulation. Section 3 shall focus on dispelling the competence and legally substantive myths surrounding competition laws application to media plurality. It will first endeavour to set straight the competence maze for the EU when dealing with media plurality to illustrate that the EU has some degrees of competence in the field. In addition, it will engage with the substantive and procedural arguments that critics use to argue that competition law could have a minimal impact on media plurality. Finally, Section 4 shall look to how competition law may be best used in practice to preserve media plurality. It will first explore how the law could be applied as it stands, and the weaknesses in that approach, followed by suggestions for reform which would strengthen the legal toolkit of the Commission. Ultimately, this article will conclude that competition law is a legitimate alternative avenue for the protection, and thus indirect promotion, of media plurality, and that, while limitations to this approach warrant scepticism, that they do not completely invalidate the recommendation.

[19] Bania, (n, 15), 7.

2. Merits of the Research

The purpose of this section is to engage with important questions which constitute the background of the ultimate purpose of this article: to determine whether EU competition law represents a credible vehicle for protecting, and thus indirectly promoting, media plurality. First, it is necessary to define what is meant by media plurality and, more importantly, what is at stake. Subsection A will posit an understanding of the very essence of media plurality and why it is a cause worth protecting. Further to this, it will be an opportunity to show modern pluralism concerns by drawing insight from big pop culture talking points and studies on the media sector which explore numerous avenues, most importantly media pluralism. Second, it will reinforce the choice of competition law as a safeguard as opposed to another policy vehicle. In doing so, it will actively align itself with the modern 'New Brandeis Movement',[20] which advocates a renewed focus upon competitive markets and protecting political economic ends as opposed to consumer welfare.

While this movement is often negatively decried 'Hipster Antitrust',[21] this article shall wear the title on its sleeve. In addressing these matters early, this section establishes the rest of the discussion on competition law and media plurality on a strong foundation, allowing it to avoid any pitfalls in its early postulations through a lack of clarity to its purpose. Throughout, it will be made it clear what this article is *not* about, making it clear that some issues

[20] Linda Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal of European Competition Law and Practice 131-132.
[21] Joshua Wright, Jonathon Klick, Jan Rybnicek, and Elyse Dorsey, 'The Dubious Rise and Inevitable Fall of Hipster Antitrust' (The CLS Blue Sky Blog, 15 October 2018), <https://clsbluesky.law.columbia.edu/2018/10/15/the-dubious-rise-and-inevitable-fall-of-hipster-antitrust/> accessed 30 July 2020.

are beyond its scope and giving a cursory justification for its stance on these issues.

2.1. Media Pluralism: what is at stake?

To begin, it is important to understand what is meant by the central element of this paper: media plurality. It is beyond the scope of this piece to define media pluralism once and for all – more established scholars have spent lengthy works exploring this.[22] Nevertheless, endeavouring to comprehend the nature of media plurality itself informs our understand of if and how it can be accommodated within competition law assessments To do this, it must first understand the theoretical foundations of each segment of the term; both 'media' and 'pluralism'.

When discussing 'pluralism', it is difficult to deal in specifics due to difficulties raised through its intrinsic multi-faceted and broad dimension. The nature of 'pluralism' contains numerous conceptions that operate and exist from its use in a variety of different contexts.[23] Nieuwenhuis distinguishes between three elements: value pluralism (diversity of conflicting values); social pluralism (a society populated by various religions, cultures, ethnicities, etc.); and political pluralism (the coexistence of different associations and groupings on equal ground).[24] All three influence pluralism with different emphases; whether that be on individual liberties or collective interests. When applied to the legal sphere, these competing interests create an ambivalence in reasoning. Nieuwenhuis explores this ambivalence in the

[22] Danielle Raeijmaekers and Pieter Maeseele, 'Media, Pluralism, and Democracy: What's in a name?' [2015] 37(7) Media, Culture, & Society 1042.
[23] Barzanti, (n, 6), 2.
[24] A Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' [2007] 3 European Constitutional Law Review 367-84.

case law of the European Court of Human Rights (ECtHR) where several fundamental rights, such as freedom of speech or association, are caught by pluralism's wide definition.[25] Further complications can arrive due to the ECtHR's view that pluralism is a 'characteristic of and a condition for a democratic society.'[26] This illustrates an underlying *passive* side – for recognising and respecting what is currently in society – and an *active* dimension – that being the pursuit and promotion of an essential ingredient for democracy.

This uncertainty can be alleviated when combined with the term 'media'. However, it can also create further ambiguities. These arise due to the ever-evolving definition of mass media due to technological and sociological progress. While mass media once encompassed newspapers, television and radio, the boundaries have further increased due to new delivering platforms and the *new media*.[27] Indeed, broadening the scope of application complicates both discussions and, more practically, the development of regulatory measures to ensure a pluralistic media. This blurred line encompassing the definitions creates practical cumbrances in research, making it difficult to understand what scholars refer to as media pluralism in their pursuits of its protection.[28]

Despite these theoretical and practical limitations in definition, media plurality can be understood in common parlance. Examination of the discussions of Barzanti and Nieuwenhuis show us that media pluralism is

[25] Ibid, 367.
[26] Ibid, 369.
[27] Barzanti, (n, 6), 2.
[28] M Ariño, 'Regulation and Competition in European Broadcasting: A Study of Pluralism through Access' (European University Institute Thesis 2005), 151-58.

related to the foundation that democracy itself rests upon.[29] The founding and fundamental role of the freedom of expression, and thus its derived freedoms of those to hold opinions and receive and impart information, are the connective fabric of a democratic society, ensuring that a multiplicity of viewpoints are represented and made available to the masses.[30] The media sector in particular plays a key role in the democratic process through ensuring a 'diversity of media supply' and 'media contents available to the public', and thus media plurality.[31] Therefore, media plurality is a precondition for preserving democracy through the right to information and freedom of expression, as opposed to their outcome.[32] Furthermore, the views of citizens, both in what they think about and their opinions on the matters, are significantly influenced by the mass media.[33]

The ability of the media to set the agenda of the moment has a significant influence on citizen discussion. For instance, a highly concentrated media market held by only a few individuals can effectively ignore news which would negative influence them or frame the news of them in a less offensive light. This is a criticism against government owned media which is equally relevant to private media. This highlights the mass importance of media plurality in modern society. As expressed by Sartori (translated), 'pluralism affirms its own value[,] because pluralism affirms that diversity and dissent are values that enrich the individual and also his political society,'[34] and thus generates an enriching plurality of differing viewpoints. Any damage to such

[29] Barzanti, (n, 6), Nieuwenhuis (n, 27).
[30] Luciani, (n, 8), 606.
[31] N Bobbio, 'Il future della democrazia' (Einaudi 1984), 48.
[32] Barzanti, (n, 6), 2.
[33] Maxwell McCombs, *Setting the Agenda: The Mass Media and Public Opinion* (Wiley Online 2013).
[34] G Sartori, 'Plualismo, Multiculturalismo E Estranei' (Rizzoli 2000), 20.

a fragile concept has wide reaching implications upon democracy at its core, and thus requires protections.

However, media plurality continues to be a concerning factor within modern democracy. As shown in Section 1, the failings in the plurality of the mass media have made common pop-culture due to the alarming content distribution of the Sinclair Broadcast Group,[35] who on multiple occasions have been caught issuing an identical irony-riddled script to its 193 US local stations and giving inspiration to this article's title. Furthermore, it is also seen due to the UK newspaper market share, where over 50% of the top ten newspapers are owned by the only two individuals.[36] Due to this, the public are becoming increasingly aware of the fragility of the systems in place to safeguard media plurality. Furthermore, empirical research by the Centre for Media Pluralism and Market Freedom, an independent monitor of media pluralism,[37] has shown a year-on-year decline of media plurality on an EU level. Their research assesses media pluralism according to the scoring of 20 indicators and 200 variables based on questionnaires compiled by individual national teams of experts in the field.

In 2018, it was shown that only two countries (France and Germany) showed a low media plurality risk and that horizontal media ownership concentration

[35] Graves, (n, 11).
[36] Media Form Coalition, 'Who Owns the UK Media?' (Media Reform Coalition 12 March 2019), <https://www.mediareform.org.uk/wp-content/uploads/2019/03/FINALonline2.pdf> accessed 30 July 2020; Ben Gelblum, 'Two Billionaires now Own Half the Top 10 Daily Newspapers warns Corbyn as Mail owner buys the i', (The London Economic, 19 November 2019), <https://www.thelondoneconomic.com/news/media/two-billionaires-now-own-half-the-top-10-daily-newspapers-warns-corbyn-as-mail-owner-buys-the-i/29/11/> accessed 30 July 2020.
[37] Centre for Media Pluralism and Media Freedom, 'About' (CMPF) <https://cmpf.eui.eu/about/> accessed 2nd August 2020.

concerns averaged at 69%.[38] Their more recent 2020 report updates this research, with an inclusion of digital media. This empirical research continues to show that ownership concentration jeopardises market pluralism and 'represents a high risk across most of Europe with no country recording a low risk.'[39] Furthermore, the impact of a globalised society, amongst other factors, trends media towards concentration to ensure that they have the resources to keep up with globalised news.[40] This worrying trend shows the necessity for updated and innovative measures in protecting pluralism.

Despite this, many still oppose policy intervention in any form. Two common assumptions drive this opposition, but, by reference to Bania's work on the matter,[41] these can be refuted. First, many media policymakers and commentators make the argument that the proliferation of sources and content available to citizens help mitigate any problem of traditional media concentration and therefore make any plurality regulations obsolete. Indeed, recent relaxation of ownership restrictions in the mass media (for instance in Australia)[42] show this view's influence in media regulation.[43] However, it has been empirically shown, both in Europe and beyond, that the media markets

[38] Centre for Media Pluralism and Media Freedom, 'Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2017 in the EU, FYROM, Serbia & Turkey' (CMPF 2018) <https://cadmus.eui.eu/bitstream/handle/1814/60773/CMPF_PolicyReport2017.pdf?sequence=4> accessed 2nd August 2020, 29.

[39] Centre for Media Pluralism and Media Freedom, 'Monitoring Media Pluralism in the Digital Age: Application of the Media Pluralism Monitor in the European Union, Albania, and Turkey in the years 2018-2019' (CMPF 2020) <https://cadmus.eui.eu/bitstream/handle/1814/67828/MPM_2020-PolicyReport.pdf?sequence=1&isAllowed=y> accessed 3rd August 2020, 106-136.

[40] Werner Meier, 'National and Transnational Media Ownership and Concentration in Europe: A Burden for Democracy?' in Werner Meier & Joseph Trappel (eds) *Power, Performance and Politics* (Nomos 2007), 75-104.

[41] Bania, (n, 15), 50-92.

[42] Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (Cth).

[43] Bania, (n, 15), 60.

have a natural tendency to concentration[44] and that in and of itself is dangerous to democracy. In addition, despite the upward drive of *new media*, traditional media is still an important aspect of EU mass media consumption, as television and radio continue to hold the two of the top three popular media mediums[45] and 60% of Europeans continue to read a newspaper multiple times a week.[46] In addition, qualitative research has shown that televisions 'immersive audio-visual qualities [which] bring stories to life' have the biggest impact upon public opinion.[47] Indeed, despite the wave of *new media*, it is inappropriate to assume that its influence nullifies the impact of traditional media on the marketplace of ideas, and it may be more appropriate to see that both off- and on-line concentration can lead to democratic weakness. Karppinen articulates this effectively, stating that 'communicative abundance alone does not render questions about the distribution of communicative power and political voice obsolete, but only reconfigures them in a more complex form'.[48] A counterargument here may be that citizens should be entrusted with the capacity to engage with the wide variety of sources, yet this leads into the second assumption.

The second assumption is that citizens consume and interact with diverse content themselves. Traditional policymaking is based upon the assumption

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[44] David Ward, 'A Mapping Study of Media Concentration and Ownership in Ten European Countrties' (Commissariaat voor de Media and David Ward 2004) <https://www.mediamonitor.nl/wp-content/uploads/2013/08/A-Mapping-Study-of-Media-Concentration-and-Ownership-in-Ten-European-Countries.pdf> accessed 2nd August 2020; Allegato A alla delibera, *utorità per le Garanzie nelle Comunicazioni Indagine conoscitiva sul settore della raccolta pubblicitaria* (551/12CONS 2012); G Mastrini and Martin Becerra, 'Estructura, concentración y transformaciones en los medios del Cono Sur latinoamericano' [2011] 18(36) Comunicar 51-59.

[45] European Commission, *Media Use in the European Union* (Standard Eurobarometer 88, 2017) 4-5.

[46] Ibid.

[47] Ofcom, *Measuring Media Plurality* (Ofcom 2012), 14.

[48] K Karpinnen, 'Rethinking Media Pluralism and Communicative Abundance' [2009] 3(4) Observatorio Journal 151-169, 160.

of passive consumption; that consumers are at the mercy of the media's persuasive messages and can only choose between switching predefined program packages.[49] In contrast, modern regulation introduced changes to adapt to the belief that consumers are no longer passive consumers and can actively critique broadcasting content[50] – for example, the relaxation of ownership restrictions in EU Member States.[51] The regulatory refocus appears to strive to assign more duties to the individuals. However, this is not quite yet appropriate as a content abundance and the ability of individuals to control the content they interact with allows them to create a private information universe[52] – a carefully curated feed which reinforces the political beliefs they already hold.[53]

Therefore, while an individual may be exposed to more news, it may actually be more of the same.[54] This can create social fractures,[55] where individuals only interact with individuals and news which share their or similar viewpoints, and diminishes the impact of the meeting of the minds and social cohesion required for an effective democracy.[56] These curated news feeds can be created intentionally or unintentionally – such as through the use of algorithms or the mistaken belief that following a few big news companies is

[49]Ibid, 160.
[50] Broadcasting Authority of Ireland, 'Strategy Statement 2011-2013' (2010) <https://www.yumpu.com/en/document/read/34609822/bai-strategy-statement-2011-2013-broadcasting-authority-of-ireland> accessed 6th August 2020, 22.
[51] Open Society Foundations, 'Mapping Digital Media in the European Union – A Report for High-Level Group on Media Freedom and Pluralism' (2012) <https://www.opensocietyfoundations.org/publications/pluralism-and-freedom-media-europe> accessed 6th August 2020, 2.
[52] Cass Sunstein, *Republic.com 2.0* (Princeton University Press 2007), 4.
[53] Nico Carpentier and Bart Cammaert, 'Hegemony, Democracy, Agonism, and Journalism: An Interview with Chantal Mouffe' [2007] 7(6) Journalism Studies 964-75, 968.
[54] Bania, (n, 15), 86.
[55] Council of Europe, 'Report of high-level task force on social cohesion in the 21st century – Towards an active, fair, and socially cohesive Europe' (TFSC 2007), 31E.
[56] C Henning and Karin Renblad, *Perspectives on Empowerment, Social Cohesion and Democracy – An International Anthology* (Jonkoping: School of Health Sciences 2009).

enough while in reality they are owned by the same corporation. The negative impact created by individual consumers actions further expresses the requirements for regulation, not the other way around. This impact can hope to be mitigated by ensuring the media market is effectively pluralised. It may be argued that the onus should be on the individual to ensure that their media sphere is diverse enough, as long as the diversity of sources exists. However, individuals have been shown to create curated feeds and, in many cases, fall into them through social media algorithms. This shows that it is not a matter to be solved at an individual level, and instead regulation is essential.

