Università degli Studi di Ferrara

DOTTORATO DI RICERCA IN

Diritto dell'UE e ordinamenti nazionali

(European Union Law and National Legal Systems)

CICLO XXXIII

COORDINATRICE/COORDINATORE
Prof. Giovanni De Cristofaro

European Union and Iranian Competition Law with an Emphasis on Civil Remedies: A Comparative Study

Settore Scientifico Disciplinare IUS/14

Dottorando
Dott. Valizadeh Fard MAHDI

Tutore
Prof. Paolo Borghi

Anni 2017/2020

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Introduction

Competition is an attempt to win among two or several persons, entities or species while pursuing a common goal. However, competition is not limited to human life but also it pertains to the lives of all other creatures (species). For instance, animals continually struggle for survival and food supplies. In a similar vein, plants compete with each other for sunlight and water too.

By the end of this struggle, the winner is the one who is stronger and more fitting than others. This is the basis of Charles Darwin's concept of "natural selection" which has brought about tremendous transformations in natural sciences. In human life, competition with each other as well as with other creatures (species) has become a common habit. Even more so, it can be argued that competition is one of the main pillars of human life on which the universe is based.[1]

"Nature's God" in the biological science. Even the value of some useful and sensible human actions is inherently dependent on it so that the elimination of competition often makes those actions devoid of meaningfulness.

The benefits of competition have led the self-interested human in a business-based world to gradually use them as means to achieve the positive outcomes of competition. In particular, this usage has been accelerated ever since Adam Smith propagated his economic ideas of the classical school based on which the importance of improving the business environment to the benefit of public became clearer and more definite. Smith's school has had a direct impact on the creation of modern economics and an indirect impact on Competition Law. We can see an example of this impact on the principles of neoclassical school according to which the sum of producers' and consumers' welfare equates the welfare of the whole society. Therefore, the final outcome of the competition in the market has to be the promotion of community's welfare.

Although the history has proven the fact that the free market economy can benefit societies and that the socialist economies have failed, it is substantiated that in many cases market economies can go to the extreme in case there is no systematic surveillance of authorities on competition rules.[2] This is owing to the fact that the primary concern of private sectors are their own interests and that is why if they are

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[1] Rudolf Callmann, "What Is Unfair Competition?", 28 The Georgetown Law Journal, No. 5 (Feb, 1940), pp. 592 – 93.

[2] Richard Whish, *Competition Law* (6 edn, Oxford University Press 2009) 1.

left unchecked they would endanger the interests of the whole community in order to gain more profit and market shares.

Pioneered by the legislative body of the US the legislators of almost all countries have enacted laws from the late nineteenth century onwards to ensure enforcement and respect for competition rules.[3] These rules which are implemented today in most of the developed countries such as Japan are still being developed in developing countries like Iran. In the latter case, competition institutions are still in their primitive phase where many basic challenges are encountered.

The EU Competition Law along with its US counterpart are undoubtedly the largest systems of Competition Law in all over the world in a way that their principles have been transposed into the legislation of many other countries. As far as the EU Competition Law is concerned, the scientific works that have been published by European scholars in interpretation of the Articles 101 and 102 of the Treaty on the Functioning of European Union over recent years are admittedly very precise and extensive. In this respect, if we say that the accelerated development of Competition Law in EU has fascinated all scholars all around the world we have not betrayed the truth.

As it was mentioned above, the Iranian legal system has been at its stage of infancy in the field of Competition Law where many challenges have been faced. For instance, governmental investment, the administrative framework of government, its intervention in economy, its reliance on oil revenues, and finally the adherence to Shari'a[4] which emphasizes private ownership led the country for some time to no longer feel compelled in implementation of Competition Law.

Nonetheless, it must be pointed out that these kinds of defect in the Iranian economy have been considerably remedied in recent years. Reforms as such, which were necessary in the face of heavy financial burdens that economic and market interferences imposed on the government, have been implemented pursuant to the ordinance of the Iranian supreme leader. Eventually, some factors such as the

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[3] Vinod Dhall, "Overview: Key Concepts in Competition Law", in Vinold Dhall (Ed.) *Competition Law Today*; Concepts, Issues and the Law in Practice (New Delhi: Oxford University Press, 2007) 1.

[4]. Islamic canonical law based on the teachings of the Koran and the traditions of the Prophet (Hadith and Sunna), prescribing both religious and secular duties and sometimes retributive penalties for lawbreaking. It has generally been supplemented by legislation adapted to the conditions of the day, though the manner in which it should be applied in modern states is a subject of dispute between Muslim traditionalists and reformists.

favorable conditions of the country for the economic jump, the thirst of managers to develop, optimal allocation of resources along with the need to attract foreign investment as well as familiarity with causes of economic growth in other countries led to the establishment of the Iranian Competition Law.

The law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution which was approved in 2007 forms the main framework and pillar of the Competition Law in Iran. Many have criticized its existence, in particular, due to the weaknesses found in its much anticipated enforcement. It seems that the legislator has had doubts about the regulation of competition but has not had serious determination in the way it is implemented. Therefore, in order to ensure that the legal goals of such rules are met, fundamental reforms are indispensable.

The present research constitutes a significant contribution to international aspects of Competition Law. One of the major issues in any law is its implementation which is a crucial matter for Competition Law too. The main research questions of the current paper are as follows: 'What is the guarantee of breaking the rules of Competition Law? How and by what means do the ruling forces require compliance with Competition Law regulations? In this regard, private enforcement (civil remedies) of Competition Law is one of the main topics of the field. Given the fundamental legal defects of Iranian Competition Law, the comparative analysis of Iranian Competition Law and EU Competition Law is necessary.

Moreover, the research is significant for the Iranian Competition Law as the comparative insights derived from the European experiences could provide useful information to support its development process. In other word it is good to ask how can Iranian Competition Law overcome the enforcement challenges by looking at EU experiences.

This paper is composed of four chapters and is structured as follows: Chapter one is dedicated to the literature review and explanation of the research problems and key terms of the research. In Section 1.1 a definition of Competition Law is provided and the importance of private enforcement is discussed. Moreover, I will explore in the same chapter the objectives of Competition Law as well as the personal, subjective, and spatial territories of Competition Law in detail. In section 1.2, I will elaborate on the necessity of determining civil remedies in Competition Law and then will bring under scrutiny the place of civil remedies and private claims in the enforcement of competition rules in the EU and Iranian Law.

The Second chapter introduces the contract-based contravention of Competition Law. In this respect, a comparison between the EU and Iranian Law will be made. Furthermore, in addition to some sorts of anti-competitive agreements such as horizontal agreements, vertical agreements, and Mergers, contractual remedies for anti-competitive agreements such as nullity and termination will be explored.

The third chapter is allocated to the non-contractual contravention of competition rules. Moreover, the pillars, status, and place of civil liabilities arising from the breach of Competition Law and other non-contractual contraventions will be scrutinized.

In chapter four I will provide a conclusion that demonstrates the study's strengths, limitations and recommendations.

The library research method will be chosen. Analytical, descriptive, and comparative theorizing will guide data collection. In the first instance data will be collected through investigating the articles and books regarding the civil remedies of Competition Law. Moreover, I will broaden the data collected in the first step by Interviewing the experts and analysts. The author wishes to interpret and conclude from different library resources and then to compare the results to what is happening in practice in order to find answers to the main research questions. Participating in different seminars and conventions with the subject of unification is another approach that the author adopts so as to produce scientific content for answering the questions in this thesis. On top of that, Competition Law is the main subject of many discussions in many academic circles nowadays and therefore another means through which the author wishes to advance the thesis is to engage in different scientific discussions in order to gather information from the students and experts interested in the subject of Competition Law.

Chapter one: Generalities and Background

1.1 Overview of the Iranian Legal System

The three main administrative branches of the Islamic Republic of Iran are executive, legislative and judiciary powers. The Assembly of Experts of the Leadership[5], the Expediency Council[6] and the Guardian Council[7], along with other organizational branches of the country, administer and form part of the organizational structure of the Islamic Republic of Iran. It is to be mentioned that the Supreme leader of Iran holds the position of the head of the state and the commander-in-chief.

According to the principles of the Iranian constitution the independent judiciary has to protect the individual and social rights and be responsible for the realization of justice.

1.1.1 Introduction to Iran's Judicial System and the Economic Policy of Iran

The Iranian Judiciary was established in the post-revolutionary country by Seyyed Mohammad Beheshti. The country's constitution defines several functions for the judiciary, which are stipulated in Articles 156 to 174 (chapter 11) the Iranian

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[5]. The Assembly of Experts of the Leadership consists of qualified jurisprudents who, in accordance with Article 107 of the Constitution of the Islamic Republic of Iran, are responsible for determining the supreme leader (leader of the Islamic Republic). The duration of each term of this parliament, whose members are elected by election and by direct and secret vote of the people, is eight years.

[6]. The Expediency Council is one of the main institutions of the Islamic Republic of Iran, whose most important responsibility is to resolve the dispute between the Islamic Consultative Assembly and the Guardian Council. The number of members of this assembly is 44 fixed and 1 guest is added according to the subject of the session. The members are elected every 5 years and by the decree of the Supreme Leader of Iran. The chairman of the assembly was Ali Akbar Hashemi Rafsanjani from the beginning of the establishment. After his death, Mohammad Ali Movahedi Kermani became the provisional chairman of the Assembly and on 23th August of 1996, for a five-year term, Seyyed Mahmoud Hashemi Shahroudi became the head of the assembly.The headquarters of the Assembly is at the Tehran Marble Palace.

[7]. The Guardian Council is one of the regulatory bodies of the Islamic Republic of Iran. All the laws of the Islamic Consultative Assembly (the legislative body) have been approved by this Council in order to avoid violation of the Shari'a law and the Constitution. The eligibility verification of candidates for all the nationwide elections, except for city and village councils, is also within the scope of the council's mandate.

constitution. Below in the footnote you can read an extracted version of the duties and authorities of the Iranian judiciary[8].

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[8]. Article 156: The Judiciary is an independent body that supports personal and social rights and is responsible for the following duties:

1- To process and issue a warrant on claims, damages, complaints, settlement of disputes and resolving hostilities and taking the decision and action required in that part of the affair, which the law determines;

2- Restoration of public rights and the spread of justice and legitimate freedoms;

3- Supervising good law enforcement;

4- Discovery of the crime and prosecution of punishment and punishment of offenders and implementation of the criminal laws and regulations of Islam;

5- Appropriate action to prevent crime and correct offenders.

Article 157: In order to carry out the responsibilities of the judiciary in all judicial, administrative and executive matters, the Supreme Leader elects a just and knowledgeable person in legal matters who is called a mujtahid and is able of management, for 5 years as the head of the judiciary, who shall be the highest authority of the Judiciary.

Article 158: The duties of the head of the judiciary are as follows:

1- Establishing the necessary bodies within the judiciary in accordance with the responsibilities given to him in Article One hundred and fifty-six;

2- Preparation of judicial bills consistent with the Islamic Republic base;

3- Recruit judges and dismiss them and install them and change the place of mission and determine their jobs and promotion, etc., and such administrative affairs, according to the law.

Article 159: The official authority for complaints and appeals is the judiciary. The formation of courts and the determination of their jurisdiction are subject to the rule of law.

Principle 160: The Minister of Justice shall be responsible for all matters relating to the relations of the Judiciary with the executive and legislative branches and shall be elected from among those whom the President of the Judiciary proposes to the President.

The head of the judiciary may delegate to the Minister of Justice the total financial and administrative powers and the powers of non-judiciary recruitment. In this case, the Minister of Justice will have the same powers and duties as those foreseen for the ministers as the highest executive authorities.

Article 161: The Supreme Court is formed in accordance with the rules established by the head of the judiciary in order to supervise the proper implementation of the laws in the courts, and to establish the unity of judicial procedure and the performance of the duties assigned to it by law.

Principle 162: The President of the Supreme Court and the Attorney General shall be a fair mujtahid and are aware of the judicial affairs, and the head of the judiciary shall, in consultation with the Supreme Court, appoint them for a term of five years.

Principle 163: Attributes and conditions of the judge are determined by law in accordance with the rules of jurisprudence.

Principle 164: A judge cannot be temporarily or permanently dismissed from the position he / she is engaged in without trial and attachment of the offense or offenses which caused him to be detached, or his place of service cannot be changed without his consent, and his judicial position cannot be changed except when it's in the interest of the community with the decision of the president of The judiciary, after consulting the Supreme Court Chief and Prosecutor General. Periodical transfers of judges shall be in accordance with the general rules laid down by law.

Principle 165: Trials are conducted publicly and the presence of individuals is permitted unless it is determined by the court that its publicity is in violation of public chastity or public order, or in private pleas in law that the parties are not willing to open trial.

Principle 166: Judgments of the courts shall be with citation of the articles and legal principles that the court awards are issued based on them.

Principle 167: The judge is required to try to find the resolution of any dispute in the written laws, and if he does not, he should issue an award based on credible Islamic sources or authoritative fatwa[8] and he cannot avoid issuance of an award on the pretext of silence or imperfection or briefness or conflict of laws.

Article 168: The investigation of political and press offenses is open and by the presence of a jury. The manner of choosing, conditions and powers of the jury and the definition of political crime are determined by the Islamic law.

Principle 169: No action or omission shall be considered a crime when criminalized after the date of commission.

Principle 170: Judges of the courts are required to refuse to enforce government decrees and regulations contrary to Islamic law/regulations or beyond the limits of the powers of the executive branch, and anyone can ask for cancellation of such regulations from administrative court of justice.

Article 171: Whenever a judge commits a mistake or fault in the matter, or in the judgement, or in the accordance of a judgment with a particular case, and a materially or spiritually harm is imposed on someone by his wrong judgment, if guilty of negligence, the negligent will be responsible according to the Islamic principles, otherwise, the damage will be Compensated by the state and in any case the wrongly accused will gain restitution[8].

Article 172: Judgments for crimes related to Special military tasks or police functions of members of the army, gendarmerie, police officers and the Islamic Revolutionary Guard Corps, military courts are established in accordance with the law, but their general crimes or crimes committed by them in their executive officer positions, will be prosecuted in general courts. Prosecutor's Office and Military Courts are part of the country's judiciary and are subject to the principles of this jurisdiction.

Article 173: In order to deal with complaints, motives and protests of the people towards the governmental agents or units, a court called the "Administrative Justice Court" under the supervision of the head of the judiciary is established, the scope of the powers and procedure of this court is determined by the law.

Article 174: Based on the right of the judiciary to supervise the good conduct of the affairs and the proper implementation of the laws in the administrative organs an organization called the "Organization of general

1.1.1.1 Nature, independence and structure of the Iranian judiciary:

In general, social revolutions start with a gradual process and abruptly gain momentum at some point of time which amount to basic transformation of country's administrative status, class structure, and indeed its dominant ideology[9]. In Iran too, the overthrow of the Shah of Iran and the rise of Iranian revolution between 1977 and 1979 occurred in a gradual process which accelerated towards the end of this time period. The removal of Shah was accompanied by the dispossession of ruling capitalists, especially those who were politically privileged. The revolution also brought the removal of all top officials and the reorganization of the administrative, judicial, and coercive state apparatuses. One of the key facets of all these transformations was based on attacking the lifestyles and institutional supports of westernized dominant groups in Iran[10]. As in most contemporary Third World countries, it is generally hard to characterize a revolution as political or social revolution in any certain way because the state and its incumbent elites occupy a central place in the ownership and control of the economy. Nevertheless, it can be argued that the Iranian Revolution has been so obviously mass-based and so thoroughly transformative of basic sociocultural and socioeconomic relationships in Iran that it surely fits more closely the pattern of the great historical social revolutions than it does the rubric of simply a political revolution, where only governmental institutions are transformed[11].

The judiciary is one of the three pillars of governance in systems that are based on the principle of separation of powers. According to the principles of the Iranian Constitution, the Islamic Republic of Iran's judiciary system is headed by one of the fair mujtahids[12]، who has to be appointed by the leadership[13] for five years and who

Inspection" is established under the supervision of the head of the judiciary, the limits of the powers and duties of this organization are determined by law.

[9]. Theda Skocpol, *Rentier State and Shi'a Islam in the Iranian Revolution* (Springer 1982) pp.265-83.
[10]. Ibid.
[11]. Ibid.
[12]. One who exercises independent reasoning (ijtihad) in the interpretation of Islamic law. Qualifications include training in recognized schools of Islamic law and extensive knowledge of the Quran and hadith. In Sunni Islam, the title is reserved for the founders of the four official schools of Islamic law, although modern Islamic reformers call for the revival of ijtihad as a means of accommodating new ideas and conditions.
[13]. The Supreme Leader of Iran election in 1989 was an indirect election where the Assembly of Expert members voted to choose the second Supreme Leader of Iran. The election was held on June 4, 1989, the

has to possess knowledge in the affairs of the judiciary, be a reliable manager and be a good moderator.

based on the constitution and customary laws that have been ratified and enforced so far The Islamic Republic's judicial system, grant the right to Iranian citizens and residents of Iran to declare any form of complaint against anyone in any case to the judicial authority. And the competent authority is obliged to issue a ruling based on the law and the procedures of the tribunal that are already established and approved in compliance with the principles of fairness and judgment. A convict shall have the right to appeal against such sentences in the event that he does not regards it as contrary to law or violation of his rights. The appeal body which is the court of appeal will approve in case the formalities are entirely observed, and ultimately, if it finds that there is a mistake or unlawful verdict in the initial ruling, it will dismiss the verdict as illegal and relegate it to another court of the same level.

The final judgment of the judiciary that follows the above steps is enforced through beneficiary's request, but this is only when there is no public prosecution against the perpetrator of the crime or the case is civil not criminal.

Therefore, in the legal system of Iran, both in the civil system and in the criminal justice sector the execution of the sentence is in accordance with the legal requirements.

2.1 Iran's economic policy

2.1.1 A Short history of Iranian economic policies

In 1979 after the overthrow of Shah the Islamic Republic of Iran inherited an economy which was heavily dependent on oil and on a small and hardly surviving manufacturing sector. Afterwards, the war with Iraq which lasted for 8 years, the influx of refugees in Iran, rapid population growth, and the most influential one the US sanctions along with debated political decisions led to economic conditions of today. Under the current economic conditions in Iran the Iranian Rial[14] has a little room for maneuver[15]. It is indeed incontestable that the economic policies are hard

morning after Ruhollah Khomeini's death and Ali Khamenei was elected as his successor with 60 votes out of 74.

[14] . The basic monetary unit of Iran and Oman, equal to 100 dinars in Iran and 1,000 baiza in Oman.

[15] . Hossein Askari, 'Iran's Economic Policy Dilemma' [2004] 59(3) International Journal 655.

to implement because of the correlation of its implementation with political circumstances[16].

In 1988, almost ten years after the Islamic revolution in Iran, Iran's real gross domestic product (GDP) was close to the levels recorded in 1977 and because of population growth which was close to 60 percent, per capita real income had fallen by roughly 40 percent[17]. However, the GDP growth trend became more satisfactory in the following time periods:

- At an average annual rate of 6.7 percent between the years 1990-1995[18] (this growth was heavily due to external financing though)
- At an average annual rate of 3.8 between the years 1995-2000
- And more pursuant to implementation of some reforms, a more balanced annual rate of 5.8 percent between the years 2000-2003. During 2002-2003, even though the oil sector of the economy faced contraction, the overall growth reached 6.8 percent. Yet even after these recent successes, real per capita GDP in 2000 was roughly 30 percent below the levels of mid-1970s[19].

2.1.2 Lack of necessities for steady economic growth

There is broad agreement among economists that macroeconomic stability which is characterized by moderate and predictable inflation, a small budget deficit, and the relative stability of the real exchange rate are essential for steady economic growth[20]. However, we can witness that the performance of Iranian economy in the 1980s and 1990s experienced a marked deterioration and the economic growth slackened drastically both in its own terms and compared with other countries in the region[21]. Some repercussions of this weakening have been a serious decline in the

[16] . Ibid.
[17] . Ibid.
[18] . Ibid.
[19] . Ibid.
[20] . Ibid.
[21] . Hassan Hakimian and Massoud Karshenas, Dilemmas and Prospects for Economic Reform and Reconstruction in Iran. in Parvin Alizadeh (ed), The economy of Iran: The dilemma of an Islamic state (IB Tauris 2000) 2.

investment sector, a low labor productivity, a widening trade gap, a fast accumulation of debt and above them all, a sharp decline in the standard of living.

2.1.3 The current economic approach

Viewed from the above-mentioned perspectives, the deterioration in the performance of the Iranian economy in 1980s and 1990s can be largely explained by the macroeconomic instability that characterized that period[22]. Inflationary pressure not only prevailed throughout the 1980s, but also exacerbated in the 1990s. Moreover, the last 20 years have also witnessed a sharp increase in unemployment, uncertainty over monetary and exchange rate policies, and of course sudden switches between fixed and floating exchange rate systems[23]. It could generally be argued that the deterioration of economic performance in the post-revolutionary period can be attributed in part to a number of negative external shocks too. Therefore, not only the economy suffered from the post-revolutionary economic policies, but also the protracted and costly war with Iraq, a continuing economic embargo by the US (which involves freezing of Iran assets) and erratic oil prices adversely impacted upon Iran's economic situation[24].

The main characteristic of the post-revolutionary Iranian economy is arguably the expanded intervention of the state in the economic sector. Hakimian and Karshenas point out that the expanded government role in the first decade after the revolution was in certain instances, a response to revolutionary upheaval[25]. The active role that the Iranian government took on since the revolution finds its roots in history and there are evidences that show the centrality of the Iranian state in determining the reproduction of the economic system in the Iranian medieval economy[26]. Furthermore, a distinctive feature of the current Iranian economic state is that a sizeable oil revenue accrues to the government because of its monopoly right over oil[27].

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[22] . Ibid.
[23] . Ibid.
[24] . Ibid.
[25] . Ibid.
[26] . Ibid 3.
[27] . Ibid.

3.1 An overview to EU Legal System

3.1.1 A short introduction to the European Union and its evolution

It has always been a central question that how one should define the European Union. EU is regarded to be more than an ordinary international organization, and as an actor in the international community, acts more than an international organization such as the World Trade Organization.[28] Scholars have applied several terms such as multi-level governance and consociationalism[29] in their efforts to define the EU but none has gained much attention so far.[30]

Our failure to agree on a definition for the EU, or at least to agree on its political and economic personality leads to difficulties in shaping the public opinion about it. The EU has many of typical features of an intergovernmental organization, in that membership is voluntary, the balance of sovereignty lies with the member states, decision making is consultative, and the procedures used to direct the work of the EU are based on consent rather than compulsion. At the same time, it possesses some qualities which renders it similar to a state. For instance, the movement into EU's external borders is harder than its internal borders, there exists a harmonized EU legal system that all the members are subject to, it has administrative institutions with the authority to make laws and policies, the balance of responsibility in many policy areas has shifted from the member states to the European level, and in some areas such as trade the EU functions as a unit.[31]

Since its formation in 1993, the European Union has conspicuously evolved, with the member states increasing from six to twenty-eight. The early attempts to form the EU as a unitary entity took place in the aftermath of the second world war where cold war tensions escalated and became more evident.[32]

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[28] . John Mccormick, *Understanding the European Union: a Concise Introduction* (Palgrave 2017) 1.

[29] . A political arrangement in which various groups, such as ethnic or racial populations within a country orregion, share power according to an agreed formula or mechanism.

[30] . Ibid.

[31] . Ibid 14.

[32] . Ibid.

In general, EU law can be divided into the 'primary' and secondary legislation. The treaties (primary legislation) serve as a foundation for all EU actions[33] . Secondary legislation which includes regulations, directives and decisions are derived and have to be based on the principles and objectives set out in the treaties[34] .

3.1.2 Sources and conditions of judicial power in the European Union

The European court of justice (ECJ) is assigned the task of constructing a binding supranational legal system that consolidates past EU agreements and of propelling regional cooperation forward.[35] The supranational power of ECJ has been attributed to its capability to rule over national verdicts rendered by states, its compelling legal and functional logic of the decisions it makes, its strategic accommodation of national interests and lastly the support it provides for national courts.[36] Conventional explanations place particular emphasis on the enforcement of many ECJ decisions by national courts and the difficulty that unanimous voting poses for overturning ECJ decisions through Treaty revision.[37] These factors certainly contribute to the ECJ's authority and the binding European legal system it pioneered.[38] The resolution of disputes by ECJ frequently challenges the national laws and practices of EU member states. It is to be mentioned that European treaties and legislation function as a higher law against which national law is judged for its compatibility. Similar to the constitutional review, ECJ's interpretations can require the democratic choices of national polities to be set aside for the sake of European integration as the European rights supersede national rights whenever a conflict arises between the two.[39]

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[33] . European union, 'EU law' (*European Union Official Website*, 27 February 2019) <https://europa.eu/european-union/law_en> accessed 20 December 2020.

[34] . Ibid

[35] . Lisa Conant, *Justice Contained: law and Politics in the European Union* (Cornell University Press 2002) 15.

[36] . Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: a Political Theory of Legal Integration' [1993] 47(1) International organization pp. 41-46.

[37] . Karen J Alter, 'Who Are the Masters of the Treaty: European Governments and the European Court of Justice' [1998] 52(1) International Organization pp. 121-47.

[38] . Lisa Conan, Justice Contained: law and Politics in the European Union (Cornell University Press 2002) 3.

[39] . Ibid 5.

3.1.3 EU's Economic Policy

Since the creation of the EU, the economic weight that the EU gained as a harmonized unit has made it an influential player in the global economy. The EU-27 is the largest exporter and importer of both goods and services[40], and is one of the largest hosts and sources of foreign direct investment. The Euro is second only to the United States dollar as an international currency. EU's internal coordination of foreign economic policies denotes that EU could at least partially translate the economic weight it possesses into influence on the global economic relations.[41] In both trade and competition policies, the EU has been able to speak in one voice in dealing with third countries since 1960s. Moreover, since the last decade the increased internal co-ordination of the EU in the field of monetary policy has leveraged its position in the international monetary system.[42]

3.2 Competition Law

3.2.1 Unpacking the Concept of Competition Law

The benefits of competition have led to the willingness of the human to bring it to the world of business as a means to benefit from its positive results. In particular, since the second half of the eighteenth century, the emergence and consistency of classical school's economic thoughts that Adam Smith propagated increased the importance of competition in improving the business environment for the benefit of the public. A century later, the founders of neoclassical school proved the unparalleled role of competition in promoting the welfare of the whole community and the efficient use of resources in a more scholarly language.

In the opinion of these founders, the impact of competition on business behavior will cause business actors to maintain their survival in the market while always seeking optimal use of resources. This means that one should obtain the best production from scarce resources at the lowest price and in a more innovative way in order to deliver advanced products as a means to attract more customers and ultimately gain more profits. In addition to eliminating the inefficient actors that waste resources, one of

[40]. Andreas Dür and Manfred Elsig, 'Principals, Agents, and the European Union's Foreign Economic Policies' [2011] 18(3) Journal of European Public Policy 323.

[41]. Ibid.

[42]. Ibid.

the effects that the neoclassical concept of optimal can lead to is the increase in the satisfaction of consumers as well as the enhancement of benefits and efficiency for economic activists.

The effectiveness of a ruling or a legal principle cannot be envisaged without its guaranteed enforcement by the government. This can refer to the potential remedies and punishments that guarantee the implementation of the law by individuals. The enforcement of legal rules can be divided into three main categories: criminal enforcement, administrative or disciplinary enforcement, and civil enforcement.

As its name suggests, the subject of Competition Law and its complex and wide-ranging topics revolve around business-aspirations. Competition Law has been customarily regarded as a branch of law, which, with the help of economic instruments, attempts to create, maintain, and protect the market. Competition can be deemed as a precious pearl in the market to protect it from opportunists and abusers. Within this perspective, it can be said that Competition Law is a set of rules and regulations that deal with and supervise disruptive unilateral and bilateral actions of firms in the market. Anti-competitive unilateral actions refer to the misuse use of market power by firms. Moreover, the term multilateral or bilateral disruptive actions stands for anti-competitive agreements between firms. On this basis, Competition Law can be divided into two major parts: 1) anti-competitive rules of competition and 2) anti-abuse rules of market power.

3.2.2 The history of the Development of Competition Law in the EU and Iran

In this part, I will introduce the historical background of the development of Competition Law in Iran and the EU. As it will be argued, the EU and Iran both found out at a certain point of time in the history that competition needs to be regulated otherwise it would be eliminated and subsequently with the formation of monopolies the existence of trade would be threatened. In the EU, Competition Law regulations are taken much more seriously as they are implemented to a noteworthy extent and are reinforced by practical civil remedies. This can be attributed to the principle of liberal market economies in the EU and its preponderant role in international trade. On the other hand, the implementation of Competition Law in Iran has been slowed down due to the obstacles it has faced as a result of

governmental interference in the economy and the presence of corruption[43] . It would not be a smooth path towards the full and organized implementation of Competition Laws. It is indeed one of the characteristics of most developing countries that governments vastly intervene in the economy and the Iranian example is not an exception in this respect. Moreover, it must be noted that according to the credible rankings published in 2018 Iran is the 138th least corrupt country out of 175 countries in the world[44] .

3.2.2.1 Creation of Competition Law in European Union

At the end of the period of reconstruction of national economies that had been shattered by the war, income redistribution and discretionary macroeconomic management emerged as two top policy priorities of most western European governments.[45] The market was regulated to the ancillary role of providing the resources to pay for this government largess, and any evidence of market failure was deemed sufficient to justify state intervention which often occurred in the intrusive forms of centralized capital allocation and the nationalization of key sectors of economy. Indeed, centralized management and unfettered policy discretion came to be regarded as prerequisites of effective governance.[46]

This social democratic consensus about the relative roles of state and market in the economy began to crumble during the 1970s. The combination of rising unemployment and rising rates of inflation could not be explained within the Keynesian model of the day, while discretionary public expenditure and the centralized welfare state were increasingly seen as part of the problem rather than the solution[47] . It is at this point that we witness public-choice theorists identifying various types of government failure just as previous generations of economists who had produced an ever-lengthening list of market failures[48] . Nationalization policies seemed to provide striking empirical evidence of the failure of public sector in one

[43] . The vastness of corruption in Iran is due to governmental economy and the vast intervention of state in every aspect. In this regard, see European union, 'Iran Corruption Rank' (*Trading Economics*, 10 January 2019) <https://tradingeconomics.com/iran/corruption-rank> accessed 20 December 2020.

[44] . Ibid.

[45] . Pio Baake and others, *Regulating Europe* (Psychology Press 1996) 1.

[46] . Ibid.

[47] . Ibid.

[48] . Ibid.

country after another. Moreover, publicly owned firms came under fire for failing to achieve not only their economic but also their social objectives[49].

That such criticisms were not always fair or objectively justified is invalid. The fact is that an increasing number of voters were convinced by them, who were willing to support a new model which included privatization of many parts of the public sector, more competition throughout the economy, and a greater emphasis on efficiency and decentralization in the provision of social services. The failure of the socialist experiment of president Mitterand in 1981/2 was seen as conclusive proof that redistributive Keynesianism was no longer appropriate for countries such as France were closely integrated in the European and global economy[50].

In addition to privatization, market liberalization, and welfare reform, the new model of policy making which emerged in 1980s is commonly thought to include deregulation[51]. It is true that in Europe, as in the United States, traditional structures of regulation and control were breaking down under the pressure of powerful technological, economic, and ideological forces and were dismantled or radically transformed[52]. This is often referred to, rather misleadingly, as deregulation. What is observed in practice is never a dismantling of all regulation - a return to a situation of laissez faire which in fact never existed in Europe - but a combination of deregulation and reregulation[53].

In Britain and elsewhere the privatization of public utilities has been followed by price regulation while the newly privatized firms have lost their pre-existing immunity from national and European Competition Law. In fact, in industries such as telecommunication, the power of the incumbent operators (the former monopolists) to fight probable off is so great that governments have to intervene to restrain them[54]. As a result, competitors frequently owe their existence to regulatory constraints imposed on their larger rivals.

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[49] . Ibid.
[50] . Ibid.
[51] . Ibid.
[52] . Ibid.
[53] . Ibid 2.
[54] . Ibid.

It must be reminded that European countries were initially following Americans in accepting and understanding the importance of laws protecting competition in developing economic power and ensuring the proper functioning of their markets. The United States was the first country that enacted Sherman act as a tool for defending competition and elimination of monopoly in 1890. Afterwards, the European attention and enthusiasm for modern Competition Law took place half a century after its life in the United States. Today's European economy, as referred to in article 119 of the new Treaty on the Functioning of the European Union, is based on the principle of open market economy with free competition. Within the last 20 years, EU Competition Law has developed to an extent that has become the second major system of Competition Law in the world whose foundations have penetrated in many other countries. The volume of scientific works that has been written by European scholars in the interpretation of Articles 101 and 102 of the Treaty on the Functioning of the European Union during these two decades cannot be counted. It can even be argued that the accelerated development of EU Competition Law, which has led to an unhealthy competition in recent few years in Europe, has been unprecedented.

3.2.2.2 Creation of Competition Law in Iran

The wave of transplanting Competition Law rules has also come to Iran. In recent years, with the government's growing inability to understand the inadequacy of the state economy, officials have sought to transform the country's economic system and move towards privatization. One of the key factors in achieving this goal is to maintain competition and prevent private and public monopolies. For this reason, in 2007, a law was passed by the Islamic Consultative Assembly of the Islamic Republic of Iran, entitled "The law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution", which involved partially rules of competition and the prevention of monopoly.

Similar to other developing countries, the present form of Iranian Competition Law has not had any precedence. The structure of the Iranian economy has for many years heavily relied on investment, centralized management, and ever-expanding role of government in the economy. Former Iranian regimes proved inefficient in the economic management of the country which cultivated a feeling of distress and distrust in the authors of the post-revolutionary Iranian constitution. Despite the general recognition of private ownership in Sharia, this mistrust was reflected in

Article 44 of the Constitution[55] which placed major industries and important economic sectors into government monopoly and gave only a small role to the private sector in the development process of the country[56]. It is possible at times to witness indifference in the country's economic management system as regards the efficiency and allocation of resources which can be attributed to dependency on oil income to ensure the relative welfare of the people. Apart from that, the issue of brain drain in the management sector can be added to all these reasons, which collective explain why the lack of attention to Competition Law and the need to transpose relevant rules in Iran can be understandable.

Article 4 of the Iranian Constitution explicitly refers to the dependence of Iran's economic system on the planning of the state, and this is in clear contradiction with the economic nature of the market. In article 81 of the Iranian constitution, as an important barrier to access to the Iranian market, the granting of the privilege of the formation of companies and institutions in commercial, industrial, agricultural, mining is strictly prohibited for the foreigners.

Nonetheless, the procedure of accessing to the Iranian market has undergone major changes in recent years and it would not be an overstatement to interpret it as an Iranian economic revolution[57]. The root of this major change can be seen in two

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[55] . The Constitution of the Islamic Republic of Iran was adopted by referendum on 2 and 3 December 1979, and went into force replacing the Constitution of 1906. It was amended on 28 July 1989. The constitution has been called a "hybrid" of "theocratic and democratic elements".

[56] . Article 44 of the Iranian constitution: The economic system of the Islamic Republic of Iran is based on three sectors: government, co-operative (private and public ownership) and private with regular and correct planning. The public sector includes all major industries, mother industries, foreign trade, large mines, banking, insurance, power generation, dams and large water supply networks, radio and television, post and telegraph and telephone, airline, shipping, roads and railroads, and the like Which is in the public domain and in control of the government. The private sector includes agriculture, livestock, industry, commerce and services, which complements state-owned and cooperative economic activities. Ownership in these three sections, to the extent that it conforms to other principles of this chapter, does not go beyond the scope of Islamic law, leads to the economic development of the country and does not cause any damage to the Iranian society is supported legally by the Islamic Republic of Iran. The details of the rules and the scope and conditions of each of the three sections are determined by law.

[57] . The main Iranian foreign investment law is the Foreign Investment Promotion and Protection Act (FIPPA). The FIPPA grants foreign investors the same rights, protections and facilities available to domestic investors. This includes permission for investment in all fields where private sector activity is allowed and permission to hold up to 100% of shares in Iranian legal entities. Protection against expropriation and nationalization is guaranteed except where public interest reasons apply, in which case the expropriation should follow a non-discriminatory procedure and the investor should obtain compensation based on the real value of the investment. Moreover, the FIPPA includes provisions to ensure

major discoveries: On the negative side of the spectrum, macroeconomic planners have empirically discovered the economic inefficiency, failures of state economy, the massive waste of national wealth. Apart from that, one could also mention the increase in the number of rentiers and corruption, high level of unemployment rate and the inability of the state to create jobs, and finally a heavy financial burden the economy and market imposed on the government. On the positive side of the spectrum, one may refer to favorable conditions for the country's economic transition and the desire of managers at the highest levels for the development and optimal allocation of resources of the country. The desirability of attracting foreign capital well as understanding the causes of growth in other countries has also had positive impacts on the shift towards more accessibility of the Iranian market to foreign firms.

3.3 Fundamental Principles of Competition Law

3.3.1 Economic Schools

As previously mentioned, the market in which Competition Law can operate should be a free market. In a free market there are no barriers in market entry and exit, the government does not create monopoly and minimal intervention in market mechanisms. Of course, the extent to which the government shall intervene in the market has been a long-standing controversial discussion amongst economic schools. One can find a spectrum of economic ideas in this respect. On the one hand, as was mentioned earlier, there are those who stress on minimizing governmental intervention as well as on enhancing the most efficient means of ensuring maximum welfare and the use of resources. On the other hand, some other economic ideas represent the governmental intervention in the market[58]. Each of these two perspectives have practically flourished in certain countries at particular historical periods and subsequently with the emergence of relevant weaknesses of each they had no way but to be abandoned[59]. As a matter of fact, countries have gradually

free transfer of foreign capital and profits of foreign investment abroad. Foreign investors may claim through the Act to convert Iranian Rial and to acquire necessary foreign currency for such transfer. Furthermore, residence and work permits for foreign personnel are facilitated under the FIPPA. The FIPPA defines a foreign investor as any non-Iranian or Iranian individual or legal entity utilizing capital of foreign origin, provided it has obtained the relevant investment license. Foreign capital is defined as being all types of capital, including cash or in kind that has been imported into Iran. To obtain an investment licence, an application has to be made to the Organization for Investment, Economic and Technical Assistance of Iran (OIETAI).

[58] . Behnam Ghaffari Farsani, *Competition Law and its Civil Remedies* (Mizan 2014) pp. 78-81.

[59] . Ibid.

realized that absolute adherence to any of these ideas will not bring about pleasant results and contrary to their inner rhetoric, they will not cause the greatest prosperity for the citizens. Hence, in most economic systems one may observe an intermingling of economic ideas where one of the above-mentioned approaches become hegemonic in the economic system but simultaneously enough room is provided to compensate for the weaknesses according to the alternative economic idea. In this context, three types of economic systems can be distinguished:

1. State economic systems (Socialism): In these economic systems, all sources of production and distribution are in the exclusive ownership of the state and the government is the sole regulator of resources and the only wealth distributor in the society. Therefore, these types of economic systems are based on a top-down public ownership approach, which means it the government that decides what goods are to be produced, what price those goods should have, and at what level those goods should be supplied[60].

2. Free-market economic systems (Capitalism): In these markets, all sources of production and distribution are in the hands of the private sector, the role of governments is small in the market, and the economic freedom rule over the financial system. In fact, governments do not undertake business activities and that is why do not have interest in interfering with market mechanisms. These economic systems are based on the recognition of private ownership and are run by the internal forces of the market. That is to say, it is the supply and demand mechanism that determines the type and amount of goods that must be produced and how they should be distributed. In this respect, the producers manufacture goods in accordance with the desires and satisfaction rates of their consumer and one may call this a bottom-up approach a free-market economic system. It should be stressed that in these systems Competition Law comes to the foreground to ensure the correct functioning of the market[61] & [62].

3-Integrated economic systems: Because each of the previous economic systems have considerable flaws (such as the ones referred to in state-owned markets), mixed

[60] . Ibid 79.

[61] . Campbell Rmcconnell and others, *Economics: Principles, problems, and policies* (McGraw Hill Education 2009) 30.