In summary, media plurality is a key aspect of democracy which requires immediate attention, and, as It has been shown, pluralism is under attack at both an EU and individual Member State level. Despite this, some policymakers argue that media ownership regulation is losing its relevance as the mass communication landscape evolves faster and faster. However, the underlying assumptions which drive these regulations are flawed and risk further damaging the pluralism of the media.

2.2. Why Competition Law: or a Legal False Dichotomy

Until relatively recently, the vast majority of competition scholars would argue that competition law is absolutely ill-suited as a vehicle for the protection of media plurality. Some of these arguments are based on the view that another, separate strand of regulation is better placed to achieve this goal. It is important that this argument is addressed head on, and this subsection exists to put forward the writer's contentions with that stance. Ultimately, these contentions afford credence to the suggestion that an exploration of an

antitrust approach to media pluralism is warranted, even if simply as a thought experiment.

A fundamental disagreement over the purpose of competition law has proven the primary catalyst for debate in this area. Indeed, the modern antitrust regime in the US has been conquered by the Chicago School,[57] and, while EU law converges upon US antitrust in numerous pillars, [58] EU competition law has its own separate goals. The central tenant of the Chicago School is a market efficiency model,[59] which refers to the situation where the gains of consumers or producers outweighs the loses of other consumers or producers.[60] The US antitrust approach treats this as gospel. While EU competition law encompasses many more considerations, such as the integration of the internal market and consumer welfare,[61] it has nevertheless shown at its core to be welfare centric. Herein may lie the disagreement that modern competition law does not consider media plurality, as it is not relevant to a consumer welfare focus, and thus is not a suitable avenue for management. Barzanti argues that competition law is ill-suited due to being driven by efficiency arguments and that these would limit its effectiveness at achieving any policy-based objectives, such as facilitating the plurality of the media.[62] Furthermore, some may argue that the EU implicitly recognises the

[57] William E Kovacic, 'The Chicago Obsession in the Interpretation of US Antitrust History' [2020] 87(2) University of Chicago Law Review 459-94.
[58] D Bartalevich, 'EU Competition Policy since 1990: How Substantial is Convergence towards US Antitrust?' [2013] 6(2) Business and Economics Research Journal 273-94; W.E. Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence' in X Vives (ed.) *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford: Oxford University Press 2009)
[59] G Becker, *Economic Theory* (New York: Transaction Publishers 2007), 25-6.
[60] Dzmity Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy' [2016] 54(2) Journal of Common Market Studies 267-83, 270-71.
[61] Raimundas Moisejevas and Ana Novosad, 'Some Thoughts Concerning the Main Goals of Competition Law' [2013] 20(2) Jurisprudence 627, 629-30.
[62] Barzanti, (n, 6), 15.

limits of EU competition law in safeguarding media pluralism in the EU Merger Regulation (EUMR)[63] by allowing Member States to interfere in EU merger cases when media plurality is involved.[64] Effectively, this is the disagreement that the essence of competition law is inappropriate to safeguard media plurality.

In contrast to this view, this paper closely aligns itself with the New Brandeis philosophy, a movement somewhat disparagingly nicknamed 'hipster antitrust'.[65] This US based movement has been backed by high profile papers[66] and even influenced the Democratic Party's antitrust policy agenda.[67] The New Brandeis movement takes its name from Justice Louis Brandeis, who was a strong proponent of Madisonian traditions – those being the democratic distribution of power and political economy opportunity.[68] This movement posits that competition law is a key tool in ensuring society is based on a democratic foundation, including political, religious, and industrial liberty. The belief is that concentration of economic power enables private entities to undermine and overwhelm the government – whether that be through lobbying, financing elections, or, more relevant to media plurality, publishing biased information which furthers their agendas to influence public opinion.[69] While the Chicago School and EU competition theory

[63] Commission Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, OJ [2004] L 24/1.
[64] Ibid, Art 21(4); Commission Staff Working Document, 'Media Pluralism in the Member States of the European Union' (SEC 2007 32); Ariño, (n, 31).
[65] Andrea O'Sullivan, 'What is "Hipster Antitrust?" Why the Newest Antitrust Thinking Isn't Actually New' (*Mercatus Centre* 18 October 2018), <https://www.mercatus.org/bridge/commentary/what-hipster-antitrust> accessed 6 August 2020.
[66] Lina Khan, 'Amazon's Antitrust Paradox' [2017] 126 Yale Law Journal 710.
[67] Matthew Yglesias, 'Democrats' Push for a New Era of Antitrust Enforcement, explained?' (*Vox* 31 July 2017), <https://www.vox.com/policy-and-politics/2017/7/31/16021844/antitrust-better-deal> accessed 6 August 2020.
[68] Khan, (n, 20), 131.
[69] Ibid, 131.

focuses on outcomes, such as consumer welfare, this movement focuses on the structures and processes of competition.[70] This writer believes that such a focus on consumer welfare, and thus on promoting efficiency to produce lower prices, has allowed mass concentrations in modern markets and blinded the enforcers to the harms it creates upon workers, suppliers and independent entrepreneurs. Furthermore, recent studies have shown that the 'consumer welfare' focus has even resulted in higher prices and mark-ups![71]

This illustrates that the disagreement may be due to a fundamental misalignment on what is seen as the true goal of competition law. While some may view the ultimate goal of competition law as consumer welfare, and thus should not take into account media pluralism, others may view it with a more structural and holistic approach, that judgments should consider all factors on a case-by-case basis. This misalignment in approach does not have to be a barrier to research along these lines. While it may take some time for competition policy to change in either jurisdictions,[72] this does not mean it is inappropriate to explore the law through the lens of a non-mainstream school of economic thought. Doing so helps develop a deeper understanding of the law and, even if the competition community ultimately rejects the new approach, helps crystallise the arguments in the field and create a more robust field of research.

Furthermore, while the tenants of hipster antitrust have not yet been adopted by the European Commission, they have not been ignored. In a 2017 speech, the then Director-General for Competition Johannes Laitenberger extended a

[70] Ibid.
[71] Ibid.
[72] Rulger Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' [2016] 12(1) Utrecht Law Review 1.

hand towards hipster antitrust, remarking that 'no one claims competition law can solve all issues in our society' but that it has always contributed to solutions beyond efficiencies and that big-picture policy concerns can be applied while applying rigorous competition enforcement.[73] Such an acknowledgment shows that it is not an impossibility for the European Commission to consider the wider societal issues the movement wishes and therefore academic discussion is appropriate. Thus, for these reasons, this paper stands by its decision to explore the field through the New Brandeis School despite the current standing of the Chicago School and EU policy focuses.

A further oft-cited argument against accommodating media plurality considerations within competition assessments is that, regardless of whether or not competition law is an appropriate field, other social, political, or legal field may be more appropriate.[74] Indeed, the multifaceted nature of concentrated corporations, and thus the conglomerated mass media industry, may make other (specialist) areas of law and policy more effective at serving plurality goals. For example, ex ante regulation in a visage of older regulation may be one avenue. On the other hand, this does not tackle the media plurality concerns which have already arisen and as shown above, there has been a trend for deregulation in the media sector. Another example could be increased executive control which could help damper anti-plurality concerns. In the view of this paper, this is a false dichotomy. Media plurality is such an important yet fragile element of democracy. Such a strong tenant of society warrants protections beyond just one field. The argument that, since another

[73] Johannes Laitenberger, 'Accuracy and Administrability Go Hand in Hand' (CRA Conference 12 December 2017) <https://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf> accessed 6 August 2020.
[74] Barzanti, (n, 6), 23.

policy field is more appropriate, another should not be pursued is a fallacy. Protections through one field do not prevent protections through another.

Therefore, it is possible to protect plurality through competition law where it is appropriate while simultaneously utilising other areas of law and policy. All can strengthen each other and provide a more robust and well-rounded protection of media pluralism. It is possible that this may be overkill and work only to smother the mass media under the weight of the law. However, this worry does not displace the evidence that current regulation has worked to smother media plurality under immense media conglomerates. Ultimately, neither approach is perfect, but the protection of plurality is so vital to democracy that it is better to be overprotective than under-protective. In addition, competition law can provide methods to protect plurality unique to its sphere. First, its jurisdiction around mergers would allow the European Commission to consider a mergers effect on plurality in its assessment and thus offer a new layer of protection which regulation could not achieve. Second, it can work *ex post* by policing the actions of dominant media conglomerates which may work, intentionally or unintentionally, to subvert democracy through their effect on damaging media plurality. While this may have a similar jurisdiction to regulation, its application in competition law allows a more holistic, ad-hoc approach which can take more minute factors into its assessment. For both these reasons, this paper stands by its examination of competition law as one of these potential regulatory avenues.

3. Dispelling Competence and Substantive Myths regarding Pluralism and EU Competition

3.1. EU Competence in Media Plurality

EU competence with regards the safeguarding of media pluralism is a legal labyrinth involving several types of legal actions under a variety of EU legal branches. Ultimately, this creates confusion and uncertainty over the ability of the EU to influence media plurality matters. For that reason, it is important that this labyrinth be at the very least laid out, and not presumed, before exploring how competition law may navigate it.

To begin, media plurality exists within, and is thus irrevocably linked with, human rights. The Court of Justice of the EU (CJEU) has expressed that media pluralism is connected with Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[75] – the freedom of expression – and is therefore a fundamental principle of the EU.[76] While all Member States are signatories, media plurality's link to human rights does not yet give the EU legal competence to govern media plurality through a human rights avenue for two reasons. First, while it is planned, the EU has not yet acceded to the ECHR and thus there are no EU obligations to adhere to them.[77] Therefore, while individual Member States have been brought before the ECtHR for media plurality violations, they would not be brought before the CJEU.[78] Furthermore, while the CJEU have made it clear that Art 10 is a fundamental principle guaranteed by the EU legal order, this

[75] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[76] ECJ Case C-288/89, *Stitching Collective Antennevoorziening Gouda* [1991] ECR I-4007, para 23-29; ECJ Case C-353/89, *Commission of the European Communities v Kingdom of the Netherlands* [1991] ECR I-4069, para 30.
[77] E Komorek, *Media Pluralism and European Law* (Alphen aan den Rijn: Kluwer Law International 2013), 61-81.
[78] Ibid.

endorsement is seen not as a requirement upon Member States to protect human rights, as all Member States had general human rights competence since the inception of the European Community.[79] Instead, the intention appeared to have been to ensure that the EU itself did not enact law which would require Member states to endanger human rights and to bind Member States only when they applied EU law.[80] Beyond the ECHR, while the Charter of Fundamental Rights ('the Charter) is legally binding upon Member States, it does not grant the EU additional powers with regard human rights.[81] Therefore, while the ECHR and the Charter ensure that media plurality is protected throughout the EU, the onus still is placed upon the Member States.

While this may conclusively place media plurality out of the scope of the EU, it would inappropriately ignore several avenues it has to govern. First, the purpose of the human rights obligations must be examined. The purpose has relevance as it illustrates *why* the onus was placed upon the Member States and what is left ungoverned and perhaps available for EU influence. The purpose may be inferred through whether the rights are positive, and therefore must be promoted with active steps, or negative, and must solely not be infringed.[82] Pluralism in the ECHR can be seen in numerous articles linked closely in case-law (Art 3 of Protocol 1, Art 9, Art 11),[83] but for media plurality it is most clearly seen in Art 10. Positive obligations in the field of

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[79] Bania, (n, 15), 16.
[80] S Besson, 'The Human Rights Competence in the EU – The State of the Question after Lisbon' in G Koflet, Migeul Poiares Maduro & Pasquale Pistone (eds.), *Taxation and Human Rights in Europe and the World* (Amsterdam: IBFD 2011), 39.
[81] Treaty of the European Union (consolidated version) [2008] OJ C 115/19, Art 6(1) and (2); Charter of the Fundamental Rights of the European Union [2010] OJ C 83/389, Art 51(1) and Art 11(2).
[82] Janneke Gerards, 'Positive and Negative Obligations' in Janneke Gerards (ed), *General principles of the European Convention on Human Rights* (Cambridge University Press 2019), 108-135.
[83] Jean-Fracois Akandji-Kombe, *Positive Obligations Under the European Convention of Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Human Rights Handbook No 7, 2007), 48.

plurality are almost non-existent here,[84] as shown in the *Guerra* case where the court rejected the argument that the government had a duty to collect and distribute information.[85] Thus, with regards pluralism and media plurality, States only have a negative obligation to ensure their actions do not disregard it, for instance through imposing a single, government owned mass media. It is therefore possible to infer that, when the division of competences placed pluralism within the field of the Member States, this was *not* intended to ensure that their local media is pluralistic, but instead to not take steps to dismantle pluralism. This viewpoint is an effective loophole in justifying EU management of media pluralism within Member States.

Second, it would be incorrect to state that the EU altogether has no competence to govern media plurality. Art 7 of the Treaty of the European Union (TEU) allows the Council to determine that there was a persistent and serious breach, or that there is likely to be one, of the founding values of the EU as dictated in Art 2.[86] These founding values include democracy. As pluralism is deeply connected with the democratic process,[87] this provides the EU the opportunity to utilise Art 7 against Member States who engage in activity which would harm plurality.

Furthermore, while it is true that media policy is traditionally an integral part of individual Member State policy, as it must advance social cohesion by ensuring that various local minorities are effectively represented,[88] this does

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[84] Ibid, 50.
[85] *Guerra and Ors. v Italy* (1998) 26 EHRR 357.
[86] Treaty of the European Union (consolidated version) [2008] OJ C 115/19, Art 2 and 7.
[87] European Commision, *Media Pluralism: Commission Stresses need for Transparency, Freedom and Diversity in Europe's Media Landscape* (Press Release IP/07/52 2007).
[88] K Lefever, Ellen Wauters, and Peggy Valcke, *Media Pluralism in the EU – Comparative Analysis of Measurements Systems in Europe and US* (Steunpunt Media 2013) <https://www.steunpuntmedia.be/wp-content/uploads/2014/03/Steunpunt-Media_ICRI_Monitoring_D1D2.pdf> accessed 13 August 2020, 7.

not mean that the EU institutions may not be influential. Articles 167(1) and 6(c) of the Treaty on the Functioning of the European Union[89] enable the EU to take actions to 'support, coordinate, or supplement' national attack to contribute to Member State culture. More so, pursuant to Art 167(5), the EU may make incentive measures and recommendations, such as the MEDIA program – although they are limited in harmonising national laws. While this puts the EU in a subservient role to national instruments, as they are better placed to understand the intricacies of their national traditions and needs, it provides further evidence of the EU institutions influence in plurality concerns.

Finally, and perhaps most important in bringing this back towards competition law, the EU has the most control with regards to the economic aspects of the media. The EU has exclusive competence in establishing competition rules for EU-based undertakings, which therefore includes domestic and international media firms.[90] While on its face economic concerns do not include plurality concerns, it is often a necessary requirement when ensuring economic integration to adopt measures which impact non-economic values.[91] In addition, non-economic considerations are required elements to have regard to when making decisions under Art 167(3) TFEU.[92] This requirement to take cultural values into account, which include media plurality, provides the EU Commission an effective loophole to justify any stance it takes on preserving media plurality through competition law.

[89] Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47, Art 6 and 167.
[90] Ibid, Art 3(1)(b).1
[91] Bania, (n, 15), 18.
[92] Treaty on the Functioning of the European Union (consolidated version) (TFEU) [2012] OJ C 326/47, Art 167.

To conclude, it has been shown that, while EU competence in the area of media plurality is a maze touching on various legal elements, there exist a number of loopholes which allow the EU to have an appreciable impact upon plurality. Most importantly, Art 167 may be used in conjunction with competition law to allow the Commission to take plurality concerns into account in its competition policy.

3.2. Argument for a Negligible Role of EU Competition Law (1500)

It would be inefficient to look at the proposed theoretical competition law applications without first engaging with critics who ascribe EU competition law a miniscule role in pluralism protection. Three common substantive arguments and one procedural are put forward by academics and this subsection shall evaluate whether they are legitimate in wholly dismissing EU competition law as a tool to preserve pluralism. A primary concern is that the academics studying the below arguments fail to explore the potential of 'strict competition enforcement' and thus leave many loopholes and questions unanswered.[93]

The first two dismiss its applicability due to the economics-based approach of modern competition law – whose focus is now on consumer welfare and economic efficiency.[94] The main concern is that this economic policy focus trumps other public policy concerns, such as media pluralism, and supplant

[93] Bania, (n, 15), 37.
[94] Philip Lowe, 'Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?' (13th International Conference on Competition and 14th European Competition Day 27 March 2007) <https://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf> accessed 13 August 2020.

them entirely in the Commission's judgment.[95] Moreover, they accept this as eternal; comfortable in the opinion that the Commission will never refocus its policy goals to consider non-economic elements.[96] Even ignoring the quote from Laitenberger, the two arguments fail to test their theory of the commission not considering non-economic policy objectives in practice, and this will be discussed below.

The first of the two economic-based arguments centres around the fact that, while pluralism may find some benefit in the use of competition law, any benefit is merely coincidental.[97] Indeed, these critics accept that pluralism may find some benefit, as the competition laws application ensures market *access* – for instance through preventing highly concentrated mergers – and therefore potentially creates a pluralistic benefit.[98] However, they caveat this with the caution that any such outcome is at the whim of the economic factors explored by the Commission in each case. However, these critics fail to test this hypothesis on how the Commission has worked to ensure media markets remain competitively open. For instance, in cases of the broadcasting market, the Commission's focus has been on behaviour remedies on owners of premium content.[99] In their discussion of such practices, studies only explore how they were designed and not impact assessments on their effectiveness and whether there are other, more effective tools available to the Commission than access remedies.[100] A further example is the prohibition of resale price maintenance agreements in print publishing. The Commission has declared

[95] Pablo Ibáñez Colomo, 'Saving the Monopsony: Exclusivity, Innovation, and Market Power in the Media Sector' (College of Europe Research Papers in Law 7/2006), 26.
[96] Barzanti, (n, 6), 14-15.
[97] Barzanti, (n, 6), 15; Komorek, (n, 77), 136-142.
[98] Ibid.
[99] *Vivendi/Canal+/Seagram* (Case COMP/M. 2050) [2000] C 311/03; *NewsCorp/Telepiu* (Case COMP/M.2876) [2004] OJ L 110/73; *SFR/Tele 2 France* (Case COMP/4504) [2007] OJ L 316/57.
[100] Bania, (n, 15), 37.

these incompatible with competition law due to threats to the internal market,[101] but these have economic literature illustrating that they may be beneficial by facilitating the production and distribution of all titles, including low-demand books, and thus delivering a pluralistic outcome.[102] The conclusions that ensuring market access is a weak method of ensuring pluralism is ill-founded without examining whether the Commission's practice is in fact the best option and thus an inappropriate counterargument.

The second argument is that the economic efficiency, and thus quantitative, approach of the Commission makes it unable to consider the dual quantitative-qualitative requirements of pluralism.[103] In essence, this argument believes that the Commission is incapable of considering non-cost-based criteria. This, of course, is an oversimplification of the complex reality of competition policy. Indeed, Merger Guidelines already require the Commission to consider non-price elements of power, such as the quality of goods and services or innovation.[104] Therefore, it is clear that the argument that the Commission's hyper-focus upon quantitative efficiency goals make it ineffective at considering qualitative outcomes holds no water. Of course, the extent to which these factors are taken into consideration depends entirely upon the nature of the products and the customers' desires. While this may be seen as a weakness, illustrating the half-mind approach of the Commission, it

[101] Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08; Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428 – VBBB/VBVB) [1982] OJ L 52/39; Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association – Net Books Agreements) [1989] OJ L22/12.
[102] Jean Paul Simon & Giuditta de Prato, *Statistical, Ecosystems and Competitveness Analysis of the Media and Content Industries: The Book Publishing Industry* (JRC Technical Reports EUR 25277 EN/6 2012), section 2.
[103] Barzanti, (n, 6), 15; Jackie Harrison & Lorna Wood, *European Broadcasting Law and Policy* (Cambridge: Cambridge University Press 2007), 149-150.
[104] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, para 8.

instead shows the malleable flexibility of competition law application to the demands of different sectors. For instance, the quality of services in IT security may depend upon its effectiveness to prevent viruses or the inclusion of other in-built features such as VPNs.[105] The media sector may use this malleability to ensure that its non-price exigencies, such as the political preferences of print news readers[106] or the temporal availability of TV broadcasting,[107] are considered. Therefore, the Commission is capable of considering the qualitative traits of the media sector in conjunction with the quantitative.

The final substantive argument raised by critics relates to the competence limitations imposed upon the Commission in state aid matters.[108] In this competition field, the Commission is limited due to the right of Member States to design aid schemes as they themselves view as necessary and, moreover, the side-lined role of the Commission in verification. Due to this more limited competence, the Commission is only able to verify that the benefits are not excessive of the objective. This restriction provides an implicit assertation that the Commission, if it were to consider pluralism in its judgment, would have a minimal role in designing aid schemes which relate to pluralism. The argument is that competition law is therefore ill-placed, as an entire wing is, by its very nature, limited and, thus, may be an

[105] Case T-201/042 *Microsoft Corp. v Commission of the European Communities* [2007 ECR II-03601, para 652.
[106] Andra Leurdijk, Mijke Slot, & Ottilie Nieuwenhuis, *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry* (JRC Technical Report EU 25277 EN/3 2012), 24.
[107] Lilla Csorgo and Ian Munro, 'Market Definition Issues for Audio and Audio-Visual Distribution Products and Services in a Digital Environment: A Report Prepared for the Canadian Radio-television and Telecommunications Commission (Canadian Radio-television and Telecommunication Commission 2011).
[108] Bania, (n, 15), 36.

avenue for anti-pluralistic measures to circumvent the Commission. Initially, it seems unnecessary to fall into a discussion on this matter.

There is not much debate to be had to disagree with these substantive arguments. It is true, the Commission is very limited in State aid, only ensuring that public funds are not misappropriated to unduly harm competition, and much more flexible in abuses of dominance, mergers, and anti-competitive agreements. Due to this, some scholars prefer to sidestep State aid and simply focus on mergers or dominance.[109] It is first important to note that this is a legitimate approach. The limited competence of the Commission makes discussion around merger control more beneficial, as they are more likely to use this more effectively. State aid limitations do not invalidate the pluralistic protections offered through merger control or abuse of dominance. However, it would be inappropriate to ignore the influence failures in state aid may create on plurality. For instance, while merger control may allow media conglomerates, state aid measures may cause media foreclosure due to strained competition.[110]

Therefore, the topic warrants the attention and examination of Commission approach. Indeed, examination into these actions perhaps illustrate the Commission's hand-off approach to competition, media pluralism, and state aid. Case law makes it clear that the Commission may not conduct efficiency assessments on aid schemes and are limited to proportionality assessments for necessity.[111] Even so, this assessment shows signs of ineffective use. Bania

[109] Monico Ariño, *Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps* (European University Institute: Florence 2004).
[110] Bania, (n, 15), 40.
[111] Joint Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)* [2010] ECR II-3397, para 141.

notes that, in the Irish case *State aid financing of RTE and TNAG*,[112] the Court expressly indicated they would not be dealing with possible disproportionate effects on competence related to the scope of sports rights acquired.[113] This illustrates the plurality implications which would be created by not concerning state aid with media pluralism. Indeed, if public broadcasters are given, or are enabled to purchase, all sports rights from the market, other sports media providers will struggle to compete, and their foreclosure will ultimately damage plurality. Furthermore, the concerns of providing enough sports cover to match their market share may limit the balanced and varied programming its citizens are meant to have.[114] In this regard, Commission actions do indeed show how currently the law may offer a negligible role in pluralism protections, and how any policy alterations may be tied by Treaty law in its protections through State aid. Reform to State aid measures to the benefit of media pluralism have been suggested and will be explored in in further sections.

Beyond these substantive issues raised, critics also raise procedural concerns about competition policy considering pluralistic elements. These concerns are linked closely to those of the New Brandeis movement, but due to their procedural nature are more relevant to this subsection. Stout critics of an expansion of competition policy in general, and thus media plurality specifically, outline numerous reasons why competition authorities currently work so effectively. These include, but are not limited to, the well-defined consumer welfare standard and the lack of continuing relationship between firm and regulator.[115] In this view, the regulator enables markets to achieve

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[112] Commission decision *State aid financing of RTE and TNAG (TG4)* E4/2005 [2008] OJ C121/5, fn. 6.
[113] Bania, (n, 15), 41.
[114] Ibid, 41.
[115] Seth Sacher & John Yun, 'Twelve Fallacies of the "New-Antitrust" Movement' [2019] 26(5) George Mason Law Review, 1515.

social goals on their own.[116] The expansion of policy to be more considerate of pluralistic concerns would increase the manpower required to deal with more complicated goals outside of their expertise.[117] The argument continues that these additional burdens would further adversely affect the performance of a regulator who is already strained for resources and thus increase uncertainty, funding requirements and, as a consequence, political capturability.[118] This argument is well founded. A refocus of competition policy to be more receptive to plurality concerns would create additional burdens. However, it is incredibly misguided to use this as a negative for the expansion of competition policy. This is instead a political critique of an overburdened and underfunded system and is entirely separate. While it is true that the regulators may struggle, that is an issue of the regulator, not one of policy. Conversely, it would not be a positive argument to argue that competition authorities should stop considering innovation or perhaps State aid completely. Such an argument incorrectly places the blame on policy.

The above discussion has taken great steps to dispel the final few arguments dissenting media pluralistic competition policy goals. While the arguments have some legitimacy, they fail to completely disregard competition law's potential in media plurality protection. A key reoccurring theme is the failure of the Commission to fully utilise its given toolkit to guarantee competition in the media market, and thus indirect plurality. Indeed, even with the inefficient use of its powers, the Commission have taken 482 judgments regarding the mass media.[119] These have dealt with all forms of mass media undertakings, from broadcasters to search engines – all of which may impact

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[116] Stephen Breyer, *Regulators, and Its Reform* (Harvard University Press 1984), 156-57.
[117] Sacher & Yun, (n, 115), 1515.
[118] Ibid, 1516.
[119] European Commission, 'All Cases' <https://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1,2,3> accessed 16 August 2020.

media pluralism. In this way, EU competition law has had an appreciable effect on the media markets and thus, indirectly, pluralism. This illustrates how the current law already has the means, methods, and history to continue to impact plurality, perhaps in greater ways once it has been acknowledged as an explicit competition policy goal.

4. Practical Application of EU Competition Law

Much of this article has been spent dispelling the myths and contrarian arguments that media plurality does not need to be protected and that, as it stands, competition law is an insufficient avenue. Consequently, the following section will now explore the arguments that competition law can in fact play a major role in pluralistic protections. Two avenues will be explored. First, in subsection 4.1, it is prudent to evaluate whether competition law can be effectively applied without any legislative intervention. Through this evaluation, it can be assessed whether it is only Commission policy which needs alteration. This is important as any competence issues would require legislative change and there may not be sufficient political will to achieve this. Furthermore, this analysis will make clear the limits of EU competition law and when it is exhausted, and from here it will be possible to look into the required regulatory amendments, recommendations, or Treaty modifications. Subsequently, subsection 4.2 will centre on the discussion of the idea that the current law needs legal modifications to reach its full potential.