[62] . Ghaffari (n 58) 79.

systems have been created to avoid such weaknesses[63]. In mixed systems, both public and private ownership as well as free and mandatory market mechanisms have been accepted. However, as mentioned above, in these economic structures one of the two above-mentioned systems become dominant and the other one adjusts its internal mechanisms to it. Since the analysis of modern economic schools along with the tragic experiences observed before[64] have proven the superiority of the free market system over the mandatory system, nowadays in many countries the rules pertaining to free market mechanisms are accepted as a default status[65]. However, there are exceptions in this regard. For instance, the constitution of Iran, in particular the Article 44, has accepted the mixed economic system, but as we mentioned earlier the state has exerted dominance over the economy.

The origins of Competition Law and the development of its concepts and rules have their roots in economic thoughts whose ultimate goal is to increase general welfare and optimal allocation of resources. Considering that these sorts of economic ideas cannot be fully understood except in economic terms, nowadays there is no doubt about the crucial importance of economic analysis in the field of competition[66]. In the advanced systems of Competition Law, such as US and EU laws, it is well-known that Competition Lawsuits are debated in the form of economic terms and concepts, and that final decisions are issued according to their effects on the market.

[63] . Ibid.

[64] . The tangible example is Iranian economy. While one or two percent of the population enjoy a luxurious lifestyle, millions of Iranians are struggling to make ends meet. In 2017, Iran's government set the poverty line at about $480 a month per household. Thirty-three percent of the population lives below the line, that's more than 24 million people. Iran’s economic freedom score is 51.1, making its economy the 155th freest in the 2019 Index of Heritage organization: The heritage foundation, 'Iran' (*2020 Index of Economic Freedom*, 2020) <https://www.heritage.org/index/country/iran> accessed 20 December 2020.

[65] . Luc Peeperkorn and Vincent Verouden, ‘The Economics of Competition’ in Jonathan Faull (ed), *The EU Law of Competition* (Oxford University Press 2014) 4.

[66] . Ibid.

Below I will introduce the main ideas of the most important economic schools and will discuss their position on the fundamentals of competition according to the degree to which they authorize intervention in the market[6] [7] .

3.3.1.1 Classic School and its fundamentals

This school was established in the eighteenth century and was heavily influenced by the economic ideas of David Hume in England and subsequently came to the forefront of economic ideas by Adam Smith. The classic school evolved in the nineteenth century with the ideas of David Ricardo and John Stuart Mill and presented for the first time a complete model of a political economic system. The founders of this school have expanded the concept of individual freedom by concentrating on free trade and by prohibiting governmental intervention in the economy. They have been amongst the first thinkers who have well recognized the benefits of competition among businesses and the importance of its maintenance and strengthening. In the classic school, the concept of invisible hand elaborated by Adam Smith in 1776 suggests that if the market is left to itself, the results will be more beneficial compared to the case in which interventions are made. In other words, the economy can be able to maintain its balance by market forces. Moreover, this school puts forward the argument that governmental intervention in the form of imposing tariffs and barriers that limit the free movement of goods and capital poses damage to the economy. Despite the fact that almost 200 years have passed ever since this economic idea was created it is still accepted by economists and subsequent to the collapse of the planned economy of Eastern European countries, it now forms the backbone of the economic system of many countries in the world[6] . In general, the position of classical economists on the concept of competition is the following: Competition is a behavior that is based on the efforts of economic agents to win the market. Sellers try to sell their goods for a lower price to compete with their competitors just as buyers try to bid at a higher price than that of their rivals. Competition from this perspective is a force that reduces prices to the extent that

[6] [7] . It is neither helpful nor necessary to address all schools regarding the degree of government intervention in the market. Therefore, only the schools that have investigated the Competition Law boldly, will be mentioned in a concise manner.

[6] . Martyn Taylor, *International Competition Law: a new dimension for the WTO?* (Cambridge University Press 2006) 8.

they cover production costs[6]. As we can see, classical economists who were pioneered by Adam believed in full-fledged trade and competition and had full confidence in its functioning and the benefits it brings to bear on the entire community. As I pointed out earlier this is because of the faith in undesirability of governmental intervention, sufficiency of free market for economic growth, and the capability of a market to adjust itself. This serves the reason why the classical economists did not tend to create rules for protecting competition in the market as they regarded law as a manifestation of state intervention[7].

3.3.1.2 Neoclassical Economic School

The neoclassical school embraces a wide range of economic ideas from the seventh-nineteenth centuries to the late-half of the twentieth century. Its founders are William Stanley Jones, Carl Menger, Leon Valras and Wilfredo Pareto. The Proponents of this School are in fact the modern followers of classical economists so there is no fundamental difference between neoclassical economists and classical ones. That is to say, they also promote the idea of a free market and prohibit government interference in the economy. In general, it is possible to summarize the basis of the theoretical positions in this school into the following principles:

1. Individual freedom is the most basic principle of this liberal school;
2. Individualism (the originality of individual interests) and provision of the interests of society through satisfaction of the interests of individuals is cherished;
3. Humanism which means the denial of religion and the supernatural powers as well as the sufficiency of reason and human experience to understand the true path of happiness takes a central place;
4. Adam Smith's concept of the invisible hand (sufficiency of autonomous price adjustments and the distribution based on the mechanism of supply and demand in the market) as well as the

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[6] . Roger Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: a Comparative Perspective* (Sweet & Maxwell 2001) 17-18.

[7] . It should be noted that the reliance of classical economists on the free market is not the same. Stuart Mill, for example, has distinguished two distinct roles for the market: 1) allocation of resources and 2) distribution of revenues. He believes in market efficiency in the first leading role, but in the latter rejects it and calls for state intervention to be necessary. Because of other differences in his view points, sometimes his views are considered to be in the middle of both classical and neoclassical schools.

undesirability of governmental intervention in the market are central tenets;

5. Looking at humans as rational and economic beings whose purpose is to maximize their own profits and interests is important[7] .

Despite the fact that the proponents of neoclassical school provided valuable services to the advancement of economics, their views were not immune to criticism. Some of the criticisms are as follows:

1. The basis of neoclassical economics rests on the model in which economic agents always seek to maximize their profits. In this regard, researches conducted in the twentieth century showed that firms, as the full competition model had assumed, would not always seek to produce at the least cost or to maximize profits[7] . Consumers, likewise, do not always follow this assumption. In fact, the economic behaviors that humans experience in the market itself is more complicated than being able to justify them only from the perspective of one factor;
2. The requisite for the idea that economic agents can always be able to maximize self-interest is that they should always have complete information before performing their actions. This condition is in fact an assumption for neoclassical school that is rarely realized[7] ;
3. The definition of competition in this school is considerably incorrect and contradictory. Neoclassicists consider competition to be perfect, in that all the entities try to sell similar products with the same price. This contradicts the definition of competition in which economic agents try to gain superiority amongst each other[7] ;
4. The models presented in this school are static and unrealistic in that they ignore the dynamics and natural movements of the market. They are also abstract and idealistic. It must be pointed out that at the end of the nineteenth century and the twenty-first century when markets faced the presence of trust, concentration, diversity, product differentiation, and competition on matters other than price and advertisement, these models were proved unable to

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[7] . Otmar Issing, 'Geschicte der nationalo ekonomie' (Hadi Samadi tr, Economic Research Institute of Tarbiat Modarres University 2002) 268.

[7] . Peeperkon (n 65) 5.

[7] . Ghaffari (n 58) 99.

[7] . Ibid.

describe market development disruptions and were no longer responsive to needs[7] ;[5]

5. The humane, ethical and emotional aspects of life in classical and neoclassical schools have been totally forgotten. Continuing to follow the free market mechanism and the excessive reinforcement of the instinct of selfishness and arrogance of the Western community, these schools took it so far that their ideas led to class divisions, injustice, and child labor whose only justification was cheaper production costs[7] .[6]

3.3.1.3 Marxist and Keynesian Economics

The criticism addressed at the two above-mentioned economic schools (in particular the latter) paved the way to develop other economic schools in response, such as Marxism (derived from Karl Marx's beliefs) and the Keynesian economics. On the one hand, Marxist economic ideas establish a socialist system (or at its extreme level communism) in which all the resources of the community are placed in the hands of public and the free market, private property, and consequently competition is rejected[7] . On the other hand,[7] in Keynes's School of Economics (which is derived from the views of John Maynard Keynes and is the foundation of the regulated capitalist system), the principles of private property and the free market were accepted. However, in this school it was more important for the government to intervene compared to the classical and neoclassical schools. The purpose of this increased tolerance for governmental intervention was to safeguard social justice, which narrows down to areas such as social security, free education, public health promotion, and an improved labor law which includes better employment provisions such as stipulating maximum hours of work, minimum working age, minimum wage, and regulations to protect consumers etc. Keynes questioned the claim that the market system would completely exploit the productive potential of the state without government intervention[7] .[8] Similar to the neo-classics of the welfare

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[7] . Ibid. [5]

[7] . Ibid. [6]

[7] . The socialists, and on top of all,[7] Karl Marx, criticized the free market ideas. In their belief, the competition is inclined towards self-destruction, and the free market economy will be annihilated. Marx believed that in capitalism, competition is chaotic. Francois Fourier who is one of Marx's socialists also believed that the main culprit of the low level of workers' living and the capital concentration and establishment of a competition that devours all the rivals, is the dominant capitalist rivalry that destroys competition itself and causes periodic economic crisis. In this regard, see Otmar (n 71) pp.101-102.

[7] . James A Caporaso and[8] David P Lavine, *Theories of Political Economy* (Cambridge University Press 1992) 155.

economy, he arrived at the conclusion that improved regulations are needed to maintain competition and confront monopolies. Indeed, in Keynesian beliefs, private sector decisions may occasionally lead to inefficient outcomes in macroeconomics and thus it supports active public sector policy making. Keynes considered governmental intervention as the safety valve of liberal capitalist systems, and, in the belief of a few, the reforms he has made in these systems saved them at the beginning of the twentieth century when they were on the edge of annihilation. Keynesian economics began to emerge in the industrialized world in the 1970s, but this approach did not succeed in Western European countries. At the same time, in those countries and in particular in Germany, a different intellectual trend was known as the Freiburg school. As the ideas of this school are the foundation for some local European Competition Laws, Rome Statute, and, ultimately the EU's Competition Law policy, it is essential to familiarize ourselves with them[79] .

3.3.1.4 Freiburg School

The Freiburg School was founded in Germany in 1930s and is the name for a set of economic concepts which belong to philosophical school of ordoliberalism[80] or German neoliberalism. The proponents of this school emphasize the necessity of governmental intervention to ensure that the free market practically brings good results just as the theoretical analysis does. This school played an important role in restoring the German economy after two world wars by developing the notion of free-market social economy[81] . According to this notion, a considerable power is given to the state in a free market, which is sometimes referred to as an economic miracle[82] .

The founders of Freiburg school were a team of Freiburg University professors who agreed on the basic principles of liberalism, including the principle that the competitive economy is a prerequisite for a happy, free and just society. At the same time, they also argued that society can only grow when the backbone of market is a proper legal framework which is only achieved by setting laws and ruls and then supervise their implementation. This goal although achievable only by governmental intervention but later, it guarantees the least intervention necessary from the

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[79] . Danijel Stevanović, 'Damages Actions for Breach of Articles 81 and 82 of the EC Treaty: a More Economic Approach' (LLM Thesis, Central European University 2009) 4.

[80] . Ordo means order.

[81] . Soziale Marktwirtschaft (Social Market Economy).

[82] . Wirtschaftswunder.

government. They opined that not only is this framework essential to minimize governmental interventions in the economy to support the process of competition and protect it from destruction, it also ensures that market interests are fairly distributed throughout society. In view of the pioneers of this school, the main problem of the contemporary economic thoughts was that they were disconnected from the social and political realities. Within this perspective, they claimed that whereas Adam Smith and other classical economists had realized that the economy forms in the context of political and legal systems, during the nineteenth century it was separated from its legal, social and political milieu. This viewpoint of ordoliberalism has drawn a new relationship between law and economics and added a legal dimension to the economy[8] . [3]

3.3.1.5 Harvard School

In the late thirties, Harvard law and economics professors founded Harvard School which had its roots in forty years of US competition policy. The approach of the founders of this school was to deny the price mechanisms and their exclusive role in advancing the market. By understanding the relationships amongst the elements of the market they attempted to predict and analyze them in terms of their results and effects. In fact, their goal was to look at the factors that lead to good market performance and encourage firms to adopt acceptable behaviors. One way to do this was to examine the facts in the American industry and the returns they earned. Hence, they proposed a model that illustrated these factors and the relationships between them. According to the above-mentioned model, which is known as the "behavior-performance" model, the performance of some industries, namely their success in obtaining consumer satisfaction, employment, price fixing and technical advancement depends on their behavior, and their behavior, in turn, depends on the structure of a specific industry. Therefore, according to the Harvard school, there is a causal relationship between the structure and the behavior in markets. Accordingly, the level of competition or the level of monopoly in each market is affected by the structural elements of the market, so that in some markets the structure is in a way that prevents competition from escalating. The proponents of Harvard School argued that in order to control the monopoly powers in such markets and promote the level

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[8] . David Gerber, *Law and[3] competition in twentieth century Europe: protecting Prometheus* (Oxford University Press 1998) pp. 232-50.

of competition in them, appropriate rules should be adopted[8] . The great emphasis of the school's thinkers on studying the structure of the market and examining the behavior of firms was the foundation of a new branch in macroeconomics called the organization of a modern economy[8] . Harvard School also opposed the idea that there could exist a perfectly ideal competition and that is why by elaborating on the concept of practical competition, they believed that the ultimate goal of competition policies is to provide the conditions in which competition occurs. To find out the answer to the question that whether specific industrial criteria have been met in a given industry, the Harvard School suggests that the structural components of an industry as well as its behavioral patterns and practices are necessary to be considered[8] . In this vein, the Harvard School of Economics incorporated the experiences of all aspects of the market (such as corporate structures and corporate behaviors) in economics rather than merely relying on abstract models, mathematical formulas, and individual behavior of economic agents.

Nonetheless, some criticisms have been addressed at Harvard School that will be briefly touched upon in the following:

- Firstly, critics say there are serious doubts about statistical data and methods used for their calculation and analysis at Harvard School;
- Secondly, it is very difficult, if not impossible, to estimate and take into account all elements of the market structure[8] ;
- Thirdly, the causal relationship between the variables is vague, which itself leads to the incorrect characterization of the realities of the market[8] ;
- Fourthly, the research results of the proponents of this school can be interpreted in different ways[8] . For example, while the concentration theory claims that the high concentration leads to monopolistic powers and thus monopolistic profits, it can be said that high profits of some firms are the result of their more efficient operation, and that their greater market share is due to their better and more efficient behavior.

[8] . Mohammad Nabi Shahi tash, 'The Concept of Competitiveness in Economics and Its Size in Iran's Economy' [2013] 11(60) Business Letter 2.
[8] . Industrial Organization (Economics).
[8] . Van den Bergh (n 69) pp. 23-24.
[8] . Ghaffari (n 58) 111.
[8] . Ibid.
[8] . Ibid.

These criticisms have caused the Harvard School of thought to lose its popularity since the 1970s in the United States. However, it continues to enjoy credibility in Europe, and especially in Germany[90].

3.3.1.6 Chicago School

In the seventies, a new economic idea emerged in opposition to the conventional economic thoughts of the time in the United States, which became known as the Chicago School as the founders of this new approach were mainly law and economics professors at the University of Chicago. These ideas succeeded in creating an important revolution in competition and its analysis in the United States and then elsewhere in the world. Although the Chicago School, in its turn, has not been immune from criticisms, but its profound influence on Competition Laws is indisputable, in a way that its domination in the 1970s and 1980s in the US was the source of dramatic changes in economic attitudes and competition rules[91]. Relying on the self-regulating and restorative forces of the market, the Chicago School can be regarded as a staunch capitalistic idea that favors free market economy. The school was keen to return to the Keynesian era and accept the price theory of neoclassicists. It could be said that the critiques of Chicago school against Harvard economic ideas are at the core focus of the School of Chicago[92]. Unlike the Harvard school, the basis for analyzing competition in the Chicago School is theoretical and data-based statistics and not empirical findings. According to the exponents of Chicago School, Harvard School's empirical studies eventually lead to abundance of barriers to entry, to the idea that market power is evil, and to a high level of concentration which are collectively incorrect and unacceptable. As a result, the policy of suppressing and prohibiting many business practices that are anti-competitive is to be abandoned. In their belief, some economic actions that are considered to be anti-competitive in Harvard School may, on the contrary, lead to increased competition and market efficiency[93].

Among the Chicago School followers George Stigler, Richard Posner and Robert Burke are more noteworthy. In discussing the objectives of Competition Law (which is one of the most significant controversies between Chicago school on the one hand

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[90]. Van den Bergh (n 69) 35.

[91]. Alison Jones and others, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2016) 23.

[92]. Ghaffari (n 58) 112.

[93]. Ibid.

and Harvard and Freiburg schools on the other), Burke believes that the goal of competition rules and economic efficiency should only be to ensure the well-being of consumers and to maintain the competitive spirit instead of supporting competitors[9] . In addition, according to him, there are only a few commercial practices in the competition rules that should be prohibited, such as cartels that embark on price fixing and market segmentation, or Mergers attempting to create monopolies or dominant firms that in turn engage in aggressive pricing. Some other behaviors, such as vertical agreements and pricing discrimination, should not be allowed to the detriment of consumers and should be left to the market. Therefore, the scope of governmental interference in Chicago School is very restrictive and limited to defined spheres which depends on the regulatory function of monetary policy. In view of the Chicago school of thought, the ultimate mission of Competition Law must be to satisfy consumers' welfare. That is why it efforts to improve the allocation of efficiency without compromising on productive efficiency.[9] That is to say, small inefficient enterprises should not be supported under any excuse, even under the pretext of public employment. Rather, these enterprises should only rely on the market and surrender to its decisions without there being an interference in market mechanisms. In this way, the identity and characteristics of the winners or losers in the market are of no importance as long as they perform effectively, even if this process leads to the creation of dominant or exclusive but efficient enterprises. Thus, monopolies were considered to be the result of better performance, and better performance of firms should not be overrun because of this success. Another Chicago idea is that firms are not able to create monopoly power or strengthen it through unilateral actions. Consequently, the focus of competition rules should be on mergers and agreements of rival firms[9] .

So far, we have discussed the basics of competition from the perspective of Western economic schools. In the following, we will investigate Islamic economic ideas as they will serve as a basis for the Iranian constitution and Competition Law.

4.1 Islamic Economics

Islam accepts and respects the private ownership of property by individuals if it is obtained through legitimate means. Not only there is no opposition to start a business by individuals and to acquire wealth in Islam, but also this religion encourages

[9] . Ibid 114.
[9] . Jones (n 91) 23.
[9] . Cosmo Graham, *EU and UK Competition Law* (Pearson 2013) 7.

people to engage in economic activities. Therefore, being wealthy and taking the market in control is not reprehended under the Islamic perspective. People are, in principle, free to choose their way of receiving income, and can engage in any economic activity such as production, distribution or provision of services. There are only a small circle of occupations that are declared "Haram jobs" – the jobs which are religiously forbidden. The rest of jobs can be categorized within the realm of al-Faraq area, which means apart from acts that due to their nature should be performed by sovereign bodies, such as certain commercial activities that have been exclusively subjected to the monopoly of an Islamic government, the rest can be undertaken by people who have the freedom to choose from a different range of activities. It is to be mentioned that Shahid Sadr considers work and trade as the base of private property, and therefore properties that are not obtained through work or the practice of trade are not included into the definition of private ownership[9] . In short, as long as commercial practices are located in the territory of al-Faraq, they are under the rule of ‘Esalah al-Ebaha’ which means people are free to choose them as their economic activity[9] .

Except for a number of expressly prohibited acts as well as some general and specific rules that are mostly the heritage of the past, individuals can follow their own will in concluding contracts. That is to say, Islam does not primarily interfere in the trade practices of individuals. Therefore, it can be said that in Islam, the principle of free market has been accepted and the socialist economic system is rejected. The Islamic jurists have set forth examples of the principle of non-intervention of the Islamic sovereign state in the market. In the following, the reasons for the lack of conflict between the principles of free market in neoclassical school and Islamic standards will be enumerated[9] :

1. The basis of the free market system is the principle of respect for private property and the freedom of action of business activists, which is consistent

[9] . Seyyed Mohammadd Baqer Sadr, *Our Economy* (Mohammad Kazem Mousavi tr, Islamic Publication ٢٠٠٣) 400.

[9] . As the holy Quran on Verse 29 of Nisaa Sura says: Gaining the property of others through trading and on the condition of their consent is a legitimate and legal one.

[9] Mahmoud Bagheri and Mehdi Reshvand bokani, 'Competition Law and Defense of Market Integrity in Imamieh Jurisprudence' [2008] 9(28) Islamic Law and Law pp. 51-86.

with Islamic foundational principles such as Esala Al-Ebaha[1] and the rule of dominance[1];

2. The free market boosts production and increases the welfare of the whole community. Under the Islamic perspective, the waste of resources has been considered a disgraceful action. This Islamic perspective resonates well with the production efficiency and the eventual enhancement of the Islamic society's welfare;
3. Since a free market promotes equal opportunities for all market players, people achieve victory and economic growth based on their merit and efficiency. This is consistent with the principles of Islam because Islam opposes any illicit discrimination and privilege.

4.1.1 The exception of governmental intervention

It should be noted that the Islamic economic system can be distinguished from the capitalist system by the active role of the religious ruler (the supreme leader of the Islamic state) in controlling the market and leading it in the desired direction, namely preserving the Islamic sovereignty and protecting the general interests of Muslims[1]. Some examples of market intervention or the necessity to avoid doing so in Sharia may include:

1-Monopoly: In Sharia, the act of hoarding everyday goods of people and exerting monopolistic power on them have been discouraged. On the basis of Hadith and prophetic traditions, Islamic jurists have come to a consensus on the perils of this act for the market order and indeed on the necessity of confronting with it. Accordingly, if the fulfillment of people's needs is only possible by selling the monopolized

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[1] . Esala Al Ebaha is an Islamic principle which means whenever we doubt that Islam has permitted a certain action or not, the action is not forbidden because we need Islamic texts if we want to forbid a specific action in Islamic law.

[1] . The rule of dominance is an Islamic rule. According to this rule, anyone who dominates over a property through legal means, cannot be held from benefiting it. The principle of dominance emphasizes the fact that all people have the right to dominate their property. Jurisprudents and Islamic jurists consider the principle of dominance as one of the basic principles of Islamic law and this principle originates from the Prophetic hadith "Al-Nas-i-Mustawane al-Amwalām" which means people dominate over their private property.

[1] . Another fundamental difference between the Islamic economic system and Western free market systems is that Islam does not accept the principle of individual freedom and the pursuit of personal interests in the event of denial of moral virtues: See Seyyed Mohammadd Baqer Sadr, Our Economy, (Mohammad Kazem Mousavi tr, Islamic Publication ٢٠٠٣) pp. 334-37.

property, then the Islamic ruler must force the monopolist to sell the supply of goods to the market[103].

2- Compulsory pricing: The absence of compulsory pricing of commodities by the sovereign Islamic state is among the issues that clearly illustrate the necessity of avoiding interference in the economy except for very urgent cases. The monopolists should not be able to impose their own prices on the market because the ultimate goal of Islam is to serve justice and the act of compulsory pricing has been regarded by some Islamic jurists as an unjust act. The views of Islamic jurists differ on this point:

a) Some jurists believe that while a monopolist should be forced to sell his goods, it is never allowed to make him sell them for a specified price. Within this perspective, what should determine the price is the supply and demand of the market[104]. Their reason for a juristic opinion as such is the prophetic Hadith and traditions according to which there has been an insistence on non-intervention in the prices of food or other goods that are necessary for people[105].
b) Unlike the first group of jurists, Sheikh Mufid believes in his valuable book that the Islamic ruler is free to determine the price of the monopoly goods in accordance with expediency. However, the price set should not be to the detriment of the monopolist owner of the goods[106].
c) The third group partially agrees with each of the two abovementioned juristic opinions. According to the third group, the ruler should not determine the price of the monopoly products unless the price set by the monopolist is too high that it would cause injustice to the buyers. In this case, by the intervention of the Islamic ruler the price will be reduced so that the injustice is remedied. Contemporary jurists should also be added to this group. Imam Khomeini writes in the book of sales: “The price is not initially specified by the Islamic ruler. Of course, if the owner commits abuse and injustice, he will be required to lower the price, and if he refuses, the ruler will force him to sell at the price the ruler recognizes as the right price. Traditions and hadiths which do not agree with the price determination do not include this item because in this case if price is not specified, monopoly will continue”[107].

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[103]. To see the verses and opinions of the great jurists, refer to: ShaikhMortaza Ansari, *Al-mekasb*, (Al-hadi Institution 1419) 373.
[104]. Sheikh Tusi, *Al-mabsut* (The Al-motazavieh School 1378) 195.
[105]. Ibn Zohreh, Al-ghanyah (Alamam Al-saydiq Institute 1417) 231.
[106]. Sheikh Moody, *Al-maqnah* (Al-mudarzin Society 1410) 616.
[107]. Rouhollah al-Musawi al-Khomeini, *Al-Bai* (The Ismaili Institute al-Taea al-Ra'bea 2000) pp. 416-17.

Although the subject of competition and the analysis of its effects has not been expressly presented in jurisprudential books, it can be clearly deduced from the mentioned juristic opinions that Islamic jurists and in particular contemporary ones have approved the market intervention of the Islamic state in cases where the preemption of the oppression of an Islamic community to respect its expediency is necessary. There are even some cases in which it is obligatory that the Islamic sovereign state intervenes in the market. According to some scholars, the cases where Islam explicitly requires governmental intervention in the market corresponds to the Western theory of market failure[1] . According to this opinion, if it is believed that competition will lead to the optimal use of resources, improvement of living standards, and welfare of the whole society, then defending the free market integrity in the form of Competition Laws is one of the Islamic ruler's tasks. Of course, Islam is against monopoly just like Competition Law.

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[1] . Maher M Dabbah, *Competition Law and Policy in the Middle East* (Cambridge University Press 2007) pp. 23-24.

Chapter two: The role of Civil Remedies in enforcing the rules of Competition Law

1.1 The necessity of determining the civil enforcement in Competition Law

Among all branches of law, Competition Law is categorized under the branch of public law. This is because, firstly, the intervention of sovereignty and government in the establishment and implementation of Competition Law is undeniable. Secondly, all competition rules are aimed to protect the public interest and because of this non-forfeitable feature, businesses cannot agree on something against them. This means Competition Laws are imperative and the will of individuals is not capable of changing their content. Thirdly, the illegitimacy or the unlawfulness of anti-competitive practices cannot be proved through the traditional analyses of private law. This is because if a pure private law approach was to be used to analyze an issue related to Competition Law infringement, there would be many anti-competitive practices that cannot be illegalized or avoided[109] As a case in point, in Competition Law entities are prohibited from implementing some unilateral or bilateral measures such as pricing below the final cost of goods and services, refusing to provide the market with goods, or colluding with each other in regard to the price of goods. However, each of these actions might have been legal before the introduction of Competition Laws. For instance, Article 30 of the Iranian Civil Code (which is supported by the principle of contractual freedom) states that the owner possesses the right to use, hold, and dominate his property as he wishes[110] Therefore, as long as civil law is concerned, the owner is entitled to sell his product at any price, even if it is less than the actual price or the final cost of that product.

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[109] . Ghaffari (n 58) 207.

[110] . Article 30 of the Iranian Civil Code: Every owner has full rights to dominate over and benefit from his/her private property except in cases the law makes an exception.

The same principle entitles the owner to donate his property to another individual without receiving any payment. On the basis of property rights and the principle of dominance, the owner can refrain from selling his own goods or even agree with others on the final cost his product will be offered to the market (Article 10 of the Iranian Civil Code)[111]. Nevertheless, the principles of dominance and contractual freedom are not absolute and a number of restrictions can be imposed on them in the presence of certain circumstances. In this respect, the most important limiting factors are justice, public order, and public interest that are in fact values the protection of which is the overwhelming mission of governments and sovereignties. It goes without saying that the protection of these values falls into the field of public law and as it was mentioned earlier, Competition Law is categorized under this branch because of its major task to protect public interests.

Apart from the restricting role of Competition Law in private law, it is fruitful to consider this field of law from the perspective of public/private divide. One may define public law as rules and regulations that govern the relations between governmental entities and their agents with the people[112]. Private law is also a collection of rules governing the relationships of individuals with each other[113]. However, for a long time, the boundary between private and public law has not been clear and steady, and the concepts and issues of these two branches of law are often intermingled. The intensity of this blend is ever-increasing since governments, on the ground of preserving public interests, directly intervene in cases which evidently belonged once to the realm of private law. This is why it can be claimed that the expansion of governmental involvement in the private sphere and consequently the development of public rights in economic affairs between businesses have not left even the oldest branches of private law pure[114]. As the public order is in fact a public law tool for intervention in the enforcement of contractual relationships, there has been a strongly defended idea that despite the presence of private relations between workers and employers and amongst consumers and suppliers in areas such as labor law and consumer protection law, the supremacy of the public law foundations in justifying their rules separates those fields from the private sphere and places them within the scope of public law. In a similar vein, Competition Law is also one of the legal branches that originally belongs to the field of private law as

[111] . Article 10 of the Iranian Civil Code: Private contracts to those who have signed it, if not expressly against the law, are valid.

[112] . Naser Katouzian, *Law philosophy* (Entesharat join stock Co 2000) 335.

[113] . Ibid.

[114] . Ibid 350.

the persons subject to it are private individuals (enterprises and entities) who perform private unilateral or bilateral acts in the market. It can be argued that the legal infrastructure which facilitates economic-based market-based business interactions is private law[115] However, in order to maintain competition in the market, which is assumed to lead to economic efficiency and the increase in the welfare of the whole society, there is a need for empirical rules so that individuals cannot obstruct these positive impacts by their will[116]

Thus, maintaining competition for the protection and promotion of public interests is a new constraint imposed by the state directly on the principle of free will. Of course, this will not separate the Competition Law from its true roots in private law.

As it was discussed earlier, the intervention of Competition Law in private relationships makes its provisions inevitably affect the legal relationships of individuals in the market. This effect reveals itself in the form of creating rights and obligations for individuals which in turn directly or indirectly creates certain interests for a category such as rival entities and consumers on the one hand and particular liabilities for another category like monopolists and powerful business entities on the other hand. The violation of competition rules endangers the rights of stakeholders and brings loss in its train. Compensation for these losses, as well as any other damage that is caused to anyone else, is subject to ordinary laws and regulations of private law.

It was mentioned that the rules of Competition Law are imperative and cannot be breached by the free will of individuals or the agreement between them. As entities are the only agents that are required to comply with the rules of Competition Law, it is only them that can potentially infringe Competition Laws through their unilateral actions and if there is any collusion between them to violate the rules of Competition Law, their bilateral agreement will be regarded as void. Certainly, declaring anti-competitive decisions of entities as invalid is in a remedy provided by private law just as claiming damages as a result of violations of Competition Law finds its roots in private law. Therefore, it must be said that the maintenance of competition and enforcement of its rules are inextricably linked to the guarantees offered by civil remedies. In some countries there are criminal offense guarantees in compensation for the violations of Competition Laws but they are all accompanied

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[1] . Mahmoud Bagheri, 'The Market Based Economy and the Deficiencies of Private Law' [2008] 1(19) Journal of Law and Politics Research 42.

[1] . Ibid 64. 1 6

by the civil remedies. Moreover, it must be stressed that while in all legal systems civil remedies have been fully or partially accepted, there is no connection between those remedies and the demand for their implementation by private persons. That is to say, whether private persons should be directly entitled to apply the rules of Competition Law (which in different countries are referred to as "private enforcement"), or that their application and discrediting offenders be entirely performed by public institutions ("Public Enforcement"), there are noticeable differences between countries.

There exist opinions which view the necessity of redressing violations of Competition Law in tort. Within this perspective, anti-competitive conduct is detrimental to the economy as a whole and it may cause loss:

- To Businesses in the form of limiting their opportunities or driving them out of the market[117];
- To suppliers in the form of minimizing their profit;
- To customers in the form of making prices exorbitant[118].

It is argued that the redress for these negative effects fall within the domain of tort law but in practice it seems that successful results for such claims are rare and are only found in the United States[119]

Private enforcement has long been a central part of US antitrust law while it has played a small or no role in European Competition Law systems.[120] "This contrast is fundamental to understanding differences between European and US Competition Law and to assessing the potential consequences of increasing the role of private enforcement of Competition Law in Europe"[121]. "It is also central to decisions about Competition Law development in much of the world, because in this respect most Competition Law systems in the world resemble European Competition Laws rather than US antitrust law"[122]. As part of its so-called 'modernization' efforts, which went into effect on May 1, 2004, the European Commission sought to reduce reliance on administrative authorities and to encourage those harmed by restraints on competition to bring private law suits in national courts. There is, however, widespread uncertainty about the prospects for successfully incorporating private

117. Jurgen Basedow, *Private Enforcement of EC Competition Law* (Kluwer Law International BV 2007) 1.
118. Ibid.
119. Ibid.
120. David J Gerber, *Private enforcement of Competition Law: a comparative* Perspective (Chicago-Kent College of Law Research Paper 2007) 431.
130. Ibid.
122. Ibid.

litigation into European Competition Law systems. There is also uncertainty about which, if any, measures should be taken to enhance acceptance of private enforcement[1] . [2] [3]

1.1.1 The definition of Private Enforcement of the rules of Competition Law and it's interaction with Public Performance

As stated above, competitive rules with the accompaniment of civil remedies would eventually lead to market protection. Whereas in traditional thought it is believed that regulations that protect public interest should only be enforced by public authorities or the public sector, nowadays it is undeniable that private enforcement of competition rules can play an important role in protecting the market. In order to find out whether the private enforcement of Competition Law is (in)effective or whether it is possible in practice private enforcement in private law in different countries it is first necessary to understand the definition of private enforcement in the field of Competition Law[1] . [2] [4]

The narrow definition of private enforcement regards it as a way of enforcing regulations in which private individuals whose legal rights have been infringed in the first place initiate civil suits and proceedings against the offender of Competition Law (claimant)[1] . [2] In the context of the discussions in Competition Law, [5] private enforcement implies "the enforcement of Competition Law by determining the guarantees for civil performance in claims filed by private persons based on civil procedure". The more general definition may include both cases in which a civil dispute is brought by a private person before the legal authorities, and also cases where the breach of Competition Law is first established and confirmed by government officials, and then the civil claims are filed by the parties concerned[1] . What we refer to here by private enforcement does not involve the more general definition.

As opposed to private enforcement, the term public enforcement of the rules of Competition Law denotes "discovering violations of Competition Law and doing the prosecution process by relevant administrative or judicial authorities". As discussed earlier, there exist a considerable volume of discussions on how the private and public enforcement Competition Law rules interact, some of which will be pointed

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1 . Ibid. 2 3

1 . 2 Kent Roach and Michael J trebilcock, 4 'Private enforcement of Competition Laws' [1996] 34(3) Osgoode Hall Law Journal 431.

1 . 2 Assjmakis P komninos, Introduction. in Dieter Ehlmermann 5 and Isabela Atanasiu (eds), *European Competition Law Annual 2001* (Oxford Hart Publishing 2003) xxiii-xxiv.

1 . Ibid. 2 6

out below. While the private enforcement of Competition Laws finds its roots in the history[127], some believe that the breach of Competition Law in the market should only be prosecuted by public authorities. This idea is influenced by the traditional thinking that laws which originate from the public interest must necessarily be enforced by public authorities, and the rules regulating private relations must also be enforced by private-sector entities. The second category of scholars believe that the executive system should be of a single texture and of a single nature, therefore, it must either comply itself with the general rules of Competition Law, or alternatively apply them to claims from private parties[128]. In contrast to the previous two opinions, the third approach argues that both private and public enforcements have advantages and that they are both complementary for each other[129]. Within this perspective, since Competition Laws have social effects and bear implications on the popularity of authorities, public enforcement cannot be abandoned and delayed until individuals start legal action. However, private demand can help better enforcing regulations, making effective detection of violations, and facilitating counteractions.

The EC antitrust prohibitions are regularly invoked in private litigation as a shield. Private persons also play an important role in public antitrust enforcement through complaints raised before competition authorities. However, in a stark contrast with the situation in the US, private actions for damages or for injunctive relief are rare in the EU. From the point of view of some scholar this situation is a desirable one and the reasons are[130]:

a. Indeed, with the motivation of ensuring that antitrust prohibitions are not violated, public enforcement is inherently superior to private enforcement. This is because of more effective investigative and sanctioning powers of public enforcement, as well as profit-driven motives of private individuals which can at times fundamentally diverge from the general interest. Apart from those reasons, one must also take into account the high cost of private antitrust enforcement compared to public enforcement;

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[127]. Kent Roach and Michael J Trebilcock, 'Private enforcement of Competition Laws' [1996] 34(3) Osgoode Hall Law Journal 464.

[128]. Cited by Tomas Nilson, Private Enforcement of EC Competition Law (Master thesis, Lund Faculty of Law 2005) 3.

[129]. Mario Monti, 'Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation' (8th Annual Competition Conference, Fiesole, September 2004) 2.

[130]. Wouter PJ Wils, 'Should private antitrust enforcement be encouraged in Europe?' [2003] 26(3) World Competition pp. 473-88.

b. There is not even a room for private enforcement to play a supplementary role, as the adequate level and varieties of sanctions and prosecutions can already be ensured more effectively and at a lower cost through public enforcement;

c. Moreover, it seems difficult to justify an increased role for private antitrust enforcement in Europe by the pursuit of corrective justice, as there does not appear to be a clear social need for such action. Furthermore, achieving corrective justice in the context of Competition Law is a very difficult task to fulfill.

1.1.2 The effects of Private Enforcement of the rules in Competition Law

The private enforcement of the Competition Law rules brings numerous positive effects in its train among which two of those advantages, namely deterrence and corrective justice, are more important than the rest. The deterring function of law is in a direct relationship with its dissuading impact on individuals as long as prevention from violating laws and regulations is concerned. In the case of laws related to economic and monetary matters, the more violent the law is, the more likely to be prosecuted in the event of a violation and the more the offender considers the possibility of no benefit gained as a result of the breach of law and as a result the deterrent effect of the guarantee will be greater. The most prominent goal of enforcing competition rules is to ensure that the prohibitions set out in them are not violated and that the effects of anti-competitive practices on the market do not occur[1] . Can private claims that are made solely for the purpose of obtaining personal benefits help preventing the commission of anti-competitive practices and their ensuing effects? The answer to this question will certainly be positive: Firstly, if violators predict that it is likely that their anti-competitive contracts will be invalidated because of breach of law and that they have to compensate the private victims' loss, they will be deterred from committing the default. Secondly, if the permission to lodge a lawsuit and providing the proof of breach were given to private individuals, the likelihood of detecting violations would increase which in turn lessens the chance of committing anti-competitive practices.

This role of private enforcement in Competition Law can also be viewed from the perspective of corrective justice. The purpose of corrective justice is to eliminate the impact of a crime and to restore the situation to the pre-crime status. It is to be

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[1] . Wouter PJ Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 116.

mentioned that Competition Law relates to the inter-dependent economic behavior of entities and consumers, and therefore it can be claimed that the violation of law by one of the entities affects the assets of others. For example, if several entities split up and collude among themselves and subsequently increase the price of a product all at once, it harms both downstream companies and consumers who are forced to pay more. Justice rules that after violations of Competition Law, the loss of victims should be restored and that the benefits of the illegal act should be reversed to the detriment of the offenders. Indeed, private enforcement is the only way to offset anti-competitive practices, since in the absence of private enforcement, the lost profits remain in the hands of offending entities forever[132]. Therefore, allowing private litigators to sue violations will lead to corrective justice. For this reason, the United States Supreme Court has consistently emphasized the importance of deterrence and compensation as a means to achieve effective implementation of the competition[133].