4.1. Preserving the legal Status Quo: No Legal Modifications

It is possible to envisage current EU competition law providing an important pluralistic check on the media through its current system without legislative amendment at all. As shown above, many of the arguments which disagree with competition laws application rely upon a lack of competence or an insufficient toolkit. However, these arguments have been countered at every turn, leaving room for the law to be applied. Indeed, section has proven that the current efficiency goals of the Commission as they stand can be proactively used to guarantee pluralism without any legislative change at all. While the Commission's methods may be inefficient, the toolkit available may still be effective. For example, the discussion of resale price maintenance agreements drew attention to how the Commission have prohibited them for internal market arguments. Despite this, resale price maintenance agreements may be legitimately used in ways to promote pluralism and, as they are within Commission competence, a ruling in its favour would promote competition and, by consequence, plurality. It is in areas like this, where the Commission has competence over something which has an influence on pluralism, that it may use its powers to protect it. Such a refocus would require no legal alteration, and function simply as a change in policy objectives for the Commission.

Some scholars go even further than this and argue that the economic considerations in competition law must be applied simultaneously with non-economic Treaty provisions.[120] This extension utilises the competence

[120] B Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?* (Alphen aan den Rijn: Kluwer Law International 2012), 283-404; Ariño, (n, 111).

granted through Article 167.[121] In short, the application of Article 167(4) would require the Commission to consider economic values in conjunction with cultural values. Taking into account such values would, however, necessitate conclusions which create economic inefficiencies in order to create pluralistic efficiencies. For instance, Ariño suggests the Commission opt for a second or third best alternative if the first, while economically efficient, would dampen democracy.[122] Van Rompuy, in making a more general public policy protectionist argument, which may be applied to media pluralism, posits that the Article 101(3) TFEU[123] exemption could have a dual-assessment of economic efficiencies and other public policy values.[124] Unlike the above, which focuses more on muting its focus on efficiency to allow measures which protect pluralism, this approach makes pluralism an ongoing focus for the Commission on a similar level to economic efficiency. Media plurality would benefit greatly from this legal interpretation while simultaneously not upsetting the current legal order. The Commission would retain its requirement to preserve economic policy goals but be tempered in its approach by simultaneously considering cultural media plurality requirements in its assessments.

Unfortunately, this may be too optimistic of a legal assessment due to two practical limitations. First, in order to satisfy its Treaty obligations, the Commission must primarily consider economic considerations.[125] In essence, this means that should economic efficiencies and media plurality be incompatible outcomes of a case, the Commission has a legal obligation to

[121] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] C 326/01, Art 167.
[122] Ariño, (n, 109), 118.
[123] Van Rompuy, (n, 120), 288-299.
[124] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] C 326/01, Art 101(3).
[125] Ariño, (n, 109), 119.

favour economic considerations. Indeed, this would be detrimental to the goal of protection, and thus promotion, of a pluralistic media. As previously mentioned, media markets benefit greatly from concentration, due to the modern globalised 24/7 news culture. The efficiencies gained legitimise mergers and conglomerations. If a merger put before the Commission required them to balance the pluralistic concerns against the efficiencies gained, the Commission would unfortunately be required to allow the merger. The Commission may inoculate themselves from such decisions by arguing that pre-merger the individual firms are already immensely efficient, and therefore the second-choice favouring pluralism may be legitimately applied. However, this may be toeing a dangerous line which may create political controversies and legal roadblocks. For instance, by forgoing competition for pluralism, the Commission may create an inevitable route to appeal which it would likely frequently have to fight. For this reason, it is unappealing to push the extent of its powers and responsibilities.

Furthermore, it is difficult to sufficiently measure and compare economic efficiencies against pluralistic gains should the Commission seek to look for second or third bests. Pluralism and diversity are not a quantitatively measurable statistic and even the loss of competition is difficult to measure. Thus, knowing how much of an impact a less-than-best choice would have on competition is impossible to compare against its benefit to pluralism. However, it could be as easy as 'if in doubt, protect pluralism'.[126] While not efficient economically, it would ensure that democratic standards are protected and discouraging mergers should not irreversibly damage competition – unless it results in firms who, unable to compete globally, foreclose. However, all of this is stretching the law to the point where it will

[126] Ariño, (n, 109), 118.

likely break. It is possible to envisage the Commission not allowing itself to be tied down to economic efficiency considerations, but the law places primacy upon it and fighting against it may create legal consequences.

The second practical limitation arises from the Council Regulation 1/2003.[127] This regulation enables national competition authorities to apply EU competition law. Therefore, if the interpretation above is accepted, they too would be able to consider non-economic objectives.[128] This would be negatively influential for a number of reasons such as arbitrary interpretation across Member States, and potentially enable States to use the clause to enable opportunist and arbitrary interpretation to their benefit.[129] Setting the precedent to allow national authorities to use non-economic cultural goals to undermine and dismantle the internal market would fundamentally risk the integrity of the Union. However, this may not be as dangerous a precedent as it seems. First, and most importantly, Article 167, which would be utilised to consider media plurality, only places an obligation upon the Union. Therefore, this legal interpretation would allow the EU to preserve pluralism from an impartial supranational standpoint without enabling its abuse by individual States. Second, it is a very pessimistic point of view to assume the worst of bolstering the toolkit of individual States. In allowing States to utilise EU competition law to judge national cases, the Union put its faith in States to do so appropriately. Consequently, it is appropriate to continue to have faith in States to apply an expanded toolkit. Regardless, while this practical reality would not limit the Commission's application, it may make it

[127] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[128] Bania, (n, 15), 35.
[129] Van Rompuy, (n, 120), 403; Bania, (n, 15), 35-36.

politically unappetising and therefore make a general consensus as to its legitimacy more difficult to achieve.

It has been shown that is possible to preserve media plurality through the present legal instruments. This can be done through either combination of a refocus in policy, which would drive the Commission to allow agreements which may be anticompetitive but pluralism enhancing, and utilising Article 167, to make pluralism a primary consideration as a fundamental EU value. However, while the law may currently be sufficient to enable pluralistic considerations, practical limitations ultimately hinder competition laws effectiveness in this field. It is possible to create contrarian arguments against these limitations, but soon enough it comes off as trying to fit a square peg into a circular hole. Theoretically it can bend and fit and, while it may do the job, it may be better to make alterations.

4.2. Expanding the Toolkit: EU Competition Law Modifications

Due to these limitations, it is often argued that competition law needs legislative change to effectively safeguard pluralism. This argument is a direct consequence of the requirement discussed above for the Commission to prioritise economic efficiencies over non-economic concerns in cases where they are juxtaposed – for instance where merging firms in separate markets would become more globally efficient despite undermining plurality in their actions.[130] While the law may be adequately placed to make positive

[130] Rachael Craudfurd-Smith, 'Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship' [2004] 29 European Law Review, 669.

impacts on pluralism, by accepting its limitations, the current law can be modified and supplemented to instead proactively benefit plurality.

Scholars have put forth numerous potential amendments. First, regulatory amendments may be made to the Merger Regulation to create an obligation upon the Commission to conduct an evaluation into a mergers effect on pluralism.[131] Creating a legal obligation will place media pluralism on equal footing with economic efficiency goals in media market mergers. This justifies the Commission in enforcing outcomes which, while beneficial to pluralism, may make a less-than-efficient market. Such a modification provides the Commission a significant ability to preserve pluralism in ways that it has not before. For instance, on one hand, a merger may be assessed on whether it would foreclose competitors, and therefore limit consumer choice, or, on the other hand, on whether it would enable the undertaking to limit the variety of viewpoints due to its opinion-forming power.[132]

It is possible to envisage contrarians who may decry that such assessments would create inefficiencies which would damage the economy and subsequently society. However, this ignores the big picture. Economic inefficiencies will almost certainly come about through non-economic considerations; this is a certainty and not to be debated. Certain decisions, while economically efficient, are not compatible with genuine media plurality. Regardless of the negative consequences of these inefficiencies, the

[131]Craudfurd-Smith, (n, 132), 669; Citizens' Rights and Constitutional Affairs Policy Department C, 'The Information of the Citizen in the EU: Obligations for the Media and the Institutions Concerning the Citizen's Right to be Fully and Objectively Informed' (European Parliament Study 2004) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2004/358896/IPOL-JOIN_ET(2004)358896_EN.pdf> accessed 20 August 2020, 251-53.
[132] Bania, (n, 15), 34.

damage to democracy through faux or unsubstantial media plurality is a far greater danger where sacrifices must be made for its preservation. For this reason, being able to take pluralistic elements into consideration alongside economic ones would have a net positive impact upon society.

Furthermore, in response to the procedural argument that the Commission does not have sufficient expertise, many have called for the creation of a specialised authority, whether that be independent or within the Commission itself, to advise in competition situations where pluralism may be in danger.[133] This tackles any concerns of assigning a legal body the obligation to govern a field which has no direct expertise. This authority's purpose would be to monitor media pluralism and media freedom in States and provide the results to the Commission. To pre-circumvent financing and manpower concerns, the recommendations by the European Parliament Policy Department, that such investigations should take place every two years, could be implemented to avoid overburdening such an authority.[134] While similar to the Centre for Media Pluralism and Freedom (CMPF),[135] this organisation would be an official non-independent authority of the Commission dedicated to an analysis with the intent for legal consequences. This would allow the Commission to take proactive steps in achieving media plurality through this new authority, while simultaneously receiving well-researched expertise upon request in individual cases. The implementation of such an authority would enable great strides to be made in the protection of pluralism in general, but also in specific through competition policy.

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[133] Ibid.

[134] Citizens' Rights and Constitutional Affairs Policy Department C, 'A Comparative Analysis of Media Freedom and Pluralism in the EU Member States' (European Parliament Study 2016) <https://www.statewatch.org/media/documents/news/2016/oct/ep-study-media-freedom-in-EU.pdf> accessed 20 August 2020, 67.

[135] Centre for Media Pluralism and Media Freedom, 'About' (CMPF) <https://cmpf.eui.eu/about/> accessed 2nd August 2020.

State aid is a genuine barrier for pluralistic protections and targeted reform may be necessary to utilise competition law to its full potential. State aid is a genuine tool which allows the economy to benefit from subsidising worthy media outlets which may struggle competitively, assuming it is not misused.[136] To ensure this misuse is avoided in the media market, the law can be reformed in several ways. First, specific rules on what form of aid may be granted and when should be defined. This definition should take into consideration a number of principles, potentially including the following: political impartiality, fairness, equity, transparency of funding, and accountability of the grantee.[137] These more general reforms can be supplemented by specific alterations with regards the mass media. For instance, the media should be subject to a transparency requirement and a monitoring system. In addition, due to pluralism's special importance to democracy, it should be exempt from the *de minimis* exemption. These modifications will have a net positive benefit on both competition – as distortion created through aid will be minimised – and pluralism – as a clear, transparent, and impartial basis will be created to improve the pluralistic qualities. Furthermore, transparency and supervision of public media undertakings and the aid they are granted should diminish the impact of political ill-influence and clientelism.[138]

Of course, this approach is not above critique. Issues arise which may limit the political drive to make such alterations. These are all focused on the very

[136] Treaty on the Functioning of the European Union (consolidated version) (TFEU) [2012] OJ C 326/47, Art 107.
[137] Citizens' Rights and Constitutional Affairs Policy Department C, 'A Comparative Analysis of Media Freedom and Pluralism in the EU Member States' (European Parliament Study 2016) <https://www.statewatch.org/media/documents/news/2016/oct/ep-study-media-freedom-in-EU.pdf> accessed 20 August 2020, 70.
[138] Ibid, 71.

nature of pluralism as it is culturally sensitive.[139] Individual States have their own political view on pluralism within and outside their borders, and the nature of the Commission as a supranational body may create apprehension. As a supranational body, the Commission would not have knowledge of the intricacies of individual States in regard their media. In addition, States may see this as an attempt to bypass the regular regulator procedures, where there was already disagreement in the expansion of EU media competence.[140] Indeed, the dilemma of political influence on media ownership is exacerbated in countries such as Hungary and Poland, whose history and culture place no care on media freedom.[141]

As such intense modification of the competition law framework would require acceptance from the European States, this may immensely limit the political willpower to push it through and stand to be a major roadblock. However, individual States will still have the majority power in dealing in pluralistic concerns. As mentioned prior, the application of competition law to this field would not supplant other media regulation, which would still fall in State competence. In addition, Regulation 1/2003 means that these powers are also usable by individual States, thus strengthening their toolkits in conjunction with the Commission's. Furthermore, the EU has already taken steps, albeit small ones, to put pressure on States to actively defend media pluralism through the EU Media Plurality monitor of the CMPF.[142] This

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[139] N Helberger, *Regulating Conditional Access in Digital Braadcasting* (Kluwer Law International 2006), 190.
[140] Alexander Scheuer & Peter Strothman, *Media Supervision on the Threshold of the 21st Century: What are the Requirements of Broadcasting, Telecommunications, and Concentration Regulation* (IRIS Plus 2002) <https://rm.coe.int/1680783385> accessed 20 August 2020, 7.
[141] Peter T Leeson & Christopher J Coyne, 'The Reformers' Dilemma: Media, Policy Ownership, and Reform' [2007] 23 European Journal of Law and Economics 237-250.
[142] Armanda J Garcia Pires, 'Media Pluralism and Competition' [2016] 43 European Journal of Law and Economics 255, 279.

'blame and shame' game helps push the culture of the EU States to understand the importance of pluralistic protections and thus hopefully create a greater acceptance of the potential influencing factors of the EU in this field.[143] Finally, one must not forget the speech of Laitenberger, whose acceptance of the possibility to achieve greater things through competition law hints towards political willpower for such reform at a high EU level.