The positive effects of private enforcement are not limited to what was described above. In many cases, private sector information about the time and place of the breach of competition rules is far more complete compared to the public sector, as those are usually committed by private individuals. Therefore, accepting the competence of private persons to litigate makes the information of private individuals accessible for the public sector. From the point of view of some lawyers and economists, the same reason has reinforced the role of private enforcement in contract law and civil liabilities[134]. Accordingly, the right to claim is sometimes given to people who possess more information rather than those who have suffered the most. For example, in the Illinois Brick Case[135][136], the court granted immediate buyers a right of private enforcement and litigation, and in spite of the fact that final customers incurred a very heavy loss, they never have this right. Some justify that according to this ruling, direct buyers are more likely to be aware of Competition Law violations, so they should have sufficient incentive to pursue litigation[137]. It must be added that in private litigation, the costs associated to discovering and

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132 . Robert H Lande, Introduction: Benefits of Private Enforcement. in Albert A Foer and Randy M Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (Edward Elgar Publishing Limited 2012) 11.

133 . E.g.: Perma_Life Mufflers, Inc v. International Parts Co., 392 US 134, 139(1968).

134 . AMitchell Polinsky and Steven Shavell, 'The theory of public enforcement of law' [2007] 1 Handbook of Law and Economics 406.

135 . Illinois Brick v. State of Illinois, 431 US 720,748 (1977).

136 . Andrew I Gavil, 'Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court' [2005] 79(1) St John's Law Review 553.

137 . Ilya R Segal and Michael D Whinston, 'Public vs Private Enforcement of Antitrust Law: a Survey' [2006] (335) Stanford Law and Economics Olin Working Paper pp. 4-5.

disclosing legal proof is less than public litigation as these costs are split among private individuals rather than being entirely imposed on the state budget.[1] It should be noted that the public and human resources of the public sector are limited and thus it is practically not possible to discover the proofs against all offenders. As I mentioned earlier, private individuals benefit from having more information access in comparison with governmental entities. In this respect, if a public enforcement agent decides to gain private information, (s)he must constantly monitor the behavior of business units, which is rather impossible given the size of the workforce in public sector and the multitude of business units[1] . Furthermore, considering the European Union Commission's exclusive enforcement of Competition Law rules in the EU and the heavy burden of responsibility placed on this entity, private enforcement of Competition Law rules is more justifiable since this type of enforcement leads to a more lucid information flow between private and public sectors. Last but not least, private enforcement of Competition Law rules prevents corruption more than public enforcement. This is because the flow of information would be more transparent and the motive for a quick and accurately planned lawsuit is much stronger in private sector.

Despite all of its benefits, a number of drawbacks accompany private enforcement of competition rules. For example, just as Competition Laws can protect competition, they can also disrupt it. This disruption is contingent on the intentions of those seeking for private enforcement. Unlike governmental agents who are responsible for enforcing Competition Law, private individuals usually file private lawsuits only if they have potential personal interests and sometimes these interests are in conflict with the goals public-sector pursues. Therefore, private individuals might use Competition Law in the courts as a tool to confront business rivals and to achieve a market position they were usually unable to reach.[1] In the US as a country where breaches of Competition Law are strictly punished, it is common to abuse laws for purposes such as threatening or pressuring a rival[1] . Sometimes filing a lawsuit can only be a response from a claimant to divert the proceedings previously filed by a defendant against him. Moreover, the possibility of extortion from

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[1] . McAfee R Preston and others, 'Private v Public Antitrust Enforcement: a Strategic Analysis' [2008] 92(10-11) Journal of Public Economics 1864.

[1] . Steven Shavell, 'Liability for Harm Versus Regulation of Safety' [1984] 13(2) The Journal of Legal Studies pp. 357-74.

[1] . R Preston Mcafee, 'The Strategic Abuse of Antitrust Laws' [2004] 1(3) Journal of Strategic Management Education pp. 1-18.

[1] . McAfee et al (n 138) 1864.

successful rivals is not far from mind in Competition Law cases. One could mention as an example the lawsuit filed by A.O.L against Microsoft for the purpose of gaining competitive advantage. The company bought Netscape in 1999 and Netscape had previously suffered losses due to its inability to compete with Microsoft in terms of network browsers. Following Microsoft's conviction for antitrust infringement in a lawsuit filed by the Department of Justice in 2002, A.O.L jumped on the bandwagon and filed another lawsuit against Microsoft and received 750 million dollars as a settlement fee. A.O.L initiated these proceedings under the pretext of Netscape losses (as a result of Microsoft reducing competition in the browser market), but at the same time it eliminated competition in the browser market by receiving 750 million dollars in exchange for using Microsoft browsers for seven years. This shows that A.O.L initially did not intend to revive Netscape and bring it back to the market for network browsers. Another downside of private enforcement is that companies can also use private lawsuits to prevent powerful rivals from entering the market. As a case in point, Utah Pie, a small company producing a special kind of cake, filed a lawsuit against three large companies that were trying to enter the market. The proceedings were initiated with the excuse that those three companies seek to form a monopoly. This suit against three large companies that were each major influential players in the frozen pie market in one or more regions of the country charged them with conspiracy under article 1 and 2 of the Sherman Act and violations by each respondent under the Clayton Act. The major competitive weapon in the Salt Lake City market was price and for most of the period, the petitioner which had the advantage of a local plant, had the lowest prices. This case resulted in Utah Pie's success and those three companies could not enter the market.

The advantages of private enforcement of Competition Law by rivals and consumers outweigh its specific advantages[1] . In this respect, providing a balanced legal environment for private enforcement is clearly important and a series of actions can be taken to offset the negative consequences of private enforcement. For example, legal systems can deter unfounded legal suits by making people pay heavy compensations for it.

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[1] . RobertH Lande, Introduction: Benefits of Private Enforcement. in Foer Albert a and Stutz Randy m (eds), Private Enforcement of Antitrust Law in the United States: A Handbook (Edward Elgar Publishing Limited 2012) pp. 1-13.

Considering all these facts, it is now widely accepted that in the best-case scenario private enforcement is complementary to public enforcement, and neither of these two can completely be alternatives for each other. Rather, each of them must live independently. Each of these two can have their own territory and goals and be independent of each other but simultaneously complement one another. Whereas in public enforcement competition is protected because of public interests and promotion of public welfare, in private enforcement the personal interests are pursued. In some jurisdictions of the world such as the United States, both enforcement systems co-exist and a private person initiating private enforcement to the benefit of public is referred to as a private attorney general[143].

There are three ways in which the complementary role of private enforcement can be conceived:

1) The possibility of independent private litigation in parallel to the public enforcement which we can see in countries such as the United States;
2) Cases where the public authorities first bring a lawsuit against a person violating the Competition Law and then, after the offender is convicted, private persons seek damages. This leads to the optimum use of resources by private persons and as long as the public sector is responsible to prove the breach of Competition Law, the private sector devotes its energy and resources to merely claiming damages[144]. This has been the approach taken by the Iranian Competition Law.
3) A more moderate path has also been proposed. That is to say, private individuals can first apply for a provisional injunction prohibiting anti-competitive action. Then the public sector intervenes and investigates whether or not Competition Law has been breached, and finally if any violation is committed by the concerned offender, private persons will have to claim for losses incurred before the court. Some authors stress the importance of an ad hoc court for Competition Law violation cases and the necessity of professional investigation of the actions suspected as violations of Competition Law[145].

It should be noted that although the nature of private enforcement guarantees is debatable, the principle of acceptance of civil and private enforcement guarantees

[143]. Ghafari (n 58) 226.
[144]. Komninos (n 125) xxxiii.
[145]. Ibid pp. xxxiii-xxxiv.

for breach of competition rules and the requirement of private enforcement is not subject to any serious theoretical or practical obstacles. In the following discussion, we will discuss the role of private litigation in enforcing Competition Laws in different jurisdictions in order to clarify the role of private litigation and the effectiveness of civil enforcement guarantees in enforcing competition rules.

2.1 The position of Civil Remedies and private legal claims in the enforcement of competition rules

In this section, I will comparatively examine the role of civil enforcement guarantees and then the private enforcement of competition rules in the laws of some legal systems. I will first look at two major Competition Law systems, namely the United States and the European Union, and then refer to other foreign countries and the template law of UNCTAD[1] . In the end I will discuss the status [6]of private enforcement in Iranian law.

2.1.1 The position of Private Enforcement of Competition Law in US law

2.1.1.1 The Competition Regulatory System and Public Executive Bodies

In the United States, both public authorities and private individuals are responsible for enforcing competition rules. Each of the two systems operate independently but in parallel. In public sector, three government agencies are entrusted with enforcing Competition Laws, namely the Department of Justice (Anti-trust Division), the Federal Trade Commission, and each state's attorney-generals independently. These three bodies are in fact US competition authorities who are responsible for enforcing the Sherman and Clayton laws as well as Federal Trade Commission Act (Article 5[1] which prohibits unfair trade is solely[7] implemented by the Federal Trade Commission). In the latter two public entities, the first is a governmental and the second an independent nongovernmental organization, both of which enforcing Competition Laws before federal courts against offenders.

We can see that the authorities are basically the pursuers, not the decision makers. Of course, the Federal Trade Commission has administrative authority to resolve disputes at the early stages. This commission has gradually gave rise to institutions

[1] . United Nations Conference on Trade and Development

[1] . Section 5(a) of the Federal Trade Commission Act (FTC Act) (15 USC §45) prohibits "unfair or deceptive acts or practices in or affecting commerce." This prohibition applies to all persons engaged in commerce, including banks. The Board has affirmed its authority under section 8 of the Federal Deposit Insurance Act to take appropriate action when unfair or deceptive acts or practices (UDAP) are discovered.

that developed the form of enforcing Competition Laws within its jurisdiction by publishing guidelines, holding conferences, and negotiating disputes[148]. Attorneys-General in different states can, in some cases, file lawsuits in federal courts for violation of Competition Laws. If any state purchases goods and as a result of failure to comply with supply competition regulations, the state incurs loss or in case unfair competition results in a state loss, just like any other legal entity, the State Attorney General may claim damages. Even the US Congress in 1976 allowed states to file claims for damages for violations of the Sherman Act that has been detrimental for natural persons residing in their territories. This right stems from the Parens Patriae principle which means the protection of citizens in case of federal antitrust violations. As such, the responsibilities of the various entities in charge overlap, which makes them competitive and results in the better implementation of Competition Law and rivalry among the enforcement bodies[149]. In US Competition Law, only legal persons are allowed to file a claim for damages. According US law, legal persons who are required to comply with competition rules, are corporations, communities, and associations created by or under the laws of the United States or any other state or foreign country (Articles 7 and 1 of Sherman and Clayton's Law). However, since the term community or association in American law has a general meaning, it also includes a group of individuals[150]. It should be noted, however, that in Clayton's law the term "engaged in commerce" is added as another criterion for the persons who are required to comply with the Competition Law. It is to be mentioned that labor, agricultural, and horticultural organizations, that are not established for profit purposes, are excluded from the scope of these regulations (article 6).

2.1.1.2 The position of Private Enforcement and relevant regulations in US Law

In the United States, the private sector is largely responsible for enforcing Competition Law. Private enforcement of US competition rules accounts for 90% of all lawsuits. The positive outlook for private enforcement in the country has led to its popularity. Sherman law was passed more than one hundred and twenty years ago, and has undergone many reforms so far. Article One of Sherman's Law (Article

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[148]. Jones (n 91) 21.

[149]. Ibid 16.

[150]. Robert W Pontz, 'II Antitrust Law; Persons under the Sherman Act: Rex Systems, Inc v Holiday' [1988] 45(2) Washington and Lee Law Review 679.

One of Chapter I, Section 15 of the United States Code), which was last revised in 2004 by the "Antitrust Criminal Penalty Enhancement and Reform Act" states:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court”.

Article 2 of the same law states: “ Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court’’.

Earlier, Article 7 of Sherman act explicitly referred to the right of private persons to establish legal proceedings for breach of its rules and to claim up to threefold of damages and costs of litigation. Thus, from the very beginning of the competition rules in this country, the right of private parties to benefit from application of those rules had been recognized. Presently the article 7 of Sherman act is replaced by article 4 of Clayton's act (Article 15, Chapter 1, Section 15 of the United States Code). According to recent article:

“…any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances...”.

Article 4 of the Clayton Act entitles persons to a threefold claim for damages incurred as a result of an anti-competitive action in addition to the standard costs of litigation and the interest allocated to the losses incurred. However, there are several points to note here about the aforementioned law:

1) formerly in paragraph (a) of Article 4, it was provided that the Federal Government shall be entitled only to actual damages if it is harmed by anti-competitive practices. This article was amended in 1990 and the federal government was also entitled to three times of the actual amount of losses;

2) The interpretation of the Supreme Court is that foreign countries and governments have the right to receive three times of the real losses because they are considered as persons[1]. This was the main reason that a new clause was added to article 15, section 15 of the US code which states that the foreign countries are excluded from the right of the persons to receive threefold losses;

3) According to article 213 of Antitrust Criminal Penalty Enhancement and Reform Act which was enacted in 2004, under specific circumstances in which an entity cooperates with the private claimants against other cartel members, it is exempt from paying threefold losses and it will be condemned to pay just the real losses inflicted by the private claimants.

Irrespective of threefold losses incurred as a financial compensation, violators of Competition Law should incur more punishments that are imposed by public entities, including fines, imprisonment, and structural remedies such as liquidation, dissolution or expropriation of certain financial assets or divesture. The important effect of public enforcement under Clause 5 of Clayton's Law (Article 16, Section 15 of the United States Code) is that final court decisions, whether criminal or civil, will be a credible reason for filing civil loss claims. In other words, the subject of the claim is credible and there is no need to substantiate in subsequent civil cases (which share the same origin) that a violation of Competition Law has been committed. An advantage of private litigation in this respect is that it is possible for a client to pay for attorney in the form of contingency fees. In this method of payment, as a rule, if the lawyer wins the case, he usually receives one-fourth or one-third of the amount of losses paid by the defendant and in case of failure, the lawyer is not going to be paid any fees.

[1] . Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

2.1.2 The position of Private Enforcement of Competition Law in Europe

The rules and regulations governing the Competition Law in the European Union are in accordance with the EU reforms that were implemented in 2009, Articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly Articles 81, 82, 85, and 86 of the former Treaty of Rome). The first article specifies anti-competitive contracts and the second one refers to the abuse of dominant position. In accordance with Article 3 of this Treaty, the Council acts on a proposal from the Commission after consulting with Parliament. It has the task of laying down the rules of competition necessary to ensure the proper functioning of the internal market. Moreover, the European Commission is the executive arm of the Treaty (Article 17 of the EU Treaty and article 105 of the Lisbon Treaty). In Article 32 competition rules as well as the development of competition conditions in the Union insofar as it improves the competitiveness of entities has been mentioned. Article 104 discusses the duty of countries regarding the implementation of internal Competition Law. It must be mentioned that neither in the Rome Treaty nor in other treaties the private enforcement of Competition Law has been mentioned. The debate over how to interact between private and public enforcement has therefore become one of the most fundamental but at the same time most difficult issues in EU law enforcement. Within this perspective, the burden of enforcing competition rules in Europe rests largely with public institutions.

According to article 103 of the current Treaty the duty of regulating and issuing of required directives for making improvements in the implementation of articles 101 and 102 is vested upon the European Union Competition Council. Before this council performs, the Commission should draft a proposal which should be conveyed to the parliament for consultation. These regulations and directives should necessarily concern with the following subjects:

a) The guarantee of the specified prohibitions stipulated in clause 1 of the article 101 and article 102 by laying down cash penalties or periodic and changing criminal fines;
b) Enactment of more detailed and more defined regulations and laws in regard to the implementation of article 101 of the TFEU;
c) If required, defining the territory of articles 101 and 102 in different economic sections;
d) Defining the specific duties of commission and court of justice in implementing Competition Laws and regulations;

e) Defining the exact correlation between internal law and the regulations specified in European Union laws and the future reforms made.

According to its duties and authorities specified in the aforementioned article, the competition council enacted regulations 17/62 in which (article 3) it was insisted that the commission should investigate and confirm the breach of former articles 85 and 86 (now outdated) while dealing with different cases. In this process, the commission can lead any investigation on its own discretion or in response to some other beneficiaries' request. In articles 4 and 5 and specially in article 9, the Commission's exclusive jurisdiction in implementation of clause 3 of article 85(clause 3 of the current article 101 of TFEU), which is about the exemption from the prohibitions laid down in the first clause of the same article, is mentioned. This meant national courts and administrative bodies inside a country do not have the right to grant exemption from the prohibitions laid down in the first clause of the aforementioned article and the only way to do this is to request the mentioned exemption from the commission. In this way, the Commission would be flooded with requests which is hard to proceed because of scarce human and financial resources. On top of that, the process of obtaining exemptions from the Commission through national legal actions is so difficult and time consuming that the action would be in the internal courts for a considerable time, awaiting the results of the request while the proceedings remain on hold[1]. It is worth mentioning that in regulation 17/62, as in the Rome Treaty, there is no article allocated to civil remedies for the breach of articles 85 and 86 (specially the possibility of claiming losses) as well as to the role of private actions in the implementation of these articles. Notwithstanding, believing that the private actions are either for claiming losses or annulling a contract (which is against competition), the Commission included them in its own proposed bill in 1960 to the European Council which eventually led to the enactment of 17/62 regulations.

Thus, despite the fact that there were many similarities between the European and US competition acts, conspicuous differences on the mechanism of their implementation can be seen between them. Whereas the American mechanism rests on mixing private and public enforcement, practical scales, statistical favours for private actions, and the exclusion of public bodies such as the U.S ministry of justice (Anti-competition division) in the process of provision of competition policies, in the European Community the commission had exclusive jurisdiction in granting

[1] . Georg Berrisch and others, 'EU Competition and Private Actions for Damages' [2003] 24(3) Northwestern Journal of International law & business 588.

exemptions and in the definition of competition policies. This concentrated administrative system along with the absence of a correct regulation for private implementation of Competition Law rendered the process of developing case law laborious. As a result of that, the absence of case law initiated by private legal actions was under heavy criticism from experts[153]. As a solution to this problem, the commission had been trying since 1973 to make the private implementation of articles 101 and 102 of the TFEU in national courts a common practice to improve the private implementation of Competition Law.

From nineties onwards, the commission intensified its efforts to fill the legal gap that existed for private implementation of Competition Law. In 1999 the commission published a proposal bill called "The bill on renewal of implementation rules of articles 85 and 86 of the European Economic Community Treaty". In this bill, the commission strongly stood with the decentralization idea and introduced the possibility of private legal actions as one of the main strategies towards decentralization. The publication of the bill created a process that eventually led to acceptance of regulation 1/2003 by the Union Council on 16th December 2002. These regulations, called "The regulation on the Implementation of the rules on Competition Laid Down in Articles 81 and 82 of the Treaty" came into effect as of May 2004 and made a huge change in the process of Competition Law implementation. The 1/2003 regulations, unlike 17/62 regulation that was enacted in 1962, allowed the direct implementation of third clause of article 101(current law in TFEU) in the internal legal jurisdictions of member states. By this delegation of authority, the exclusive jurisdiction of commission regarding the investigation on the breach of competition rules ended and the governmental authorities from member states and national courts could implement article 81 of the former Competition Law. Of course, the new regulations are not limited to decentralization of the competition implementation in Europe and they still recognize Commission's right to investigate the vital cases of Competition Law breach[154]. We should bear in mind that the regulations are not clear about the possibility of implementing articles 101 and 102 of the Treaty (current law) in private actions that are initiated against breach of the aforementioned articles. Nonetheless, the European Court of Justice case law and case procedures have left no doubts about the possibility to implement these articles directly. As the regulation 1/2003 has ended the exclusive role of the Commission, the national courts are now able to implement the articles 81 and 82

[153] . Jones (n 91) 85.

[154] . Nilson (n 128) 24.

(101 and 102 of TFEU currently)[1] . Moreover, the regulation 1/2003 has announced its support of private actions in national courts. For example, in clause 7 of the introduction it is mentioned that national courts have a crucial role in implementation of competition regulations and the reason is that the courts would provide private persons with civil remedies that will protect them from the breach of Competition Law. Moreover, article 15 of the same regulations allows the Commission to declare its opinion on an open case in the national courts and this means both the Council and the Commission have accepted the initiation of a private action against breach of Competition Law in national courts.

Apart from regulation 1/2003, the Commission published a questionnaire at the end of 2005 about "the actions on claiming losses for the breach of Competition Law" in the European Union which proposed novel reforms in the formal aspects as well as some substantive rules. These questionnaires, called "green paper", were the first preliminary proposals on a certain subject that were published to ascertain the different opinions of experts before laying down a rule and to adopt a democratic approach in the process of law enactment. The eventual purposes of this initiative were to amend the substantive and formal rules of Competition Law in national courts, to increase private persons' motivations to commence proceedings, and to make the implementation system as close as possible to the US Competition Law. The European Parliament approved the above-mentioned questionnaire in 2007. A year later the Commission provided a bill called White Paper on Damages Action for Breach of EC Antitrust Rules which was drafted after assessing all the opinions and proposals provided by the questionnaire. These efforts culminated in a draft which was suggested to the Council and Parliament by the Commission. The Commission published this draft in January 2013 and named it "European Commission Proposal for Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of Member states and of European Union". This draft took the form of a directive on 26th November 2014 (2014/104/EU. This directive seeks to strike a balance between the need for public repression of trusts and cartels on the one hand and the right of private persons (i.e. natural and legal) to receive compensation or restitution for the damages they suffered from anti-competitive behaviour. However, it seems that some of the provisions of the directive prioritise the public system of enforcement over the

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[1] . Rosochowiez., op. Cit., 8.

private one[156]. The directive apparently tries to encourage the phenomenon of forum shopping towards EU jurisdiction because it is more efficient for private enforcement procedures[157]. From the EU perspective, this directive tries to generate uniform rules at the minimum level of harmonisation. Furthermore, the directive introduced national uniform standards for member states which have been unfamiliar in the fabrics of the EU Competition Law so far. In regard to the EU law, the directive has laid down in a legislative way some rules governing aspects of a private law remedy, i.e. the right to compensation by damages suffered by victims of anti-competitive behaviour. This is a significant step when one considers the lack of guidance in the TFEU[158] regarding remedies that might be applicable in cases of breach of competition rules and a chronically exiguous culture of private enforcement of these rules”[159]. It would be interesting to examine the main hardships in the interaction between public and private Competition Law enforcement in the EU particularly looking at the directive as it denies access to corporate leniency statements for claimants in damages[160].[161] “Therefore, according to the 2014 Directive, the enforcement of EU Competition Law shall comprise the interplay between private and public enforcement, aimed at deterrence, and private enforcement, aimed at compensation, whose balance point is represented by the access to evidence held by competition authorities”[162].

2.1.2.1 The enforcement system in competition regulations

So far it has been mentioned that the article 17 of the European Union Treaty makes Commission responsible for guaranteeing implementation of the referred Treaty and the Treaty on the Functioning of the European Union(TFEU). According to this article and the authority given to the Commission can start a legal action in the European Court of Justice (article 285 of the Treaty of European Union) against a

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[156]. Migani, Caterina. "Directive 2014/104/EU: in search of a balance between the protection of leniency corporate statements and an effective private Competition Law enforcement." *Global antitrust review* 7 (2014): 81.

[157]. Ibid.

[158]. The only private law remedy provided in the treaty is the article 101(2) that specifies nullity as result for agreements and concerted practices that breach article 101(1).

[159]. Albertina Albors-llorens, 'Antitrust Damages in EU Law: The Interface of Multifarious Harmonisation and National Procedural Autonomy' [2018] 37 University of Queensland Law Journal 139.

[160]. Migani (n 156) 81.

[161]. The penalties for companies that breach the competition rules can be very severe. The commission operates a leniency policy whereby companies that provide information about a cartel in which they participated might receive full or partial immunity from others.

[162]. Ibid 91.

member state that is not following the Treaty law. Furthermore, the member states can also start a legal action against a breaching member (Article 259 of the European Union Treaty). Moreover, the natural and legal persons can ask for the annulment of contracts concluded by European Union entities (Articles 264 and 263). However, there is no provision to enable the private persons to start a legal action against each other on the ground of breaching the Treaty in the European Union. Because of this and particularly before the enactment of Directive 2014/104/EU of European Union, experts and case law in the European judicial tribunals attempted to extract a legal base for starting such actions from the mandatory principles and fundamentals of the European Union and to fill the legal void until the enactment of the required laws and regulations[163]. As it will be followed, it would be helpful to know about the case law that prevails in the European tribunals on private enforcement of Competition Law.

1-Assessment of Public Enforcement of EU Competition Law

Public Competition Law enforcement refers to the system where the infringement of articles 101 (agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition) and article 102 (abuses of dominant position) TEFU are pursued by the European Commission and by the National Competition Authorities (NCAs) of the member states when the anti-competitive practices affect trade between member states[164]. In addition, these two articles as well as their national equivalents can be implemented in domestic and national courts or by arbitration.

Up to this date, Articles 101 and 102 TFEU have been almost exclusively enforced through administrative procedures carried out by commission[165] and NCAs following the dispositions laid down in the TFEU, council regulation 1/2003[166], commission regulation 773/2004[167], various Commission notices and guidelines, and the jurisprudence of the EU courts[168]. So far, the public enforcement has been

[163]. Jones (n 91) 46.

[164]. To clarify whether or not an agreement or practice has an effect on trade between member states, the commission has published guidelines on the effect on trade concept.

[165]. The commission holds decision power, power of investigation and power to impose administrative(non-criminal) sanctions solely on companies;

[166]. Council regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty.

[167]. Commission regulation 773/2004 of the 7 April 2004 relating to the conduct of the proceedings by the commission pursuant to articles 81 and 82 of the EC Treaty.

[168]. Migani (n 156) 83.

rigorously fulfilled as it has been the primary way to deal with anti-competitive practices. Since the regulation 1/2003 entered into force, articles 101 and 102 have been practiced in "close cooperation"[169] with the Commission and National Competition Authorities according to the threshold of European Competition Network in which the Commission and National Competition Authorities share the load of work. Close cooperation means that the cases will be entrusted to well-placed competition authorities. The term well-placed means refers to a situation where the authority pursues the matter in the event that anti-competitive practices have effects on competition between more than three-member states[170].

The main objectives of public enforcement in the EU as stated in the Fining Guidelines of 2006 are:

Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also with the aim to deter other undertakings from engaging in or continuing a behaviour that is contrary to articles 101 and 102 TFEU (general deterrence)[171].

Deterrence is therefore considered to be gained by imposition of fines which makes it unprofitable to engage in anti-competition activities. These fines are that are determined in proportion to the chance of being detected: The lower is the chance of being caught, the heftier are the sanctions. The main principles for the imposition of fines are stipulated in articles 23 and 24 of the regulation 1/2003 and also Fining Guidelines of 2006 in which specific conditions for setting penalties are laid down. It is to be mentioned that cartel participants can benefit from a reduction of fines imposed or even from total immunity by leniency or/and a settlement procedure[172].

According to regulation 1/2003, the maximum penalty that can be imposed shall not exceed 10 percent of the worldwide turnover of the undertaking in the preceding business year[173]. This amount can be very significant as it is not connected with the turnover of the specific infringement or the turnover generated only within EU. In general, duration and gravity of the infringement determine the level of the fine but

[169]. Regulation 1/2003(5) art 11,
[170]. Notice on NCA cooperation, (n 8) para 14.
[171]. Guidelines on the method of setting fines imposed according to article23(2)a of regulation 1/2003(Fining Guidelines), para 4.
[172]. Migani (n 156) 84.
[173]. Regulation 1/2003, (n 5) Article 23(2).

Commission can stray from these calculation methods to achieve effective deterrence[174].

Despite the fact that the commission has set heavy fines in recent years (particularly for cartels), anti-competitive practices continue to happen in a large scale and are accompanied by recidivism[175]. Many scholars believe that the private enforcement should play the role as an additional deterring factor. A potential perpetrator should evaluate the threat of an action for damages as a real cost and should consider the possibility of being detected by the public authorities. There should be no overlapping and trade-off between the private and public enforcement and they should be cooperative with each other.

2-Assessment of Private Enforcement of EU Competition Law and the 2014 Directive

A private action can follow a legal action that is initiated by Competition Law authorities or as a stand-alone action on the ground of overcharge harm and lost benefits. Regulation 1/2003 and the Co-operation Notice[176] promote the decentralization of the enforcement of EU Competition Law, emphasising that national courts have an essential role to play in applying the EU competition rules which complements that of the competition authorities. According to Regulation 1/2003, articles 101 and 102 TFEU have a direct effect on undertakings in member states in their entirety[177] and national courts have power to apply them[178] alongside national Competition Law. This refers to the situation where the relevant agreements or abusive conducts affect trade between member states.

Moreover, the implementation of the EU Competition Law should be uniform in all tribunals. National courts work in co-operation with the Commission in different ways. The Commission sends to member states different opinions and observations on the implementation of EU Competition Law and in return member states send the copies of decisions rendered in their territories to the Commission on the same subject matter[179]. As an instance of co-operation, in some cases national courts stop

[174]. Migani (n 156) 84.
[175]. Ibid 85.
[176]. Commission notice on the co-operation between the commission and the courts of the EU member states in the application of articles 81 and 82 EC (2004).
[177]. Article 1.
[178]. Article 6.
[179]. Article 15.

the trial on a specific matter in order to avoid ruling on a case that might be in conflict with a decision contemplated by the commission in proceedings it has initiated[180].

The right to damages and direct applicability of articles 101 and 102 TFEU finds its roots in the rulings of European Court of Justice (ECJ) and in particular judgments issued in Courage[181] and Manfredi[182] cases. In Courage case, the European Court of Justice recognized that articles 101 and 102 of TFEU establish direct effects between individuals and therefore the rights stipulated in these two articles should be protected through resorting to national courts[183]. The judges confirmed that any individual, including those that are party to a contract or agreement that restricts or distorts competition within the meaning of the provision, can claim the breach of articles 101 and 102[184]. This can be done provided that the party does not bear significant liability for the distortion of competition considering the economic and legal context in which the parties are situated and the respective bargaining power and conduct of two parties to the contract[185]. The ECJ has also emphasized on the important deterring role of private enforcement in regard to distortive anti-competition actions. In this respect, private legal actions for damages can make a significant contribution to the maintenance of effective competition in the European Union[186].

In a similar vein, the ECJ recognized a few years later in Manfredi case that the compensation function of private enforcement and the full effectiveness of article 101 of the TFEU would be jeopardized if it were not open to any individual to claim damages for the loss incurred because of an anti-competitive contract or a conduct that has distorted competition[187]. The ECJ also declared that domestic legal systems possess autonomy in regulating such anti-competitive actions, provided that:

- There exists no harmonised EU legislation
- The relevant rules do not make it impossible or excessively difficult to exercise the right for damages (principle of effectiveness)

[180]. Article 16.
[181]. Case C-453/99 Courage Ltd v Bernard Crehan(2001) ECR I-6297.
[182]. Joined Cases C-295-298/04 Vicenzo Mafredi v Lioyd Adriatico Assicurazioni(2006)ECR I-6619.
[183]. Courage case (n 181) 23.
[184]. Ibid 24.
[185]. Ibid 32.
[186]. Ibid 7.
[187]. Manfredi case (n 182) 60.

- The relevant rules are not less favourable than those governing equivalent national actions (principle of equivalence)[188].

According to the ECJ, the national autonomy also includes the right to award punitive or exemplary damages if it is provided by national law for breach of corresponding domestic provisions[189]. In this vein, the deterrent role of actions for damages becomes more reinforced.

In the recent case of Kone[190], the ECJ recognised the right to claim damages for a loss suffered because of a conduct or contract liable for restricting or distorting competition as well as the loss caused by umbrella pricing. This refers to the loss resulted from the fact that an undertaking which was not party to a cartel had to set its price higher than the threshold for competitive conditions because of the cartel's anti-competitive behaviour[191]. This award shows that in case of existing a causal relationship between the conduct and the loss suffered, any individual who is harmed can seek compensation.

Despite the recognition of its importance, private enforcement in the EU is considered to play a secondary role in compensation and the actions for damages in the common market are still being considered as "ineffective and uneven"[192]. As a testimony to this, in 2008-2012 only 25% of the decisions issued by Commission on competition infringements were followed by actions for damages. Moreover, the actions are preponderantly brought by large-scale businesses and only in countries with less complicated rules regarding the subject-matter like Netherlands, Germany and United Kingdom[193]. Private Competition Law enforcement in the majority of member states suffer from many shortcomings and the absence of significant incentives, specifically in matters related to cost and risk of litigation. In this regard, it is argued that EU Competition Law needs to incorporate treble damages and contingency fees and apart from that the experience of national judges in dealing with Competition Law leaves much to be desired[194]. Moreover, the difficulty of

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[188]. Ibid 62.

[189]. Ibid 93.

[190]. Case C-557/12 Kone AG and Others v OBB-Infrastruktur AG.

[191]. Ibid 37.

[192]. Joiquin Alumnia, 'Antitrust Damages in EU Law and Policy' (College of Europe CGLC Annual Conference, Brussels, 7 November 2013) 2 <http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm> accessed 21 December 2020.

[193]. Ibid.

[194]. European commission, 'Training of national judges and judicial cooperation in the field of EU Competition Law' (*Competition*, 2018) <https://ec.europa.eu/competition/court/training.html> accessed 20 December 2020.

claimants to have access to some evidences which are held by perpetrators and are subject to different disclosure mechanisms represent an important problem in private claims for damages that should be dealt with to build an effective private enforcement system.

Despite the insistence of the Green and White Papers (as two constituents of Directive 2014) on the guarantee for a full compensation and as a result on the protection of consumers from anti-competitive disturbances[195], there exist legal challenges to achieve the necessary requirements in this respect. Full compensation includes actual loss, loss of profits, and the interests[196] which "shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages"[197]. However, if we admit that "sanctioning EU Competition Law infringement is and should remain the exclusive task of competition authorities"[198], it can be said that the deterrent effect of private enforcement is excluded.

Notwithstanding the above, recital 6 of the 2014 Directive affirms the complementary relationship between private and public enforcement:

"to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access documents held by competition authorities. Such coordination at the union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market".

Therefore, we can see that from the directive point of view, the enforcement of EU Competition Law shall comprise the interplay between public enforcement (aimed at deterrence) and private enforcement (aimed at compensation) that can be represented as an example by the access to evidence.

The 2014 Directive has been acclaimed by many scholars, in view of whom the aim of public enforcement is clarification and development of law's punitive and deterring function, while actions for damages exclusively have a compensatory role. What is generally considered to be reasonable is that competition authorities are better equipped and more suitable for interpretation of the law at hand (articles 101

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[195]. 2014 Directive, article 1.

[196]. Ibid Article3(2).

[197]. Ibid Article3(3).

[198]. Migani (n 156) 90.

and 102 of the TFEU) as private claimants will try to interpret the legislations in a way that it mirrors their own interests[199]. Arguably, the action of competition authorities is considered to achieve the deterrent effect more efficiently as these authorities have more functional, investigative and sanctioning power than private claimants[200]. Similarly, the public authorities are deemed as being in a better position to decide about the optimal fines (i.e. an amount proportional to the chance of being detected) and also their power to impose non-monetary sanctions such as imprisonment and disqualification of directors makes them far more suitable than a private damages claimant whose only purpose is to compensate his own damages. It is believed that a mere trebling of damages cannot be assumed to be the right kind of multiplication to deter abuse of the Competition Law[201]. Moreover, breaching Competition Law might still be very profitable for the perpetrator. Therefore, having in mind that monetary sanctions is all that would be imposed on him, the perpetrator would calculate the monetary sanction well in advance while still having the intention to commit the breach. That is why it is argued that private actions diverge from the general interests as it enhances the risk of strategically invoking the breach of Competition Law (particularly in intra-firm relationships) to escape obligations under a contract[202].

However, as we mentioned earlier, the most important parts of case law and the European Union itself support the idea that an efficient system of granting damages is a cornerstone of protecting individual rights, especially to ensure full compensation for people who fall victims as a means towards achieving corrective justice[203]. For instance, in Courage, Manfredi, Pfleiderer and Donau Chemie cases the positive role of private enforcement and actions for damages was acknowledged to be in public interest. It is estimated that a well-functioning combination of public and private Competition Law enforcement helps to enhance annual social benefits as high as 1% of GDP or 117 billion Euros in the EU[204]. It is even said that the legal actions of European private citizens to seek damages play a similar role to that of

[199] . Ibid 91.
[200] . Ibid.
[201] . Ibid.
[202] . Ibid 92.
[203] . Ibid.
[204] . This view is supported, among others, by the study of Erasmus Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR) and LUISS making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report (2007), 10.

"private attorney-general", just like in the United States[205]. While doctrine generally recognises the superiority of public enforcement in the pursuit of deterrence, some authors have been insisting that by pursuing the primary compensatory goal, private enforcement "generates an important additional deterrent effect, particularly because companies are more likely to avoid infringements of competition rules when they risk having to pay damages to their competitors"[206]. In this way, an efficient system of private enforcement and the grant of civil damages will be an essential element of perpetrators' potential exposures. In addition to all contributions of private enforcement to public interests, courts not only have to consider economic public policy in their judgement when the dispute in question has a wider impact on the market[207], but also article 15 of the regulation 1/2003 sets forth the possibility for the commission and NCAs to intervene in private litigation by submitting observations and this is because of the probable public nature of such disputes[208].

Accepting this approach will have its own consequences. In case we accept this approach no more changes to improve private enforcement is necessary and what we currently see in Directive 2014 in regard to complementary monetary restitution of private enforcement would be sufficient. The most important consequence for this approach is that as in the past, no access should be given to private damages actions in case of self-incriminating statements because it lowers the chance of cartel members to cooperate and give in information to the cartel which leads to the weakening of public enforcement. On the contrary, embracing the deterrence approach (including both public and private enforcement) means that infringers should evaluate the chance of private actions for damages because leniency policy does not restrict the probability or the extent of actions for damages, as leniency statements would in principle be accessible by claimants. In this case, the accessibility of leniency corporate statements will be the point of balance between the caring for public and private enforcement[209]. The EU landscape is currently divided between a recent ECJ case law which opened up the possibility of disclosure of leniency corporate statements, and the 2014 Directive which provides exception of disclosure of evidence in accordance with the commission and NCAs existing

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205. Assimakis P Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement?' [2006] 3(1) Competition Law Review 10-13.

206. Roger Van Den Bergh and Peter D Camesasca, European Competition Law and Economics: a Comparative Perspective (2nd edn, Sweet & Maxwell 2006) 332.

207. Komninos (n 205) 13.

208. Ibid.

209. Migani (n 156) 93.

approach. The most controversial and significant judgment of ECJ is presented in Pfleiderer in 2011. In this case, the court was requested to give the right of access to evidence file of the German Federal Cartel Office to the victim of German decor paper cartel, Pfleiderer. The file included leniency and other documentations provided by the leniency applicant. Having insisted that the civil actions contribute to a great extent to the maintenance of effective competition in EU and recognising their deterrent effect, the ECJ allowed access to leniency corporate statements in this case[210]. The court held that, in the absence of EU's binding regulations on the subject, national courts should carry out, on a case by case basis, an exercise to "weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency"[211]. In 2013, the approach of ECJ in the former case was confirmed during the proceedings of another case called Donau Chemie, where the court was requested to issue an award on the compatibility of Austrian law with the EU law as regards the prohibition of access of the third parties to the judicial case file in competition cases without the consent of all parties involved therein[212]. Once again, confirming the important role of private enforcement and the deterrent effect, the ECJ repeated the necessity of national courts weighing exercise[213]. The court held that when a national court insists on the prohibition of access to case files in a private action of Competition Law, it leads to the undermining of private Competition Law enforcement[214], especially when the parties have no access to other evidence. However, it seems that the rule of general access contradicts the efficiency of leniency mechanism[215].