This section has shown how EU competition law may be used in practice to preserve media pluralism. First, it was explored whether the law could be used as it stands. While it is theoretically possible, it would be practically inappropriate. Ultimately, the practical limitations are too genuine to simply be ignored or dealt with. Subsequently, it must be necessary to give competition law something more to strengthen its powers. A few suggestions were given to this, which would help manage the practical limitations. However, these regulatory modifications may be hampered by significant political roadblock. Ultimately, this may be the primary burden on this theory. Political disagreements block potential reforms year-on-year, especially within the European Union, and here may be no different. However, as pluralistic worries continue to mount, political pressure may ultimately play in its favour, and regulatory reformation may be backed by strong players.

5. Concluding Remarks

5.1. Recommendations for Further Research

Unfortunately, this article has been limited by word count, the necessity to justify its research, and a focus on contrarian arguments. While the wealth of citations has shown that this is a partially researched field, it remains an area

[143] Ibid.

rife with opportunity. Should this research be continued, this subsection will briefly explore some possible avenues for analysis.

First, it would be prudent to conduct a thorough investigation into *how* the highlighted weaknesses may be strengthened through regulatory reform. While this article proposed several reform opportunities, the area has enough depth to make up several small papers and perhaps beyond through official reform committee recommendations. An in-depth examination of the suggested reforms, especially that of an official pluralism authority, would be useful, and would offer an expanded insight into how such an authority would function in practice. This research would further strengthen the argument for competition law co-jurisdiction on pluralism matters or highlight further unforeseen weaknesses in such a regime.

Second, a further exploration of where the Commission has misused its current toolkit potential in preserving pluralism would be academically beneficial. While Bania made great strides in exploring how the Commission has engaged with pluralism,[144] further research into this field would further illustrate how competition law has an untapped potential, without the need for legal or political reform. One potential focus could be on the resale price maintenance agreements briefly discussed in Subsection 3.2. While academic studies suggest its beneficial nature on media plurality, the empirical research is lacking.

[144] Bania, (n, 15).

5.2. Conclusion

This article has tackled the ongoing issue of pluralism within the modern mass media. Its goal in these discussions has been to champion competition law as one possible avenue of many to secure, and thus promote, media plurality. In doing so, it has spent considerable focus on tackling the common arguments and myths which are used to discredit this approach. To do this, each argument has been given an equitable platform to illustrate its reasoning, before being deconstructed to illustrate the weaknesses in its approach and why it is not a roadblock to a competition law approach.

The first hurdle surpassed in Section 2 related to the general merits of the research on two fronts. First, and fundamental to any debate surrounding media plurality, was whether it is necessary to proactively preserve the plurality of the media in the modern mass media culture. Subsection 2.1 began to undertake this challenge by endeavouring to understand the theoretical aspects of *what* media pluralism is and *why* its preservation is so vital. Its conclusion, that media pluralism is fundamental to the integrity of the western democratic system, further strengthened its next point: that research, and to a lesser extent pop culture, has shown that threat to pluralism is legitimate. Despite this, policymakers and academics rely upon two assumptions to make the case that, despite the research concerns, there is no need for worry: that a proliferation of sources and content mitigate media concentrations, and that citizens proactively engage with diverse content with no regulatory intervention. This subsection deconstructed these arguments and put forward contrarian arguments in favour of regulatory intervention. This subsection therefore made a compelling case as to *what* media plurality is, *why* it must be protected, and *how* it is currently in danger, and engaged and critiqued the contrarian arguments that any regulation is unnecessary.

Next, Subsection 2.2 critically engaged with competition policy theory and the debate between the tradition, Chicago School, which favours an economic efficiency approach, and the New Brandeis Movement, a modern movement which sees competition law as a key tool in maintaining the fabric of society. In aligning itself with the latter, this Subsection put work towards countering the arguments that competition law is fundamentally not suited to tackling pluralistic concerns. First, it made it clear that, despite the fundamental disagreements between the two schools of thoughts, the research still had merit, as any research helps develop a greater understanding of the law – crystallising arguments in the field and creating a more robust field of research. Second, it acknowledged that competition law should not be the only avenue used to protect the fragility of pluralism – and that arguments which viewed this as a weakness were instead creating a legal false dichotomy in which only one legal field is necessary.

Finally, the article was able to engage with the legal substantive issues. Section 3 dispelled the substantive myths which ascribe competition law a limited field of applicability to the protection and promotion of media plurality. Four arguments, three substantive and one procedural, were deconstructed and critiqued. In doing so, this provided a definitive argument that, despite academic commentaries to the contrary, competition law has an unachieved potential to be used for the betterment of media plurality. While the limitations raised by academics were acknowledged as legitimate, they do not utterly dispel competition's utility. Section 4 continued from this and explored how competition law may be applied to the benefit of plurality. First, to show where the law may be lacking, Subsection 4.1 attempted to apply the law as it stands with only Commission policy change. However, while potentially effective, it was accepted that the law may be using an ill-fitted toolkit to achieve its goals. Subsequently, Subsection 4.2 proposed several

reforms to overcome these barriers, for instance the development of an EU institution whose speciality is media pluralism. In the discussions, the potential limitations of these reforms are acknowledged, and, while several are refuted, the political roadblocks to reform are accepted as legitimate.

The work has supplied a new perspective and illustrates how our current competition law system may be appropriately placed to tackle the modern concerns of media pluralism. In doing so, it has given great attention to the myths and substantive limitational arguments put forth by scholars and policymakers to ensure that the argument rests on a strong and stable foundation. Through dispelling these myths, it has made it clear that competition law, while perhaps limited in some areas, is a legitimate avenue to protect, and thus promote, media pluralism in the modern age. While political willpower may make such regulatory reforms limited, it is exceedingly important that legal and societal focus shifts towards exploring *why* pluralism is under such a threat and *how* it can be preserved, even if the ultimate conclusion sees greater benefit in another legal field. As the connective tissue of democracy, pluralism needs care and attention. Indeed, while democracy is fragile, our fear of whispers may be its true undoing, and its protection requires us to make noise.

COMPETITION COMMISSION OF INDIA'S TRYST WITH WHATSAPP: THE NEED FOR RECALIBRATION IN THE APPROACH TOWARDS REGULATION OF BIG TECH

Mehar Singh Dang*

During a congressional hearing in 2018 before the Senate Judiciary and Commerce Committees, Mark Zuckerberg was asked who he thought was Facebook's biggest competitor. For a few minutes he fumbled, but eventually resigned to not having an answer, implying that there is no undertaking in the market that can challenge the presence and reach of the enterprises owned by the Facebook Group. This implicit admission by the owner of a market giant must be understood as a harbinger of the exploitation that is impending. The Indian antitrust regulator has been faced with varying facets of alleged anti-competitive conduct by Facebook's WhatsApp. Until very recently, The Competition Commission of India maintained a reactive stance towards such instances, and when it did decide to undertake a proactive approach, the efficacy of the intervention remains questionable at best. This article seeks to understand the Competition Commission of India's approach towards the conduct of WhatsApp in comparison with other domestic regulators and identify the most plausible course of action for the regulation of Big Tech's activities from hereon after.

Keywords: *Big Tech, Consumer Welfare, Open Data Access.*

1. Introduction[1]

This article first will trace a trajectory of the various encounters the Competition Commission of India (CCI) has had with complications caused by *WhatsApp's* conduct to lay the groundwork for an analysis of the Commission's suo moto probe of 2021. The article then will highlight instances of similar intervention by other domestic competition regulators; and initiatives that have been taken by other domestic regulators towards the generic conduct of *Big Tech* in their respective markets, understand the reasons for the dominance of these undertakings in the market; and finally present recommendations.

2. Competition Commission of India's encounters with instances of WhatsApp's alleged anti-competitive conduct

2.1. Vinod Kumar Gupta Case

In 2017, the CCI took cognizance of *WhatsApp*'s privacy update which sought users' assent for data sharing with its sister undertakings also owned by *Facebook*.[2] Here, CCI found no cause for violation of the provisions of the Indian Competition Act and passed an order to dispose of the matter accordingly. In this case, the fact that *WhatsApp* provided an option to its users to '*opt out*' of sharing user account information with *Facebook* within 30 days of agreeing to the updated terms of service and privacy policy was a critical consideration in deciding against the alleged contravention by *WhatsApp*.[3]

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[1] Following acronyms are used in this article:
CCI: *Competition Commission of India*
GDPR: *General Data Protection Regulations*
OTT messenger: *Over the Top messenger*
EC: *European Commission*
CMA: *Competition and Markets Authority*

[2] Vinod Kumar Gupta and WhatsApp Inc., Case No. 99 of 2016, (Competition Commission of India).

[3] K Sabeel Rahman, 'Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities' (2021) Georgetown Law and Technology Review 234-251.

2.2. Jaadhu Order

In June 2020, CCI approved a combination between *WhatsApp* and *Jio Platforms*, wherein the latter acquired a 9.99% stake in the former.[4] In the combination under consideration, the Target and the Acquirer were both dominant players in their respective relevant markets. Jio's consumer base and market share in the telecom sector stands at a third of Indian wireless subscribers as its customers. Amongst the featured mediums of *Facebook*, *WhatsApp* was a dominant player in the relevant market for instant messaging services using consumer communication apps through smartphones. The CCI found that the combined estimated share of *WhatsApp* and *Facebook's Messenger* in the consumer communication market was 45-50%.[5]

As a result of this combination, when the installation of *WhatsApp* in a device shall be accompanied by the pre-embedded *JioMart* platform, it shall principally amount to an abuse of dominance as conceived by the Indian Competition Act, wherein the installation of *WhatsApp* will be the agreement the user will enter into by volition and the embedded *JioMart* will act as an appendage (supplement) to the installation of the application by the user.[6] Further, to understand the occurring phenomenon of vertical integration, we shall break it down to an assembly chain. Jio is every Indian's preferred cost effective and efficient internet connection provider. *WhatsApp* is every Indian's go-to free of cost instant messaging application which needs to be fueled by an internet connection which the user in question is assumed to be deriving from his *Jio* subscription.[7]

Consequently, *WhatsApp* will now be featuring *JioMart*, in turn, furthering the economic interests of *Jio*. This posited these two dominant players of their respective relevant markets to form a self-sustaining entity that has the potential to disallow other market players in either sector to sustain.[8] The vertical integration as explained above also stands

[4] Combination between Jaadhu Holdings LLC and Jio Platforms Limited, Combination No. C-2020/06/747, (Competition Commission of India).
[5] *Jaadhu Order* (n 4).
[6] Mehar Singh Dang, 'Implications of the Entry of WhatsApp Pay in the Indian Online Payment Application Market' (2021) BPP Commercial Law Journal <https://www.commercialawjournal-bpp.com/post/implications-of-the-entry-of-WhatsApp-pay-in-the-indian-online-payment-application-market> accessed 11 June 2021.
[7] *Jaadhu Order* (n 4).
[8] *Jaadhu Order* (n 4).

to violate platform neutrality since *Jio* shall be playing a dual role of an intermediary by allowing the user to have access to *WhatsApp* and a market player, when the user will find himself being directed to *JioMart* in his capacity as a *WhatsApp* user.[9] Invariably, an arrangement that displays vertical integration to this extent is bound to leverage preferential treatment towards *WhatsApp Pay* and *WhatsApp*, and in turn prevent healthy competition from sustaining itself in either market.

2.3. Harshita Chawla Case

In March 2020, CCI received a complaint stating that the conduct of *WhatsApp* and *Facebook*, namely the automatic installation of *WhatsApp Pay* for all *WhatsApp* users amounts to an abuse of their dominant position and a violation of Section 4 of the Indian Competition Act.[10] *Facebook* denied all liability placed on it in the complaint, alleging that since *WhatsApp* is a severable entity, the marketing gimmicks and executive decisions of the two undertakings are independent from one another.[11] This submission came across as an attempt to circumvent liability, after *Facebook* incorporated a subsidiary (namely, *Jaadhu Holdings*), the sole purpose of which appeared to be the acquisition of stock in *Jio Platforms* to facilitate the accessibility of *JioMart* to the end consumers.[12]

The CCI found an absence of abuse of dominance in this case stating that the mere presence of the *WhatsApp* Pay feature does not translate to the user making transactions on it. Further, the CCI found that the undertakings in question had neither indulged in tying, nor bundling, since the former would occur when the seller would require the buyer to actually buy another product tied to its own product and the latter would occur when

[9] Gregory Werden & Kristen Limarzi, 'Forward Looking Merger Analysis and the Superfluous Potential Competition Doctrine' (2010) Antitrust Law Journal 109-143.
[10] Harshita Chawla and WhatsApp Inc. and Facebook Inc., Case No. 15 of 2020, (Competition Commission of India).
[11] *Harshita Chawla* (n 10).
[12] Rajarshi Singh & Abhishek Abhi, 'The Problematic Stance of CCI in WhatsApp Pay Tying Case: An Opportunity Missed?' (2021) Kluwer Competition Law <http://competitionlawblog.kluwercompetitionlaw.com/2021/01/11/the-problematic-stance-of-cci-in-WhatsApp-pay-tying-case-an-opportunity-missed/?print=pdf> accessed 11 June 2021.

the seller would attempt to sell two products in fixed proportions at a specific price in a package.[13]

2.4. Suo Motu Probe of 2021

WhatsApp recently updated its privacy policy and terms of service for its users, wherein it required said users to accept the revised terms and conditions in order to retain their *WhatsApp* account information. This revision in policy mandates the sharing of personalized user information with *Facebook* and its subsidiaries.[14] *WhatsApp* has made revisions in its privacy policy in the past, but in those instances, the users had the freedom to allow or restrain the sharing of their *WhatsApp* data with *Facebook*. Vide the notification(s) that *WhatsApp* users started receiving in January 2021, such acceptance was mandatory to continue using the OTT messenger application. The CCI took suo moto cognizance of this development in January 2021. This was an unprecedented action on the part of the regulator as it finally adopted an *ex-ante* approach, as opposed to an *ex-post* one.[15]

2.4.1. Commission's analysis of WhatsApp's privacy policy update of 2021

The CCI noted that the '*take-it-or-leave-it*' nature of the privacy policy and terms of service of *WhatsApp* and the information sharing stipulations mentioned therein, merited a detailed investigation in view of the market position and power enjoyed by *WhatsApp*. It found that the users were being subjected to a strong lock-in effect, wherein switching to another OTT messaging application shall be difficult and meaningless until all or most of their social contacts also switch to the same alternate platform.[16] Hence, while it may be technically feasible to switch, the pronounced network effects of *WhatsApp* significantly circumscribe the practicability of the switch. It is also not clear from the policy whether this sharing of data would also be applicable to historical data of users,