It would be interesting to know that the approach of European institutions (other than the courts) and NCAs in favour of protection from disclosure of leniency corporate statements was not born with the 2014 Directive. The white paper of 2008 already insisted on the necessity of adequate protection of leniency corporate statements in private damages[216]. The leniency Notice[217] explicitly provides that access to leniency statements will be limited to the addressees of statements of objection, on the condition that they won't make a copy of it and use it solely for the

210. Pfleiderer, paras 29-31.
211. Ibid.
212. Case C-536/11 Bundeswettbewerbsbehorde V. Donau Chemie, 6 June 2013.
213. Ibid para 23.
214. Ibid paras 32-33.
215. Ibid para 31.
216. White Paper, paras 2.2 and 2.9.
217. Leniency Notice, para 33.

purposes specified in Leniency Notice. Other parties such as complainants are not granted access and the specific protection will not be available anymore if the applicant of leniency statements disclose the information to a third party. The Cooperation Notice also denies access to Leniency statements to national courts without the consent of the applicants[218]. It is to be mentioned that after the Pfleiderer judgment, the European Competition Network issued a resolution supporting the necessity of protection from disclosure[219].

It is undeniable that there have been considerable progresses made by the European Union towards efficient private Competition Law enforcements in the past years. In this respect, there has been a multiplicity of approaches throughout the EU area and now it is the time to design a harmonised system in which the public and private enforcement can play in the same field without there being discrimination against private enforcement or the undermining of public enforcement. Many scholars have sided with the ECJ in the cases such as Courage and Manfredi that granted access to leniency statements based on the idea that damages actions should also have a deterrent effect and there are also scholars who believe that the fines can exclusively provide for enough deterrence[220]. To achieve a powerful deterrence, the probability of being litigated by a civil action should become high enough in a way that a potential perpetrator would consider it as a threat. A remote probability is not sufficient. Access to leniency statements and self-incriminating evidence for a private action claimant would be vital. In this way, cartel members will not rush to be the first to do the leniency statements and therefore the public enforcement policy effect in EU would be undermined and weakened. The 2014 Directive attempted to make a balance between the two enforcement regimes and strengthened the position of claimants (by giving a binding probative value to an NCA's decision as well as the presumption that the cartels cause harm) while trying to encourage and improve leniency programmes (limiting, on certain conditions, joint and several liabilities of the leniency statement applicant). Although the directive had positive points as a binding law for all members, it somehow contradicted the Transparency Regulation by denying access to leniency statements to private damages claimants[221]. Denying

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[218] . Commission Notice on the Co-operation between the commission and the courts of the EU member states in the application of Articles 81 and 82 EC (2004) OJ C101/54, para 26.

[219] . Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 _ Protection of Leniency Material in the Context of Civil Damages Actions, https://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf

[220] . Migani (n 156) 110.

[221] . Ibid.

access to information directs competitors to win their cases by forum shopping. The preliminary goal of the Directive was to introduce a complementary system, but all of a sudden it denied its main goal counter-productively and refused access to evidence by private claimants. The solution to this problem might lie in an ad hoc EU regulation. According to this regulation, a combination of national court judges and National Competition Authorities would decide whether or not they grant access according to underlying conditions such as other evidence available in case of rejection of access, or in case the claimant is a multinational company with enough knowledge of the market and efficient incriminating information. Moreover, in some domestic courts such as the UK, Germany, and Netherlands there are more favourable conditions for claimants regarding the information disclosure: If enough evidence is provided already in the national court, can lead to denial of access to further or general unnecessary information disclosure[2] . Thus, in general a[2]ccess to information is the principle, and the denial of access occurs only when there is no hurdles for the claimant to gain supporting evidence because of favourable rules on disclosure of information (for example in the country that the action is started).

2.1.3 The position of Private Enforcement of Competition Law in Iran

2.1.3.1 A short history in a comparative perspective

After the end of the war with Iraq, the competitiveness of the national economy was recognized as one of the central policies of the Islamic Republic of Iran and has been emphasized in the second, third and fourth economic, social and cultural development programs. Article 44 of the Iranian Constitution had practically granted monopolies to the public sector and had banned the private sector from access to some markets. This had prevented the economy from being competitive and thus reduced productivity and consumer welfare. In order to expand the scope of privatization and reduce the burden on private enterprises, governmental management and the transfer of management of economic entities to the market, a new interpretation of this principle, has been put forward based on which Most state-owned corporations were privatized, even in areas such as electricity, telecommunications, insurance, and banks, which were state-owned until then, and in the year 2008, the law on implementation of general policies specified in principle 44 of the Iranian constitution was enacted and came into force. In practice, a new

[2] . Ibid 111. [2] [2]

interpretation of Article 44 of the Constitution was readily made available to broaden the scope of private sector activity.

In the first draft of Iranian Competition Law prepared by the Ministry of Commerce of Iran and probably in accordance with the French Law, the Competition Council was designated as the body implementing the competition rules. The council was made up of seven members and had the right to sue the breaching persons (perpetrators of an anti-competitive crime) whether natural or legal through its secretary or representative offices on the basis of reports sent to it or on its own discretion. This council was not empowered to impose penalties and punishments and in case an anti-competitive crime was committed, the Competition Council of Iran had to start a legal action in the court. Despite its inability to impose criminal sanctions, it could still implement civil measures such as annulment or modification of anti-competitive agreements, determining losses, and requiring perpetrators to pay for those losses. The appeal to Council's decisions was within the jurisdiction of the appellate courts. It is to be pointed out that there were subsequent amendments to the mentioned law, so that in the final draft and in contrast with the above the Council was empowered to impose penalties on entities committing anti-competitive practices in addition to the enforcement of civil remedies. Another change was that the power to issue a ruling regarding the losses incurred by the victims was returned to the courts. In these cases, the courts are allowed to issue a judgment against a defendant only on the condition that Competition Board's affidavit and confirmation about the occurrence of an anti-competitive action is annexed by the appellant to his petition.

An overview of the Competition Laws in some countries reveals some similarities between them and Iranian laws. European antitrust rules are contained in various legal instruments. The basic provisions are contained in the Treaty on the Functioning of the European Union (TFEU) and a number of regulations have later been adopted, either by the Council or the Commission. Some of these regulations comprise the general rules for the implementation of the Treaty provisions laying down, among others, the investigative powers of the Commission. Other regulations deal either with particular types of conduct or with specific sectors[2] . 2

[2] . [2] [3] European Commission, 'Legislation' (*Competition*, 2018) <https://ec.europa.eu/competition/antitrust/legislation/legislation.html> accessed 21 December 2020.

In Italian Competition Law, forming cartels constitute an administrative offence. The Italian Competition authority (ICA) is entrusted with relevant investigative, decision-making and fining powers. ICA is responsible for applying article 101 of the TFEU to cartels that are having a dimension that covers the whole Europe, as well as article 2 of the Italian Competition Law to domestic cartels[2] . 2

2.1.3.2 The current situation

By explicit order of Article 62 of the law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution, the Competition Council is an entity that recognizes the commission of anti-competitive practices[2] . 2

In the latter article, the types of decisions that can be issued by the Competition Council are enumerated and each time a complaint subject to an anti-competitive conduct in articles 44 to 48 is received or investigated by an agency, one or more of these decisions will be rendered[2] . 2 6

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[2] . Global legal insights, 'Cartels 2020 Italy' (*GLI*, 2020) <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/italy#chaptercontent1> accessed 21 December 2020.

[2] . According to this article: The Competition Council is the sole authority to deal with anti-competitive practices and is required to regulate and start investigation in person or on the basis of complaints by any person, whether natural or legal, including the Attorney General or the District Attorney, the State Accounting Office, the State Inspectorate General, Sector adjustors, government agencies and institutions, syndicates, consumer rights protection associations and other nongovernmental organizations, on anti-competitive practices within the meaning of Article 61 of this Act.

[2] . These decisions, which, in addition to compensation for losses, are considered as the remedies for commission of anti-competitive practices, are as follows:

1. The order to terminate any contract, agreement or understanding that entails anti-competitive practices subject to Articles 44 to 48 of this law;

2. The order to stop the parties of the agreement or its related agreements from continuing their anti-competitive practices;

3. The Order to cease or abstain from any anti-competitive practice;

4. Public awareness promotion for greater market transparency;

5.The Order to dismiss managers who have been elected in violation of Article 46 of this Act;

6. Orders to divest shares or equity of firms or companies obtained in violation of Article 47 of this Law;

7. The requirement to suspend or revocation of any action contrary to the prohibition of Article 48 of this Law or to the dissolution of the merged companies;

2.1.3.3 The Iranian Competition Council and remedies for violation of competition regulations (civil and criminal)

Here are some important points to consider concerning the remedies offered in article 61 of the law on Implementation of General Policies specified in principle 44 of the Iranian constitution:

1- The first question that comes to mind is: Whether the Competition Council is required to determine one or more of the twelve clauses of the mentioned article in its sole discretion, or is it unable to impose none of them in spite of the fact that it has been proven that a certain act has been anti-competitive? We might think that the word “may” at the top of the article implies the council's freedom to adopt none of the remedies, but that is not acceptable. Therefore, the Council should, as appropriate, adopt one of the foregoing as a remedy and only have the freedom of choose the type and the number of remedies;

2-All the remedies provided in Article 61 of the mentioned law are considered as civil except the fine and confiscation of property which are subject to doubts as to whether they constitute criminal penalties or civil remedies. If we consider them as criminal penalties, then we will have to consider anti-competitive behavior as crime. The reason to consider them as criminal penalty is that confiscation of properties as a result of anti-competitive actions are solely in the interest of the state and no private person will benefit from them as in a civil remedy. By referring to these remedies as criminal penalties, we must also call the offense of anti-competitive conduct as a crime.

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8. The order to extradite or detention of property acquired through the anti-competitive conduct or practices in the matters referred to in Articles 44 to 48 of this Act through the competent judicial authorities;

9. Ordering an agency or company not to operate in a particular field; or area or areas;

10. Ordering to amend the Statute, the corporation contract or Minutes of the General Assembly or the Board of Directors, or to make a proposal to the Government regarding the amendment of the Statutes of the public sector Corporations and Institutions;

11. Requiring firms and companies to comply with minimum supply and price range in monopoly conditions;

12. Determination of a fine from ten million Rials to one billion Rials in case of violation of Article 45 of this law.

The legislator has already referred to anti-competitive actions as crime in articles 67,79 and 81. In addition, despite the fact that in clause 12 of article 61 the amounts specified are referred to and designated as fines, in Article 84 these amounts are named as "cash penalties". However, on the other hand, article 36 of the Iranian Constitution states: “The punishment and its enforcement must only be issued by a competent court”. Therefore, in view of this article, the Competition Council is not a competent authority to impose penalties. There are three solutions to this problem:

- The First solution is to rely on the terms used in the Act on Implementation of General Policies specified in Article 44 of the Iranian Constitution and to justify clauses 8 and 12 of article 61 (anti-competitive conduct) as criminal acts. The argument is that this principle of Iranian constitution specifies court as competent to impose punishment and this term can be interpreted as judicial entities and bodies which will of course involve bodies under the supervision of justice ministry or bodies independent of it. Therefore, as the competition council is an example of a judicial independent body. What reinforces this argument is that according to the Article 57 of the Act the approval of one of the judges of the Council is necessary for the enforcement of the issued decisions;
- The second solution is that we can call the Iranian Competition Council as a new body which, despite not being a court, can issue decisions in its own jurisdiction. In this way, we can refer to this new body is an ad hoc entity that is an exception to the constitution and criminal law principles;
- The third option is to adopt a general definition for the “criminal remedy” and interpret it more generally so that it can encompass a definition broader than a term such as punishments for crime. Within this perspective, although the clauses 8 and 12 of the article 61 are referred to as criminal remedies, this does not necessarily mean that they are punishments and the anti-competitive actions are crimes. This can be useful specially when considering that there is no imprisonment punishment set forth against anti-competitive actions and in all parts of the law it has been mentioned they are general courts that are competent to execute the remedies (articles 78, 72 and 82).

By far it seems more consistent with the law to adopt the first solution. What the legislator cares for in principle 36 of the law is that a punishment should be imposed according to the law (the principle of legality of the crime and penalty) and should be issued by a decent judge (elected according to the legal criteria). The court owes its validity to the lawful consideration and decision of the judge. Thus, what matters

is that decisions should be confirmed at least by a judge. In other words, by using the term court, the constitution refers to a qualified judge and as there is a judge in the commission who approves decisions there will be no breach of constitution.

In any case, confiscation of property and imposition of fines are undoubtedly not a part of civil remedies. Confiscation of property arising out of anti-competitive practices (clause 8 of Article 61) depends upon council's discretion, but only they are judicial authorities who can implement such decision. Therefore, it should not be assumed that in order to expropriate the property in question, it is necessary for the Competition Council to request the judicial courts to issue a decision. Article 61 allows the Council to approve any of the 12 sub-sections and Article 70 confirms this view. According to Article 70 "Decisions of the Competition Council or the Board of Appeal shall, as the case may be, be enforced by the judicial enforcement unit". With regard to the cash penalties referred to in clause 12 of Article 61, it is stated that only in case of unilateral anti-competitive practices referred to in Article 45 the aforementioned punishment is imposed. It should be mentioned that anti-competitive practices such as collusion and anti-competitive agreements which are subject to Article 44 of this Act and acquisition, merger, and simultaneous managements that are subject to articles 46 to 48, are common cases of antitrust violations whose impact on disruption of competition are usually more enormous and severe than the unilateral practices.

In clause 12 of Article 61, the criminal remedy for prohibitions set in article 45 has been mentioned. The remedy has been limited to mere financial punishments and that is why it lacks sufficient deterrence which has provoked intense criticisms.

Actions that are considered as secondary comparing to anti-competition practices (articles 72 to 78), such as those that interfere with legal processes, false statements, refusal to provide information, providing forged documents to the Council, or testimonies contrary to the truth can receive imprisonment sentences and are considered as relatively serious crimes. It may be said that, given the composition of the Competition Council members, the legislator is reluctant to let the Council to impose imprisonment sentences. This is unacceptable because there are two senior judges among the Council members and the decisions of the Council concerning the application of Article 61 shall be valid only if the vote of at least one judge member confirms it.

However, the legal vacuum can be offset very weakly by the consumer protection act adopted in 2010. Article 8 of the law states that any collusion and imposition of

conditions by suppliers of goods or services that reduce supply or quality or increase prices is a crime. It may be assumed that this article concerns only direct relationships between supplier companies and consumers, but the definition provided by the collusion in Article 1 (5) of the Consumer Protection Act proves that this is wrong. This article defines collusion as: "Any compromise or positioning among suppliers of goods or services to increase prices or reduce quality or limit the production or supply of goods and services or impose unfair conditions according to commercial/ trade practices". The anti-competitive collusions specified in article 44 of the law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution can be punished if proved to be under the scope of this definition of the word "collusion" according to the Iranian consumer protection.

The legal remedy or implementation guarantee for the infringement of the aforementioned article is specified in Article 19 of the Consumer Protection Act: "supplier of goods and services and manufacturers who violate Articles 3 to 5 of this law, in case of imposing losses on consumers as a result of the consumption of the relevant goods and services will be responsible for compensation of losses and will be fined up to double of the amount of losses". There have been serious objections to this rather mild punishment, but here I will skip relevant discussions as they fall outside of the scope of my research. Regarding the monetary penalties provided for in Article 61 (12) of the law on implementation of the general policies specified in principle 44 of the constitution, the following points should be considered:

- First, at the end of Article 61, a separate regulation should be approved to determine the amount of cash penalties. This regulation has been adopted and then replaced by another regulation issued by the board of ministers called "the regulation on Determining the amount of cash penalties according to anti-competitive practices" which is currently applicable;
- Second, the amount of penalties should be adjusted every three years by proposal of the Competition Council and the approval of the board of Ministers, in accordance with the customer price index (CPI) formally announced by the Central Bank annually;
- Third, the enforcement of cash penalty decisions of the Council (subject to Article 70) should be executed by judicial civil implementation units, but these civil units must comply with the provisions of the Criminal Procedure Code and the Law on the Implementation of Financial sentences and other respective laws and regulations.

As noted earlier, the determination and issuance of an award on damages arising out of anti-competitive practices falls outside the jurisdiction of the Competition Council and is assigned to the public courts. A petition for damages and compensation of losses should be submitted to the public courts (Article 80) and the court will hear the petition only if the petitioner attaches a copy of the final decision of the Competition Council or the Board of Appeal on confirmation of occurrence of an anti-competitive procedure. Thus, with regard to Article 58 (1), 62 and 66, the nature of the Competition Council as the principal executor of Chapter 9 of the law on Implementation of General Policies specified in principle 44 is public and it must be said that the system of enforcement of Competition Law in Iran is based on public enforcement.

However, the dominant approach in fighting anti-competitive conducts is to emphasize on civil remedies. In fact, the law has apparently sought to establish an institutional competition council similar to the European Commission in Iranian competitive regulatory system. Although any person, whether natural or legal, can file a lawsuit against another in the Council, their role is limited to a mere declaration of an anti-competitive conduct and the claim for damages. Other than that, the role of individuals is considered as subordinate that can have no initiative in pursuing a lawsuit as the process relevant to investigation and collection of evidence is solely the responsibility of the Council. The subordinate role of individuals is due to the fact that private litigation is possible only after the public authority has established the commitment of an anti-competitive conduct. Moreover, their limited power to claiming damages is because it is at the discretion of the Council to determine other civil enforcement guarantees. That is why if a person who is a party to an anti-competitive agreement or a third party who has been affected by an anti-competitive contract submits a complaint to the Council and requests the termination of the agreement, the Council may, if appropriate, opt for other types of decisions stated in article 61 instead of respecting the original request of the claimant (termination of the respective contract). Therefore, the purpose of accepting private litigation appears to be only to provide justice to individuals and to complement the incomplete deterring function of the law. In any event, the Competition Council does not appear to have the capacity or ability to perform its critical tasks, neither structurally nor financially.

It seems that according to the latest EU commission's confirmations, all the EU members have transposed the rules of the Directive 2014 on Actions for Damages, except for four member states that failed to do this up to the end of the first deadline.

On 24th of January 2017, letters were sent to those member states and they subsequently amended or enacted the necessary rules in their national jurisdictions. The commission is now examining if all transposed rules by EU jurisdictions fully implement the Directive which, according to the table updated last time on 2018[2] seems to be the case so far. We should bear in mind that United Kingdom has already separated from the European Union Treaty on 2020 and therefore it is omitted from the table.

Chapter Three: Types of anti-competitive behavior and Civil Remedies for the breach of Competition Law

In the past chapters I talked about the necessity of remedies for breach of competition regulations and discussed existing laws and regulations regarding the competition protection. It is maintained that although Competition Law belongs to the territory of public law, it covers the same subjects as in private law due to the commercial and economic activities of the entities. Competition Law shares its domain with private law (such as contract law, property law, corporation law, toll law and intellectual property) more than other public law branches. We might accept that the main purpose of Competition Law is to limit the freedom of private persons if their anti-competitive conduct imposes harm on the process of competition. However, as far as remedies are concerned, we must accept and recognize the value of private damages actions in the enforcement process of Competition Law. In general, anti-competitive conducts can be categorized into unilateral, bilateral, and multilateral. Moreover, the remedies for breaching Competition Law can be divided into two parts: contractual and non-contractual.

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[2] . European Union, 'Actions for Damages' (*Competition*, 2018) <https://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> accessed 21 December 2020.

1.1. The definition of anti-competitive agreements

Before knowing what is an anti-competitive agreement we should know what is the definition of an agreement. The term agreement refers to the meeting of minds or concurrence of wills on the same subject regardless of its form or its binding nature and is conceived to be more general than a contract. Although agreement is not defined in most Competition Laws, there is no doubt that the same definition can be applied in the context of Competition Law. In order to avoid anti-competitive practices and any possible abuse, Competition Law generally accords a broad meaning to the term agreement. This approach is witnessed specially in the European Union tribunes[228]. For instance, the European Court of Justice recognizes even an unsigned document between the entities as an agreement within the scope of Competition Law[229]. This broad interpretation of the term agreement allows courts to consider some instances such as the exchange of information that discovers a future practice of the involved parties, simple arrangements, definite or indefinite promises, and official commercial contracts between two or several entities as anti-competitive behaviour. From this point of view, it does not make much difference whether the agreement is implemented or not. Likewise, it does not matter if the concluded contract is void according to other laws or if it is not beneficial to some of the parties involved[230]. The commitment of anti-competitive behavior can start from a simple oral promise no matter how binding it is. However, the essential element in every agreement is the meeting of the wills and for its formation it is necessary that an offer be made by a party and be accepted by the other or in other words, one party should invite another person to realization of a certain goal and the invited party should accept it. Furthermore, there is a requirement of intentional communication between the parties, as in consensus[231] among entities. This communication or contact is the tool for conveying the will and exchange of motives

[228] . Louis Kaplow, 'On the Meaning of Horizontal Agreements in Competition Law' [2011] 99(3) California Law Review 690.

[229] . Acf chemiefarma v commission: ECJ 15 Jul 1970, Cases 41, 44 and 45.

[230] . Courage case (n 181).

[231] . In Consensus, the parties only manifest their opinions on a certain subject and they have no intentions to make a binding agreement. However, some believe that an agreement is formed when there is a common motive and attempt between the parties and leads to a commitment between them although it is not binding: Kingston, Suzanne Elizabeth Joy. "The role of environmental protection in EC Competition Law and policy." PhD diss., Faculty of Law, Leiden University, 2009: p. 163. Though, this is not accepted by ECJ and Commission: Guidelines on the Application of Article 81(3) of the Treaty, 2004/C 101/08, OJ [2004] C 101, 27.4.2004., para. 15.

which is also called manifestation of wish in ECJ rulings[232]. It is to be mentioned that a similar rule exists in the Iranian Civil code (Article 191). Normally there is no formality necessary for the formation of a contract which has been admitted in Competition Law too. It is not important with which tool one conveys common motives to the other party. Therefore, the means of communication might be through a formal contract or sending letters by post. Similarly, common motives might be expressed in a meeting, during oral negotiations, or even by showing meaningful behaviors to the other party. In cases where entities share opinions and inclinations regarding a common motive but there is no formal proof of their agreement in this regard, it can still be regarded as an anti-competitive behavior if it practically leads to an explicit or implicit market agreement. The ECJ states in one of its decisions that as long as entities communicate according to their true and corresponding motive, the agreement is formed between them. In this way, even if parties suggest that their production capacity is a certain amount and they plan to continue the same production policy, the agreement is made between them even though it does not have a binding nature at its face value[233]. Uncertain behaviors and speculations about the next move of rivals could be regarded as important factors in the formation of market structure whose impact on the severity and fairness of competition is unquestionable[234].

Over the years, the US and EU have been trying to delineate the boundaries of anti-competitive agreements that are respectively set forth in Sherman Act and Article 101 TFEU[235] (Article 101 of the TFEU prohibits agreements between two or more independent market operators that might restrict competition). Anti-competitive agreements are kinds of agreements in which competitors try to prevent, restrict or distort competition. These kinds of agreements are considered to be illegal by civil or criminal laws (or both) in different countries and regional unions. Some very serious types of such agreements are those that are concluded by cartels which, through their hidden arrangements, usually fix prices, rig competitive tendering process[236], divide up markets, or limit production. As a result, cartelists have no need

[232]. Bundesverband der Arzneimittel_ Importeure eV and Commission V.Bayer AG, Joined Cases C_2/01P and C -3/01P.

[233]. Ivo Van Bael and Jean Francois Bellis, *Competition Law of the European Community* (5th edn, Wolters Kluwer 2009) 41.

[234]. American Column & Lumber Co., v. United States, 257 U.S. 377,411.

[235]. Sandra Marco Colino and Peter D camesasca, *Cartels and Anti-Competitive Agreements* (Routledge 2017) xiii.

[236]. This means that before the start of tender process all cartel members agree on who is going to be the winner and they help that person to win for example by offering much higher prices.

or incentive to improve the quality of products and services or to lower the prices. In view of the European Competition Commission, companies can distort competition by cooperating with competitors in order to fix the prices or to divide the market so that each one can hold a monopoly in part of the market.

The reason that anti-competitive practices (including those of cartels) are usually illegal is that they often lead to higher prices for consumers in return for a lower quality[237]. As far as EU Competition Law is concerned, cartels[238] are illegal and relevant perpetrators must pay heavy fines that are imposed on them by the Competition Commission. In this respect, agreements that lead to one of the following results are probably always illegal and anti-competitive:

- Price Fixing
- Limiting production
- Sharing markets or customers
- Fixing resale prices (between a producer and its distributors)[239]

Agreements are allowed if:

- They have more positive results than negative results;
- They are not concluded among competitors;
- They involve companies with only a small combined share of the market;
- They are necessary to improve products or services, to develop new products, or to find new and better ways of making products available to consumers[240].

Providing a definition for anti-competitive agreements in view of article 101 would be an easier task to do if we could answer the following question: What is meant by restriction and distortion of competition?

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[237]. European commission, 'Anti-competitive agreements' (*Competition*, 2018) <https://ec.europa.eu/competition/consumers/agreements_en.html> accessed 21 December 2020.

[238]. Article 2(11) of the Directive2019/1: 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors; Article2(12): 'secret cartel' means a cartel, the existence of which is partially or wholly concealed.

[239]. Ibid.

[240]. Ibid.

1.2 What is considered as competition restriction?

One of the main problems in providing a definition for restriction of competition is that there is no clear definition for the competition itself and that competition is not limited to entities. Some legal systems attempt to provide illustrative examples in their legal texts to reduce the severity of vagueness in the definition of such terms. For example, inspired by the case law, article 1 of the Sherman antitrust Act states that anti-competitive agreements are agreements that restrict and limit trade. Nonetheless, it is not clear in both case law and written laws what is the definition for trade restriction and we can only find examples in this regard. In a rather similar vein, in the European Competition Law article 101 TFEU only provides examples for the anti-competitive agreements.

It seems that the duty to define what is anti-competitive and what is not is consigned to case law, which is responsible to discover what is the impact of each agreement on the market and in the end to specify which one causes distortion, restriction or prevention from the competition. In fact, despite the vagueness one finds in articles 101 and 102 of the TFEU Treaty, European jurists have not tried much to define the nature of anti-competitive agreements but they have mostly endeavored to define the examples of such agreements specified in the aforementioned articles and in domestic laws. Among these jurists some believe that in case of damage to consumer welfare, the agreement is probably detrimental for competition. On the other side, some other jurists believe that anti-competitive agreements should have a far vaster territory. They are these scholars who distinguish among restriction, distortion and prevention of competition. They believe restriction of competition involves all direct and indirect restrictions that impact the decision making of present and potential rivals in regard to their market activity. It is the same for all the restrictions that create or reinforce market entering. In other words, all the man-made restrictions on freedom of activity for entities is recognized as restriction of competition[2] . Distortion of competition is where human artificial interventions cause the change of competition conditions in the favor of one entity and to the detriment of others. In this case, there is no direct restriction imposed on the other entities[2] . Prevention of competition happens when competition is prevented from forming or omitted completely. Due to the fact that in all these cases there is a restriction on competition, it is preferable not to separate them.

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[2] . H Stephen Harris and Calvin S Goldman, *ABA Section of Antitrust Law: Competition Laws outside of United States* (3rd edn, Chicago: American Bar Association 2011) 23.

[2] . Ibid.

The kind of differentiation offered earlier does not help much to define anti-competitive practices and agreements. Moreover, referring to the term restriction as a general criterion for distinguishing anti-competitive from other agreements does not suffice either. The reason is that all kinds of contracts create commitments that limit the freedom of at least one of the parties compared to the time before their conclusion and not all these restrictions of freedom can be deemed as anti-competitive. There should be some other criteria to define an anti-competitive restriction. For example, in United States "per se rules[243] and the rule of reason[244] " are famous criteria for distinguishing between anti-competitive agreements. However, even these criteria can be interpreted vastly which have not proved to be satisfactory for some scholars. By emphasizing on the freedom of contract conclusion when its beneficial for both of the parties, some jurists state that the only way to distinguish an anti-competitive agreement is to investigate it through the context that it is committed[245] . According to them, the only anti-competitive contracts are those which entities commit to them in order to restrict the aforementioned freedom and prevent the conclusion of trades that potentially make the condition of their rivals' customers better.

If we presume that economic efficiency and consumer welfare are at their maximum during the full competition period and at their minimum during monopoly, then each agreement or generally any practice of the entities that lead to the elimination or distortion of competition can be called restriction of competition[246] . This is where anti-competitive practices transition full competition conditions to full monopoly conditions. If we want to analyze the elements of competition, they can be put into two categories: The first category includes elements that create competition or increase the competition level. For example, quantity, quality, the number of rivals the independence of rivals from each other, and the innovation they bring in their businesses are those elements that encourage competition. The second category comprises elements which eliminate or distort competition, such as centralization in the market, market power, entry barriers, and predictability of rival behavior. Each

[243] . A rule that considers a particular restraint of trade to be manifestly contrary to competition.

[244] . The rule of reason is a legal doctrine used to interpret the Sherman Antitrust Act, one of the cornerstones of United States antitrust law. While some actions like price-fixing are considered illegal per se, other actions, such as possession of a monopoly, must be analyzed under the rule of reason and are only considered illegal when their effect is to unreasonably restraining trade.

[245] . Andres Tjernlund-jemail, *The Dilemma of Article 81 (1) EC-the Notion of Restriction of Competition* (Lund University Publications 2001) 20.

[246] . Ghaffari (n 58) 282.

unilateral or bilateral (multilateral) action of the entities that decrease the first or promote the second actions are recognized as anti-competitive[247].

Moreover, we should bear in mind that:

- Firstly, the decrease of elements in the first category should not happen as a result of natural causes and should rather be the outcome of anti-competitive agreements;
- Secondly, only restrictions that are considerable and tangible are recognized as anti-competitive;
- Thirdly, if there exist restrictions but they do not impact competition elements they cannot be regarded as anti-competitive;
- Fourthly, in each case it is necessary to consider the context in which the action has been committed[248].

Investigation into the awards of US courts shows that for more than a century, the anti-competitiveness of actions is interpreted according to criteria such as the impact of restrictions on price, product quantity, allocation of resources, product quality, and consumer welfare. In the same way, the case law of European courts as well as documents and guidelines that are issued by European Commission (which are not binding but are one of the most important resources not only in the EU but also in other legal systems) provide rather similar criteria. In clause 16 of the guidelines on application of article 81(3) of the TFEU to Horizontal Co-operation agreements (now 101) and also in Clause 27 of the recent guidelines enacted on the application of 101(1) of TFEU the commission states that entities' agreements are recognized as agreements according in 101(1) only in case they have a considerable potential impact on competition elements and factors such as price, the amount, diversity, quality of the final product and the amount of innovation. Agreements that considerably decrease competition between parties to an agreement or between agreement parties and the rest of the entities can have such effect. Such agreements try to adjust at least one party's behavior in the market to the rest of market players in a way that the independence of decision making of that party (or a number of parties) is reduced. The Commission has published some guidelines on the procedure of assessing the impact of an agreement on competition factors or elements. According to clauses 17 and 18 of the above-mentioned guidelines, the assessment of an agreement should be done

[247] . Ibid.

[248] . Ibid 283.

in an economic and legal context in which competition would have formed in case of non-existence of an agreement. In fact, in view of European Commission, first we have to investigate that in case of absence of such agreements (for instance, an agreement among the distributors of one brand or among different brands), how would the competition look like? In the next step, we should explore how the potential or present implementation of contract would change and impact on competition factors. It is after going through this two-tiered process that one can ascertain whether an agreement has been anti-competitive or not.

In the law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution, the anti-competitive unilateral or multilateral (bilateral) agreements of entities are called connivance, which is referred to as one of the types of various anti-competitive conducts. In article 11 of the aforementioned law it is stated that: “any connivance in form of contract, agreement or understanding (written, electronic, oral or in practice) among persons...so that the final result is distortion of competition, is prohibited...”. Apart from the fact that the word “connivance” is somehow inspired by the Sherman Act, the main purpose of the legislator has been to separate bilateral or multilateral actions from unilateral actions which are addressed in article 45 of the same law. This article somehow collects all forms of plural agreements into one place[249].

Moreover, the definitions that were introduced at the beginning of this chapter regarding the interpretation of the word “agreement” applies to the Iranian Competition Law too and the examples set in article 44 (the first of which is Contract) are non-exclusive. This means, these examples are never meant to set aside the exchange of information or other forms of agreement from the law[250]. The Iranian law has also provided a definition of restriction and monopoly respectively in articles 1(20) and 1(12). While other countries have mentioned the same examples set in article 44 of the Iranian Competition Law as examples of anti-competitive agreements, Iranian law has set these examples as the result of anti-competitive agreements and as a consequence, they are the only cases which will be recognized as anti-competitive.

249. Ibid 294.
250. Ibid.

2.1 Types of anti-competitive agreements

According to EU antitrust policy which are developed from two essential and central rules in the Treaty on the Functioning of the European Union there are several anti-competitive agreements:

First is the article 101 of the TFEU which prohibits agreements between two or more independent market operators that restrict competition. This provision covers for both vertical (between firms operating at different levels such as agreements between a manufacturer and its distributor) and horizontal agreements (between actual or potential competitors operating at the same level of supply chain)[2] . The most obvious example for this article is the cartel between competitors which usually involves price fixing or market sharing. One of the bold and big steps of the Directive 2014 was to presume that cartels are causing distortion to competition[2] .

The second article is article 102 which prohibits firms that hold a dominant position on a given market from abusing that position for example by charging unfair prices, by limiting production or by refusing to innovate to the prejudice of the consumers[2] . Mergers seem to be illegal if breaching Competition Law, according to this article. The result of the combination of different companies is going to be one company sometimes with a dominant position in the market.

The EU Merger Regulation complements articles 101 and 102 by allowing control certain "concentrations" (Mergers, acquisitions and joint ventures) involving companies operating in Europe.

In addition to this, the EU competition rules contain special rules aimed at preventing member states from distorting competition through the grant of state aid. Furthermore, there are special rules applicable to state monopolies that seek to encourage liberalization of markets within the EU. Its common that legislators all around the world define anti-competitive behavior in three different categories: horizontal, vertical and Mergers. Although the Merger means the possession of other economic entities by one entity and it can be vertical or horizontal, its importance

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[2] . European commission, 'Anti-competitive agreements' (*Competition*, 2018) <https://ec.europa.eu/competition/consumers/agreements_en.html> accessed 21 December 2020.

[2] . Ibid.

[2] . Ibid.

and its vital position has made the scholars to categorize it as a different anti-competitive behavior from horizontal and vertical agreements[254].

The EU antitrust policy is derived from two essential articles in the Treaty on the Functioning of the European Union according to which there exist several anti-competitive agreements:

The first is the article 101 of the TFEU which prohibits agreements between two or more independent market operators that restrict competition. This provision covers both vertical (between firms operating at different levels such as agreements between a manufacturer and its distributor) and horizontal agreements (between actual or potential competitors operating at the same level of supply chain)[255]. The most obvious example in this regard is the formation of cartel between competitors which usually involves price fixing or market sharing. One of the bold and big steps of the Directive 2014 was to presume that cartels are causing distortion to competition[256].

The second article is article 102 which prohibits firms from holding a dominant position on a given market by abusing that position for example by charging unfair prices, by limiting production or by refusing to innovate to the prejudice of the consumers[257]. According to this article, if mergers breach Competition Law in this way their formation is to be deemed as illegal. The result of the combination of different companies into one company can sometimes lead to that newly formed company's dominant position in the relevant market. The EU Merger Regulation complements articles 101 and 102 by allowing to control certain "concentrations" (Mergers, acquisitions and joint ventures) involving companies that operate in Europe.

The legislators all around the world define anti-competitive behavior into three different categories: Horizontal, vertical and mergers. Merger means the possession of other economic entities by one entity which can itself take a vertical or horizontal form. The importance and vital role of mergers have made scholars categorize it as a different anti-competitive behavior from horizontal and vertical agreements[258].

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[254]. Ghaffari (n 58) 304.

[255]. European commission, 'Anti-competitive agreements' (*Competition*, 2018) <https://ec.europa.eu/competition/consumers/agreements_en.html> accessed 21 December 2020.

[256]. Ibid.

[257]. Ibid.

[258]. Ghaffari (n 58) 304.

2.1.1 Horizontal agreements

Horizontal agreements between competitors are the kind of agreements whose parties share a similar position in the supply chain of a certain product and have similar activities in the market (such as distribution). Therefore, if two economic entities that both produce printers reach an agreement, it is called a horizontal agreement. In the same way, the agreements concluded among wholesale distributors of printers are considered as horizontal. As parties share a similar position in horizontal relationships, one can expect to see the formation of true competition amongst them. Because of the same interests, they may easily reach an agreement to make more profit and that is why the possibility of connivance is higher. In practice the most severe competition restrictions and breaches occur in horizontal agreements. Fighting this kind of anti-competitive agreements has been the most important task of legislators, competition authorities, and competition policy makers[259]. We should bear in mind that proving horizontal agreements requires not only assessing the present position of the parties in the provision of a specific product, but also the potential position of them too. An agreement that has been concluded between two potential rivals is considered anti-competitive because it has the potential to prevent future competition and reinforce position of at least one of the parties. In horizontal agreements, entities shall be considered as actual competitors if at the time of conclusion of the agreement they have been active in a similar or neighboring market and in connection with a certain product. Moreover, they should be regarded as potential competitors if regardless of any agreement made, in case of permanent although low increase in a product price, it is strongly probable that one of them enters a market with investing and spending of essential costs, that the other entity has already been active in or has planned to enter[260]. In the assessment of horizontal agreements, paying attention to economic conditions and legal grounds is necessary in each case to determine whether the parties involved are competitors. If an agreement is not feasible and practical as a result of financial risks and technical capacities of the parties and all these factors lead to a belief that none of the parties can achieve the agreed goal, they shall not be considered as each other's' competitors[261].

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[259]. Ibid 305.

[260]. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011, para 10.

[261]. Guidelines on the application of Article 81(3) of the Treaty. 2004/C 101/08. OJ[2004], para 18

In the following some types of horizontal agreements will be touched on:

1. Price fixing agreements: These agreements are one of the oldest agreements that have existed as far as 18th century. In these agreements, parties set a certain price for a product and promise to keep it for a limited or unlimited period of time. It does not matter whether products have the same or different prices. Sometimes these agreements are about the increase of prices at a specific time or even compromising on the least price. There are other types of this agreement. Prohibition or limitation of discount or rebate among any of the agreement parties so that they do not set a discount more than the amount allowed in the agreement, setting the amount of markup[262], synchronization of payment methods such as urging parties to receive payments in cash or refusing short term sale on credit, and the application of same formula for calculation of the price are some examples of different types of horizontal agreements[263]. As far as the geographical scope of horizontal agreements is concerned, these agreements can be concluded at the country, region, international or even universal level[264]. It is to be mentioned that although these agreements usually form among provider entities, it is possible that buyers of a specific product agree on a certain price[265]. The occurrence of such connivance is probable in particular circumstances such as when entities engage in a public bidding. Horizontal agreements may also be concluded pursuant to the formation of a cartel. As mentioned before, cartels or coalitions are a kind of organised cooperation among rival entities to achieve anti-competitive goals in the form of undermining competition. Among other goals, the first goal of such anti-competitive structures is usually fixing the price. Even more so, it should be mentioned that in order to fix the prices, there is a need for the formation of a cartel. The reason is that if only few entities agree on a higher price amongst themselves, they will be overtaken by other major entities that have already set a lower price. Cartels usually start with a price that is much less than the price specified in a monopoly condition, but then they gradually increase it and make it close to the monopoly price.
   In order to investigate the changing supply and demand conditions and the new price, cartel members need to meet up regularly[266]. Sometimes OPEC[267] is called one of the greatest cartels whose members set the global price for oil. The reason that OPEC

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[262]. The amount between the final costs and market price.
[263]. John M Connor, *Global Price Fixing* (2nd edn, Heidelberg Springer Verlag 2008) 26.
[264]. Ibid 95ff.
[265]. Knevelbaard Dairies v. Kraft Foods, Inc., 232 F. 3d 979, 986(9th Cir. 2000).
[266]. Ibid 24.
[267]. Organization of Petroleum Exporting Countries.

is not considered anti-competitive is that it is based on a transnational Treaty among different governments and whenever price fixing or some specific privileges are granted according to a Treaty among governments, the Competition Law does not apply. Another example is the price of airplane tickets that is set through reaching a compromise with the International Air Transportation Association (IATA). Another exception regarding the exclusion of Competition Law is the field of regulated industries which is more prevalent in developing countries. These industries are under heavy governmental protection because of their natural monopoly or their highly sensitive nature for the governments. The most common example of regulated industries is the energy sector.

Naturally the economic entities are price takers and not price makers. It is expected from competition to gradually make economic entities lessen the price in order to be more competitive. However, fixing the prices by entities directly leads to the opposite result and removes the burdens that are imposed by competitive processes. In fact, entities may try to disturb the competition process by setting prices instead of allowing them to be determined according to the rules of demand and supply. Since the fixed price is always higher than the competitive lower price, the wealth starts flowing towards the economic entities to the detriment of consumers. Consumers will not be able to enjoy the welfare that could be offered by competitive prices. Under this assumption, entities stop to search for more efficient ways of production and innovation in their products. Along with all these impacts, entities eliminate the unpredictability of their rivals, which should normally exist as a constitutional factor in the formation of a market[2] . This is the reason why almost nobody doubts the anti-competitiveness of price-fixing agreements, which are called at times the Evil of Evils among anti-competitive behaviours[2] . In Chicago school, which advocates the least intervention in the market, the price-fixing agreements are one of the rare cases that have been eligible for a strict confrontation[2] . In the first article of the US Sherman Act, these agreements have been considered as trade restrictive covenants. Recognition of price-fixing agreements as illegal per se is very common in American classic case law. However, nowadays it is less common that courts consider a price-fixing agreement as illegal per se. In case of the defendant being able to justify the fact that his actions have had competitive privilege, the per

[2] . Francesco Russo, *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (Cambridge University Press 2010) 33.

[2] . C Picker Randal, 'Take Two: Stare Decisis in Antitrust the Perse Rule against Horizontal Price Fixing' [2011] 1(398) Chicago Law & Economics, Olin Working Paper 1.

[2] . Michael E Debow, 'Whats Wrong with Price-Fixing: Responding to the New Critics of Antitrust' [1988] 12(2) Regulation pp. 44-50.

se rule is replaced by the rule of reason[271]. In the European Union, price-fixing agreements have been prohibited explicitly and have been mentioned as anti-competitive in article 101 of the TFEU. We read in this article that:

"The following shall be seen as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions".

These agreements are considered as "Hardcore Restrictions" and are classified as agreements whose subject is to restrict competition.[272] One of the first price-fixing cartels in Europe was Quinine (a kind of drug) cartel in which the producers set a price for buying the materials and exchanged information on sale methods and prices[273]. In the Iranian Competition Law, the first clause of article 44 has mentioned these types of agreements, according to which any agreement that leads to setting the sale and purchase prices or setting some methods to determine them in a way that leads to disruption of competition is prohibited.

2. Production control agreements: Another type of horizontal anti-competitive agreements is the one in which rivals or parties to the agreement set their ideal amount of production and supply in co-operation with each other. The goal in the aforementioned is to limit production and as a result to achieve a certain price. It is to be mentioned that price fixing, restriction of investment, avoiding investment or technical development, market sharing, limitation of access to the purchase of production materials, limitation of annual gross income, and limitations regarding the number of personnel involved are factors that impact on production volume in economic entities. Moreover, avoiding transactions by some of the market players is another kind of restrictive production agreements because the result of such behaviour is that in a certain period of time rivals compromise on not supplying the market[274]. Production, just like the price, is an important factor in competition. The production rate shows how much competition exists in a certain market, which is a

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[271]. David J. Gerber, "Competition Law", 50 The American Journal of Comparative Law, Supplement: American Law in a time of Global Interdependence: U. S. National Reports to the 16th International Congress of Comparative Law(Autumn, 2002) 281.

[272]. European Commission, Guidelines on the Application of article 81(3) of the treaty, OJ(2004), paras21,23; European Commission, Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to Horizontal Co_operation Agreements, OJ (2011), para. 160.

[273]. Boehringer Mannheim v. Commission, Case 45/69(1970)ECR 769.

[274]. Ghaffari (n 58) 322.

factor to determine whether or not that market is healthy. In order to recognize actions taken by entities as anti-competitive, the impact of their actions on the production should be investigated. From the Competition Law perspective, it is efficient to continue production as long as production costs and the price are equal. Logically, the only natural limitation for production is the time price is lower than the production costs. Any time at which reaching the maximum financially and economically justifiable production rate does not occur while there exists enough financial and technical sources, we should start watching out for a potential anti-competitive agreement. In the United States, the above-mentioned agreements are an instance of trade restrictions in article 1 of the Sherman Act and are dealt with as per se illegal agreements[2] . The US Supreme Court has declared in one case that restriction of production is equal to restriction of competition[2] . This harsh approach to these agreements probably finds its roots in Chicago School because in this School, there has been much attention to production as a source of efficiency and that is why any restriction to production means inefficiency of the economy. In the European Union, the second clause of article 101 TFEU refers to the control or restriction of production, market, technical development or investment. In some documents published by the European Commission[2] as well as decisions issued by the European Court of justice, production control or restriction agreements are counted among agreements whose subject is to restrict competition. Competition authorities apply Competition Law in all cases of restriction of production volume, sale, existing capacity, transportation vehicles, permitted storing amount, product delivery rationing, research and development programmes, and specialisation agreements[2] . In the Iranian Competition Law, the second clause of article 44 has prohibited any co-operation among economic entities whose impact is restriction of production, purchase, sale, or services in the market in a way that disturbs competition. As it was mentioned earlier, the production restriction and control come along with general avoidance of doing transactions among the agreement parties. This matter should have been mentioned in the text of article 44 but instead it has

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[2] . Augusta News Co. V. Hudson News Co., 269 F 3d 41 Court of Appeals(1st Circuit 2001)(NCAA v. Board of Regents, 468 U.S. 86(1984); Weg, Adam, " Per Se Treatment An Unnecessary Relic of Antitrust Litigation'', 60 Hastings Law Journal(June 2009), pp. 1550-52.

[2] . Broadcast Music, Inc. V. Clumbia Broadcasting System, Inc., 441 U.S. 20(1979).

[2] . European Commission, Guidelines on the Application of Article 81(3) of the Treaty, OJ (2004), paras 21, 23; European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, OJ(2011), para. 160.

[2] . Producers agree on production of products that are very specific and different from the way others produce it. Each product has a different technically specific feature which makes it different from the other products.

been mentioned in article 45 that refraining from doing transactions is illegal. It should be noted that apparently from the perspective of the Iranian law, avoiding transactions has been regarded as the result of an agreement among entities and therefore, there has been no need to have another article prohibiting such behaviour. Apart from that, it should be noted that not every refraining from doing transactions is necessarily illegal. In article 45 only those general avoidances that lead to monopoly or direct or indirect restriction of supply are considered to be illegal or against competition[279].

3. Market Sharing Agreements: In market division or allocation agreements, rival entities determine a certain share of the market for themselves. In fact, these agreements have a production restriction impact on the market because they ration the market supply amount. In another kind of such agreements, markets are divided among agreement parties and party should avoid supplying to other markets that are allocated to relevant rivals. This means that a certain market is allocated to a certain entity and other entities are not allowed to supply products for that market. There can exist different bases for market sharing agreements:
    1) Geographical statistics (land sharing);
    2) Specialisation or specifications of production;
    3) The features and characteristics of consumers and customers.

    This kind of agreements are reached in multipolar markets through forming cartels. We should bear in mind that these agreements can be formed in an extremely unofficial way through exchanging information about not intending to sell to certain distributors or about avoiding a certain market[280]. The same prohibitions on anti-competitiveness apply to these agreements whose aim is to create monopoly and market entrance barriers. It must be underscored that there is no limitation for entities to aim for a certain market in a certain land but co-operation among entities to share markets is not approved by Competition Law. Such behaviours cause monopoly and as a result, breach consumers' rights and welfare. As was mentioned earlier, in the US law horizontal agreements (in this case market-sharing agreements) are dealt with in article 1 of the Sherman Act and are illegal per se with some exceptions. The article 101 of the TFEU has mentioned market or supply sources sharing as the third example of anti-competitive agreements. The European commission has put these agreements in a competition restrictive category repeatedly and due to this fact

[279] . Ghaffari (n 58) 327.
[280] . Ghaffari (n 58) 332.

even small entities are not excluded from prohibitions set for these agreements[2].
According to the Iranian Competition Law, all concluded horizontal agreements that share a market or markets among two or more entities (such as the examples referred to above) are subject to 6th clause of article 44 and are prohibited.

4. Bid Rigging or Collusive Tendering/Bidding
In official transactions that are concluded within the framework of tender or bidding, the form of such transaction encourages competition whose final goal is to select the best and most efficient transaction party offering the best conditions. These types of contracts are called competitive transactions. Although tenders and biddings are mostly presented by governments, they can be offered by private sector's publicly owned stock companies too. In any case, whether these transactions are offered by governments or private bodies, colluding on the offered prices denies the purpose of such contracts and will therefore undermine competition. Since the most important factor that leads to winning such contracts is the price offered, the bidding/tender parties may try to settle on a definite price. Thus, in cases where the highest price is the winner (such as in an auction), parties settle on the highest price and vice versa, in cases where the least price is the winner parties settle on the lowest price. From the perspective of economic efficiency, such collusions lead to the establishment of inefficient entities because they will keep efficient entities away from the market. These collusive agreements are considered against the article 1 of the Sherman Act and are regarded to be illegal per se[2]. In the EU law, collusion in competitive contracts has not been mentioned in article 101 of the TFEU. The reason for this might be that competition regulations of the Treaty will be implemented in case an anti-competitive behaviour impacts the trade among member states. In case an anti-competitive agreement passes the national borders and comes within the Union territory, the Union will not hesitate to deal with it because the examples offered in article 101 are not exclusive and in case there is an anti-competitive behaviour committed and not mentioned in legal text, it can still be deemed as illegal. European Court of Justice in one of its decisions has announced that in competition contracts such as tenders and auctions, the competition has the ultimate importance. If the prices offered by participants is not the result of their individual economic

[2] . European Commission, Commission Notice on Agreements of Minor Importance Which Do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimis), OJ(200)368/07, para. 11.
[2] . Addyston Pipe & Steel Co. V. United States, 175 U.S. 211 (1899).

calculations, but is determined based on the other participants' illegal knowledge of the prices the competition is limited, prevented or disturbed[283].
In the Iranian Competition Law, cases in which collusions involve price fixation, product limitation and market sharing can be subject to clause 1 of article 44. Furthermore, if collusion includes limitation of supply or sale it can be corresponded to clause 2 of article 44. Clause 6 of article 44 decides about agreements that share participation in auction and tender/bid based on price, transaction volume, the identity of the organizer, the location of performance, and the type of activity or product etc. It must be mentioned that in some cases such as the collusion of several economic entities to undermine competition in the form of a consortium article 44 has nothing to offer. We may conclude that perhaps because all these agreements impact prices in an indirect way, we can bring them under the umbrella of the first clause. It should be added that there is another single-article law on this subject entitled "The Punitive Law on Collusion in Governmental Transactions" enacted by the Parliament in 1969. This law illegalizes any governmental collusion in tender/biddings and auctions by anyone, including the governmental authorities or private persons. This law does not sufficiently address the matter as it only rules over governmental transactions and the only ground to apply this law is that there should be an action that is committed to the detriment of the government. According to this law, if collusion is discovered before the commitment of any action, there will be no punishment. The punishment imposed is the compensation of the amount gained by the crime plus 1 to 3 years of imprisonment.

5. Denying the access of others to the market: In these kinds of agreements entities agree on not letting a certain entity to enter the market by avoiding trade, by making others avoid trade with this entity, or by denying its access to the necessary requirements for competition. Some writers believe that the goal of these agreements is to punish customers, suppliers or competitors[284]. One of the examples of such agreements is when supplier entities refuse to give products to a distributor in order to force this distributor to obtain supply from a third certain supplier. The same thing happens when entities threaten a certain material supplier with sanctions in case it sells its materials to another buyer entity. The anti-competitive impact of such agreements is to force a market player out of the market or to make barriers for entering into the market. Entities' syndicates and unions create guidelines and rules that can have a serious impact on facilitation of forming cartels or these types of contracts. In both cases, the result of such behaviour is creating monopolies and

[283] . The European Sugar Cartel(1973)OJL140/17,(1973)CMLR D65, para. 42.
[284] . Van bael (n 233) 448.

centralisation in the market. As a result of monopoly, the entity possessing power can increase the prices as a result of which the welfare of consumers decreases. Of course, we should bear in mind that these agreements may not have an impact on the market supply. The reason is that in such agreements, one entity is normally deprived of supplying the market but other entities simultaneously decide to fill the created gap. However, what makes these agreements illegal is that they undermine the soul of competition since an entity will be deprived of the free market. From the perspective of Sherman Act, the illegal knowledge of recent agreements are called Group Boycott and are considered as illegal per se and prohibited. The US Supreme Court decided in 1914 that "publishing the list of the wholesalers" in a retailer's union is an anti-competitive behaviour because retailers should avoid doing business with them and condemn this act according to article 1 of the Sherman Act[2] . In this decision, the supreme court decided that a certain retailer can decide to do or not to do business with a certain wholesaler. Nevertheless, when the action is committed by a group of people co-operating to avoid business with wholesalers, it is anti-competitive. In the European Union law, although these agreements have not been mentioned under article 101 of the TFEU, but as it was previously mentioned, this article include non-exclusive examples and there are enough grounds to incorporate other agreement types in this article as anti-competitive. The cases relevant to these agreement types in the European Union is rare[2] .

According to the 7th clause of article 44 of the Iranian Competition Law, any agreement that impacts the market in a way that restrict others' access to it and leads to disturbances in competition is prohibited. Others in this article refers to anyone outside the scope of such agreement. These agreements are illegal per se in Iranian law too, because the legislator has not demanded a dominant position for the parties to it. Such interpretation should not stop the agreement parties to try justifing their behaviour as promotion of competition and consumer welfare. If it is proved that the agreements concluded has such effects, it is not regarded to be illegal anymore. For example, if some entities do not observe technical and safety essentials and other entities decide to avoid business with them, their behaviour is of course justifiable. However, if standard or highly technical entities try to avoid business with less technical ones that do not have the financial capabilities to achieve certain technicalities, then their behaviour cannot be legally justified. Moreover, in cases where an entity is foreign, the domestic entities can stop the foreign business from gaining a dominant position in the Iranian market and this will not be regarded as

[2] . Eastern States Lumber Ass'n v. United States, 234 U.S. 601(1914).

[2] . Papiers Peints de Belgique, OJ(1974 L237/3).

illegal according to 20th clause of article 1 of the Iranian Competition Law. According to this article, business activities that lead to foreigners' economic dominance is to be considered as the disruption of competition. Accordingly, if entities sanction a foreign entity to prevent its dominancy or its potential dominant position, it is not only legal but also it contributes to the proper implementation of the Iranian Competition Law. It should also be noted that the 4th clause of article 44 has also prohibited any agreement "that requires the parties to conclude a contract with a third party'' in case it leads to the disruption of competition.

6. Other Horizontal Agreements: The horizontal agreements explored were the most typical ones. It should be noted that not all the horizontal agreements are illegal per se. While so many of them are neutral and do not impact competition in any way, there are many horizontal agreement types that are beneficial to the competition. Some of these agreements are beneficial for some competition factors and detrimental to others. The last category will be deemed as anti-competitive if according to the rule of reason, they are detrimental to the competition. In each single case, they should be separately investigated and accordingly decided on.

2.1.2 Vertical agreements

In many markets, the producers and manufacturers do not supply the market directly because of economic reasons and they supply the market through wholesale or retail distributors. This action creates a variety of contracts between manufacturers and distributors that is called vertical agreements. In other words, vertical agreements are agreements whose parties are positioned at different levels of supply chain. According to these agreements, products are brought from factories to consumers which may include entities that do additional operations on the products. Moreover, no matter the goods involved are intermediate or final the whole process can be called vertical agreements. The most common example of vertical agreements is distribution agreements concluded between a manufacturer and a distributor in which a vertical restraint is imposed on any of the parties to such a contract[2] . In vertical agreements, the parties are not in an even position and those who are closer to consumers are more dependent on manufacturers. It seems the intensity of competition involved in vertical agreements is not considerable compared to horizontal agreements because these agreements are formed among entities from fundamentally uneven levels of supply chain. This may be the reason why there exist

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[2] . E Salde Margaret and Jean Francois Bellis, *The Effects of Vertical Restraints: An Evidence Based Approach* (Konkurrensverket 2008) 14ff.

doubts regarding the inclusion of such agreements into article 101 of TFEU. The fact is that because of the considerable dependence of lower levels in supply chain on manufacturers and producers, imposing different discriminative conditions in vertical contracts is facilitated. Sometimes they may be the buyer entities that impose their discriminative or anti-competitive conditions on manufacturers. Although vertical agreements are sometimes anti-competitive, they are mostly looked upon by Competition Law as less severe in terms of their disruptive effects compared to horizontal ones. This lenient approach towards vertical agreements is reflected in courts' decisions in which according to the rule of reason they have been declared not as illegal per se[2] . Just like horizontal agreements, the most common restrictions that are imposed in vertical agreements are on prices. Therefore, in specifying the most important cases of vertical agreements, we are going to start from price restriction agreements.

1-Resale Price Maintenance (RPM): In these agreements, the manufacturer entity sets or restricts the range of the price that the distributor entity should accordingly sell products. There are a few ways that the manufacturer does this:

1) Setting a specific price for a product;

2) Setting the maximum price;

3) Setting the minimum price.

Agreements that try to restrict or determine the interest, discount and other factors should be added to this vertical category too. However, the most important types are those agreements that set the minimum and maximum prices. Agreements that set the minimum price for resale may have negative or positive effects on the competition. As for negative effects, when a manufacture determines a minimum price for distributors, there will be a high potential that all retailers and wholesalers choose to set the same minimum price for the product and that is why competition in a specific brand will be undermined. The second negative impact would be the decrease of production and facilitation of the formation of cartels. As a result of all this process, the distributors would not be able to decrease the price even if they want to and the consumers pay more prices if the minimum is set and agreed on. For a long time, it was believed that the only effect the resale price maintenance agreements causes would be negative and these agreements were considered as

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[2] . Oreck Corp. V. Whirlpool Corp.,579(F. 2d 126(2nd Cir. 1978)).

illegal per se[2] . However, from a certain point onwards, the importance of competition in a specific brand was not the concern of modern competition and what mattered most was the competition among different brands[2] . Perhaps the reason for the initial approach was that there did not exist various brands and competition was limited to the inside structure of a company. The reason that the modern competition is not concerned anymore with intra-brand competition is that there are a variety of brands and manufacturers that can provide distributors with products in case one manufacturer decide to breach Competition Law by setting the minimum price for resale. In fact, competition among different brands provides protection for distributors and consumers from anti-competitive behaviour. The reason is that if the conditions and prices offered by one manufacturer is not favourable, consumers and distributors can resort to that manufacturer's competitors for better prices. Therefore, it can be argued that the reduction of consumer welfare in these agreements will be suspended. Moreover, one cannot consider the damage that this type of agreement may pose as definite. The manufacturer who sets a minimum resale price condition will try to encourage its customers with another kind of incentive such as the improved quality, better services, or innovative products and then this entity will catch up with other competitors in case the price they offer for their product is less. Bearing this in mind, as opposed to the traditional perception, agreements like this do not impede competition and will rather encourage competition among brands. If we consider such agreements as illegal per se, manufacturers will provide markets with their products directly and the final price for products will be higher because there will be no distributor trying to haggle for a less price to make cheaper products accessible for the consumers. Furthermore, retailers will be eliminated in case of direct provision of products to the market by manufacturers and that is why there will be an increase in the unemployment rate. The empirical studies show that there are few evidences of the fact that these agreements are harmful and damaging for consumers[2] . 9 1

In agreements where the maximum price is set, the sensitivity is much less than other agreements because no one can sell higher than the default maximum price. This

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[2] . Robert W Hann, *Antitrust Policy and Vertical Restraints* (1st edn, Brookings Institution Press and AEI 2006) 3.

[2] Barbara O Bruckmann, *Revisiting Dr Miles: Reinstating a Modern Rule of Reason for Vertical Minimum Resale Price Agreements* (1st edn, The Antitrust Source 2007) 4

[2] . James C Cooper, 'Vertical Antitrust Policy as a Problem of Inference' [2005] 23(7) International Journal of Industrial Organizations pp. 639-64.

seems to be to consumers favour[2] . Through setting the[9] maximum price for [2]resale, every market actor will try to decrease the production and distribution costs so that more profit is generated. On the other hand, there are negative sides to these agreements too:

1) Since there are limitations on the final price, distributors lose their motives for developing their business and promoting the services offered;

2) The inefficient distributors who cannot decrease their costs will be omitted from the market. Therefore, one might witness monopoly in the distribution sector;

3) These agreements may in practice set the least resale price instead of maximum price but the parties call it maximum. This refers to a fake agreement on maximum price but in reality the manufacturer may ask the distributors to sell the products to the maximum price that is set in the agreement and not less than that. Even if there is no covert agreement, there is a chance that all the manufacturers sell at the maximum price and competition is lost. There is more chance for the aforementioned to happen when the price set is very low.

The article 101 of the TFEU has not separated the vertical and horizontal agreements and basically does not distinguishing between the two[2] . According to the [9]first clause of this article, any agreement that sets the price is prohibited because of setting limitations for competition. However, Commission's documents and procedure and the interpretations provided by scholars have differentiated between these agreements. In this regard, Commission believes that consumers and merchants should be free to buy products at best price anywhere inside the European

Union[2] . Accordingly, any [9]agreement that limits[4]this freedom will be deemed as illegal. Because of the fact that vertical agreements impact the commercial relationship among members of the Union, these agreements had been dealt with in a more serious way compared to the US and the probable privileges offered by such agreements had been long ignored. This has been commission's approach at least up until the end of 90s. However, in the new European Commission regulation it is specified that market power of each party and the turnover involved in the

[2] . Frank H Easterbrook[9], 'Maximum Price Fixing'[2][1981] 48(4) The University of Chicago Law Review 886.

[2] . Atlantic Richfield Co. V[9].USA Petroleum Co., 495 U[3].S. 328(1990).

[2] . Campbell (n 61) 85. [9] [4]

competition inside a brand are criteria for judging each case single case[2] . This means that in contrast with the past, the Commission is not considering every vertical agreement as illegal per se and investigates every case separately to find out about the probable anti-competitive nature. By this change of approach, the European Commission transitions from a Form-Based Approach to the Effects-Based Approach[2] . According to article 8 of the 2010 Commission Regulations, in case each party's share of the market is less than 30 percent of the whole market in a vertical agreement, the assumption is that in the absence of other extreme limitations of competition, the agreement leads to promotion of production, distribution and consumer welfare. According to these criteria, the European Commission investigates resale price maintenance agreements in two different categories:

A) Resale price maintenance on maximum price: In case each party has a share less than 30 percent of the market, the agreement is exempted generally and the commission assumes that it is not anti-competitive, unless it is proved to be otherwise. However, in case each party's share is more than 30 percent of the market, the commission will not hold any presumption and postpones any decision to further do research and investigation. These agreements are neither under the rule of 1st and 3rd clause of article 101 nor under the rule of exemptions set in the 3rd clause of article 101[2] . In order to distinguish between anti-competitive and competitive vertical agreements, it is the Commission that should investigate the conditions in an agreement and assess its nature, parties' market position, the position of their rivals, market entrance obstacles, and the situation of the product and its volume in a trade[2] .

B) Resale price maintenance on the minimum price: The primary assumption in these agreements is that they are anti-competitive and as a result the negative impact of such agreements on competition and consumer welfare is assumed by the European Commission already. These agreements are under the rule of the 1st clause of article 101. Moreover, it is far from expectation that the exemptions offered by the 3rd clause of this article apply to these agreements, unless the defendant proves

[2] . European Commission, Regulation No. 330/2010 on the Application of Article 101(3) of the Treaty of the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, OJ[2010]L 102/1, paras. 6-7.

[2] . Nicolas Petiti and Henry David, 'Vertical Restraints under EU Competition Law: Conceptual Foundations and Practical Framework' [2010] <https://dx.doi.org/10.2139/ssrn.1724891> accessed 21 December 2020.

[2] . European Commission, Guidelines on Vertical Restraints, OJ[2010]C130/1.

[2] . Articles 110 and 111 of the European Commission guidelines.

that they are efficient and that all the conditions set in the 3rd clause of article 101 are met[2] .

In the article 44 of the Iranian Competition Law, just like article 101 of the TFEU, there is no difference specified between vertical and horizontal agreements. In the first clause of article 44, it has been specified that every agreement whose direct or indirect impact is to pre-set sale and purchase prices for products and services in a way that leads to disturbing the competition is prohibited. This should logically include both vertical and horizontal agreements. The fact is that by having such interpretation of the Iranian law, we will exclude a number of vertical agreements that encourage competition in a certain brand. The Iranian legislators believe that it is very improbable that the competition in a brand create disruptions in competition in case there is good competition among different brands. In this way, it can be argued that the Iranian Competition Law has already explained what is the definition for disturbing the competition. In view of the Iranian Competition Law, issues such as monopoly, economic corruption, posing harm to consumers, wealth concentration in the hands of specific people and groups, and foreigners' dominance over the Iranian market are counted as instances of Competition Law disruption. This means that just like the European Union, in cases where after investigation it is proved that a vertical agreement is disturbing the competition in the Iranian market, that agreement will be declared as illegal. However, it seems that the Iranian Competition Council still needs to draft regulations to clarify its legal approach towards vertical agreements.

2- Other vertical agreements: Here we can point to four categories:

A) Exclusive deals: That are agreements which require the distributor to buy his products from a certain entity and avoid buying them from competitors. These deals have both positive and negative effects on competition;

B) Exclusive sale agreements: In these agreements, the manufacturer or distributor sells his products to a certain distributor which is regarded to be an intense anti-competitive behaviour;

C) Land or territory sharing agreements;

D) Tying Agreements or Arrangements: In these agreements, the purchase of a product depends on the purchase of another product. Tying products is anti-competitive probably in cases where the providers of the main product possess a

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[2] . Article 223 of the guidelines.

dominant position in the market. If the manufacturer does not have a dominant position the consumers are free to refuse paying for the second product and to go to other market suppliers. These agreements are investigated in clauses 3 to 7 of article 44 of the Iranian Competition Law. These clauses specify that if an agreement requires the parties to contract with third parties or in case it imposes conditions on parties, the agreement causes disturbance in the competition.

2.1.3 Mergers

While in general the companies that combine can expand their markets and bring economic growth and benefits, some types of this incorporation can lead to anti-competitive effects. Combining the activities of different companies may allow the companies, for example, to evolve better products or to reduce production costs so that they lead to a more competitive market in which consumers access better products with a cheaper price. However, there are cases of mergers that lead to a dominant position in the market. The reason that companies are interested in formation of mergers is that in general the market in EU is very competitive and that is why this could be a good opportunity for companies to lessen the competition by merging if they are interested in anti-competitive practices. The objective of European Commission from examining mergers is to prevent harmful effects on competition process. Mergers that go beyond national borders are examined at the European level[3] . Mergers are welcome as long as they do not impede competition in the internal or European markets.

Mergers refers to an agreement in which two or more legal persons dissolve and subsequently form a new legal entity (bilateral or multilateral legal person), or at least one legal person dissolves and incorporate into others (unilateral merger or acquisition). Acquisition itself is comprised of two categories: The first one is the case the acquired legal person is completely dissolved and the second one refers to the situation in which the acquired legal person continues its existence under the supervision of the owner legal person. In the latter, all the assets or shares of the acquired entity or part of it will be possessed by the owner entity or at least the owner will possess a controlling share or a temporary management contract with the acquired entity[3] . A difference between merger and acquisition is that whereas in

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[3] . European commission, 'Procedures in merger control' (*Competition*, 2018) <https://ec.europa.eu/competition/mergers/overview_en.html> accessed 21 December 2020.

[3] . Herbert J Hovenkamp, 'Merger Policy and the 2010 Merger Guidelines' [2010] University of Iowa, College of Law 1.

merger entities are usually at the equal levels and their competitive powers are similar, acquisition typically occurs amongst entities in which one company has more competitive power than the others.[302] Moreover, it should be noted that joint ventures are different from mergers since they form a new entity in which the legal personality of former entities separately persists.

Mergers can be vertical, horizontal, or mixed. The impact of mergers on the market can be diverse based on the purpose of their establishment. The ultimate effects of mergers can be the decrease in general costs, increase in efficiency, the promotion of competitive power for small entities, and as a result the promotion of competition. In cases where such positive results are the outcome, mergers bring consumer welfare in their train. Sometimes mergers turn competitive markets into limited, multipolar, or even monopolar or exclusive markets[303]. As there can be much negative and positive aspects for mergers, a proper supervision on them has been regarded as a means for controlling them which can also be named as merger policy or control. Furthermore, it must be mentioned that in most cases that are initiated against mergers the positive and negative aspects co-exist which makes it difficult to decide about the case[304].

Whereas mixed mergers are rarely found and horizontal mergers are less a source of concern as they form only 10 percent of mergers, the main concern in the EU and US are vertical Mergers. In the US law, apart from the articles 1 and 2 of the Clayton Act, article 7 of the same Act refers to mergers as 'Acquisition by One Corporation of Stock of Another'[305]. It seems that merely the decrease in the level of competition is not enough for being anti-competitive since decrease of competition should be substantial to be considered as anti-competitive[306]. Because of the vagueness of the term 'The Substantial Lessening of Competition' in this article, the US Department of Justice has acted promptly to approve guidelines in cooperation with the Federal Trade Competition Commission which have already been revised for many times.

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[302] Anywhere in this thesis that the word Merger is used, we mean the general definition that includes all examples of it.

[303] . Ghaffari (n 58) 383.

[304] . David W Barnes, 'Non efficiency Goals in the Antitrust Law of Mergers' [1889] 30(3) William and Mary Law Review 806ff.

[305] . ʻʻ No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[306] . Ibid.

The latest revision in this regard was approved on 2010 in which the phrase decrease of competition is interpreted as: If mergers lead to creation, increase, or promotion of market power or facilitate such results (reinforcement of market power), they should not be allowed. Mergers reinforce the market power if they encourage entities to increase the prices, to decrease market supply, or to avoid innovation. In other words, according to the guideline, in case mergers increase the market power of the parties the competition decreases substantially.

It has also been stressed that if mergers amount to the creation of concentrated markets, it is supposed that they lead to the increase in market power unless it is proved otherwise. From what has been mentioned in the guidelines we can infer that the focus of merger policy in the US is on unfair concentrations in the market that help to apply power therein[307]. In the European Union law mergers are similar to the U.S. law, though with a different approach towards the efficiency of mergers. In the European Union Mergers are not less severely because of being efficient for the consumers so the overall approach in Europe is more severe and serious comparing to U.S. law[308]. In the Rome Treaty and other treaties that followed, there has been no specific and explicit reference to the subject of mergers. The idea at the time was that rules should be set for big entities to control their behaviour, not to limit their expansion or disintegrating them[309]. This approach has led to more concentration in European markets compared to the U.S. counterparts[310]. Such concentration in European markets continued up to the end of 80s that several cases were taken to the European Court of Justice and Commission and as a result the court resorted to article 101 and 102 of the TFEU to solve the cases[311]. Nonetheless, after it was proved that mergers abused their concentrated power, the Europe felt the necessity of enacting regulations on mergers control which resulted in European Council's approval of the 'Regulations on the Control of Concentrations between Undertakings'. The aforementioned regulations were replaced by new regulations entitled 'EC Merger Regulation' in 2004. The most important thing changed in the latest regulation, which creates more similarity between the U.S. and European laws on mergers, is the criterion for distinguishing the illegal from non-illegal mergers.

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[307]. Eleanor M Fox, US and EU Competition Law: A Comparison. in Edward M Graham and David Richardson (eds), Global Competition Policy (Institute for International Economics 1997) 348.

[308]. Bergman Mats, 'Merger Control in the European Union and the United States: Just the Facts' [2015] 1(1) European Competition Journal <https://doi.org/10.5235/174410511795887633> accessed 21 December 2020 2.

[309]. Fox (n 307) 348.

[310]. Ibid.

[311]. Albertina Albors Lioens, *EC Competition Law and Policy* (Willian Publishing 2002) pp. 2-3.

This distinction was once made according to the criterion of 'creation or reinforcement of dominant position'. However, currently the assessment criterion has been changed to 'Significantly Impeding Effective Competition'.

The supervision over mergers in the European Union is entrusted to the European Council. The Council has granted the authority over mergers to the 'Merger Task Force' which itself functions under the auspices of Competition Secretary-General. The decisions made by the Commission can be repealed before European Judicial Authorities[3] . It should be noted that only mergers that have community dimensions are included in 2004 Mergers regulations. According to article 1 of the regulations, in order for the Regulation to apply to a merger case, the merger should have more than 5000 Million Euros turnover universally or more than 250 Million Euros in the European Union unless each of the relevant entities in the Merger gains more than 2/3 of its turnover in just one member country. Other entities that come under the rule of this regulations are mergers whose member entities' turnover is overall more than 2/5 thousand million Euros universally and the turnover for each member entity is more that 100 million Euros in the Europe. Furthermore, another example is mergers whose overall turnover in at least three European countries is 100 million Euros and each member entity of the merger gains at least 25 million Euros in those three countries unless each of the member entities gains more than 2/3 of its turnover in Europe and only from one country. As we can witness from European Council's point of view, entities that form mergers with less than the aforementioned thresholds are supposed to be legal and their structure is not regarded to be significantly impeding effective competition. However, as it was mentioned earlier, not all mergers are considered as harmless and some mergers can be illegal according to national or domestic law of member states.

Any merger that meets the criteria of being potentially anti-competitive goes under investigation and the second phase of investigation starts. For substantiation of anti-competitiveness of mergers, the Commission resorts to the factors specified in the first clause of merger Regulation. According the to the first clause of article 2 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[3] , the following

[3] . Francisco Todorov and Anthony Valcke, 'Judicial Review of Merger Control Decisions in the European Union' [2006] 51(2) The Antitrust Bulletin pp. 339-81.

3 . Article 2 1 3

Appraisal of concentrations

factors are taken into account for assessment of anti-competitiveness: structure of the relevant market, the potential and de facto competition among European and non-European entities, the market position of merger parties and their financial and economic power, the accessible alternatives for suppliers and consumers and their access to markets and requirements, legal and general entrance obstacles and other factors. Mergers are required to notify Commission about their formation and they will not be able to perform any activity before the Commission ascertains their legality.

As was mentioned, the Commission is responsible for taking a decision on whether or not the merger is significantly impeding effective competition and the creation or reinforcement of a dominant position is a clear example of such criterion. According to Grenor V. Commission case, the dominant position in a situation is where one or more undertakings (entities) have enough economic power so as to stop or eliminate the formation of effective Competition by forming a Merger[3] . It is to be mentioned that the Commission, aiming to clarify the criteria for legality of horizontal mergers or to provide more objective examples for creation and reinforcement of dominant position in the market, has issued another guideline in 2004[3] . This guideline which is quite close to its American Counterpart, advises that after the assessment of a product and determination of market and its geographical territory, we should assess and compare the results of the merger formation with the condition in which the merger has not been formed yet. There are few indicators in this assessment that should be valued:

1) Market shares and market concentration;

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1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.
In making this appraisal, the Commission shall take into account:
(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out with the Community;
(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

[3] . Case T_102/96, Grenor V. Commission, [1999] ECR II-753, para. 200;
[3] . Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings

2) The potential anti-competitive circumstances resulting from the relevant Merger;

3) Countervailing factors regarding anti-competitive impacts. Within this indicator the most important factors are:

a) Buyers' power;
b) The probability of appearing new rivals and competitors;
c) The probability of efficiency resulting from the relevant Merger;
d) The possibility of bankrupt undertaking defence[316].

There is also a guideline published on 2008 about the assessment of non-horizontal Mergers[317].

As we mentioned earlier, in the Iranian legal system there had been no systematic Competition Law before the Law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution came into effect. Moreover, there had been no reference to mergers in the Iranian Trade Law which was enacted in 1968. In 1971, the Law on Cooperative Businesses considered mergers as a form of concentration or expansion of companies but the problem was that the formation of mergers was regulated merely formally and only for cooperative companies that intended to merge with other cooperative[318] or non-cooperative companies. As a result, Mergers were not categorized as legal, illegal, or anti-competitive. Apart from this law, the Law on the Fourth Development Plan eventually counted merger among undertakings and formally recognized it. Article six of the aforementioned law advises and allows the government to use mergers as a means to privatize governmental corporations. In article 40 of the same law it is specified that it is government's duty to attract the most developed technologies in the country through forming new mergers. However, according to this article, the government is required to set restrictions and rules to avoid the formation of monopolies or concentrations in the market. In the article 38 of the same law the government is required to draft a

[316] . Failing Firm Defense.

[317] . Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.

[318] A cooperative is a jointly owned enterprise engaging in the production or distribution of goods or the supply of services, operated by its members for their mutual benefit, typically organized by consumers or farmers. Cooperative businesses are usually more economically resilient than many other forms of enterprise, with twice the number of cooperatives surviving their first five years compared with other business models. In 1971, Cooperative Societies Act was approved by Iranian legislator, parts of which are still binding as the basis of cooperative operation.

bill for facilitation of competitive and anti-monopoly conditions and subsequently pass it to the parliament. Later on, the contents of this bill were transposed into articles 47, 48 and 49 of the Iranian Competition Law. It has been stipulated in article 47 of the Iranian Competition Law that no natural or legal person may acquire assets or company shares in a way that disturbs competition in one or several markets. Article 48 has laid down that merging undertakings or corporations is prohibited in the following cases:

1) When actions specified in article 45 are committed (Actions for instance: Hoarding and refusal to enter into transaction, Aggressive price setting, Forced sale or purchase and...)
2) When a merger leads to market concentration
3) When merger will lead to establishment of a firm or a controlling company in the market

There is an exception to these three cases of prohibition on mergers that refers to the situation where access to technological knowledge is only possible by formation of a merger. In this case, even when the second and third clauses apply the formation of mergers is legal. It should be mentioned that the scope of serious concentration in the market will be defined by competition council.

The most interesting point that draws attention is that in the Iranian Competition Law Acquisition and Mergers are distinguished from one another while in the European and American competition systems these two are inextricable. The Iranian legislator has defined merger in section 16 of article 1 of the Iranian Competition Law as: "actions according to which several corporations along with dissolution of their legal personality, form another uniform legal personality or join another"**.** There are two points in regard to this article:

1) The first point concerns the carelessness of the legislator in phrasing the text of article 1. The legislator specifies that merger formation requires dissolution of the legal personality of involved undertakings or entities, in a way that either all of them dissolve and form a new entity or some of them dissolve and join another. Based on this explanation, if the participating undertaking still exists after the possession, even if 99 percent of its assets or shares is possessed by the new undertaking, it does not form a merger. In this case merger rules do not apply and the subject matter will be decided on based on acquisition rules of article 47;

2) The second point is that the outcome of interpretation would differ if we construe the text of section 16 of article 1 in a way that the phrase "dissolution of legal personality" only applies to the first part and does not apply in a case where the undertaking or entity joins another existing undertaking. According to this interpretation, any possession of an undertaking by another (whether it leads to the dissolution of the participating undertaking or not) is called a merger and the meaning of the merger will be more general in this case. This way we can say that as long as the possession of an undertaking or its shares does not lead to its dissolution or loss of legal independence, it is under the scope of article 47 (acquisition), otherwise it will be called a merger and will be assessed under its relevant rules.