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[13] *Harshita Chawla* (n 10).
[14] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021, (Competition Commission of India).
[15] *Suo Motu Probe of 2021* (n 14).
[16] Kritika Ramesh, Payal Chatterjee & Vinay Shukla, 'WhatsApp Goes through the Looking-Glass of India's Competition Enforcement' (2021) Kluwer Competition Law <http://competitionlawblog.kluwercompetitionlaw.com/2021/03/27/WhatsApp-goes-through-the-looking-glass-of-indias-competition-enforcement/> accessed 11 June 2021.

and to *WhatsApp* users who are not present on other applications owned by *Facebook*. It is noteworthy that the users have not been provided with appropriate granular choice, neither upfront nor in the fine print, to object to or opt-out of specific data sharing terms, which prima facie appear to be an unfair and unreasonable imposition.[17]

Further the CCI also feared that lower data protection by a dominant firm can lead not only to the exploitation of consumers but can also have exclusionary effects as *WhatsApp* and *Facebook* would be able to further entrench and reinforce their position and leverage themselves in neighbouring or even unrelated markets, resulting in insurmountable entry barriers for new entrants.[18] For *Facebook*, the processing of data collected from *WhatsApp* could serve as a conduit to supplement the consumer profiling that it carries out through direct data collection on its platform, by allowing it to track users and their communication behaviour across a vast number of locations and devices outside the *Facebook* platform.[19] The CCI found that the aforementioned conduct prima facie amounted to the imposition of unfair terms and conditions upon the users of *WhatsApp*, thus resulting in a violation of provisions of Section 4(2)(a)(i) of the Indian Competition Act.[20]

2.4.2. Delhi High Court's Order

WhatsApp appealed the CCI's prima facie order in the Delhi High Court stating that this probe amounted to gun jumping since these questions of law are already *sub judice* before the Supreme Court of India.[21] The High Court's order indicated that while this probe was not bereft of jurisdiction in principle, this exercise of jurisdiction by the CCI definitely displayed lack of discretion and prudence.

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[17] *Suo Motu Probe of 2021* (n 14).
[18] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' (2019) Antitrust Bulletin.
[19] Maria Lanceiri & da Silva Pereira Neto, 'Designing Remedies for Digital Markets: The Interplay Between Antitrust and Regulation' (2020) FGV Direito SP Research Paper Series.
[20] *Suo Motu Probe of 2021* (n 14).
[21] WhatsApp LLC v. Competition Commission of India & Anr., W.P.(C) 4378/2021 & CM 13336/2021, (Delhi High Court).

3. Analysis of CCI's Suo Motu Probe of 2021

Before delving into the myopic nature of the probe by the Commission, we shall first try and understand the rationale behind the probe in question. One speculation is that the CCI had been exercising an ex-post approach for previous instances surrounding this undertaking's conduct, and it felt the need to recalibrate its handling of such occurrences.[22] Another possible explanation is that other domestic antitrust regulators have been directionalising their probe into the conduct of the *Big Tech* undertakings, and thus, the CCI too felt the pressure to make an advance to this end.[23]

There are various parameters that have been set out to determine whether or not an undertaking has abused its dominant position under Section 4 of the Indian Competition Act. However, the CCI must be mindful of the fact that this provision was not drafted to tackle the peculiar and unique complications that are posed by the digital space, such as blurring market denominations and data aggregation effects.[24] Thus far, the Indian regulator has been taking cognizance of instances of abuse of dominance, after the abuse in question has transpired. However, it is pertinent for the CCI to undertake a '*prudently proactive*' approach in such times. Further, we shall delve into certain concerns that are solicited by the prima facie order that has been passed by the Commission.

3.1. Boundaryless markets

Any investigation in the Indian antitrust regime is initiated with the delineation of the relevant product and the geographic market, and the inaccurate determination thereof has the effect of questioning the credibility of the analysis and finding of the CCI in the order at hand.[25] Further, when assessing an instance of a complication in the digital space, the relevant geographic market cannot be confined to the Union of India since the digital

[22] Ariel Ezrachi & Maurice Stucke, *Virtual Competition: The Promise and Perils of the Algorithm Driven Economy*, (Harvard University Press 2016).
[23] Maurice Stucke & Allen Grunes, *Big Data and Competition Policy*, (Oxford University Press 2016).
[24] Vikas Kathuria, 'A Legal Toolkit for Fair and Competitive Digital Markets in India' (2021) Observer Researcher Foundation Occasional Paper No. 307.
[25] Krishnesh Bapat & Meghna Jandu, 'Outlining Big Tech Issues for the CCI' (2020) The Indian Journal of Law and Technology.

space is boundaryless. The CCI must take this into account and realign its approach of assessing instances of complications in the digital space.[26]

3.2. Constant innovation

WhatsApp started out as an instant messaging application and has subsequently broadened its services across fields and sectors. For an undertaking such as *WhatsApp*, which is innovating and upgrading its interfaces on a daily basis the CCI must equip itself with the requisite knowhow to be able to assess the intricacies of the undertaking's conduct, to be able to tackle it.[27] To this end, the CCI must either ensure that its members are made aware of the updates that undertakings are making in the digital space, or that it brings in subject matter experts to advise and weigh in on the determinations in the matter.[28]

3.3. Data Sharing

Another question that the CCI must answer is*, how is it wrong for Facebook and WhatsApp to share data with one another?* So long as the parent of two undertakings is the same, data sharing amongst them will not amount to collusion. This is why common ownership is such a concern in the antitrust community to begin with.[29] The privacy update which allows *Facebook* and *WhatsApp* to share data with another is an internal policy decision of the *Facebook* Group. If the CCI is looking to find *WhatsApp*'s conduct as an occurrence of abuse of dominance, it shall have to establish a violation of specific provisions of Section 4 of the Competition Act, which is not foreseeable in the given factual matrix. Further, if the CCI intends to identify exclusionary conduct through the privacy update in question, it shall also have to establish that *Facebook* and *WhatsApp* are intentionally depriving other undertakings of access to this data.[30] However, such a

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[26] Ioannis Lianos, 'Competition Law for the Digital Era: A Complex Systems' Perspective' (2019) CLES Research Paper Series 6/2019 <https://www.ucl.ac.uk/cles/sites/cles/files/cles_6-2019_final.pdf> accessed 11 June 2021.

[27] Tim Wu, 'Taking innovation seriously: Antitrust enforcement if innovation mattered most' 2012 Antitrust Law Journal 313-328.

[28] M. Olhlausen & Alexander Okuliar, 'Competition, Consumer Protection and the Right (Approach) to Privacy' 2015 Antitrust Law Journal.

[29] Chee F, 'EU throws new rule book at Google, tech giants in competition search' (2020) Thomson Reuters <https://www.reuters.com/article/uk-europe-tech-google-antitrust-analysis-idUKKBN24262N> accessed 11 June 2021.

[30] Katharine Kemp, 'Concealed data practices and competition law: why privacy matters' (2020) European Competition Journal.

connotation also seems bleak given that this is purely an instance of two sister undertakings sharing their data with one another.

3.4. Recalibration of approach

It is pertinent for the Indian regulator to readjust its approach of dealing with instances of alleged anti-competitive conduct in the digital space. In the matter of *WhatsApp*'s new privacy update also, it must stop attempting to identify an instance of abuse of dominance.[31] Instead, it must ask if any other undertaking in the market is posited to impose such a take-it-or-leave-it unilateral update on its users.[32] If the answer to this question is no, then the CCI must step back and ask itself why this leverage is being afforded to the *Facebook* group.

4. Overseas Regulators' Handling of WhatsApp's Anticompetitive Conduct

4.1. European Commission's Probe into Facebook's Data Collection Practices

When the combination between *Facebook* and *WhatsApp* was brought before the European Commission for approval, the regulator asked *Facebook* if it had an intention to integrate the two platforms. In response to this, *Facebook* stated that the configurations and purposes of the two platforms were extremely diverse, and thus, such an integration would not be feasible. In 2016, the regulator learnt that such an integration was now underway, and was technically feasible even in 2014, when assertions to the contrary were made by *Facebook*. In light of this, the EC imposed a fine of £110 million on *Facebook*.[33]

In this instance, every stakeholder of the antitrust community must introspect and ask themselves how much of a setback this penalty would have caused to the *Facebook* group. The integration of the platforms has transpired anyway, and the monetary and data

[31] Allen Grunes & Maurice Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (2015) Innovation Law & Policy Journal.
[32] Christopher Yoo, 'When Antitrust Met Facebook' (2012) University of Pennsylvania Law Review.
[33] 'Mergers: Commission fines Facebook £110 million for providing misleading information about WhatsApp takeover', European Commission <https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_1369> accessed 11 June 2021.

prowess that the undertakings have derived therefrom can barely be dampened by the imposition of such a negligible penalty.

4.2. Bundeskartellamt's Proceedings Against *Facebook*

In 2019, the German regulator learnt that *Facebook* was abusing its dominant position in the market by denying its users access to the platform unless they gave their consent to allow their data to be combined with that of other *Facebook* owned undertakings such as Instagram and *WhatsApp.*[34] The regulator found that this practice denied users the right to informational self-determination as is guaranteed by the GDPR (General Data Protection Regulations) and thus, found a per se violation of competition law. In this instance it is noteworthy that the regulator was only able to find a per se violation of competition law and no substantive violation thereof was identifiable.

4.3. United States of America's probe of 2020

In December 2020, the American federal regulators and forty-five state prosecutors sued *Facebook* for allegedly attempting to stifle competition in the American market by buying up potential competitors. By way of this suit, the litigators have called for the company to be broken up and divestment of its undertakings to be carried out.[35] This litigation is underway and the international antitrust community is yet to witness how it unravels.

5. Antitrust Regulators' Conduct Towards Tackling Big Tech- Generically

5.1. European Union

EU recently drafted the Digital Services and the Digital Markets Act. The former is aimed at protecting the users' right to freedom of expression and thus, places liability on the undertakings providing digital platforms should there be any curtailing thereof. The latter is aimed at regulating the conduct of digital service undertakings in the market, and

[34] Administrative proceedings against Facebook Inc., Facebook Ireland and Facebook Deutschland, B6-22/16, (Bundeskartellamt).
[35] Mark Glick & Catherine Ruetschlin, 'Big Tech's Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook' (2020) Hastings Law Journal.

requires the regulator (European Commission) to be apprised of any combinations in the market or any impending takeovers, irrespective of monetary thresholds.[36]

5.2. United Kingdom

Pursuant to Brexit, the UK had to devise its own mechanism to tackle *Big Tech* in its market, severed from the action taken by the European Union. To this end, the Competition and Markets Authority has dedicated a branch to understanding the digital markets and has christened it the Digital Market Unit.[37] Dedicated subject matter experts and personnel have been employed by the CMA for this unit. The regulator's approach of how it wants to tackle the conduct of these undertakings is currently being deliberated upon.

5.3. United States of America

In October 2020, the USA released the Antitrust Sub-Committee's Report targeting the conduct of the *Big Four*.[38] While this report addressed the effects of these undertakings' conduct in the market it was highly criticised because it adopted a more competitor protectionist stance than a consumer welfare one.[39]

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[36] 'On the Rise: Europe's Competition Policy Challengers to Technology Companies', Center for Strategic & International Studies <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies> accessed 11 June 2021.

[37] 'New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are treated fairly', Competition and Markets Authority, <https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated> accessed 11 June 2021.

[38] 'Investigation of Competition in Digital Markets', Subcommittee on Antitrust Commercial and Administrative Law of the Committee on the Judiciary, <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 11 June 2021.

[39] Richard Steuer, 'Energizing Antitrust; Submission to the Subcommittee on Antitrust, Commercial and Administrative Law' (2020) U.S. House of Representatives Committee on the Judiciary <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623090> accessed 11 June 2021.

5.4. Japan

Japan has recently drafted the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms.[40] The bedrock of this enactment is divergent from the others, since it places the onus of ensuring transparency in the market on the undertakings themselves, as opposed to making an imposition to this effect. Thus, it makes it incumbent on the market players to take innovative steps to enhance and maintain transparency on their platforms, and resultantly, in the digital market.

6. The Way Forward

6.1. Reasons for dominance of *Big Tech* undertakings in the market

Given the mammoth presence of the *Big Tech* players in the global market, the marginal cost that is borne by them for each user is negative and they enjoy extremely high returns to scale.[41] As a result, they avail complete profit for every new user that signs up for their services, but bear no cost. With specificity to the *Facebook* group, the interoperability of its sister undertakings is largely responsible for its insurmountable foothold on the market.[42]

Somewhere, the consumers are also to blame, since we all have a tendency to try and seek the most convenient method to get something done. A consumer that is not aware of the antitrust ramifications of the entry of *WhatsApp Pay* in the online payment application market would have been more than happy about this integration. [43]

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[40] 'Cabinet Decisions Made on Two Cabinet Orders for the Act on Improving Transparency and Fairness of Digital Platforms', Ministry of Economy Trade and Industry, <https://www.meti.go.jp/english/press/2021/0126_003.html> accessed 11 June 2021.
[41] Howard Shelanski, 'Information, innovation, and competition policy for the internet' (2013) University of Pennsylvania Law Review 581-631.
[42] Daniel Sokol & Roisin Comerford, 'Antitrust and Regulating Big Data' (2016) George Mason Law Review.
[43] AF Dougherty, 'The Case Against Bigness: Politics, Power and Technological Inertia' (1979) Antitrust Law and Economic Review 41-66.

Finally, these powerful undertakings have also started to create bottlenecks, wherein they integrate the supply chain of the services that they are offering.[44] They have been able to do this to the extent that they have transformed into self-sustaining entities, and have left no scope for the analysis of upstream or downstream competition. Rather, there are stagnant ponds of provisioners of digital services in the market now.