The first indication that justifies the second approach is that in article 47 it is specified that a natural person is able to acquire undertakings or their assets while it would be meaningless in section 16 of article 1 of the Iranian Competition Law to say that it is possible to merge natural persons with legal persons. The second indicator to justify such approach is that in article 40 of the Law on the Fourth Development Plan, acquisitions are called as unilateral mergers and are under the same legal regime as mergers. According to this law, the formation of mergers by commercial undertakings, whether in the form of unilateral mergers (acquisition) or dissolution of all undertakings and formation of another, is legal as long as it does not lead to monopoly and concentration in the market. The third indicator to justify the second approach to section 16 of article 1 is that in article 48(4) of the Iranian Competition Law, the phrase "controlling entity or undertaking" has been used and article 1 of the same law has defined this term as: "an entity, undertaking or corporation that controls other entities' economic activities in a market by acquisition (possession) of all or part of their assets, shares or management". The fourth indicator is that in the draft of the Competition Facilitating Regulations which was suggested by the government to the parliament, mergers was split into the three categories of unilateral, bilateral, and multilateral and the same law apply over all these types. In order to justify this approach, we still need to point out that that the purpose of legislator by picking the word acquisition in article 47 has been the general term and not the term used widely in Competition Law.

If we want to decide based on facts, we should argue that the term "dissolution of their legal personality" in article 16 only refers to the phrase "form another uniform legal personality" and not to "join another". This means only in the first phrase the dissolution of legal personality is required by law. This indicates that in view of the

Iranian law, the necessary condition for formation of a merger is dissolution of legal personalities that subsequently come together in the form of a new undertaking. According to the Iranian Competition Law, merger is different from acquisition and the rules governing them are different. Nonetheless, it must be mentioned that the goal of Competition Law is not to differentiate between mergers and acquisitions. The fact is that what Competition Law concerns most is the creation of concentration which can be the result of both mergers and acquisitions and that is why the approach of Iranian law to differentiate between mergers and acquisitions is doomed to failure. Another point is that if we apply the interpretation of article 1 to acquisitions that was explained earlier, agreements that increase concentration but do not involve the possession of another undertaking or dissolution of their legal personality will be out of the scope of articles 47 and 48. An example of these are contracts which are concluded to transfer management or voting power to another undertaking.

Acquisition in article 47 means general possession and follows the general principles of the Competition Law. Therefore, we can apply the criterion set in article 44[3] of the Iranian Competition Law which is disturbing or obstruction of the competition to distinguishing whether actions committed in article 47 are anti-competitive or not. As a result of such approach we can argue that only articles 48 and 49[3] govern mergers and acquisitions. This argument may be criticized because of ignoring article 47. However, the fact is that we set a complementary role for article 47 in this

[3] . Article 44 of the act reads as follows: Any collusion among persons through (written, electronic, verbal or practical) contracts, agreements or accords resulting in one or multiple effects mentioned below that will obstruct competition is prohibited:

- specifying prices for the purchase or sale of goods or services and the process of determining these prices in the market either directly or indirectly;
- restricting or controlling the amount of production, purchase, or sale of goods or services in the market;
- imposing discriminatory conditions in identical transactions with different trading partners;
- having the trading party conclude a contract with a third party or dictating contract terms to them;
- conditioning the conclusion of the contract on an acceptance of supplementary commitments by other parties that, based on trade norms, have nothing to do with the contract;
- dividing or giving shares in the market for goods or services between two or more persons;
- restricting market access of those not signatory to the contract, agreement, or accord.

[3] . Article 49: Firms and companies can ask the competition council whether their actions are subject to article 47 and 48. The competition council will have the responsibility to investigate the cases within a maximum of one month from receipt of due requests and inform the applicant of the result in a written way or by sending a reliable message. If the inquiry related actions that are announced, are not subject to articles 47 and 48 and if no response is received from the competition council within the specified time, the actions will be deemed proper.

approach to accomplish the aims of article 44. According to article 44, committed actions should necessarily accompany one of the impacts specified in the remainder of the article and if they do not result in the specified results despite obstructing or disturbing competition, they are not prohibited. The role of article 47[3] here is that it does not expect and depend on a certain result from the specified actions and obstruction or disturbance of competition is enough for prohibiting those actions.

Similar to many other countries, the principle in article 48 is that the formation of mergers does not have any legal limit unless it contradicts the legal thresholds set for it. The reason for such worldwide policies towards mergers is that there is a propensity to help small businesses to flourish and turn into bigger more competitive businesses.

3.1 Types of contractual Civil Remedies in anti-competitive agreements

So far, we know that Competition Law has prohibited some of undertakings' bilateral or multilateral interactions such as anti-competitive agreements, concerted practices, mergers and/or acquisitions because of their potential side effects. In this section, we will investigate how these prohibited practices should be dealt with in case they are committed. We will explore what civil remedies parties to any anti-competitive contract should expect to encounter in case they do not observe Competition Law. Subsequently, we will explore the consequences of the breach of Competition Law for undertakings. As will be explained below, the first civil and possibly harshest remedy that follows the prohibition of an action (such as the formation of an anti-competitive contract) according to the law is its invalidity.

[3] . Article 47: No legal or real entity will be authorized to own capital or share of other companies or firms in a way that would hinder competition in one and/or more markets. However, there are some exceptions:

- Ownership of shares or capitals by a broker or the like that is engaged in the purchase and sale of notary bonds. This will be in effect as long as s/he has not used the voting rights of their shares to hamper competition;
- Enjoying or securing mortgage rights of shares and capital of companies and firms active in a market for a good or service on condition that possession will not lead to owing voting rights in companies or firms;
- If shares or capital is owned under emergency situations, on condition that the Competition Council is informed of the issue within one month from the ownership and the ownership will not be maintained longer than the time limit set by the Council.

3.1.1 Civil Remedies that make the contract null and void

As we have mentioned earlier, when we speak about the prohibition of an agreement that is anti-competitive, the nullity of the contract or the agreement will be the best option. The reason for using such civil remedy is that Competition Law belongs to the realm of public law[3] . This is because an anti-competitive behavior is to the detriment of citizens as they are the ultimate consumers. Therefore, a private claimant should not be the only eligible individual for claiming damages but the public authorities should also be able to start legal action against anti-competitive practices of undertakings on behalf of the society[3] . In industrial societies, one of the ways to make a contract invalid or null and void is to claim and prove that they are anti-competitive[3] . The reason that a claim for nullity is the preferred civil remedy is that it invalidates the contract as of the time of its conclusion. In fact, the effect of the invalidity of a contract is to revert to the former situation before the formation of the agreement. It also preempts the anti-competitive action from developing in future. By recognizing the remedy of nullity, the goal of Competition Law is to retrieve the former conditions so that the welfare of consumers would not deteriorate.

In the US law there is no explicit reference made to nullity as the civil remedy to illegal contracts. In this legal system, anti-competitive contracts are declared as illegal by the first article of Sherman Act and the judicial procedure has been considering them as void and null. It does not make a difference that these contracts are illegal per se or they are considered as illegal as a result of the rule of reason. The nullity of contracts finds its roots in an ancient common law rule which had been developed years before the enactment of Sherman Act. According to this ancient rule, every contract that restricts trade is null and void[3] . Common law judges state that the reason for this nullity is violation of public order[3] . Nonetheless, in the past decades there has been some changes to this rule. The first change was that the term general was added to the phrase restriction of trade. Therefore, only restrictions of trade that were general led to the nullity of the

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[3] . Ghaffari (n 58) 424.

[3] . In the Iranian law, article 62 specifies that only Competition Council has the authority to start legal actions based on public and private persons report.

[3] . Lewis Evans and Neil Quigley, 'The Interaction between Contract and Competition Law' (20th Pacific Trade and Development Conference: Competition, New Millenium 2004) 4.

[3] . Chris Turner, *Contract Law* (2nd edn, Hodder Education 2007) 167; Mindy Chen- Wishart, Contract Law(Oxford:3th Ed., Oxford University Press, 2010) 20.

[3] . Dyer's Case(1414) Y.B.2Hen. V, Pasch. Pl. 26.

contract[327]. According to this, only when minor restrictions were proved to be anti-competitive, they could lead to nullity of a contract[328]. However, this did not stay the same and common law courts changed the general restrictions to reasonableness[329]. According to the new criterion, which has already been used to interpret the first article of the Sherman Act, only contracts that restrict trade in an unreasonable way are declared as void[330]. Although claimants in most private claims demand damages, the contractual civil remedies abound in Common Law history so that it is possible to say that Common Law courts have never ceased to believe in nullity of a contract breaching Competition Law or restricting trade[331].[332] The result of such approach is that if any contract or agreement breaches Competition Law, the result is the nullity of that contract or agreement. As it is recurrently stated by the case law, the interpretation of the word illegal in the first article of the Sherman Act is Null and Void.[333][334]

3.1.1.1 The European Union

Unlike Sherman Act, in article 101 of the TFEU, the civil remedies for conclusion of anti-competitive contracts have been explicitly specified. According to the second clause of article 101, any decision or agreement which is subject to the first clause of the article is Automatically Void**.** This civil remedy has opened its way into the laws of member states too[335]. The scholars and European Union tribunals interpret the word automatically in the following way: Any beneficiary or party to an anti-competitive contract is able to request the announcement of its nullity before a competent court. The European Commission and European Court of Justice too can automatically declare an agreement null and void if they ascertain that it is subject to the first clause of article 101. Pursuant to this declaration and similar to the US law, the agreement is null and void as of its conclusion or in other words, the effect of such declaration is retrospective. This declaration of nullity is regardless of the anti-competitive nature of subjects or effects of such contracts. Although this

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[327]. Mitchal V. Reynolds, 1 P. Wms.181,24 Eng. Rep. 347(Q. B. 1711).
[328]. Ibid.
[329]. Nordenfelt V. Maxim Nordenfelt Guns and Ammunition Ao., [1894] A. C.535.
[330]. Theodore C Bartholomae, 'The Common Law on Restraint of Trade' [1923] (4) The University Journal of Business 456.
[331]. Sir Guenter H Treitel, *The Law of Contract* (11th edn, Sweet & Max well Limited 2003) pp. 124-25.
[332]. Stanton V. Allen, 5 Denio 434(Sup. Ct. N.Y. 1848).
[333]. United States V. Trans_Missouri Freight Ass'n et al., Kansas CircuitCourt (28 November 1892).
[334]. India Bagging Association V. Kock, 14 La. Ann.168(1859).
[335]. P Kmninos Assimakis, *EC Private Antitrust Enforcement; Decentralized Application of EC Competition Law by National Courts* (Hart Publishing 2008) 149.

voidness is explicitly predicted in the European Union Law, there are still some implications in this respect that we will present below:

1) Contrary to article 101, article 102 that stipulates the prohibition of abuse in case of dominant position in the market has not decided on what will be the legal consequences of any agreement that results from such abuse. Claiming that these agreements, which sometimes lead to criminal penalties, are to be valid, and that the damaged parties may claim damages or restitution from the abusing entity, is completely wrong. This is because such agreements lead to some form of contradiction: Whereas article 101 explicitly prohibits such agreements, giving credit to those agreements and executing them under the scope of article 102 undermines the efficiency of this article. Many scholars have announced that the nullity specified in article 101 should be generalized to article 102. The European Court of Justice has implicitly valued such approach too[336]. Similar to many other countries, France has explicitly adopted this approach, for example in article L. 420-3 of the French Commerce law[337] [338].
2) What happens if there is an anti-competitive clause within a contract? What shall be the legal consequences according to the European Union Law? Shall we annul the whole contract and declare it void? Or shall we omit the anti-competitive clause and execute the rest of the agreement? According to guidelines published by the EU Commission, in case of severability, we should practice severance and annul the anti-competitive part and execute the rest of the contract[339]. For instance, if during a sale contract between a producer and a distributor a specific amount of product is sold in return for a price and it is stated in the contract that the buyer shall sell the products later not for less than a specific price to any potential third party, the Commission would only annul the anti-competitive clause and declare the rest as executable in case the contract is proved to be anti-competitive. Setting Commission Guidelines aside, there is no answer in the text of TFEU regarding the question whether the contract should be declared as fully or partially void. There is also no answer to the question what happens to the

[336] . Alessandro Di Gio, 'Contract and Restitution Law and the Private Enforcement of EC Competition Law' [2009] 32(2) World Competition 213.
[337] . Code de Commerce.
[338] . Di Gio (n 336) 213.
[339] . The Commission Notice, Guidelines on the Application of Article 81(3) of the Treaty, OJ[2004] C 101/08 para 41.

beneficiary or beneficiaries of anti-competitive contracts or clauses. EU member states have their own legal text and strategies to deal with severance and voidness of the anti-competitive clauses. Almost all these member countries approach this matter with severance strategy and only annul the parts that are anti-competitive and severable, for example in cases where the anti-competitive part is a clause or annexed to the contract later[340].

3) The other problem is the absence of any text or law in the European Union about the contracts that are concluded based on other anti-competitive contracts with third parties or the same parties in the first contract. In this regard, the question is whether the voidness of the base contract annuls the dependent contracts or not? Most member states do not let the base contract impact upon the dependent contract that has been concluded with third parties[341]. It is argued that the prohibition should only be limited to the main contract such as a Cartel[342]. We can see in some ECJ decisions that the declaration of voidness in a subsequent contract, except in case the contract is directly subject to article 101, has not been contingent upon the voidness of the main contract[343]. Nevertheless, some European Union Members such as Austria, Hungary and Poland have adopted a completely different approach and considered the second contract as null and void[344]. Moreover, regarding the situation in which parties (for example in a cartel) conclude contracts to facilitate the execution of the base agreement, they will be mostly declared void because of their closeness to and dependence on the base contract and their same anti-competitive nature[345].

Apart from what was stated above, there are some exceptions in which despite the fact that the agreement is anti-competitive, it is exempted from the prohibitions. These three exclude the application of the second clause of this article despite the anti-competitive nature of the agreement. The third clause states that:

“The provisions of paragraph 1 may, however, be declared inapplicable in case of:

[340] . Libertini&Maugeri, op. Cit., p. 256.
[341] . Countries such as England, France, Germany, Netherlands, Spain, Portugal, Greece, Denmark, Finland and Sweden. In this regard, see: Thomas M J Mollers and Andreas Heinemann, *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007) 595.
[342] . Ibid.
[343] . Stergios Delimitis, Case C-234/98[1991] ECR I_935.
[344] . Mollers (n 341) 595.
[345] . Di Gio (n 336) 212.

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

I believe think what creates a balance between the positive and negative effects of agreements is this very paragraph of article 101 of TFEU. It opens the way for some analysis and creates an environment in which the reasonableness principle, which functions best in the U.S. Law, can play a productive role in the European law. This paragraph eases the harsh gesture the law adopts in the second clause/paragraph. According to this paragraph, only agreements whose subject is anti-competitive or have more negative impacts than positive ones, are annulled. The fact is that as soon as an agreement is regarded to be infringing paragraph 1, it is presumed that it is prohibited and void according to paragraph 2. Notwithstanding this default rule, a claimant is eligible to substantiate the exemption of agreement from prohibitions with pertinent proofs. On the other side, it will be Commission authorities' duty to prove that the agreement is anti-competitive.

In general, there are two ways to prove exemptions of the third clause. The first way is relevant to the situation where an agreement is recognized as anti-competitive according to the first paragraph in article 101 of the TFEU. As we mentioned above, here the relevant person attempts to prove the existence of exemptions. The second way is in regard to general exemptions that are already declared as possessing the conditions of exemptions. As these exemptions are common, the Commission has specified certain agreement types among undertakings that are presumed to meet the conditions of exemption according to the third paragraph of article 101[3] . Among these general exemptions are research and development agreements[3] , specialization agreement[3] , Vertical

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[3] . European Commission, Guidelines on the Application of Article81(3) of the Treaty, OJ[2004] C101/8 para. 35.

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Agreements and Concerted Practices in the Motor Vehicle Sector[3] . This agreement is the same in other vertical agreements on the condition that:

- First: The parties to it should not be competitors (unless one is manufacturer and the other is distributor);
- Second: Each party's share of the relevant market should not be more than 30%;
- Third: The agreement does not include specific restrictions such as the restriction of sale in certain territories or price determination for the buyer.

The same conditions apply to the supplier and assemblers of parts because the supplier can possibly restrict the assembler and as a result there will be restriction in supplying final products to consumers.

Some vertical agreements that include certain commitments are not to be exempted, such as non-compete clauses between parties for an unlimited time or for more than 5 years. We should bear in mind that although certain anti-competitive agreements are exempted, in some cases the Commission and sometimes domestic authorities have ceased to apply exemptions with the possibility that the parties prove otherwise[3] . In this regard, the Commission and domestic competition authorities can grant temporary or limited exemption on the condition that the exemption applicant reforms some parts of the agreement that is suspicious.

3.1.1.2 The stance of Iranian Law on voidness of anti-competitive agreements

Even before the enactment of present Iranian Competition Law there had been many grounds for declaration of voidness of an anti-competitive agreement by courts. The basis for such decisions could be public order[3] , infringement of public morals[3] ,

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[3] European Commission, Regulation 1400/2002/EU of 30 July 2002on the Application of Article 81(3) of the Treaty to Catogories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, OJ [2002] L 203/30.

[3] . Council Regulation(EC), No. 1/2003 of the 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1, Art. 29.

[3] . Articles 10,975, 960 and 1295 of the Iranian Civil Law; Article 6 of the Iranian Civil Procedure Law; Article 44 of the Iranian Constitution Law.

[3] . Articles 975, 960 and 1295 of the Iranian Civil Law.

abuse of rights[3] , No Harm Rule[3] ; illegality of the subject of agreement[3 4], or illegality of the purpose of the agreement[3] . Although all these grounds could be used to declare an anti-competitive agreement void in civil and constitution law, the newly enacted Competition Law in Iran did not envisage a Voidness declaration specifically for anti-competitive agreements. Unfortunately, the Iranian Competition Law has failed to pose Voidness as a result of anti-competitive behaviour. The only option that ends an anti-competitive agreement is the termination right predicted. The other grounds that were mentioned above, are the grounds available in Iranian Civil or Constitutional law.

3.1.2 Civil Remedies that create termination rights

A certain category of unilateral or bilateral actions committed by entities and/or undertakings are recognized as anti-competitive on the condition that they disturb competition. It is explicitly stated in the text of Article 44 of the Iranian Competition Law that these actions are prohibited. Some scholars are of the opinion that because of the word prohibited these actions are null and void[3] . However, the fact is that in article 62 it has been stated that the only authority responsible for decision making about anti-competitive practices is Competition Council and the Council should choose from the range of possible decisions types specified in article 61. One of the possible decisions that Council can adopt is termination of the action. Thus, there is no voidness in the Iranian Competition Law. The only option available is termination which may be implemented by the Iranian Competition Council. The following points can be interpreted from article 61(1):

1) As we know, according to the general contract law, termination of a contract is a unilateral right which can be implemented only when a valid contract is formed[3] . In other words, the creation of termination right is dependent on the validity of a contract in the first place. Therefore, providing termination

[3] . Prohibited according to Article 40 of the Iranian Constitution Law.

[3] . There is no Loss and no imposition of Loss on Others in Islam which means you can apply your rights as long as you do not impose loss on other persons. This Rule is Used as a tool for restriction of application of one's rights. For example you can set your house on fire because its yours but as long as the fire does not damage your neighbour. If in any way you impose damage on your neighbors, then you are to be stopped by this rule which is quite common in Iranian Court Decisions .

[3] . Article 215 of the Iranian Civil Law.

[3] . Articles 190 and 217 of the Iranian Civil Law.

[3] . Ghaffari, op. Cit., 446.

[3] . Nasser Katouzian, *The General Rules of Contracts* (3rd edn, Entesharat Stock Company 2001) 2-3

rights for anti-competitive agreements is entirely illogical because prohibition of anti-competitive contracts in article 44 should typically lead to voidness while the termination right specified in article 61(1) would mean that the contract is legal and valid in the first place and then the termination right comes into existence as a result of this validity. The right approach is that we should not judge the article 44 by the word "prohibition" because the truth is that the Anti-Competitive Agreements are not "Void";

2) Termination rights renders the contract ineffective from the moment it is exercised. A question that can be asked in this respect is that how should the already created impacts of anti-competitive contracts be dealt with? As we already pointed out, the impacts of anti-competitive practices and agreements pose harm to consumers and the duty of Competition Law is to annul or cease the operation of harmful contracts as much as possible to protect consumers and the competitive environment. However, it appears that the Iranian legislator has ignored this duty and has attempted to enact a futile decision in regard with these agreements. Based on such decisions, the competitors can conclude anti-competitive agreements and since they can be sure that those agreements are not going to be void, they may abuse them until the competition authorities notice the anti-competitive agreement. Then before the Competition authorities declare this agreement terminated, competitors can make another agreement and until the authorities notice the second agreement again, they can benefit from its anti-competitiveness. This vicious circle can recurrently occur.
3) It is stated in article 61(1) that the Competition Council issues order of termination. However, in the Iranian contract law the termination right should be applied by the parties to the contract. The question that arises in this respect is what happens if the Council orders the parties to terminate the agreement but they refuse to do so? There are no legal sanctions predicted by the Iranian Competition Law for such situation. The right argument seems to be that it is the Council (not the parties) that declares the termination of the anti-competitive agreement and from that point onwards the contract becomes ineffective;
4) The Council is not obliged to issue the order of termination and it can do this based on its own discretion. The positive side of this freedom is that the Council can negotiate about the anti-competitive parts of the agreement and avoid terminating it in case the anti-competitive parts are severable or edited. However, the fact is that the criteria for such exemptions from termination

order are not defined in the law and only in article 58(1) it is stated that granting exemptions is within the authority of the Council. There are some other exemptions granted in articles 44 (syndicates exemption), 47 (legal acquisitions exemption), 48(1) (legal mergers exemption) and article 50 (retailers exemption). The fact is that the legislator has committed a serious wrong by not envisaging a voidness decision for anti-competitive cases in the law. It is to be mentioned that the voidness decision had been included in the Competition Law draft but was deleted later and not enacted;

5) There is an extremely negative consequence for termination of anti-competitive agreements in the Iranian Competition Law. As we already mentioned, the only authority responsible for recognition and investigation of anti-competitive practices is the Iranian Competition Council. However, the parties to an anti-competitive contract might go to the court and enforce its implementation before the Council recognizes its anti-competitiveness. In some cases the court may be able to issue an order according to which it waits until the Council takes a decision regarding the anti-competitiveness of the contract that had been previously brought before the court. The truth is that if nobody notifies the Competition Council about the perpetration of anti-competitive behaviour, the anti-competitive agreements would be implemented without any obstacles in their way and even if the Council notices anti-competitive agreements, the termination right predicted in law, doesnot render the agreement null and void and the Council may or may not at it's own discretion, issue a termination order which is quite vague when we want to execute. The vagueness lies in the fact that only parties to an agreement may have a right to termination and how the Competition Council wants to make them terminate the agreement? ;
6) The fact is that there has never been something like this (having termination right to a contract without being a party to it) in Iranian law except for the termination right that is applied by Iranian courts in case of a bankrupt merchant contracts[3] ; 5 9
7) In the European and American approaches, if the anti-competitive parts of a contract are severable, there is no need to annul the whole contract. However, in the Iranian law there is no clear approach to this legal problem and in the

[3] . According to article 424 of the Iranian Commercial Code, in case that a bankrupt merchant transfers any property/asset with the intention of avoiding h his debt payment, the Court can apply a termination to the contract only on the condition that a damage more than a quarter of the price of the property/asset at the time of contract, is imposed on the creditors.

first instance it seems from the law that the termination right exercised by the Council should be applied to all the contract. However, as was mentioned earlier, the Iranian Competition Council is not a general judicial authority and has limited powers. Council is an exclusive non-judicial entity and according to the law it can only take specified decisions about the anti-competitive practices. Therefore, a more correct interpretation of the law could be if a contract was fully anti-competitive the Council could terminate the whole contract, but if it was only partly anti-competitive the Council would not be allowed to terminate the other parts which are not anti-competitive. This approach seems to be consistent with the limited powers of the Council and general trends in Competition Law;

8) The last point is that the legislator has been specifying two contradictory approaches regarding the anti-competitive mergers. In article 61(1) it is mentioned that the Council shall terminate anti-competitive mergers but in 61(7) it is said that the Council shall declare such mergers "null and void". What seems to be the correct interpretation to solve this contradiction is that the Council should pick the option at its own discretion.

3.1.3 Other Civil Remedies

There are other contractual remedies for anti-competitive agreements:

1) Suspension: There are certain mergers in the European and U.S. laws whose activities are suspended until further consideration and decision making about their anti-competitiveness. Unlike these two legal systems, the Iranian Competition Law has introduced post-suspension in this regard, meaning that suspension may only happen after the confirmation of anti-competitiveness of the relative merger by the Council. In article 61(7) it is stated that once the anti-competitiveness is proved, the suspension order applies. Nonetheless, there exists no further explanation about whether this suspension is temporary or permanent? The most important point is that if parties refuse to suspend the merger, it appears that there is no guarantee to implement council's decision;
2) Disintegration: It is stated in article 61(7) that disintegration is one of the consequences of anti-competitive agreements. This remedy divides the merger into smaller entities. Disintegration is a structural remedy as it reforms the entity structure and as a result the market structure is reformed too. Disintegration is not retrospective, i.e. it does not erase the effects of agreement up to the present time. The difference between disintegration and

voidness is that disintegration does not have a retrospective effect but the voidness eliminates the effects of agreement from the time anti-competitive agreement was concluded. Moreover, the difference between disintegration and suspension is that disintegration cancels the merger agreement from the moment of its implementation and there is no further hope for its revival as it is the case in suspension;

3) Cessation Order: According to article 61(2), unlike disintegration, cessation order is a behavioural remedy that reforms entity's unfair behaviour in the market in the form of preventing it from implementing the anti-competitive agreement or concerted practices. Cessation orders are divided into formal and substantive. The formal cessation orders are issued before the court formally decides upon the case and their nature is temporary. According to article 279 of TFEU, the European Court of Justice may issue a temporary order according to which the defendant will be prohibited or required to do a certain action. The same order may be issued by the Commission according to article 8 of the 1/2003 Commission Regulations. In article 5 of the aforementioned Regulations the same authority is given to domestic competition authorities. Cessation order in the Iranian Competition Law is substantive and is issued when the Council confirms anti-competitiveness of a certain action. Although it is possible to see cessation orders in all countries and heft criminal remedies for refusal of their implementation, there is no legal guarantee predicted in the Iranian Competition Law in case parties refuse to implement them;
4) Modification: In many legal systems there is no authority given to competition authorities to reform an anti-competitive agreement. The fact is that it is possibly only the Iranian Competition Law that has given an official right to competition authorities to exert modifications in an anti-competitive agreement. In many countries there is a right to termination or annulment of agreements which can be used as a tool to compel parties to reform their agreements. Article 61(10) of the Iranian Competition Law states that the Competition Council can issue orders to reform corporate regulations, decisions issued by board of directors or general assemblies.

4.1 Types of non-contractual Civil Remedies in anti-competitive agreements

Non-contractual violation of competition rules is comprised of various types, of which tort law is the most important one. The reason for predicting non-contractual civil remedies in Competition Law is that apart from the parties to an agreement, there may be other individuals such as consumers and downstream entities who may

bear loss as a result of that agreement. As we mentioned before, there are unilateral actions that can be anti-competitive and the Competition Law is not limited to agreements. That is why non-contractual remedies are used to redress unilateral anti-competitive actions.

4.2 Civil Liability (Tort Law) due to violations of Competition Law

In US law 90% of all legal actions are started by private persons who claim for financial damages. These private individuals help the relevant authorities to find out the violations and the authorities do not spend much time, human resources and huge costs for discovering violations. Moreover, the European Union is attempting to reinforce private persons' legal actions so that a better Competition Law system is developed. Legal actions to claim damages follow the rules of tort law rules but anywhere that is deemed necessary, tort law will be abandoned and not implemented anymore. This condition is witnessed in the U.S. law where the first goal of torts in the field of Competition Law is to provide deterrence. In Iran legal actions for torts are within the jurisdiction of general courts. There are three conditions for tort law cases that should be proved in the court:

a) Loss;
b) Wrongdoing
c) Causal relationship between loss and wrongdoing

The most important ordeal for proving tortious liability is calculation and assessment of damage and recognition of victims. Proving the loss and its calculation is not same in all anti-competitive actions. For example, it is not possible to calculate the losses in price fixing agreements in the same way they are calculated in invasive pricing. The identities of victims in such cases is different too. As the exact assessment of damages is not possible, in most cases an estimation of the loss will be provided. There are many models and economic theories that provide us with criteria for assessment of damages and losses. The complication of these models and theories is serious enough to claim that it is a field which should only be practiced by specialists and technical experts.

The Pass-on defense is not accepted in the U.S. courts. It means if a distributor buys products from a manufacturer at very high prices because of an anti-competitive practice, the manufacturer may defend that the distributor has already gained profit by adding to the price of the end product and then selling it to the consumers. The European Union has not accepted this defense too because the European Union cares

more about practicing tort law. In Iran we deal with the same approach but the fact is that facilitation of civil actions has a long way to go.

The commission of anti-competitive behaviors is considered as negligence and wrongdoing because of violating Competition Law. Therefore, by proving that an action is anti-competitive, a claimant already proves its wrongfulness. In the Iranian law this is the case in unilateral anti-competitive behaviors (article 45). However, in case of anti-competitive agreements it is doubted whether they can be analyzed from the perspective of tort law. This is because anti-competitive agreements have been prohibited in article 44 and as was mentioned before, article 61(1) states that these agreements may be subject to termination order. Therefore, the Iranian law takes the position that anti-competitive agreements are valid but they may be subsequently terminated. Now one may pose the question how is it possible to recognize tortious liability in a valid anti-competitive agreement as such? As we previously mentioned, the position of article 61(1) on providing termination rights seems to be completely wrong and it should be omitted from the Iranian Competition Law and voidness should alternatively take its place. If termination right is substituted with a provision on voidness of anti-competitive agreements it seems to be possible to assess the repercussions of those agreements from the perspective of tortious liability.

We mentioned that in the U.S. law the defense of transfer is not allowed. This rule is against the principle of compensation according to which all damages and losses should be fully compensated. However, the purpose of this defense is to avoid damage compensation for more than one time. Therefore, the affected consumers and indirect buyers can be deprived of the legal capacity to commence proceedings before the court. In some countries the defense of transfer is permissible but there are several problems associated to it. For instance, the damage imposed on each single consumer is not enough to start a legal action and usually there is a tendency to avoid initiating legal actions since the amount obtained as compensation is very small. The intermediary distributors cannot start legal actions too because their case would lose by defense of transfer. As a result, entities that violate competitive rules gain more and more profit out of their actions because it is not efficient for consumers to start legal actions. That is why some legal solutions have been proposed to increase the legal consequences of committing anti-competitive behaviors. One of those solutions is collective litigation in which all consumers form a group of litigants. This approach is far more efficient for litigants as the amount of damages obtained can be far more than the actions that could be individually initiated.

In the Iranian law there has not been many solutions offered by law to increase the legal consequences and chances of being sued for damages based on tortious liability. One of those solutions has been provided in article 66 of the Iranian Criminal Procedure Law according to which it has been accepted that NGOs can start legal actions on behalf of affected individuals. Moreover, it seems that starting a legal action on behalf of affected individuals is legal in article 48 of the Iranian Commercial law and it is possible to generalize this representative litigation to civil cases.

As for the amount of damages, the U.S. law states that in case of proving the tortious liability, the violator shall pay three times more than the real amount of imposed damages. This approach has not been accepted in most countries and is against the principles of tort law. A privilege that is granted to tort law cases is that the legal fees (including lawyers' fees) has to be covered by violators.

Apart from that, usually there are some specific time lapses within which claimants have to commence legal actions and after that the doors are closed for any further tortious claim. In Iran the time lapse is up to a year after the final decision of anti-competitiveness by the council or the board of appeal.

4.2.1 History and position of Tort Law in case of Competition Law infringement

In the U.S. law, the compensation of loss in anti-competitive agreements has never been doubted. It has been stated in the first Competition Law (Sherman Act) that all damages resulted from anti-competitive behaviors should be fully compensated. In article 7 of the Sherman Act (replaced by article 4 of Clayton Act), private persons' right to claim for damages has already been recognized and nowadays, more than 90 percent of legal actions are started by private persons[3] . The history shows that some private legal claims are initiated only to provoke the implementation of Competition Law and to increase the price of a potential anti-competitive behaviour.

In the European law, since the only effect of anti-competitive agreements is voidness (article 101(1)) and as there is no other civil remedy predicted by law, the subject of loss compensation has always been controversial. Apart from articles 101 and 102 themselves, the 1/2003 Regulation that is issued for the implementation of these two articles has not introduced any tortious liability as a result of anti-competitive behaviours. This silence has been fortunately interpreted in a positive

[3] . Edward D Cavanagh, 'The Private Antitrust Remedy: Lessons from the American Experience' [2010] 41(1) Loyola University Chicago Law Journal 629

way by the Commission and the European Court of Justice, according to which national courts should decide based on their national law on torts whether a tortious liability arising out of anti-competitive behaviour should be imposed[3] . The European Court of Justice, has always protested that tortious liability for anti-competitive behaviours can be extracted from the European law. Domestic courts have various approaches towards tortious liability. 12 European countries deal with tortious liability with specific laws and other countries do not have a specific approach regarding tortious liability arising out of anti-competitive behaviours.

Before the enactment of Competition Law in Iran, we could not have claimed that the Iranian law recognizes tortious liability arising out of anti-competitive behaviours. However, after the enactment of Iranian Competition Law, articles 66 and 67 of that law specified that private persons possess the right to start a legal action in national courts and that the Council can start a legal action for claiming loss and damages on behalf of the public.

4.2.2 Pillars of Civil Liability in case of Competition Law infringement

In order to judge whether we can apply tortious liability for losses and damages that arise out of anti-competitive actions, we should first see what are the pillars of tortious liability. These pillars are:

A: Loss: As a result of an unlawful action, there may be several kinds of losses: Financial loss, body injuries and spiritual loss[3] . In anti-competitive behaviors, the only kind of loss that we can envisage is financial loss. The financial loss is itself divided into two categories:

a) Actual or material loss
b) Loss of Profit which means a definite benefit has not been added to someone's property as a result of a certain action (in this case anti-competitive behavior). Both of these losses are considered when calculating the whole amount of loss. Furthermore, the interest over the whole amount of loss is allocated to the victims. For example, in the U.S. law according to article 4 of the Sherman Act the court may, under certain circumstances, allocate interest to the total amount of loss calculated from the time legal proceedings have commenced until the time

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[3] . Tomas Nilson, *Private Enforcement of EC Competition Law* (Master thesis, Lund Faculty of Law 2005) 26

[3] . Nasser Katouzian, *The Requirements of a Non-contractual Relationship: Tortious Liability* (Entesharat Ganje Danesh 2020) 224

the decision is rendered. In the European court of Justice, the same rule applies about the interest. The European Commission has recommended that the calculation of interest can be based on the date the anti-competitive behavior is committed or from the date the loss is inflicted, but at the same time admitted that the second one is more logical[363]. The assessment of loss is one of the most important ordeals that should be encounter. In this regard, two different views exist:

I. The loss resulted from anti-competitive actions is dispersed among consumers and downstream entities and this makes calculation of loss very hard and time consuming. On the other hand, there are many victims that do not claim their losses because it is a very small amount and it is not efficient to claim the loss inflicted. As a result of this assumption, the violator of Competition Law benefits from committing the anti-competitive behavior. Within this perspective, it is said that instead of calculating the loss imposed on each individual or legal person, it is preferable to calculate the amount of profit gained by the violator. This approach is called "Gain-Based Damages"[364]. Despite having some advocates in the U.S., this approach is against article 4 of the U.S. Clayton Act as it specifies that the law only allows the recovery of damages imposed on persons (not profits gained by violators). In countries such as Italy, Netherlands and Spain, it is possible to assess violators' profit and calculate the loss according to it in order to facilitate loss assessment,[365].

II. The other group has adopted a two-tiered process. In the first step, one should assess the situation of the market and the damaged person without the actions that are claimed to be the reason for loss and damages. In the second step, one should compare the present situation with the situation that would have occurred if the loss had not been inflicted. By undertaking this comparison, it is possible to discern if the claimant has truly endured loss and accordingly the loss can be proved. For assessing the situation in the most factual manner, the following non-exclusive factors should be taken into account: The type of the anti-competitive action, its duration, type of loss incurred, the damaged persons, type of the relevant market, and the position of the damaged victim compared to the position of the violator in the supply chain (meaning that whether their relationship is

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[363] . European Commission, Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008)404(Brussels: Commission of the European Communities, April 2008), pp. 56-57.

[364] . James Edelman, *Gain-Based Damages* (Hart Publishing 2002) 5

[365] . Waelbroek et al, (Ashurst Study), p. Cit., pp. 7, 80.

vertical (consumer vis-à-vis distributor) or horizontal). For example, if the anti-competitive behaviour is committed by a cartel that has increased the price, it is possible to have two kind of damages: a) Factual damages incurred as a result of buying a product; b) The lost welfare: The lost welfare refers to the situation where as a result of the increase in price, the number of sales decreases and the public welfare diminishes. This diminishment is the result of change in the behaviour of two group of buyers. The buyers that are deterred from buying because of the increase in the prices and the buyers whose number of purchased products decreases[3] . This kind of loss is not personal and decreases the whole amount of welfare in the society. As we know not all damages incurred as a result of anti-competitive behaviour lead to personal private damages[3] . In the Iranian Law, we can use article 67 of the Competition Law to claim that the Iranian Competition Council can start a legal action against the violator on behalf of the society and claim damages incurred by the public. C) We should add the loss of profit as a result of anti-competitive behaviour to two previous types of loss. For example, in case of an unjustified price increase: If the product of a cartel is a raw material for another entity, that entity may start a legal action on the ground that if the cartel had not unjustifiably increased the prices, the entity would have been able to buy more raw materials, produced more products, and eventually gained more profit. Moreover, by considering market situation (for example demand for the final product), sometimes it is possible to incorporate the loss of profit into damages.

According to article 515(2) of the Iranian legal procedure, it is generally not possible to claim for the loss of profits unless the parties to a contract agree on it or another legal text specifically allows it. For instance, according to article 1 of the Iranian tort law, in case the loss of profits results from violation of legal rights belonging to the claimant, it can be redressed. According to article 9(2) of the Iranian Civil Procedure, profits that are possible to gain but as a result of the crime are lost can be claimed. The Iranian Competition Law stipulates in article 45 that only unilateral anti-competitive actions are criminalised by law and therefore the victim cannot claim damages in case of anti-competitive agreements. This shows an extremely illogical difference between agreements

[3] . Frank Maier-rigaud and others, Quantification of Antitrust Damages. in David Ashton and David Henry (eds), *Competition Damages Actions in the EU: Law and Practice* (Edward Elgar Publishing Limited 2013) 219.

[3] . Van Boom, Willem H., "The Law of Damages and Competition Law: Bien etonnes de se trouver ensemble?"(December 2010); Available at:http://ssrn.com/abstract =1784808: 10.

and unilateral actions. We should bear in mind that the compensation of loss is only when the loss directly results from anti-competitive actions and since the loss of profit is not directly imposed by the anti-competitive actions, we probably cannot claim for lost profits. In many common law countries, the loss of profit is called Pure Economic Loss which is not possible to be compensated[36] . The methods of loss calculation are different. In one of the recent studies published by the European Commission, a number of approaches were proposed for loss calculation and based on this, the Commission provided a guidance paper on quantifying Harm in Actions for Damages for courts and competition authorities. According to this guidance, three approaches can be used[37] :

1) Comparator-based Approaches: These approaches use information whose source in comparison with the the violation is external. There are three different ways:

1-1) Before and After (Time Series Comparisons): In this method, which is one of the simplest and most prevalent approaches, the product price in the market is analysed and compared. Sometimes the announced results are very illogical, for example the price after the dissolution of the relevant cartel is more than the product price before that[38] ;

1-2) Cross Sectional Comparisons (Yardstick or Benchmark Approach): In this approach, we choose a similar market which is not under the effect of anti-competitive behaviours and then compare it to our case;

1-3) Difference in Differences: This method is a combination of the two aforementioned methods. In this method the price changes in a cartel market are analysed in different periods of time and then compared with price fluctuations in a non-cartel market in the same periods of time.

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[36] . Ghaffari (n 58) 497.
Willem H van Boom, 'The Law of Damages and Competition Law: Bien Etonnes de se Trouver Ensemble?' [2011] Sellier <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1784808> accessed 21 December 2020

[37] . European Commission, Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union(Brussels June 2011).