6.2. Breaking up of companies

There are several contradicting schools of thought with regard to the regulation of *Big Tech*, with several academics questioning the very ability of antitrust laws to tackle such complications. Some believe that the divestment of market giants shall put an end to the authoritarian reign of *Big Tech* undertakings.[45] However, the author believes that this shall be unnecessarily gory, and shall lead to avoidable, metaphorical bloodshed. Additionally, there is no way to ensure that the breaking up of these undertakings shall definitely salvage competition in the market(s) in question.[46]

Primarily, we must consider consumer behaviour while implementing any measures towards ensuring market regulation. Most consumers are not aware of the effects of data aggregation and other such phenomenon and find it convenient to be able to access an integrated platform which allows them to carry out more than one activity on the same application.[47] This can be attributed to the expanding access to an internet connection and a smartphone across the world, bereft of an understanding thereof.

For a layman user, Instagram is allowing him to post content on both, his Instagram and *Facebook* profiles by only uploading the content once, which is rather convenient. Specifically for a developing country like India, it is imprudent to expect the masses to be mindful of the data collection practices that are prevailing in the background of their

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[44] Barak Orbach & Grace Campbell Rebling, 'The Antitrust Curse of Bigness' (2012) Southern California Law Review 605-656.
[45] Adi Ayal, 'The market for bigness: economic power and competition agencies' duty to curtail it' (2013) Journal of Antitrust Enforcement 221-246.
[46] John Newman, 'Antitrust in Zero-Price Markets: Foundations' (2015) University of Pennsylvania Law Review.
[47] Tim Wu, 'The Rise of Tech Trusts, The Curse of Bigness: Antitrust in the New Gilded Age (2018) Columbia Global Reports.

favourite social media applications.[48] Bearing this in mind, breaking up of Tech Giants might prove to be counterproductive. The implementation of this radical remedy is bound to fail in the absence of consumer cooperation, and unless this awareness is imparted to each consumer, the probability of said cooperation remains bleak.[49]

Secondly, even if the current *Big Tech* companies are broken, and are prevented from acquiring any other undertakings that are potential competitors, the phenomenon of *Big Tech* is bound to occur again because of network effects and data aggregation.[50] Hence, breaking up of these undertakings may truncate the activities of the current *Big Tech* enterprises, but it may not have the desired effect of preventing the recurrence of such a cycle.

6.3. Open Data Access

Hindu mythology refers to Lord Brahma's *Brahmastra* (the creator of the Universe's weapon), which is indestructible, but it can cause the cessation of human life. It has often been compared to the '*Deplorable Word*'. The author believes that the *Brahmastra* of these undertakings is their ability to collect, analyse and utilise data in manners and magnitude that is unimaginable for a common person. This can be attributed to their omnipresence, their technical apparatus, and their ulterior capitalistic tendencies.[51]

The only way to level the playing field of the digital space is to make this data available to every undertaking that provides, or seeks to provide digital services for commercial purposes. This shall allow undertakings other than the *Big Four* to also compete in the market.[52] Senator John Sherman, the namesake for the American Sherman Act once said, *'If we will not endure a king as a political power, we should not endure a king over the*

[48] Winston Ma, 'Breaking the Big Tech Monopoly: The Coming Decade of Big Tech Regulations' (2021) Horizons: Journal of International Relations and Sustainable Development 166-179.
[49] Erik Brattberg, 'Technology and Digital Issues, Reinventing Transatlantic Relations on Climate, Democracy and Technology' (2020) Carnegie Endowment for International Peace.
[50] Jessa Lingel, 'The Fight for Fiber' (2021) The Gentrification of the Internet: How to reclaim our Digital Freedom, University of California Press.
[51] Nils Peter Schepp & Achim Wambach, 'On Big Data and its Relevance for Market Power Assessment' (2015) Journal of European Competition Law & Practice 120-124.
[52] Gregory Sidak & David Teece, 'Dynamic Competition in Antitrust Law' (2009) Journal of Competition Law and Economics 581-631.

production, transportation, and sale of any necessaries of life'.[53] While he intended this statement towards the prevention of a conventional instance of abuse of dominance, his words ring scarily true in the data driven landscape. In a utopian world, personal consumer data would not be a commodity, and undertakings would not be profiteering therefrom.[54] However, now that such an arrangement has lodged itself in the global market, the most foresighted and plausible solution would be for the relevant domestic regulator to seize this data from the current *Big Tech* undertakings, and make it available to any enterprise that seeks access to it for a legitimate commercial purpose.

This data shall of course have to be guarded very strictly with the objective of preventing the misuse thereof. Such an implementation by the regulators is bound to receive severe backlash from the current *Big Tech* undertakings, since it will hamper its market advantage in an incomputable fashion.[55] All the same, such a drastic approach is necessary to salvage the competitive landscape of the digital space.

6.4. Indian Scenario

Primarily, it must be borne in mind that India does not have an equivalent to GDPR; ergo, there is no dedicated data protection law in the country's legal regime. Additionally, there is no appointed regulator to oversee the functioning of this relatively complicated sector.[56] This ground reality allows the undertakings to exercise their will in an unbridled fashion. In such a scenario, and in the want for a Data Protection sectoral regulator, the antitrust regulator can and will have to intervene.[57]

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[53] Phil Allmendinger, 'Unholy Alliance: how government, academics and Big Tech are colluding in the takeover of our cities' (2021) The Forgotten City: Rethinking Digital Living for Our People and the Planet, Policy Press.
[54] Kara Frederick, 'Hearing on "How Corporations and Big Tech Leave Our Data Exposed to Criminals, China and Other Bad Actors' (2019) Center for a New American Society.
[55] Clarke Cooper, 'Deciding the Facebook Question' (2019) Issues in Science and Technology 79-83.
[56] Anirudh Burman, 'Will India's Proposed Data Protection Law Protect Privacy and Promote Growth?' (2020) Carnegie India's Technology and Society Program <https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217> accessed 11 June 2021.
[57] Anirudh Burman & Upasana Sharma, 'How Would Data Localisation Benefit India?' (2021) Carnegie Endowment for International Peace.

Sections 60 and 62 of the Indian Competition Act state that the CCI will have jurisdiction to adjudicate upon any conduct that poses a threat to competition in the market in question, even if a dedicated sectoral regulator is appointed in the market.[58] However, this can only be treated as an interim solution, and a more permanent mechanism to curtail violations of data privacy in India must be devised at the earliest. Further, so long as the *ad hoc* arrangement of the CCI taking cognizance of such complications prevails, the CCI must take inspiration from UK's Competition and Markets Authority, and dedicate a branch of the CCI to specialise in and investigate matters concerning the digital space.[59] If the practicability of such a dedicated taskforce seems bleak, the CCI must bring a few subject matter experts on board, so as to facilitate and deepen its understanding of the workings of the digital space and the conduct of the undertakings in question.

[58] Paridhi Poddar, 'Sectoral Regulation, Competition Law, and Jurisdictional Overlaps: Tracing the Most Viable Solution in the Indian Context' (2018) Kluwer Competition Law <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/?print=print> accessed 11 June 2021.

[59] Kati Suominen, 'On the Rise: Europe's Competition Policy Challenges to Technology Companies' (2020) Center for Strategic and International Studies.

THE PRICE ISN'T RIGHT:

PROVING PRICING ABUSES BY DOMINANT APP STORES

Shreya Rajasekaran & Vidhi Damani[*]

App stores have emerged as the most convenient and widely used digital platforms that facilitate transactions between the two user groups of app developers and app users. However, currently, several app developers such as Epic, Spotify, and Match have alleged that app stores of dominant players like Apple and Google are in violation of antitrust law. Pursuant to this, competition authorities across the globe are currently investigating the payment models adopted by these dominant app stores. The main predicament lies with the in-app payment system, which must be mandatorily used by app developers and for which an inescapable and anti-competitive commission fee is charged. Through this article, we seek to analyse the relevant factors in digital platforms of app stores that amounts to the pricing abuses of margin squeeze, excessive pricing and discriminatory pricing, and verify these factors constituting the abuses against the conduct of dominant app stores in question.

Keywords: *margin squeeze, excessive pricing, discriminatory pricing*

[*] The authors are undergraduate students pursuing B.B.A. LL.B. (Hons.) at National Law University, Jodhpur. They can be reached at shreya.raj.1610@gmail.com and vidhi.damani@nlujodhpur.ac.in, respectively.

1. Introduction

Apple and Google have been on the radar of competition authorities across several countries including India[1], European Union,[2] United States of America ("**U.S.**"),[3] and Australia,[4] for a spectrum of their activities, and most recently for their respective app stores' pricing practices. The European Commission ("**EC**") in its Statement of Objections in the antitrust case between Apple and Spotify, has expressed its concern over the high commission fee that Apple levies on app developers.[5]

In the last few weeks during a settlement, Apple has allowed 'small developers' in the U.S. to inform their users of methods to make purchases, outside of Apple's in-app purchases ("**IAP**") mechanism.[6] However, this settlement is merely an attempt to evade anti-competitive claims since it does not address, in any manner, the concerns raised by those big app developers, such as Spotify and Epic, who are the main source for IAP generated revenue for Apple. In this backdrop, we seek to establish that the 30% commission fee charged by these app stores constitute the pricing abuses of margin squeeze and excessive pricing, while highlighting the factors that are unique to app stores.

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[1] Siladitya Ray, 'Apple's App Store Fees Now Face Antitrust Challenge In India' (*Forbes,* 2 September 2021) <https://www.forbes.com/sites/sidadityaray/2021/09/02/apples-app-store-fees-now-face-antitrust-challenge-in-india/?sh=49da48a9362> accessed 3 September 2021.

[2] The European Commission, 'Antitrust: Commission opens investigation into Apple's App Store rules' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 4 September 2021.

[3] Friso Bostoen, 'Epic v Apple (1): Introducing Antitrust's Latest Big Tech Battle Royale' (*CoRE Blog*, 4 September 2020) <https://www.lexxion.eu/en/coreblogpost/epic-v-apple-1/> accessed 3 September 2021.

[4] Liza Carver et al., 'Full Federal Court Gives Epic Games The Green Light To Continue In Its Australian Proceedings Against Apple – Implications For Competition Enforcement' (*Herbert Smith Freehills,* 19 July 2021) <https://www.herbertsmithfreehills.com/latest-thinking/full-federal-court-gives-epic-games-the-green-light-to-continue-in-its-australian> accessed 3 September 2021.

[5] The European Commission, 'Antitrust: Commission sends Statement of objections to Apple on App Store rules for music streaming providers' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> accessed 3 September 2021 ("Statement of Objections") .

[6] 'Apple, US developers agree to App Store updates that will support businesses and maintain a great experience for users' (*Apple Newsroom,* 26 August 2021) <https://www.apple.com/newsroom/2021/08/apple-us-developers-agree-to-app-store-updates/> accessed 3 September 2021.

2. The dynamics of multi-sided app stores from an antitrust perspective

While at first glance it may seem as though Google and Apple form a duopoly in the market for app stores, the EC in the Google Android case found Google Play to be the dominant undertaking in the relevant market for app stores for Android devices,[7] and has found Apple to be dominant in the market for app stores on iOS device in its preliminary ruling of *Apple v. Spotify*.[8]

A finding of their dominance and abuse thereof can be made only after duly analysing the unique features of app stores.[9] App stores constitute two-sided digital platforms wherein app developers and app users are their two distinct user groups. These groups are linked through indirect network effects meaning, as the users of the app store increase, more app developers are attracted to distribute their app on it, further drawing in more users.[10]

App stores act as gatekeepers for app developers to gain access to app users of their respective operating systems ("**OS**") since no realistic alternatives are available to them outside of their platform.[11] These unique characteristics of app stores that make it prone to false positives of abuse which have been factored in while proving their pricing abuses of margin squeeze and excessive pricing.

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[7] *Google Android* (Case AT.40099) Commission Decision (2018).
[8] Statement of Objections (n 6).
[9] Jens-Uwe Franck and Martin Peitz, '*Market Definition and Market Power in the Platform Economy*' (2019) CERRE Report, 6-8.
[10] David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business School 2016) 117; European Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final, 11; The European Commission, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581> accessed 4 September 2021.
[11] The Netherlands Authority for Consumers & Market, 'Market study into mobile app stores' ACM/18/032693 (2019) ("Market Study").

3. Pricing Discriminations by App Stores

3.1. Margin Squeeze

The abuse of margin squeeze contrary to Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") is constituted when an undertaking dominant in an upstream market supplies an essential input to competitors in a downstream market, at prices such that the margin between the wholesale and retail prices is insufficient for an as-efficient competitor to compete effectively in the downstream market.[12]

Margin squeeze as an independent abuse has been majorly adapted and applied to the characteristically vertically integrated telecom markets.[13] In this digital era, a textbook example of margin squeeze may easily be the 30% commission fee levied through in-app purchases by Apple and Google's app stores. These dominant app stores have the ability to levy exorbitant commission fees for their input so that the apps competing with Apple and Google's own apps in the downstream markets become less profitable and lose their market share.[14]

In the *Apple v. Spotify* case pending before the EC for instance,[15] Apple's App Store satisfies the two crucial elements of margin squeeze as laid down in the TeliaSonera and Deutsche Telecom cases,[16] viz. firstly, the fee charged for the essential input of app stores renders the activities of *an equally efficient* downstream rival uneconomic**,** and secondly, this has *potentially* anti-competitive effects.

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[12] Deutsche Telekom AG (Case COMP/C-1/37.451) Commission Decision [2003] OJ L263/9; Richard Whish and David Bailey, Competition Law (8th edn,, OUP 2015) 754; Jan Bouckaert and Frank Verboven, '*Margin Squeezed in a Regulatory Environment*' (2003) CEPR Discussion Paper Series, 27.
[13] Case C-295/12 P Telefonica and Telefonica de Espana v Commission, EU:C:2014:2062.
[14] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 230.
[15] Statement of Objections (n 5).
[16] Case C-280/08 *Deutsche Telekom v Commission* EU:C:2010:603 [2010] ECR I-9555, paras 196-202; Case C-52/09 *Konkurrensverket v TeliaSonera* EU:C:2011:83 [2011] ECR I-527, paras 31-33; Case T-336/07 *Telefónica v Commission* EU:T:2012:172, para 194.

The ‘as efficient competitor’ test essentially determines whether the dominant entity would have remained efficient enough to offer its services to end-users profitably if it had been obliged to pay its wholesale prices for the intermediary services.[17] The considerably high 30% fee charged by the app stores are not paid by their own downstream apps such as Apple Music.[18] Its €9.99 per month subscription model would most likely not remain profitable if it had to pay the same App Store fee as its competitors like Spotify, who unlike Apple also generates revenue from targeted ads shown to the users of its free service model.

Interestingly, the shift from ‘*as-efficient competitor test*’ back to the ‘*reasonably efficient operator*’ is most apposite in such cases involving app stores wherein the costs of operating a dominant app store cannot be calculated accurately due to its economies of scale, dynamic nature of digital markets, and lack of production costs incurred in upgrading its established infrastructure.[19] Margin squeeze can, therefore, also be established here if the fee levied by the app store, combined with downstream costs incurred by the app developers, makes it impossible for a ‘*reasonably efficient*’[20] app developer to trade profitably. Epic Games,[21] for instance, may then be a reasonably efficient competitor facing additional efficiency constraints due to App Store’s fees and anti-circumvention rule, as well as Play Store’s fees and Google Play Billing Rules,[22] that squeezes or reduces its revenue and profits.

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[17] Robert O'Donoghue and Jorge Padilla, The Law and Economics of Article 102 TFEU (3rd edn, Hart Publishing 2020) (“Donoghue & Padilla”) 447; Friso Bostoen and Daniel Mandrescu, ‘Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores’ (2020) 16(2-3) Eur Competition J 431.
[18] Damien Geradin, & Dimitrios Katsifis, ‘The Antitrust Case Against the Apple App Store’ [2020] DP 2020-035 TILEC Discussion Paper.
[19] *See* Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] E.C.R. I-527 (“Telia Sonera”), para 45.
[20] National Carbonising Co. Ltd. v. Commission (76/185/ECSC) Commission Decision [1976] OJ/L 35/6, 7.
[21] United States District Court, ‘*Epic Games, Inc. v. Apple* Inc.’(uscourts.gov) <https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc> accessed 3 September 2021.
[22] Jeffrey J. Amato and Stephen LaBrecque, ‘State AG's Allege That Google Has Been Playing Monopoly With Android App Store’ (*Mondaq,* 13 July 2021) <https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1090464/state-ag39s-allege-that-google-has-been-playing-monopoly-with-android-app-store> accessed 3 September 2021.

The anti-competitive effect does not need to be concrete, as potential exclusionary effect suffices.[23] The preliminary ruling by the EC in *Apple v. Spotify*,[24] stated that the App Stores fees distort competition for music streaming services by raising their costs and creates anti-competitive harm by excluding them in the long run. The same potential harms would also apply for any service providing app paying the same steep 30% fee. Moreover, a dominant app store is an indispensable, essential gateway for app developers and app users,[25] which can easily hamper the incentive to innovate for app developers thereby, reducing the choices available to consumers in a rapidly evolving market. App stores can make it impossible for downstream entities to sustain in the long run due to the high fees that make these competitors less profitable.[26] Margin squeeze thus, offers a reliable framework to assess potentially anticompetitive pricing practices of digital platforms such as app stores.[27]

3.2. Excessive Pricing

The conduct of imposing an excessive and unfair price constitutes an abuse of dominant position,[28] and consequently, every dominant entity has a '*special responsibility*' to not set excessive prices.[29] Price regulation is vital where entry is insuperable,[30] and where app stores enjoy considerable market power in their respective OS,[31] leaving the

[23] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] E.C.R. I-527 ("Telia Sonera"), para 64.
[24] Statement of Objections (n 6).
[25] Market Study (n 10).
[26] Alison Jones, Brenda Sufrin and Niamh Dunne, 'Market Power, Market Definition, and Barriers to Entry' in Jones & Sufrin's EU Competition Law: Text, Cases, and Materials (7th edn, OUP 2019) ("Jones & Sufrin"), 72.
[27] Niamh Dunne, 'OECD Roundtable on the implications of e-commerce for competition policy' (Background Note) DAF/COMP (2018) 3, 35-6.
[28] Article 102(2)(a), The Treaty on the Functioning of the European Union.
[29] Massimo Motta and Alexandre de Streel, 'Excessive Pricing and Price Squeeze under EU Law' in C. D Ehlermann, I Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of Dominant Position?* (Oxford, Hart Publishing 2006).
[30] Philip Lowe, 'How different is EU anti-trust? A route map for advisors – An overview of EU competition law and policy on commercial practices' (Conference d'automne de l'American Bar Association, Brussels, 16 October 2003) <https://ec.europa.eu/competition/speeches/text/sp2003_038_en.pdf>.
[31] See Assessment of Conduct, OFT Draft Competition Law Guideline For Consultation, April 2004, para. 2.6, para. 2.20.

consumers with no credible alternatives.[32] In *United Brands Company v. Commission*,[33] a two-fold test was laid down to determine whether a price is in violation of Art. 102(2)(a). *Firstly*, the price-cost margin must be found to be excessive; and *secondly,* it is to be seen whether the price is unfair in itself, or in comparison to the price charged by the competitors.[34] It must be noted that the price-cost margin method is just one way of showing the excessiveness of the price, but that there is no obligation to undertake this test.[35]

While determining whether a price is unfair in itself, the bearing of the price on the '*economic value*' of the product in question is a vital consideration.[36] In *General Motors Continental NV v. Commission* [37], it was found that there was no abuse when a car manufacturer charged a seemingly high price for production of documents, as the 'value' to customers was great since the cars could not be imported without them. Similarly, one might argue while considering the economic value of an app store that owing to indirect network effects the economic value of an app store to app developers is great since app stores act as gatekeepers for accessing a vast majority of subscribers for apps, and likewise the app users gain the right to choose among a wide variety of apps.[38]

That being said, we present that the 30% fee is still unfair, primarily because it is levied only on app developers offering digital goods such as Spotify and Epic, as opposed to Amazon offering physical goods without incurring the same fee. Though at first this discrimination between apps offering physical goods and digital goods appears to be equitable, the question boils down to what the 30% commission rate is for. Is it for availing the services that the app store provides to app developers or is it merely for making use of the in-app purchase mechanism?

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[32] Robert O'Donoghue and Jorge Padilla, The Law and Economics of Article 102 TFEU (2nd edn, Hart Publishing 2013) 798.
[33] Case 27/76 United Brands Company v Commission [1978] ECR 250.
[34] *Id.*, 253.
[35] *Id.*
[36] Case C-177/16 *Latvian Copyright* [2017] EU:C:2017:286, Opinion of AG Wahl, paras 121- 123.
[37] Case 26/75 General Motors Continental NV v Commission [1975] ECR 1367.
[38]Organisation for Economic Co-operation and Development, 'Roundtable on Excessive Prices' DAF/COMP(2011)18, 5.

Apple has claimed that its commission "*reflects the value of the powerful technology platform, tools, ... and intellectual property that allows developers to create and distribute apps and is not merely a processing fee*".[39] If this is the case, then the fee ought to have been levied on all app developers, irrespective of the nature of goods.

It must also be noted that since the 30% fee is charged only to app developers who are made to use the in-app payment services, a comparison can be made with the fee charged by payment processors. PayPal charges a transaction rate of around 2.9%[40] and PayU charges 2%.[41] Comparatively, the commission rate of 30% is exorbitant and hence, meets the threshold to be considered excessive.

Apple's App Store has recently reduced its commission fee from 30% to 15% for any developer who earns less than $1 million in annual sales per year.[42] This policy façade barely makes a dent in the IAP generated revenue for Apple since all the majorly used apps continue to pay the exorbitant 30% fee. Moreover, it is mandatory to make payments through Apple's IAP mechanism, and owing to the anti-circumvention rule, app developers are prohibited from informing their users of alternative payment avenues.[43] Google Play Store also seeks to similarly make its in-app billing system mandatory very shortly, which makes their IAP mechanism patently unfair in itself.[44] In essence, the 30% fee charged by app stores constitutes the abuse of excessive pricing.

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[39] Letter from Chief Compliance Officer, Apple to Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and Consumer Rights (May 13, 2021) <https://9to5mac.com/wp-content/uploads/sites/6/2021/05/Senate-Subcommittee-Letter.pdf> accessed 2 September 2021.
[40] PayPal, 'PayPal Merchant Fees' <https://www.paypal.com/us/webapps/mpp/merchant-fees>, accessed on 3 September 2021.
[41] PayU, 'PayU Help > Pricing' <https://help.payu.in/knowledge-center/faq-pricing>, accessed on 1 September 2021.
[42] Apple, 'Apple announces App Store Small Business Program' (18 November 2020) <https://www.apple.com/newsroom/2020/11/apple-announces-app-store-small-business-program/> last accessed on 3 September 2021.
[43] Statement of Objections (n 5).
[44] Peerzada Abrar, 'Google to force apps to pay 30% Play Store tax; gives one year to comply' (*Business Standard*, 30 September 2020) <https://www.business-standard.com/article/technology/google-to-enforce-play-billing-system-gives-one-yr-to-non-compliant-apps-120092901274_1.html> accessed 2 September 2021.

3.3. Discriminatory Pricing

App Stores, by differentiating between different types of apps for charging their fee, can be said to be in violation of Article 102 of the TFEU for their discriminatory pricing practice. Apple's App Store has been accused of discriminatory pricing where it charges a 30% fee to all music streaming services developers, but exempts its own Apple Music from such a fee[45] and exempts media apps, apps that sell physical goods, including ride-hailing and food delivery services.[46]

Price discrimination contrary to Article 102(c) occurs when competition is distorted due to dissimilar conditions being imposed on equivalent or identical transactions.[47] Price discrimination occurs when the *same commodity* is sold at distinct prices to different customers despite *identical costs*[48] and the transactions being *equivalent.*[49] Additionally, the discriminatory conduct must be capable of *distorting competition*.[50] That is, an element of '*competitive disadvantage'* must be established[51] and the existence of a strategy aiming to exclude a rival from the downstream market is relevant.[52]

Multi-sided platforms like app stores provide app developers with a route of access to app consumers.[53] In that case, a material fact to be considered is the transactions between an app store and different app developers are substantially identical since access to the same platform is being provided. Both Google and Apple charge their exorbitant fee only to

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[45] Damien Geradin & Dimitrios Katsifis, 'The antitrust case against the Apple App Store', [2020] DP 2020-018 TILEC Discussion Paper 1.
[46] Kif Leswing, Apple will cut App Store commissions by half to 15% for small app makers (*CNBC,* November 18 2020) <https://www.cnbc.com/2020/11/18/apple-will-cut-app-store-fees-by-half-to-15percent-for-small-developers.html>
[47] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia v Autoridade da Concorrência* EU:C:2018:270, paras 26, 28 and 37.
[48] Louis Philips, *The Economics of Price Discrimination* (Cambridge University Press, 1983).
[49] Art. 102(2)(c), TFEU.
[50] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia v Autoridade da Concorrência* EU:C:2018:270, paras 26, 28 and 37.
[51] *Id*.
[52] C-413/14 P *Intel v Commission* EU:C:2017:632, para 139; Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR I-0000, para 29.
[53] *Google Search* (*Shopping*) (Case AT. 39740) Commission Decision of 27 June 2017, para 159.

some apps as some in-app purchases such as subscriptions to platforms selling digital goods and services, and physical products are exempted.[54]

It may be argued that the different apps are not similarly placed, for instance, the transaction with retail shopping apps on one hand and media or music streaming apps on the other hand are not equivalent due to the underlying fundamental difference in the nature of the apps.[55] Music and media streaming apps such as Spotify offer digital goods which have to be accessed through the app on Apple or Google's smartphone every time. From an operational perspective, this allows them to verify whether the customer has received the product, and thus, charging the fee in this case is more concrete.[56] On the other hand, retail shopping apps sell physical goods and there is no way in which the same can be kept track of.

However, it must be noted that different types of app developers be it of streaming services or retail services, are subject to the same terms of the developer's agreement. This means that they are allowed to display their apps in the same way on the app store and accrue identical benefits and facilities from the app store, and as such does not justify any pricing discrimination between different types of apps.

Apart from discriminating between different types of applications, it can also be seen that when a dominant app store such as Apple selectively levies its in-app purchasing fee only on the competitors of its downstream apps but conveniently exempts only its own apps from the fees, such a conduct would also constitute discriminatory pricing. For instance, levying the app store commission only on the competitors of Apple Music patently puts its competitors at an unfair competitive disadvantage due to a substantial reduction in their profits. Therefore, app stores can be seen to have manifestly abused their dominant

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[54] Google, Understanding Google Play's Payments policy <https://support.google.com/googleplay/android-developer/answer/10281818?hl=en>; Ian Carlos Campbell and Julia Alexander, A guide to platform fees (*The Verge,* August 24 2021) <https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google>.

[55] Friso Bostoen and Daniel Mandrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) 16(2-3) European Competition Journal 431.

[56] Sven Voelcker and Daniel Baker, 'Why There Is No Antitrust Case against Apple's App Store: A Response to Geradin & Katsifis' (2021) Journal of Competition Law & Economics.

position in the upstream market of app stores to the unjustified disadvantage of their downstream competitors through engaging in discriminatory pricing contrary to Article 102(c) of the TFEU.

4. Conclusion

It is undisputed that app stores provide immense benefits to app users and app developers as a facilitating and connecting platform. However, the consumer harm caused by their pricing abuses as discussed above, outweigh these benefits in the long run. The plethora of cases against the App Store and Play Store, coupled with legislative measures such as the bill passed in South Korea banning app market operators from forcing app developers to use their payment systems,[57] proves that competition authorities around the world have started to recognize the pressing need to regulate the prices in a manner that doesn't stifle the incentive of app stores to innovate. Suffice to say, the antitrust regime is more robust than ever in the digital era. The pending American and EU cases and legislations regarding digital markets will set the pace for the it for the next few decades.

[57] Graison Dangor, 'South Korea Becomes First Country to Ban Google and Apple Monopolies On App Store Payments' (*Forbes,*31 August 2021) <https://www.forbes.com/sites/graisondangor/2021/08/31/south-korea-becomes-first-country-to-ban-google-and-apple-monopolies-on-app-store-payments/?sh=4edd6a462f4f> accessed 3 September 2021.

Aim

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

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