[38] . Maier-Rigaud (n 366) pp. 238-40; Emily Clark, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Analysis of Economic Models for Calculation of Damages (Ashurst 2004) 17-19 <https://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf> accessed 21 December 2020.

2) Financial Analysis Based Approaches: In this method, we should use financial information from different entities, such as income rate, interest margin and their costs (such as production costs and capital opportunity cost) to imagine the condition of the relevant market without the presence of anti-competitive actions and then we should compare it to the present condition of the parties to a legal action (violator and the victim);

3) Market Structure Based Approaches: In this approach, by using Harvard school and different models it provides, the situation of the present market and the market without anti-competitive interventions are designed into a model[3] . 7

There are criteria for recognizing victims too. In a supply chain, if a supplier buys a product for a higher price from another supplier, he eventually sells the product to the consumer with a higher price. The defense of transfer or passing-on defense can be applied here because if the second supplier buys the product at a more expensive price from the first supplier, he earns the same profit he used to earn by selling the product at a higher price to consumers. Therefore, if the second supplier starts a legal action, the defendant (first supplier) can defend that the second supplier has already obtained profit by charging consumers at a higher price. In this case, victims are the final consumers. In this respect:

a) As consumers do not have enough information about what has happened in the market, they do not know which entity is responsible for the existing problem and cannot start legal actions against the real perpetrator;
b) If numerous consumers opt to start a legal action against the perpetrator, the entity can go bankrupt and the justice system can receive thousands of legal actions which is very difficult to handle. However, since there is no legal relationship between the perpetrator entity and the victim, starting an action for damages would be in vain as the damage incurred should have a direct relationship with the victim. By direct relationship, the law means that an anti-competitive action should cause damage (presence of causal relationship)[3] .On the other side, 7even though there is a 2causal relationship between the action of final supplier and the consumer, the nature of that action is not anti-competitive. Thus, the consumer cannot start a legal action against the final supplier.

[3] . Violation Free Market M7ethod. 1
[3] . Ghaffari (n 58) 508. 7 2

A few points should be mentioned in this regard:

1) It is not always the consumer that bears the damage and sometimes consumers even gain more profit through the violation committed by the violator. For example, when a cartel reduces the prices to eradicate other entities from the market, consumers can buy the products of the cartel at a cheaper price. In this case, distributors and suppliers of other products may not even be able to sell the products they had bought from non-cartel entities. Therefore, within this assumption, the final victims are those suppliers and distributors that failed to sell the products.
2) In many cases the anti-competitive behavior is disclosed by competition authorities and consumers can more easily start a legal action since the infringement of Competition Law is already established by responsible authorities. These actions are called Follow-on Actions. In this case, in spite of the fact that the individual losses of consumers might be small, starting a legal action in the form of collective actions might still be beneficial, because in the absence of a collective legal action big profits can be gained by the violator.

There is a common view on the existence of tortious liability in case of anti-competitive actions in all legal systems of the world. Generally, two different solutions exist in legal systems:

1) In case legal systems are strict towards applying tortious liability, violators are let to defend with Pass-On Defense and consumers are counted as real victims;
2) In case of flexibility towards tort law rules, the Pass-On Defense is not heard and the downstream consumers are allowed to start legal actions.

B: Wrongful action: According to general rules, the second material pillar for tortious liability is wrongful action or negligence. Wrongful action or negligence refers to a deviation from the reasonable human behavior. Dr. Katouzian, an eminent Iranian legal Scholar, states in his book that "any action against law is certainly negligence"[3] . Accordingly, every time a person commits a wrongful action that violates mandatory legal rules (either intentional or unintentional), they are legally responsible and should compensate for damages. Since Competition Law is a mandatory law, by violating them negligence is committed by the perpetrator and by

[3] . Nasser Katouzian, The Requirements of a Non-contractual Relationship: Tortious Liability (Entesharat Ganje Danesh 2020) 337.

proving other tort law pillars, which are loss and causal relationship, the victim can claim damages.

In the European Union Law, article 102 (formerly article 82 and 86) investigates unilateral actions. An interesting point to concentrate on can be the difference between article 102 TFEU and article 2 of the Sherman Act. Article 102 has not prohibited the dominant position itself, but it is the abuse of dominant position that is presented as a criterion for prohibition. In general, there is not much clear explanations about what is abusive behavior and what is not. For example, in a definition that the European Court of Justice provided for clarification of abusive behavior, it referred to a behavior that is out of normal competition, or sometimes to a behavior that is out of Competition on the merits[3] . The vagueness of these terms is not less than the term abusive behavior itself. There are two conditions for implementation of article 102 of the TFEU:

The TFEU has not provided a definition of dominant position. However, the ECJ has stated that dominant position refers to the economic power of an entity based that enables that entity to act independent of its rivals and to prevent the effective competition in the market[3] . The way exclusive power is assessed in the European and U.S. systems is almost similar. First, the relevant market is determined and then the entity's market share is assessed. Eventually, competitive restrictions and other factors and their impact on the entity's market power is analyzed.

Similar to clarifications on the term dominant position, the case law sheds some light on the meaning of abuse of dominant position. The case law divides abusive actions into two categories: 1) Exploitative abuse and 2) Exclusionary abuse. The first category includes the situation where the dominant entity exploits its power in the market to gain customers which would not be available to him without those exploitative actions. Article 101(1) makes reference to such exploitations and These actions are not of priority for the European Commission[3] . The second category of actions is regarded to be more worrying. These actions are aimed at other rivals in the same or different markets and the goal is to expel them from the market. In case of success, other rivals leave the market and the dominant entity gains monopoly.

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[3] . Robert E Bloch and others, 'A Comparative Analysis of Article 82 and Section 2 of the Sherman Act' (European University Institute, The International Bar Association 9th Annual Competition Conference, Fiesole, 2005) 1.

[3] . United Brands v. Commission, Case 27/76[1978] ECR 207.

[3] . Bloch et al (n 374) pp. 10-11.

All the clauses of article 102 may have such exclusionary impact, particularly the first and the second clauses.

In the Iranian Competition Law, article 45 refers to unilateral actions. At the beginning of this article actions that can lead to disturbance of the competition are enumerated and prohibited. The examples provided in article 45 for abuse of dominant position are exclusive. It is necessary to substantiate before the Competition Council the disturbance of competition as a result of actions specified in article 45. The Competition Council should suppose that only in one case, which is the exploitation of dominant position, the disturbance of competition does not need any further proof. Similar to the EU law, only having a dominant position is not prohibited in the Iranian law but it is the abuse of this dominance that is banned. The dominant position is defined in article 15(1): “It is a position in the market in which the power to fix prices, product supply or demand or contractual clauses are controlled by one or more legal and natural persons”. This definition is very close to the definition that the European Union provides for dominant position. However, it should be mentioned that there are no criteria in Iranian Law to assess the disturbance of competition. Despite the absence of legal text and depending on the interpretive stance of the Competition Council, the European criteria (certain share of the market (at least 51%) and assessment of market entrance hurdles) can potentially be used in the Iranian law to asses disturbance in competition.

C: Causal relationship: The third pillar for proving tortious liability is causal relationship between the wrongful action and the loss. In other words, it should be proved that the loss imposed on the victim directly results from the wrongful action committed by the violator (i.e. causal relationship between the expulsion of the rivals from the market and the anti-competitive actions committed by the violator).

The history of tortious liability in Competition Law is not very long except in the U.S. law where antitrust actions have been dealt with for more than a century[3] . In tortious liability, there is generally a but for criterion which is discerned by answering to the following question: What would have happened in case the anti-competitive action had not been committed? By using this criterion, it would be easier to assess damages. However, in case a victim decides to claim damages based on anti-competitive actions and apart from the but for causal relationship, other criteria can be employed: proximate cause, sole causation, existence of reasonable

[3] . Michael A Carrier, 'A Tort Based Causation Framework for Antitrust Analysis' [2011] 77(3) Antitrust Law Journal 991.

relationship, and eventually increase in the chances of incurring damage[378]. The claimant should prove that the damage imposed is antitrust injury, which means that the damage incurred should be the result of a behavior that is prohibited in Competition Law (anti-competitive action).

Antitrust injury was recognized in a case called Brunswick Corp. V. Pueblo Bowl in which Brunswick Corp. (a small bowling corporation) started a legal action against a big bowling corporation (Pueblo Bowl) accusing the latter that it has acquired a rival company which, if had not been acquired, it would have been expelled from the market in the near future and consequently, its exit would have led to more profit for Brunswick Corp. in the future[379]. In this case, the court ruled that the damage or loss should be the result of an anti-competitive action or in other words, damages should be granted as a result of committing actions that Competition Law has prohibited.

Some scholars believe that we should return to the old fundamental principles of tortious liability and prove the existence of reasonable connection between the wrongful action and the loss[380]. According to them, whenever the probability of existence of a reasonable connection between the wrongful action and the loss is more than the probability of its absence, the causal relationship exists[381]. These scholars also believe that as soon as the claimant proves that the anti-competitive harm is imposed, the courts should already suppose the existence of causal relationship[382].

Following the latter approach, European law developed the stochastic causation theory. According to this theory, if the whole members of a society incur loss but there is no definite clue as to whether the harm can be attributed to a single wrongful action, we should calculate the average amount of damage and pay it to all those who reasonably bore losses from wrongful actions. It is suggested that the same theory can be applied to anti-competitive actions that lead to tortious liability of the violator[383].

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[378]. Ibid 991.

[379]. Brunswick Corp. V. Pueblo Bowl _O_Mat, Inc.,429 U.S. 477, 489(1977).

[380]. This fundamental principles has been the base for many court decisions: Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1215(9th Cir. 1983); Metronet Services v. U.S. West Communications, 329 F.3d 986(9th Cir. 2003).

[381]. Carrier (n 377) pp.1005-1007.

[382]. Ibid 1015.

[383]. Hanns A Abele and others, 'Proving Causation in Private Antitrust Cases' [2011] (4) Journal of Competition Law & Economics 6.

The Iranian competition rules have been silent on the particular tortious liability aspects of anti-competitive behaviors and therefore, the general tortious liability principles can be applied to Competition Law cases. In cases where the anti-competitive behavior is committed and there is a direct relationship between the violator and the victim, it seems that there are no barriers to prove the tortious liability. However, the question is what happens when there exist intermediary entities between the violator and the final victim (i.e. consumers) who pays the final price to those intermediaries? In the article 526 of the Iranian Criminal it is stated that in case the perpetrator of an illegal action is insane, ignorant, unwilling or minor etc., the actions he commits are attributed to the real cause of those actions. It can be inferred from this article that in general in case an action is caused by another person through intermediary means and if those means cannot be legally held responsible, the law attributes the crime to the cause. Moreover, it seems from the text of article 66 of the Iranian Competition Law that after an anti-competitive behavior is proved in the Competition Council, the victim can claim damages from the main perpetrator because the intermediary entities between the victim and the violator are mere means to transfer the loss to the final victims[3] . 8

4.2.3 Other aspects of Tort Law in case of Competition Law infringement

In this discussion, we will investigate other important aspects of tortious liability arising out of anti-competitive actions.

4.2.3.1 Class actions as a method of claiming tortious liability arising out of anti-competitive actions

Anti-competitive actions are among mass torts, which means many people who may not even be known to the court can bear loss from the perpetration of those actions. As there can be many victims and the damages they each receive can be inconsiderable, they might never find it worthwhile to start a legal action against the violators of competition. This also allows the violator to always find it economically efficient to commit anti-competitive behaviors as he would know that a huge number of consumers will never waste time and money in return for a small amount of loss or damage. This drawback has led to the development of new legal strategies to deal with the perpetrators evading punishment. One of the most effective strategies is class Actions or suits which is quite popular in the U.S. law. Class actions are defined

[3] . Ghaffari (n 58) 545. 8 4

as a legal procedure that settles numerous different claims against a certain defendant in the form of a legal action[385]. In class actions, one or more claimants start a legal action both on behalf of themselves and other potentially righteous claimants (the Class)[386]. There are common issues and common bases for this action because the legal claim finds its roots in the same anti-competitive action which has imposed damage on all claimants. In this action, only the specific claimants are addressed because the others are unknown[387]. The class action is in fact an evolved form of Compulsory Joinder Rule which was popular in 12th century in England. In this action, all the beneficiaries to a legal claim should be involved in it so that the court decision would be final and collective[388]. The decision issued after proceedings would be mandatory to all action parties even if they do not know about the action. The specific and known claimants would be considered as the representatives of the absent and unknown parties. In these cases, either the lawyer pays for the expenses and takes a certain percent of the final damages or alternatively there are organizations and companies that would pay the legal expenses and similarly take a certain amount from the granted damages[389]. Moreover, in class actions the court orders the publication of relevant information in public media or newspapers and if people do not waive their rights or exclude themselves from the case, they are included in the final decision (opt-out system). Since these legal actions are immense, they often go public and it could be described as the nightmare of a perpetrator to get involved as the defendant. In class actions, the action is usually settled by the parties before the court takes a decision.

Class actions are not very popular in the world and even the European system has showed resistance towards such actions[390]. This does not mean that there are no similar approaches in the European law. In the EU law, these actions are called Group Actions, Representative Actions, and Template Actions. In some rare cases, Class Actions are accepted but the European system has chosen Opt-in System which means that only those who opt to be involved in the case are required to apply the court decision. In the Iranian law, no special strategy has been introduced to deal with class actions or actions that have numerous claimants who may not be known.

385 . Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart publishing 2004) 3.
386 . Ibid.
387 . Ibid.
388 . Ibid.
389 . Geoffrey C Hazard and Michele Taruffo, *American Civil Procedure: An Introduction* (Yale University Press 1993) 159.
390 . Van den Bergh (n 69) pp. 13- 20.

The only positive point in Iranian law is that article 66 of the Criminal Procedure Code lets NGOs to start criminal actions on behalf of the people. There may be some hope that this strategy can be used for civil actions too.

b) Legal capacity to start tortious liability arising out of anti-competitive actions

According to tort law, anybody who imposes damage or loss on others should compensate for the damage or loss and affected persons should be able to claim against perpetrators. However, in Competition Law the story is a bit different. The problem is that in some cases there are intermediary entities between violators of antitrust laws and real victims. For example, the U.S. legal system does not recognize any rights for the indirect buyers when there is a vertical relationship among the parties of a potential case. As we already mentioned, the Pass-On Defence is relevant to this discussion. The American Supreme Court initially prohibited the use of Pass-On Defence in Hanover Shoe Inc. v. United Shoe Machinery Corp.[3] In this case, it was stated that the defendant (vertical relationship should exist between parties such as producer/manufacturer and distributor) cannot claim that since the distributor has added his profit to the final price and took the same amount of profit from the consumers compared to the past, he is not capable of claiming for damages again because the distributor has already charged the consumers and has already been compensated for the damage that the violator has imposed on him by increasing the price. The fact is that the American strategy in dealing with antitrust cases is more deterrent and adherent to the public benefit compared to the traditional principles of tort law. In this case the supreme court justified that since the final consumers are people who bought shoes and the damage posed to them is quite small, the violator of antitrust law will keep huge profits gained from violation of a mandatory law. This is because the violator presumes that none of the final consumers waste money and time in return for a small amount of loss and by accepting the Pass-On Defense, the ground is already prepared for the violator to keep the illicit profits and to be encouraged to repeat the perpetration. According to the Supreme Court, the article 4 of the Clayton Act allows everyone harmed by the antitrust violations to claim for damages and limiting the right to start a legal damage claim is against article 4. This approach led to a situation in which the defendant faced many simultaneous claims from consumers and distributors and even it had to compensate the harm for more than one time. Subsequently, the Supreme Court decided in famous Illinois Brick Co. V. Illinois that in vertical agreements only

[3] . Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 US 481,488_494(1968).

direct buyers possess the right to initiate an action for damages[3] . In this regard, there are two exceptions according to the Supreme Court:

a) Circumstances in which there is an agreement that involves a certain amount of product purchase with a fixed price (the final production cost plus a certain amount of profit)[3] among the first buyer and his customers[33] ;

b) When the first buyer is possessed or controlled by the supplier.

The European Commission, after receiving proposals from scholars and theorists, considering the ECJ Manfredi case according to which: Everyone who has suffered from harm has the right to initiate a claim for damages even if there is no direct relationship with the violator. In this respect, the Commission has designed two ways to encourage consumers to start actions for damages:

a) The acceptance of representatives: Organizations and entities such as consumer rights associations etc. should approve and be able to start a single action against the violator;

b) Class Opt-in Actions: In Commission's proposal on private antitrust litigation, there is a slightly different approach compared to the previous solution. In articles 1, 2, 12 and 13 it is suggested that:

- Firstly, every person including the direct and indirect buyers who have been suffering from the violations of European and domestic Competition Laws has the right to claim damages;
- Secondly, the member countries should guarantee that defendants may use Pass-on Defense but the burden of proof is on the defendant himself and;
- Thirdly, the member countries should be adhering to the principle that there is the damage should be compensated not for more than a single time.

According to article 66 of the Iranian Competition Law, the damaged victims may claim damages incurred from civil courts. This article states that both natural and

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[3] . Up to 1977 the final consumers(indirect buyers) had the right to claim damages along with other buyers and this approach was justified by article 4 of the Clayton Act: Craig Y. Clark, "Antitrust Law_ An Illusory Expansion of Consumer Standing Under Section 4 of the Clayton Act –Reiter v. Sonotone Corp., 442 U.S. 330(1979)", 81 Western New England Law Review, No. 3(1980), 81.

[3] . Cost-Plus Contracts

[3] . Joseph H Anderson, 'A Legal and Economic Analysis of the Cost Plus Contract Exception in Hanover Shoe and Illinois Brick' [1980] 47(4) The University of Chicago Law Review 743-70.

legal persons possess the right to claim for damages. It appears that the Iranian approach is close to the European one since apparently article 66 implicitly indicates that Pass-on Defense may be claimed by the defendant but in practice both direct and indirect buyers may claim damages from the civil courts. It is also stated in article 34 of the Iranian Constitution law that every person has the right to start a legal and/or criminal action.

c)The amount of damages in judicial decisions

This discussion finds its roots in article 4 of the Clayton Act that stipulates violations of antitrust law by any entity leads to damage compensation three times more than the real amount of damages. This legal provision is implemented up to the present day despite all the positive and negative feedbacks it has received.

European Union Treaties do not have a clear stance in this regard. However, since the EU law adheres more to the traditional tortious liability principles compared to the US law which sticks to the deterrent policies, it cannot be reasonable to consider the grant of damages for three times more than the real incurred loss. A supporting proof in this regard is Commission's proposal in which it is insisted that there should only be full compensation of damages. In the Iranian law granting damages for two or three times more than the real amount is unprecedented and the law tends to fully compensate the victim for the real extent of loss. The only relevant article is article 79 of the Competition Law that predicts Joint and Several Liability for the director of the entity, along with the legal personality in case, the commission of violations is attributed to the directors.

d)Time Lapse

The last thing to consider about tortious liability is the time lapse. If one claimed that persons are allowed to start an action against violators whenever they wish, it may lead to the bankruptcy of violators as well as complications for the judicial system. That is why legal systems use time lapses to limit the commencement of legal actions within a specific time frame. For example, according to article 4 of the Clayton Act, the time lapse for starting actions for damages is up to 4 years since the commission of the antitrust action. In the European treaties, there is nothing similar predicted but the Commission's proposal has relegated the issue of time lapse to the domestic legal system of members. In the Iranian law, the time lapse for such actions is one year according to article 66 of the Competition Law. In case claimants hold

the copy of Competition Council's final decision, they have one year since the date of the decision to start a civil claim for damages.

4.3 Other non-contractual Civil Remedies in case of Competition Law rules violation

Having discussed tortious liability as the most important non-contractual remedy dealing with anti-competitive behavior, in this section we will discuss other non-contractual options.

4.3.1 Cessation Order

Article 61(2) of the Iranian Competition Law has introduced cessation order for anti-competitive agreements and in article 61(3) the Competition Council is allowed to issue cessation orders in case of unilateral anti-competitive behaviors. It should be stressed here that the implementation of this cessation order has no guarantee and in case this order is issued, there is no sanction available to apply on cases of failure to implement the order.

4.3.2 Public Information

One of the most effective non-contractual guarantees is introduced in article 61(4) of the Iranian Competition Law, according to which the Competition Council may order Information Disclosure to Public to Enhance Market transparency. If the Competition Council confirms an anti-competitive behavior or practice, it can issue the aforementioned order. Since an entity's reputation can be at stake, the Council should be cautious in drafting this delicate order.

4.3.3 Order to Dismiss Directors

The legislator has specified in article 46 of the Iranian Competition Law that in order to avoid concentration in the market and the control of entities over each other, none of the advisors, directors, and other employees of a certain entity are allowed to be employed in another entity with relevant or similar activity with the aim to disturb or restrict competition in one or more markets. If a person is director in one entity and an executive director in another rival entity but the intention of disturbing competition is not legally proved, we cannot claim that he has committed anti-competitive behaviour. In the latter case, we cannot apply article 61 of the Iranian Competition Law, only because it is not substantiated that director's motive has been

to disturb competition. In this case, it should be argued that we already suppose that in such condition the relevant person has ill will. In article 61(5) it has been specified that the Competition Council may issue an order to dismiss directors whose conduct lead to disturbance in competition. It must be mentioned that this authority is limited to the dismissal of directors and legal sanctions for advisors and other employees who violate Competition Law in a similar way is not determined.

4.3.4 Refund of surplus income and seizure of property

According to article 61(8) of the Iranian Competition Law, one of the decisions that Council may adopt is Order of Refund of Surplus Income and Seizure of Property. In case an entity's anti-competitive behavior is substantiated, the Council may issue this order as one of the punishments or as the only one. What is not clear is whether the Council should request for issuing such order from the judicial authorities or the Council can issue the order and the judicial authorities are responsible for its implementation? Considering the contents of article 70 and the usage of the word order in this article as well as the presence of experienced judges in the set-up of the Council, we must say that the implementation of such order is entrusted with the judicial authorities[395]. It is not specified in the text of the law that in case of seizure who will own seized properties and assets? Will it be the government or the private parties who incurred loss? It seems that the legislator has used the wrong wording. Perhaps these properties are temporarily seized until a certain time lapse, just in case the victims start a civil action and claim their damage, but this is so far from what the article states. The other probability is that the legislator may have made a mistake in choosing the word expropriation of violator's property[396].

4.3.5 Order of Deactivation

The order to deactivate an entity in a certain market or a certain field is stated in article 61(9). However, as we know the more entities in a market, the more there is competition and therefore, this order is not consistent with Council's duties and roles in confronting an anti-competitive behavior[397]. Moreover, there exists no guarantee to ensure the implementation of this order too.

[395] . Article 70- The final decisions of the Competition Council or the Board of Appeals shall be implemented by the Civil Judgments Enforcement Unit of the Judiciary, as the case may be.

[396] . Ghaffari (n 58) 572.

[397] . Ibid.

4.3.6 Order of statute amendment

This order is one of the compelling remedies that is specified in article 61 of the Iranian Competition Law. The Council may order to implement an amendment in corporations' statutes and board of directors' minutes after the substantiation of their anti-competitive behaviour. This remedy is effective in case the anti-competitive behaviour results from the statutes or minutes of a corporation.

4.3.7 Order to Observe Price Minimum and Supply Range

According to article 61(11), another power is granted to Competition Council, such as issuing Order to Observe Price Minimum and Supply Range. This remedy functions best in case there is monopoly in the market. The minimum supply rate and price range should be specified by the Competition Council. Just like other remedies specified in article 61 of the Iranian Competition Law, there is no strict guarantee for implementation of this remedy too.

Chapter 4: conclusion

The findings of this research are as follows:

1- competition in commercial activities refers to the process of seeking superiority over other independent entities and undertakings in the market with the goal of attracting customers for one's products, earning financial interest, and gaining more share of the market. The economists apply competition in specific patterns of the market as an ideal competitive condition and measure it in different markets by comparing the current situation of those markets with their ideal competitive conditions. On one side of these patterns is the maximum competition and on the other side is the maximum monopoly. Between these two extreme conditions, there exist practical competition, multipolar markets, and monopolized competition. The closer a market is to the ideal competition, the more efficiency exists regarding the public welfare in that market.

2- The efficiency of competition in commercial activities has been rarely doubted. In case the market is free and away from unfair restrictions and discrimination, the natural course of competition creates more efficiency for entities/undertakings. These entities will be successful in attracting clients and customers and as a result the number of sales will increase. This eventually leads to more market share and financial benefits. Other entities that are not able to compete with such efficient undertakings should leave the market and this is one of the fairest naturural laws. From the economic perspective, competition encourages entities to make most products out of the least resources and to supply the market as much as it demands. This process is ordinarily accompanied by the promotion of efficiency and a progressive innovation. The main beneficiary in this process is the consumer and therefore, we should consider competition as a matter of and a value for public interest.

3- Although competition is very beneficial for the whole society and for the promotion of public welfare, it is not able to maintain itself and there are always non-observant undertakings/entities that attempt to gain superiority over the others by colluding

among themselves. The fact is that some entities prefer to insure their existence in the market by merely concluding official or unofficial agreements with other entities and in this way, they may gain financial interests while omitting competition. The goal of such agreements is to destruct competition and gain as much interest as possible from the consumers. Competition Laws are tools to avoid such undesired conditions. These laws had been already enacted and implemented in the U.S for half a century before the rest of the world decided to introduce laws to defend competition in the markets. In Iran the first Competition Law was enacted in ۲۰۰۷ and was entitled as The law on Implementation of General Policies Specified in Principle 44 of the Iranian Constitution. Although it is a positive progression to enact Competition Laws in Iran, the fact is that the Iranian Competition Law abounds with defects and contradictions. The focus of this research has been on a comparative study between the Iranian and European Competition Laws to fill the legal gaps of the Iranian Competition Law system. The choice of EU Competition Law as one side of the comparative analysis is inspired by tremendous progressions it has made towards achieving the aims of Competition Law. Moreover, the U.S. Competition Law as the longest practiced Competition Law in the world has been used as a point of reference in comparative analyses.

4- As for the goals of Competition Law, the Chicago school scholars believe that since competition tries to adjust the market, Competition Law finds its roots in the realm of economic laws whose goal is to increase efficiency and to promote consumer welfare as a result. Therefore, according to this school, the only anti-competitive practices are those which lead to the decrease in efficiency. The scholars of Chicago school believe that competition is not a value in its own and owes its importance to efficiency promotion it leads to. Other scholars believe that Competition Laws can be viewed from the lenses of both economic and non-economic perspectives. These scholars maintain that since distributive justice, the support for small entities, the reinforcement of employment and domestic production, the avoidance of wealth accumulation among a few members of the society, and the widening gap in the society has been actively affecting the contents of Competition Law, they should be considered in its implementation too. There are always circumstances within which economic and non-economic perspectives of Competition Law come into contradiction but in such circumstances we should decide what the interest of the society is. This approach is far more practicable in developing countries whose entities/undertakings are not able to compete with those of developed countries. In general, we can say that the goal of Competition Law is to protect competition in order to promote efficiency to the benefit of consumers (economic goals) but there

will always be exceptions in which non-economic goals have the upper hand. As far as Iranian Competition Law is concerned, the goals of Competition Law are not specified but it can be argued that the attention of the legislator to non-economic goals has been more observable.

5- Anyone including natural and legal persons who are active in a certain market are subject to and addressed by Competition Law. In Iranian Competition Law the legislator has specified that entities and corporations are subject to Competition Law but there are some objections regarding legislator's use of the word entity. In this research we have preferred using the word entity or undertaking over the word corporations because they can both include the word corporations under their meanings.

6- All actions of entities are subject to Competition Law and are divided into two categories: Unilateral and Bilateral/Multilateral. Most Competition Laws in the European and U.S. legal systems are allocated to monitor unilateral actions of entities with dominant market positions because all their actions potentially endanger Competition Law. In the Iranian Competition Law, article 45 specifies that a certain category of actions is prohibited by law in which a particular type of anti-competitive unilateral actions are included. This article has been much criticized because of its disordered content and as well as the fact that some of the actions that are prohibited has nothing to do with Competition Law goals. Concerning bilateral/multilateral divide, we should mention that all agreements and concerted practices among entities/undertakings are included in this category. Agreements have a vast territory and involves both written and unwritten intentional affirmative communications among entities including both contracts (either valid or void) and simple promises/information exchanged. Concerted practices are similar and coordinated intentional behaviours by entities in which clear communication or contact is absent.

7- Although Competition Law monitors a big part of entities' activities, we cannot claim that each and every unilateral or bilateral/multilateral action is prohibited. Only those actions that lead to anti-competitive impacts or generally cause restriction of competition are prohibited. In the Iranian Competition Law, restrictions in competition is phrased as disturbing the competition. One of the most basic questions in Competition Law is that what is precisely the definition of restriction of competition? there is no specific answer to this question. What we can do is to know what factors affect competition and then assess the anti-competitiveness of actions according to the impact these competitive indicators bear. These indicators are divided into internal and external categories. The internal

indicators are divided into negative and positive. The positive indicators promote competition, for example in terms of product diversity, product quantity (product and supply), number of entities, freedom of action, and their independence and innovation in the production of new products. In this respect, any action that leads to a decrease in any of these indicators should be considered as anti-competitive. The negative internal indicators, such as market power and centralization, cause a decrease in competition. If an action increases these indicators, it is regarded to be anti-competitive. External indicators are the results of a competitive market situation. Therefore, we assess external indicators to know how competitive is a certain market. For instance, we can refer to economic efficiency and consumer welfare that are accompanied by a lower price and a better quality. Every action that decreases these indicators, is deemed as anti-competitive. In the Iranian Competition Law, disturbing competition has been defined in article 1(20), but similar to the explanations provided in this law for Competition Law legal terms, it has not helped to elucidate this concept but rather unnecessarily compounded its ambiguity.

8- The anti-competitive impact of some actions on competition indicators is so clearly serious that there is no need to investigate such anti-competitive actions. These actions are judged upon according to Per Se Rule. However, there are actions that may bear a negative impact on one indicator but simultaneously have a positive effect on others. These are judged according to the Rule of Reason. These rules are developed in the U.S legal system as a result of development in case law and legal procedures for many years. It is possible to find similar procedures in European law too. However, in the Iranian law, it is not clear whether this approach is accepted. In article 44 of the Iranian Competition Law it seems that the law inclines towards the Rule of Reason regarding the bilateral and multilateral actions but in article 45 it seems that the law favours the Per Se Rule regarding unilateral actions. Such contradictions lead to illogical and paradoxical interpretations. It seems that the application and implementation of these two rules in the Iranian Competition Law should be entrusted with the Competition Council. It is only then we will be able to observe how the Council brings into its assessment the impacts either of these two approaches bear on competitive processes. Moreover, there are serious criticisms regarding the set-up and the authority the Council has.

9- Competition Law divides entities' agreements into three categories: Horizontal, vertical, and mergers. Horizontal agreements may be concluded amongst rival entities that are in a similar position in the supply chain of a certain product. These agreements have the most perilous consequences for Competition Law and are considered to be anti-competitive according to Per Se Rule. An example of price-

fixing agreements is price fixing. Vertical agreements are concluded between entities that are active at different levels of a supply chain. In these agreements, one party is the supplier. These agreements are investigated according to the Rule of Reason. Whereas in countries that have a more intricate history of Competition Law a general rule for recognition of anti-competitiveness is usually set by law and some examples are specified for the purpose of clarification, in Iranian law we observe that only exclusive examples of anti-competitiveness have been enumerated – an unreasonable approach that has come under intense criticisms. In general merger means any agreement among entities after which at least one of the entities is dissolved and brought under the control of the other possessor entity. Merger policies are very close in EU and U.S. laws. In the U.S. law, the formation of mergers which lead to the decrease in competition or in other words, those which reinforce a market power (including mergers that create entities with high market concentration) are considered to be anti-competitive. In the European law, mergers that prevent effective competition are prohibited. Similar to the U.S. law, creation of dominant entities is a clear example of harmful mergers in the EU legal system. Moreover, in order to clarify other important factors in assessing mergers and their harmfulness a number of guidelines are issued by the executive authorities both in Europe and U.S. In case the harmfulness of these mergers is probed, they are suspended until further investigation and decision making. If the order of suspension is violated, there will be criminal sanctions against perpetrators. In the Iranian Competition Law acquisition (possession that creates full control) is separated from mergers in articles 47 and 48 and each article follows a different regime. In article 1(16), merger is defined as an action in which several entities form or integrate with another legal entity while their own legal personalities are dissolved. Therefore, it can be inferred from this article that the necessary condition for formation of a merger is the dissolution of at least one of the parties' legal personalities. Moreover, it can be understood from article 48 that mergers also include cases where the control of an entity is transferred to the others. In the Iranian Competition Law four indicators have been recognized to assess the harmfulness of a merger among which the most important one is high concentration. However, the phrase high concentration has not been defined in this law and it has been stated that the Competition Council shall define its meaning. Requesting the Council for affirmation of a merger or allowing its formation is voluntary in article 49 of the Iranian law which should be criticized heavily.

10- Another important matter in Competition Law are remedies for violation of its regulations. In this research we stated that although Competition Law is

considered as a branch of public law, this has no contradiction with incorporating civil remedies into its rules in case of violation. In order to eliminate the anti-competitive impacts, to cease anti-competitive behaviours, and to restore the market to its former condition, civil remedies are necessary to ensure the well-functioning of Competition Law. Putting civil remedies into the field of Competition Law is regarded to be an instance of corrective justice. By setting off the financial benefits gained as a result of violating Competition Law, civil remedies cause deterrence and legal actors find fewer financial motives in committing anti-competitive behaviour. In the EU and U.S. Competition Law systems we can clearly observe that there is much attention to civil remedies because of the role they play in deterrence. However, in the Iranian Competition Law, 12 remedies are specified to redress the violation of Competition Law but these remedies seem not to be enough for generating the required deterrence. Thus, a potential violator would think that even if he is punished by law as a result of violation, he would still make good profit out of violation. The required deterrence is created by setting strong civil remedies as well as effective and quick implementation tools which have to be duly reinforced by commensurate criminal punishments. In this research, we explained that no special and effective remedy has been offered in the Iranian law for causing deterrence.

11- The civil remedies available in Competition Law are divided into two categories: contractual and non-contractual. The first category encompasses agreements and concerted practices. In the studied legal systems, anti-competitive contracts are fully declared null and void because of the public law perception of the seriousness of anti-competitive behaviors. There are also some exemptions regarding the null and void decision for anti-competitive behavior. In the Iranian Competition Law, a clear prohibition is set in article 44 for anti-competitive agreements but in a very strange and illogical strategy, article 61(1) states that the legal remedy for their conclusion is that the Competition Council has the authority to issue termination order.

12- This weak remedy is not consistent with the aims of Competition Law. Apart from its obscurities and vagueness, there are serious defects associated to termination order:

a) The acceptance of termination as a remedy means the acceptance of negative impacts of anti-competitive agreements as of its conclusion till its termination by competition council. In this respect, we cannot claim that the Iranian Competition Law has adopted an efficient approach towards anti-competitive agreements. A termination order is not consistent with the word prohibition as set in article 44.

b) It is ambiguous whether Council's authority to issue termination order refers to the possibility of direct issuance of this order by the Council or the parties should first request it. The first approach seems to be preferred because there is no legal guarantee to compel the parties to terminate the agreement.
c) Since there is no effective criminal remedy in the Iranian Competition Law except for confiscation of properties that are gained through anti-competitive agreements, the Council can be duped quite easily. A relevant question in this regard is that if parties decide to cancel the contract just before the Council terminates it, what is exactly going to be terminated by the council? There is no legal remedy offered in case the same parties renew their contract after they cancel it. In this way they can repeatedly cancel the contract and renew it to circumvent the proceedings of Competition Council.
d) In case there is an anti-competitive clause or annex to the agreement the question is shall we annul the whole agreement or shall we annul the anti-competitive parts? The preferred answer is the second one although very new in Iranian contractual law.
e) There are two incompatible remedies in the Iranian Competition Law for formation of anti-competitive mergers. In article 61(1) the remedy is termination but all of a sudden, the legislator introduces in article 61(7) voidness as the second remedy. We argued in the thesis that the Council is free to decide about which remedy to choose at its own discretion. This freedom can be a privilege because Council may take into account the non-economic goals of Competition Law in regard to a certain case and decides at its own discretion that the case should not be annulled but rather terminated.

13-There are other contractual remedies for anti-competitive agreements in the Iranian Competition Law:

a) Suspension: There are certain kinds of mergers in the EU and U.S. Competition Laws that until further consideration and decision making about their anti-competitiveness, they are suspended from any activity. However, instead of pre-suspension, the Iranian Competition Law has adopted post-suspension which means suspension can only happen after the confirmation of anti-competitiveness of a merger by the council. Moreover, although article 61(7) states that the suspension order applies when anti-competitiveness is proved, there is no further explanation as to its temporary or permanent nature. On top of that, if the parties do not suspend the merger and refuse to do it, there is no guarantee to implement Council's decision.

b) Disintegration: This remedy is a structural remedy, which means the merger divides into smaller entities. As a result of the reform in the entity structure, the market structure is reformed too.
c) Cessation Order: Unlike disintegration, the cessation order is a behavioural remedy that corrects entity's unfair behaviour in the market and prevents it from implementing an anti-competitive agreement or concerted practice. Cessation orders are categorized into formal and substantive. In general, formal cessation orders are issued before courts' final decision and are temporary. What has been specified in the Iranian Competition Law is the substantive cessation order which is issued when the Council confirms anti-competitiveness of a certain action. Although there exist hefty criminal remedies for refusing to implement cessation orders in many legal systems of the world, there is no legal guarantee in the Iranian Competition in this regard.

13- Tort law offers remedies for the non-contractual violation of Competition Law rules. In the US law 90% of all legal actions are initiated by private persons who claim financial damages. These private persons aid authorities, who do not spend much time, human resources and huge costs for discovering violations, to find out about infringement of Competition Law. The European Union also attempts to reinforce private persons' legal actions so that it can develop a better enforcement system. Legal actions to claim damages follow tort law rules. This situation is witnessed in the U.S. law where the first goal of tort law in the field of Competition Law is deterrence. There are three pillars for tort law cases that should be proved in the court: a) Loss b) Wrongdoing and c) The causal relationship between loss and wrongdoing. In Iran proceeding actions for tort law are within the jurisdiction of general courts.

14- The most important ordeal for proving tortious liability is calculation and assessment of damage and recognition of victims. Proving the loss and its calculation is not the same in all anti-competitive actions. For example, it is not possible to calculate the losses in price fixing agreements in a similar way they are calculated in invasive pricing. The identities of victims in such cases are different too. Moreover, it is not feasible to assess exact amount of damages and in most cases, calculations are in fact an estimation of the loss. There are various models and economic theories that provide us with the criterion for assessment of damages and losses. The complication of these models and theories is so intense that we should say it is a field for specialists and highly technical experts and should solely be practiced by them.

15- The defense of transfer is not accepted in U.S. courts. This term means that if a distributor buys a product from a manufacturer at a high price because of an anti-competitive practice, the manufacturer may defend that the distributor has already gained profit by adding to the price of the product and then selling it to the consumers. The European Union has not accepted this defense too because the European Union cares more about practicing tort law. In Iran we deal with the same approach but the fact is that facilitation of such actions(tortious liability arising out of anti-competitive agreements) has a long way to go.

16- The Commission of anti-competitive behaviors is considered as negligence and wrong (wrongdoing) because they violate Competition Law. Therefore, by proving that actions are anti-competitive, their wrongfulness is proved too. In Iranian law, the tortious liability as a result of wrongdoing can be proved in unilateral anti-competitive behaviors but in case of agreements, it is doubted whether tortious liability can be applied. It is true that anti-competitive agreements have been prohibited in article 44 but as was mentioned before, article 61(1) states that they may be subject to a termination order. The position of law is that anti-competitive agreements are valid but it is possible to cease their effect by termination. The question that may arise is how is it possible to recognize tortious liability in a valid anti-competitive agreement? As we argued in this thesis, the legislative position in article 61(1) has been entirely wrong and it should be omitted from the Iranian Competition Law and voidness should take its place.

17- The pass-on defense (defense of transfer, which is not accepted in the U.S Law) is against the principle of compensation according to which all damages and losses should be compensated. Because of the intricacies of initiating legal actions against the principal manufacturer, consumers and indirect buyers are practically deprived from the legal capacity to start these actions. In some countries the Pass-on Defense is allowed but several problems are associated to it. The damage imposed on each single consumer is not enough to allow staring a legal action and usually affected individuals avoid commencing legal actions as the amount they obtain is inconsiderable. The intermediary distributors cannot start legal actions too, because their case would lose after the manufacturer exercises the Pass-on Defense. Therefore, entities that violate competitive rules gain more profits from their actions because it is not efficient for consumers to start legal actions. Some solutions have been proposed to increase the legal consequences of committing anti-competitive behaviors. One of them is collective litigation in which all consumers form a group of litigants. In this way, efficiency increases for litigants and the amount of damages that can be paid can be far more compared to the situation where only one consumer

initiates a legal action. Lawsuits on behalf of consumers is another solution. In the Iranian law there has been no solution offered by law to increase the legal consequences and chances of being sued for damages based on tortious liability. However, starting legal actions on behalf of people is precedented: In article 66 of the Iranian Criminal Procedure Law it is accepted that NGOs can start legal actions on behalf of people. Moreover, in article 48 of the Iranian Commercial Law there is a legal base for initiating lawsuits before courts on behalf of people and it seems that it is possible to generalize the rationale behind this representative litigation to civil cases.

18- Concerning the amount of damages, the U.S. law states that subsequent to proving the tortious liability, the violator shall pay three times more than the real amount of imposed loss. This approach has not been accepted in most countries and is against the principles of tort law.

19- A privilege that is granted to collective tort law claims is the inclusion of associated legal fees (including lawyers' fees) into violator' account.

20- Usually there are some specific time lapses within which legal actions shall be initiated. After the expiry of time lapses the doors are closed for any further tortious claim. In Iran the time lapse is up to a year after the final decision on anti-competitiveness issued by the Council or the Board of Appeal.

21- In the Iranian Competition Law non-contractual remedies have other types such as Cessation Order on Public Notices, Order of Managers Dismissal (article 46), Order of Statute Amendment and Observing the Supply Minimum and Price Range.

Annex 1

COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS (EU Competition Law)

CHAPTER 1

RULES ON COMPETITION

SECTION 1

RULES APPLYING TO UNDERTAKINGS

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103 (ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104 (ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105 (ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2

AIDS GRANTED BY STATES

Article 107 (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108 (ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109 (ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

Annex 2

DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (of 26 November 2014)

on certain rules governing actions for damages under national law for infringements of the Competition Law provisions of the Member States and of the European Union

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Acting in accordance with the ordinary legislative procedure (2),

Whereas:

(1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.

(2) The public enforcement of Articles 101 and 102 TFEU is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 (3). Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Union became Articles 101 and 102 TFEU, and they remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial

authorities to apply Articles 101 and 102 TFEU as public enforcers and to carry out the various functions conferred upon competition authorities by that Regulation.

(3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. The right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

(4) The right in Union law to compensation for harm resulting from infringements of Union and national Competition Law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law.

(5) Actions for damages are only one element of an effective system of private enforcement of infringements of Competition Law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.

(6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

(7) In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national Competition Law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as

regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.

(8) Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of Competition Law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU.

(9) It is necessary, bearing in mind that large-scale infringements of Competition Law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union Competition Law and national Competition Law where that is applied in parallel with Union Competition Law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.

(10) Article 3(1) of Regulation (EC) No 1/2003 provides that '[w]here the competition authorities of the Member States or national courts apply national Competition Law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national Competition Law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].' In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national Competition Law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national Competition Law which must be applied in the same cases in parallel to Union Competition Law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. This Directive should not affect actions for damages in respect of infringements of national Competition Law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

(11) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of Competition Law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

(12) This Directive reaffirms the acquis communautaire on the right to compensation for harm caused by infringements of Union Competition Law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (damnum emergens), for gain of which that person has been deprived (loss of profit or lucrum cessans), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

(13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.

(14) Actions for damages for infringements of Union or national Competition Law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal

requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national Competition Law. However, as Competition Law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

(16) National courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

(17) Where a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 (4) apply.

(18) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.

(19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.

(20) Regulation (EC) No 1049/2001 of the European Parliament and of the Council (5) governs public access to European Parliament, Council and Commission documents, and is designed to confer on the public as wide a right of access as possible to documents of those institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest. It follows that the system of exceptions laid down in Article 4 of that Regulation is based on a balancing of the opposing interests in a given situation, namely, the interests which would be favoured by the disclosure of the documents in question and those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001.

(21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of Competition Law by a competition authority. This Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities.

(22) In order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings.

(23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

(24) This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of Competition Law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions.

(25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national Competition Law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national Competition Law and sent

to the parties to those proceedings (such as a ‘Statement of Objections’) or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures.

(26)Leniency programmes and settlement procedures are important tools for the public enforcement of Union Competition Law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of Competition Law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents. Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions.

(27)The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.

(28)National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority (‘pre-existing information’).

(29)The disclosure of evidence should be ordered from a competition authority only when that evidence cannot reasonably be obtained from another party or from a third party.

(30) Pursuant to Article 15(3) of Regulation (EC) No 1/2003, competition authorities, acting upon their own initiative, can submit written observations to national courts on issues relating to the application of Article 101 or 102 TFEU. In order to preserve the contribution made by public enforcement to the application of those Articles, competition authorities should likewise be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities' files, in light of the impact that such disclosure would have on the effectiveness of the public enforcement of Competition Law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for ex parte proceedings.

(31) Any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence.

(32) However, the use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of Competition Law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Directive are not undermined, the use of evidence of the types referred to in recitals 24 and 25 which is obtained solely through access to the file of a competition authority should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

(33) The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect

confidential information and for the abusive use of information obtained through disclosure. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

(34) Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of national competition authorities' final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union Competition Law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national Competition Law are infringed in cases where Union and national Competition Law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.

(35) Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least prima facie evidence of the fact that an infringement of Competition Law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties. The effects of decisions by national competition authorities and review courts finding an infringement of the competition rules are without prejudice to the rights and obligations of national courts under Article 267 TFEU.

(36) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and

Union Competition Law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

(37) Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

(38) Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

(39) Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not

affect the possibility for the infringer to use evidence other than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.

(40) In situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.

(41) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national Competition Law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show prima facie that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such prima facie proof. As regards the quantification of passing-on, national courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

(42) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

(43) Infringements of Competition Law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.

(44) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national Competition Law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that

compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidenciary value of judgments rendered in that context. It is possible for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (6). Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation.

(45) An injured party who has proven having suffered harm as a result of a Competition Law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in Competition Law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in Competition Law cases can thus constitute a substantial barrier preventing effective claims for compensation.

(46) In the absence of Union rules on the quantification of harm caused by a Competition Law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in Competition Law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused by the Competition Law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.

(47) To remedy the information asymmetry and some of the difficulties associated with quantifying harm in Competition Law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not

cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

(48) Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a Competition Law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

(49) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.

(50) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages for the same claim has been brought before a national court, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the advantages of an expeditious procedure.

(51) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages

from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

(52)Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

(53)This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.

(54)Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union Competition Law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(55)In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (7), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(56)It is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of Competition Law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that

undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

(1) 'infringement of Competition Law' means an infringement of Article 101 or 102 TFEU, or of national Competition Law;

(2) 'infringer' means an undertaking or association of undertakings which has committed an infringement of Competition Law;

(3) 'national Competition Law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union Competition Law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;

(4) 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

(5) 'claim for damages' means a claim for compensation for harm caused by an infringement of Competition Law;

(6) 'injured party' means a person that has suffered harm caused by an infringement of Competition Law;

(7) 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU;

(8) 'competition authority' means the Commission or a national competition authority or both, as the context may require;

(9) 'national court' means a court or tribunal of a Member State within the meaning of Article 267 TFEU;

(10) ‘review court’ means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of Competition Law;

(11) ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of Competition Law;

(12) ‘final infringement decision’ means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means;

(13) ‘evidence’ means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;

(14) ‘cartel’ means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

(15) ‘leniency programme’ means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;

(16) ‘leniency statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;

(17) ‘pre-existing information’ means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;

(18) ‘settlement submission’ means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of Competition Law and its responsibility for

that infringement of Competition Law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;

(19) 'immunity recipient' means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;

(20) 'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of Competition Law;

(21) 'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;

(22) 'consensual settlement' means an agreement reached through consensual dispute resolution.

(23) 'direct purchaser' means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of Competition Law;

(24) 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of Competition Law, or products or services containing them or derived therefrom.

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of Competition Law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of Competition Law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Article 4

Principles of effectiveness and equivalence

In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of Competition Law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged

injured parties than those governing similar actions for damages resulting from infringements of national law.

CHAPTER II

DISCLOSURE OF EVIDENCE

Article 5

Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of Competition Law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of Competition Law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency statements; and

(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

Article 7

Limits on the use of evidence obtained solely through access to the file of a competition authority

1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1

or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

Article 8

Penalties

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:

(a) their failure or refusal to comply with the disclosure order of any national court;

(b) their destruction of relevant evidence;

(c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;

(d) their breach of the limits on the use of evidence provided for in this Chapter.

2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

CHAPTER

R III

EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

Article 9

Effect of national decisions

1. Member States shall ensure that an infringement of Competition Law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national Competition Law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of Competition Law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

Article 10

Limitation periods

1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of Competition Law has ceased and the claimant knows, or can reasonably be expected to know:

(a) of the behaviour and the fact that it constitutes an infringement of Competition Law;

(b) of the fact that the infringement of Competition Law caused harm to it; and

(c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of Competition Law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Article 11

Joint and several liability

1. Member States shall ensure that undertakings which have infringed Competition Law through joint behaviour are jointly and severally liable for the harm caused by the infringement of Competition Law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

2. By way of derogation from paragraph 1, Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC (8), the infringer is liable only to its own direct and indirect purchasers where:

(a) its market share in the relevant market was below 5 % at any time during the infringement of Competition Law; and

(b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

3. The derogation laid down in paragraph 2 shall not apply where:

(a) the SME has led the infringement of Competition Law or has coerced other undertakings to participate therein; or

(b) the SME has previously been found to have infringed Competition Law.

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

(a) to its direct or indirect purchasers or providers; and

(b) 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.

Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.

5. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of Competition Law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

6. Member States shall ensure that, to the extent the infringement of Competition Law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

CHAPTER IV

THE PASSING-ON OF OVERCHARGES

Article 12

Passing-on of overcharges and the right to full compensation

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of Competition Law to the claimant, as well as the absence of liability of the infringer, are avoided.

2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of Competition Law relates to a supply to the infringer.

5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

Article 13

Passing-on defence

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of Competition Law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Article 14

Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

(a) the defendant has committed an infringement of Competition Law;

(b) the infringement of Competition Law has resulted in an overcharge for the direct purchaser of the defendant; and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of Competition Law, or has purchased goods or services derived from or containing them.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Article 15

Actions for damages by claimants from different levels in the supply chain

1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:

(a) actions for damages that are related to the same infringement of Competition Law, but that are brought by claimants from other levels in the supply chain;

(b) judgments resulting from actions for damages as referred to in point (a);

(c) relevant information in the public domain resulting from the public enforcement of Competition Law.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

Article 16

Guidelines for national courts

The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

CHAPTER V

QUANTIFICATION OF HARM

Article 17

Quantification of harm

1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

CHAPTER VI

CONSENSUAL DISPUTE RESOLUTION

Article 18

Suspensive and other effects of consensual dispute resolution

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.

2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.

3. A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

Article 19

Effect of consensual settlements on subsequent actions for damages

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of Competition Law inflicted upon the injured party.

2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.

3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of Competition Law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

CHAPTER VII

FINAL PROVISIONS

Article 20

Review

1. The Commission shall review this Directive and shall submit a report thereon to the European Parliament and the Council by 27 December 2020.

2. The report referred to in paragraph 1 shall, inter alia, include information on all of the following:

(a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of Competition Law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of Competition Law;

(b) the extent to which claimants for damages caused by an infringement of Competition Law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of Competition Law has occurred;

(c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of Competition Law or suffered at any level of the supply chain.

3. If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Temporal application

1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

Article 23

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 November 2014.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

S. GOZI

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(1) OJ C 67, 6.3.2014, p. 83.

(2) Position of the European Parliament of 17 April 2014 (not yet published in the Official Journal) and decision of the Council of 10 November 2014.

(3) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

(4) Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

(5) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

(6) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

(7) OJ C 369, 17.12.2011, p. 14.

(8) Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

Annex 3

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 (Text with EEA relevance)

Official Journal L 001 , 04/01/2003 P. 0001 - 0025

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

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of

experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national Competition Law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by

associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community Competition Law. To that effect it is necessary to provide that the application of national Competition Laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community Competition Law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community Competition Law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national Competition Laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

(10) Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to

an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national Competition Law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use

it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community Competition Law. The Commission and the competition authorities of the Member States should also be able to submit

written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in

order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.

(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

(35) In order to attain a proper enforcement of Community Competition Law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17(12) should therefore be repealed and Regulations (EEC) No 1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) should be amended in order to delete the specific procedural provisions they contain.

(37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 of the Treaty and national Competition Laws

1. Where the competition authorities of the Member States or national courts apply national Competition Law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national Competition Law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national Competition Law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II

POWERS

Article 4

Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,

- ordering interim measures,

- accepting commitments,

- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6

Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III

COMMISSION DECISIONS

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10

Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV

COOPERATION

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national Competition Law is applied in the same case and

in parallel to Community Competition Law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national Competition Law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14

Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take

place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community Competition Law.

Article 15

Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16

Uniform application of Community Competition Law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V

POWERS OF INVESTIGATION

Article 17

Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Article 18

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected

infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply mutatis mutandis.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI

PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;

(b) to comply with a decision ordering interim measures taken pursuant to Article 8;

(c) to comply with a commitment made binding by a decision pursuant to Article 9;

(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);

(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27

Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month.

Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX

EXEMPTION REGULATIONS

Article 29

Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X

GENERAL PROVISIONS

Article 30

Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32

Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.

Article 33

Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI

TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34

Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35

Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community Competition Law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36

Amendment of Regulation (EEC) No 1017/68

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;

2. in Article 3(1), the words "The prohibition laid down in Article 2" are replaced by the words "The prohibition in Article 81(1) of the Treaty";

3. Article 4 is amended as follows:

(a) In paragraph 1, the words "The agreements, decisions and concerted practices referred to in Article 2" are replaced by the words "Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty";

(b) Paragraph 2 is replaced by the following:

"2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease."

4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37

Amendment of Regulation (EEC) No 2988/74

In Regulation (EEC) No 2988/74, the following Article is inserted:

"Article 7a

Exclusion

This Regulation shall not apply to measures taken under 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(16)."

Article 38

Amendment of Regulation (EEC) No 4056/86

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Breach of an obligation

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in 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(17) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed."

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words "under the conditions laid down in Section II" are replaced by the words "under the conditions laid down in Regulation (EC) No 1/2003";

(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

"At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, inter alia, to obtaining access to the market for non-conference lines."

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words "pursuant to Article 10" are replaced by the words "pursuant to Regulation (EC) No 1/2003".

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words "Advisory Committee referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

(b) In paragraph 2, the words "Advisory Committee as referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words "the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)" are deleted.

Article 39

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

Article 40

Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

Article 41

Amendment of Regulation (EEC) No 3976/87

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

"Article 6

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(18) before publishing a draft Regulation and before adopting a Regulation."

2. Article 7 is repealed.

Article 42

Amendment of Regulation (EEC) No 479/92

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

"Article 5

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(19)."

2. Article 6 is repealed.

Article 43

Repeal of Regulations No 17 and No 141

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.

Article 44

Report on the application of the present Regulation

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 December 2002.

For the Council

The President

M. Fischer Boel

(1) OJ C 365 E, 19.12.2000, p. 284.

(2) OJ C 72 E, 21.3.2002, p. 305.

(3) OJ C 155, 29.5.2001, p. 73.

(4) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.

(5) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

(6) Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

(7) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

(8) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and

concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.

(9) Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

(10) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

(11) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

(12) OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

(13) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.

(14) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.

(15) Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

(16) OJ L 1, 4.1.2003, p. 1.

(17) OJ L 1, 4.1.2003, p. 1.

(18) OJ L 1, 4.1.2003, p. 1.

(19) OJ L 1, 4.1.2003, p. 1.

Annex 4

Law on Implementation of General Policies of Principle (44) of the constitution
Chapter 9 (Iranian Competition Law)

Chapter IX: Promoting Competition and Prohibiting Monopoly

Article 44: All legal and real entities from the public, government, cooperative and private sectors will be subject to articles of this chapter. Any complicity among persons through (written, electronic, verbal or practical) contracts, agreements or accords resulting in one or multiple effects mentioned below that will obstruct competition is prohibited:

1- Specifying prices for purchase or sale of goods or services and process of determining it in the market either directly or indirectly.
2- Restricting or controlling amount of production, purchase or sale of goods or services in the market.
3- Imposing discriminatory conditions in identical transactions with trading partners.

4- Having the trade party conclude contract with a third party or dictating terms of contract to them.
5- Conditioning conclusion of the contract on acceptance of supplementary commitments by other parties that has nothing to do with the contract based on trade norms.
6- Dividing or giving shares in the market for goods or services between two or more persons.
7- Restricting market access of those not signatory to the contract, agreement or accord.
Note- Contracts between the workers' or employers' organizations to decide wages and benefits will be subject to the labor law.

Article 45: The following acts which hinder competition are forbidden:
A. Hoarding and refusal to enter into transaction
1- Personal or group refusal to enter into transaction or restricting amount of goods or services subject to the deal.
2- Having other persons to refuse to transact or restrict their exchanges with a competitor.
3- Storing or annihilating goods or refusing their sale or refusing to offer services in a way that the storing, action or refusal will artificially push up prices of goods or services in the market either directly or indirectly.
b. Discriminatory pricing
Supply or demand for a similar good or services in prices that would reveal discrimination between two or more trade parties or discriminating in prices between different regions despite equal conditions governing the transaction and the transportation cost or other extra costs.
C. Discrimination in trade conditions
Discriminating trade with different persons under equal conditions.
D. Aggressive price setting

1. Supply of goods or services at a price lower than the cost prices to the extent that would harm others seriously or prevent the entry of new competitors to the market.
2. Offering gifts, prizes, discounts or the like that would harm others seriously.
Note– The Competition Council shall determine the seriousness of the harms caused.
E. Misleading comments
Any verbal, written or practical comment that will:

1. Show goods or services unrealistically qualitative in specific amount, degree, characteristic, model or standard, portraying the competitors' goods or services as being of low quality.
2. Present repaired, old, second-hand and low quality goods as new.
3. Make false claim on after-sale services, warranty for change, maintenance, and repair of goods or any of them or repeating or continuing services by pursuing special objectives, whereas no such facilities exist.
4. Deceive people with the price of goods and services that will be or are sold or offered.
F. Forced sale or purchase
1. Conditioning sale of a good or service on purchase of another good or service and vice-versa.
2. Having the other party enter into transaction with a third party in a way that competition of the deal will be linked to supply or demand of another commodity or service.
3. Dealing with the other party on condition that the party will refrain from entering into a deal with the competitor.
G. Supplying substandard goods or services
Supplying goods or services that do not comply with compulsory standard limits specified by authoritative bodies, including the application, combination, quality, content, designing, manufacture, completion and/or packaging standards.
H. Intervening in internal affairs or dealings of a firm with a rival company
Using the voting right, share transfer, disclosure of confidential information, and intervention in dealings of firms or companies or applying similar methods to persuade, provoke one or more shareholder(s), capital owner, director or staff of a firm take an action that will be against the interests of the rival.
I. Abusing dominant economic condition
Abusing dominant economic conditions in one of the following ways:
1. Deciding, maintaining or changing price of a good or service in a non-conventional way,
2. Imposing unfair contract conditions,
3. Restricting supply or demand to raise or lower market price,
4. Creating impediments to make entry of new rivals difficult or eliminating rival firms or companies in a special profession,
5. Conditioning conclusion of contracts on acceptance of terms that have nothing to do with subject of such contracts in terms of nature or commercial norms,
6. Ownership of capital or shares of companies in a way that would harm competition.
J. Restricting re-sale prices
Conditioning supply of goods or services to the purchaser on acceptance of the following conditions:
1. Having the purchaser accept the earlier decided price or limiting his/her options of deciding prices in any form.

2. Having the purchaser maintain price of a specified goods or service for a firm or company from which he/she buys goods or services or limiting the said firm or company's option in deciding price in any way.
K. Unauthorized profession, abusing information and position of persons
1. Illegally obtaining or use of any sort of secret information of the rivals in the commercial, financial, technical and so on fields in one's own or the third party's favor.
2. Illegally obtaining and using the information and approvals of official authorities before their disclosure or public announcement or their denial in one's own or the third parties' favor.
3. Abusing positions of persons in one's own or the third parties' favor.

Article 46: None of the directors, advisors or staff of the company or firm can concurrently hold a similar position in a related company or firm or similar profession with the aim of restricting or disrupting competition in one market or more.

Article 47: No legal or real entity will be authorized to own capital or share of other companies or firms in a way that would hinder competition in one and/or more markets.
Note– The following will be an exception to the article:
1. Ownership of shares or capitals by a broker or the like that is engaged in purchase and sale of notary bonds. This will be in effect as long as s/he has not used the voting right of share to hamper competition.
2. Enjoying or securing mortgage rights of shares and capital of the companies and firms being active in market of a good or service on condition that it will not lead to the using voting rights in companies or firms.
3. If share or capital is owned under emergency situations, on condition that the Competition Council is informed of the issue within one month from the ownership and that it will not take more than the time limit set by the Council.

Article 48: Merger of companies or firms will be forbidden in the following cases:
1. During or as a result of the merger the said actions will be taken in the Article (45).
2. When price of goods or services increases unconventionally as a result of the merger.
3. When the merger will lead to extreme centralization of the market.
4. When merger will lead to establishment of a firm or a controlling company in the market.
Note 1 - It will be allowed in cases when avoiding the stoppage of the activities of firms and companies or their access to technical know-how will not be possible other than through merger, although merger will result in paragraphs (3) and (4) of this article.
Note 2- The scope of extreme centralization will be specified and announced by the Competition Council.

Article 49: Firms and companies can ask the Competition Council whether their actions are subject to articles (47) and (48). The Competition Council will have the responsibility to investigate the cases within maximum one month from receipt of due request(s) and inform the

applicant of the result in a written way or by sending a reliable message. If the inquiry related actions are announced that are not subject to articles (47) and (48) and if no response is received from the Competition Council within the specified time, the actions will be deemed proper.

Article 50: Guild members subject to Guild System Law who are engaged in small-scale supply (retail sale) of goods or services will be an exception to the chapter.

Article 51: Restricted rights or advantages of intellectual ownership will not lead to violation of articles (44) to (48) of the law. In that case the Competition Council will have the right to make the following decision(s):
a. Stopping activity or refusing to enforce monopoly rights including restricting period of clamping down the monopoly rights.
b. Restricting the party to the contract, agreement or the compromise with monopoly rights to observe whole or part of conditions and commitments included in it.
c. Annulment of contracts, agreements or accords with monopoly rights in case the measures envisioned in paragraphs (a) and (b) of the article do not prove effective.

Article 52: Any assistance and award of government advantages (in rial, foreign exchange, credit, exemption, discount, preferential treatment, information or the like) in a discriminatory way to one or more firms or companies which would make them dominant on the market or hinder competition will be forbidden.

Article 53: To meet goals of this chapter, a council, known as 'Competition Council', will be formed. The composition of the Council and conditions for elections of the members will be as follows:
a. Composition of the members
1. Three Parliament deputies assigned by Parliament from among members of Parliament Economic Commission, Plan and Budget and Auditing Commission and Industries and Mines Commission– one from each commission to serve as observers.
2. Two judges from the Supreme Court elected and on a decree issued by the Judiciary Chief.
3. Two top economists proposed by the Minister of Economic Affairs and Finance and the decree of the president.
4. A distinguished juror familiar with economic rights proposed by the Minister of Justice and the decree of the president.
5. Two trade experts proposed by the Minister of Commerce and the decree of the president.
6. An industry expert proposed by the Minister of Industries and Mines and the decree of the president.
7. An infrastructural services expert proposed by the Head of the State Management and Planning Organization and the decree of the president.
8. A financial expert proposed by the Minister of Economic Affairs and Finance and the decree of the president.

9. A person elected by Iran's Chamber of Commerce, Industries and Mines.
10. A person assigned by the Islamic Republic of Iran Central Cooperative Chamber.
Note 1– Chairman of the Council will be assigned from among economists who are members of the Council per paragraph (3) as proposed by members and upon a decree issued by the president.
Note 2- Vice Chairman of the Council will be assigned from among members of the Council on a proposal by the members and a decree by the Council Chairman.
B. Conditions for election of members
1. Nationality of the Islamic Republic of Iran,
2. Having minimum 40 years of age,
3. The economist and juror members of the Council shall hold valid Ph.D. degree and the trade, industry, infrastructural services and financial experts will hold at least B.A. /B.S. degree,
4. Having no criminal record per article (62) of the Islamic Penal Code or any record of bankruptcy due to offense or fraud,
5. Having at least 10 years of experience in related field,
6. Having no record of disciplinary guilty verdict per paragraphs (a) to (d), Article (9) of the Law on Administrative Offenses (adopted on November 28, 1993).
Note– Retirement, with the exception of the judge, will not be a criteria for non-election of the people.

Article 54: To handle professional, executive and other affairs of the Competitive Council Secretariat, the Central Competitive Council will be formed to serve under President's supervision as an independent government institution. The body of the Center will be named on the proposal of the Ministry of Economic Affairs and Finance and the approval of the cabinet. Incoming changes in body of the National Competition Council will be proposed by the Competition Council, confirmed by the State Management and Planning Organization and approved by the Cabinet.
Note 1– Head of the Competition Council will also be the Head of the National Competition Council.
Note 2– The official and contract personnel of ministries and government organs and institutions will have the priority in employment to the National Competition Council.
Note 3– The by-law on encouragement of the Competition Council members and staff of the National Competition Center will be proposed by the Ministry of Economic Affairs and Finance and approved by the Cabinet.

Article 55: The Competitive Council members' tenure and employment as well as investigation into their offenses will be based on the following points:
a. Tenure of the judge in the Council will be two years and for other members six years. The judge can assume the post for two terms and the other members for a single term.
b. Term of those succeeding the Council Members for whatever reason will be equal to the remainder of the term of his predecessor.
e. Granting mission to government and judiciary employees who are members of the Council and

the Jury Board will be obligatory.
d. Chairman and members of the Competition Council will work full time. They can concurrently hold other job or responsibility in the public, private or cooperative sectors.
Note- Members of the academic board of instructors will be excluded from the point if their teaching hours equal their duty hours as per paragraphs (8), (9) and (10) of paragraph (a) of Article (53) of this law.
g. Offenses of the Competition Council and the Jury Board members, excluding the judge assigned by the Judiciary, and also those of the employees of the National Competition Center will be investigated per regulations of the law on administrative offenses, whereas offenses of the judge assigned by the Judiciary Chief will be dealt with in the prosecutors' offices and the Judges Disciplinary Courts per legal regulations.

Article 56: Job security of the Council members and their independence will be based on regulations as follows:
1. None of the Competition Council members will be forced to get member in the Council against their wishes unless under the following conditions:
a. Failure to abide by the assigned duties as determined by two third of the Council members.
b. Indictments referred to in parts (3) and (5) and paragraph (b) of Article (53) of the law.
c. Indictment due to abusing regulations in articles (75) and (76) of the law.
d. Losing chance of resignation.
e. Unauthorized absence for more than two consecutive months and three non-consecutive months in a year in the Council as determined by majority of the Competitive Council members.
f. Violation of duties and restrictions envisioned in Article (68) of the law and failure to observe regulations envisaged in articles (75) and (76) as determined by majority of members of the Competition Council.
2- In case of voluntary resignation or death of a member of the Council and also in case of conditions leading to expulsion in a way cited above, Chairman of the Council or his deputy will report the issue along with bona fide reasons, proofs and documents, if needed, to the authority appointing the member in order to arrange appointment of a successor. The authority will within maximum one month from the receipt of the demand, elect the succeeding member and introduce him/her to the Competition Council per Article (53) of the law.
3. Members of the Competition Council cannot be sued for adopting a decision per legal duties or the statements they make under the law.
4. The Competition Council will have full authority to investigate and make decisions per regulations of this chapter.

Article 57: The Council sessions will be official with the attendance of two third of the members, chaired by the Chairman and the Vice Chairman in case of the Chairman's absence. The Council decisions will be effective by a simple majority of votes by members having the voting right unless the number of votes is less than five. The Council decisions on Article (61) of the law will be valid if vote of one judge member of the Council is in favor of it.

Article 58: In addition to the points mentioned in other cases, the Council will have the following duties and authorities:
1. Identification of instances of anti-competition procedures and the exemptions covered by this law and making decision on the exemptions concerning occasional affairs mentioned in the law.
2. Assessment of conditions and specifying boundary of good and services market in connection with articles (44) to (48).
3. Compilation and announcement of necessary guidelines and instructions to implement this chapter and internal guidelines of the Council.
4. Providing consultation to the government to draw up necessary bills.
5. Ratification of guidelines on price adjustment, amount and conditions of access to monopolized market of goods and services -– in each case in line with related regulations.

Article 59: With regards to special good or service, whose market is an instance of natural monopoly, the Competition Council can propose formation of part adjustment institution to the cabinet for approval. It can also cede part of its regulation duties and authorities in related field to the part adjustment institution.
Composition of the part regulations institution members will be decided on a proposal made by the Competition Council and the approval of the cabinet. Conditions for election of members of the institutions will be in accordance with paragraph b of Article (53) of the law. Their members will undertake responsibilities envisioned in the law for members of the Competition Council to fulfill their duties and authorities.
At any rate, no institution can make any decision or take any action contradictory to the law or approval of the Competition Council to facilitate Competition.

Article 60: The Council authority for inspection and research is as follows:
a. Inspection
The Competition Council will have the authority in line with its duties and missions to investigate claims and cases, inspect firms and companies and issue permissions for entry to places, warehouses, vehicles, and computers and searching them and also issue licenses for inspection of economic activities, properties, computers, bureaus and other documents. Participation in general assembly sessions and compiling necessary data, including approvals of the board of directors, will also be subject to authority of the Council for inspection.
b. Research
The Council will have the authority to fulfill its duties and missions using one or more of the following strategies and investigate issues relating to the law and complaints:
1. Summoning to the Council or Center the defendant so as to conduct investigation.
2. Summoning eyewitnesses or any other person whose presence is deemed necessary for investigating the complaint.
3. Calling for report, information, documents, evidences and records (including paper or electronic record) in connection with anti-competition procedures from legal or real entities.
4. Inviting experts and specialized institutions and seeking comments from them in process of

research and inspection.
Note 1- The Competition Council should ask one of the judge members of the Council or one of five judges assigned and named for the purpose by the Judiciary Chief (from among judges with at least ten years of experience) to issue licenses for research and inspection and specify boundaries of implementation of the article. The judge will be duty-bound to make decision within maximum two weeks. Any research and inspection will be possible through judge's verdict.
Note 2- The Council can refer research and inspection to specialized institutions and the legal or real bodies formed and qualified for the purpose.

Article 61: If the Council proves after receipt of complaints or conclusion of necessary investigation that one or more than one cases of anti-competition procedures per articles (44) and (48) of this law have been enforced by a firm, it can make one or more than one following decisions:
1- Order cancellation of any contract, agreement and understanding that incorporate anti-competition procedures per articles (44) to (48) of this law.
2- Order the parties reaching accord or relevant accords to stop continuing intended anti-competition procedures.
3- Order the stoppage of any anti-competition procedures and their repetition.
4- General information dissemination in order to make market more transparent.
5- Order the removal of directors that have been elected contrary to regulations of Article (46) of this law.
6- Order ceding shares or capital of firms or companies secured contrary to Article (47) of this law.
7- Mandating suspension or ordering annulment of any sort of merger deemed contrary to ban on Article (48) of this law or mandating disintegration of the merged companies.
8- Order the return of extra income or confiscation of properties secured through anti-competition procedures per articles (44) to (48) of this law by competent judicial experts.
9- Order the firm or company not to be active in any specific field or region or special region.
10- Order the amendment of the by-law, company or notes of the general assemblies or board of directors of companies or extension of necessary proposal to government to amend articles of association of public sector companies and institutions.
11- Mandate firms and companies to observe minimum supply and range of price under monopolized condition.
12- Set a cash penalty of ten million rials (10,000,000) up to one billion rials (1,000,000,000) in case of violation of prohibitions envisioned in Article (45) of this law.
The article of association relating to specifying the amount of cash punishments proportionate to the committed action will be made on the joint proposal of ministries of Economic Affairs and Finance, of Commerce and of Justice, then approved by the cabinet.

Article 62: The Competition Council will be the only authority to probe anti-competition procedures and the responsibility to start investigation on anti-competition procedures and make

decisions within framework of Article (61) of the law. It will do that either itself or based on complaints raised by legal or real entities, including Prosecutor General or local prosecutor, State Audit Court, General Inspection Organization, section adjusters, government affiliated organizations and institutions, guild groups, the associations of support for consumer rights and on the non-governmental organizations. The Council will have the duty to set a date for investigating complaints and inform either side of the result of the investigation. The two sides can be present in the session or introduce an attorney or submit a bill of defense to the Council.
Note– Offenses discussed in Chapter eight of the Guild System Law will be investigated according to anti-Competition Law, if it causes anti-competition action. A committee, comprising one of the members of the Competition Council chosen by Chairman of the Council, a representative of the High Supervisory Board per Article (53) of the Guild System Law and a person assigned by Justice Minister, will settle disputes, if any.

Article 63: Based on Article (61), the decisions of Competition Council can be reviewed within 20 days from the notification to the beneficiary as per Article (64) of the law. The period will be two months for those living abroad. In case of the decision is not reviewed in the period under study and in case the Council decisions are not confirmed by the Retrial Board, the decisions will be final.
Note- In case the Council decisions are deemed general in the view of the Council, they should be published in one of the mass circulated dailies with the losing party bearing the expense once they become final.

Article 64: The location, composition of the retrial board, conditions of elections and type of decisions made at the board will be as follows:
1. The retrial board that will be located in Tehran will comprise the following persons:
a. Three judges from the State Supreme Court chosen and on a decree by the Judiciary Chief.
b. Two economic experts proposed by the Minister of Economic Affairs and Finance and a decree by the president.
c. Two commercial, industrial and infrastructural affairs experts jointly proposed by ministers of Industries and Mines and Commerce and a decree by the president.
2. Members of the Retrial Board should have at least 15 years of experience in related field. Other conditions for election of the members and also regulations relating to period of the members' tenure of the post, occupation, dismissal, and also investigation of the members' offenses and the job status, employment regulations and their wages and benefits will be in a way as specified in paragraph (b) of Articles (53), (55) and (56) of the law.
3. The Retrial Board will make decisions as follows:
a. Decisions of the Retrial Board will depend on majority members' approval but the Retrial Board's verdict on decisions relating to Article (61) of the law will however be effective with the consent of at least two of the judge members of the Board.
b. The Retrial Board can have specialized institutions and the specialized legal and real entities that have been formed on special regulations and qualified to conduct inspection.
c. The Retrial Board can reject the Council decisions or accept them as they are or make them

lenient or amend them if required or make other decisions independently.
d. The Retrial Board's decisions will be final and binding as explained above.
4. The Retrial Board can invite the disputing parties to offer explanations. Also, the two parties or their attorneys will on their own decision show up at the court or offer a bill of defense to provide explanation in the court proceeding for the case. Otherwise, the board will make necessary decision with respect to recorded evidence and proof.

Article 65: The Competition Council decisions will be in effect per paragraph (12) of Article (61) following notification to the beneficiary. The beneficiary' call for reconsideration will not bar the ratification from going into effect per Article (63). In any case, the beneficiary can, while calling for reconsideration or after that until the Retrial Board' decision, request suspending the implementation of the Competition Council decisions. The Retrial Board will hence ask immediately for examination of the case and can order a halt to the implementation of the Competition Council decisions after receiving proper guarantee or warranty.

Article 66: Legal or real entities incurring losses as a result of anti-competition procedures as referred to in the law can, within maximum one year from the period the decision of the Competition Council or the Retrial Board to enforce the non-competition procedures goes into effect, declare open a file of indictment at a competent court to compensate the losses. While observing regulations of the law, the court will call for an indictment in case copy of the final verdict of the Competition Council or of the Retrial Board is attached to the said call for indictment.
Note- In case decisions of the Competition Council or the Retrial Board are pronounced to be general and are published in mass circulated dailies after being deemed final, the third party beneficiary can receive a certificate from the Competition Council substantiating that the said decision will be the concern of them, thus submitting their request to the competent court. Issuance of a ruling for compensation of damage will be possible in case a certificate to that effect is issued. The court will on demand of the claimant for issuance of adjournment ruling put the case on hold until the response of the Competition Council is received.

Article 67: The Competition Council can serve as plaintiff in all offenses pertaining to the law, calling on a competent court to take part in the proceedings to offset the damage inflicted to public interests.

Article 68: Duties and limitations of the Competition Council members, the Retrial Board and staff of the National Competition Center will be as follows:
1. Ban on participation in sessions and decision making as stipulated in Article (91) of the proceeding law of the Public and Revolutionary Courts for Civil Affairs.
Decisions taken without heeding the provisions of this paragraph and the benefits gained from it either directly or indirectly or pertain to relinquishing a member's duties will be null and void and of no legal value.

Note- If due to the said restrictions member(s) of the Competition Council or of the Retrial Board are banned from participation in the Council and decision making sessions, the Competition Council or the Retrial Board will call on the authority introducing the member to appoint a substitute to look into the issue.
2. Non-disclosure of inside information
Members of the Competition Council, the Retrial Board, and staff of the National Competition Council and anybody who had been assigned previously to the post will not reveal inside information of the firms, companies or people that they have obtained in the course of their duties or in a similar process. Neither will the members be allowed to use the information in their favor or to the benefit of others.
3. Avoid making any comment before a decision is adopted
Members of the Competition Council, the Retrial Board and staff of the National Competition Council will not make any written or verbal comments about violation of rules and regulations by firms, companies or persons prior to the announcement of any decision.

Article 69: The Competition Council will have the duty to make it possible for all to have access to regulations, by-laws and guidelines relevant to this chapter and publish annual report on implementation of the chapter and make them available to the public.

Article 70: Final decisions of the Competition Council or those of the Retrial Board will be enforced by Department of Enforcement of Civil Rules of the Justice Department.

Article 71: The executive by-law related to this chapter, covering method of inspection, research, registration of inquiries, and receipt of complaints will be approved by the cabinet on the proposal of the Competition Council within maximum six months.

Article 72: Anybody making false claims in the process of investigation of anti-competitive procedures, including the inspection phase, to receive the certificate or licenses concerned in this chapter or that if s/he avoids extending information, documents and proofs that can influence the outcome of decisions of the Competition Council and the Retrial Board and anybody offering forged or false documents to the Competition Council, Retrial Board, National Competition Council, Retrial Board and National Competition Center or trying to remove, change or distort the information, documents and evidence relevant to the anti-competition procedures directly or indirectly irrespective of their format, will receive prison terms ranging from three months to one year or be fined between ten million (10,000,000) rials and one hundred million (1,000,000,000) or receive both the sentences.
If it is proved that the documents and evidence and false or forged statements have influenced the receipt of certificate or licenses referred to in this chapter, the court will, in addition to punishment mentioned in this article, issue ruling on a request by the beneficiary to revoke the said certificate or license.

Article 73: Any expert or experienced personnel, whose testimony or comment per regulations envisaged in this chapter are needed, gives false testimony which affects decision of the Competition Council or the Retrial Board, will be sentenced to one to three years jail terms or cash penalty to the tune of thirty million (30,000,000) rials to three hundred million (300,000,000) rials or both.
Note- In addition to the above punishments, perjury will be subject to punishment as laid down in the Islamic penal code.

Article 74: Anybody lodging a complaint at the Competition Council or the Retrial Board with an aim of harming commercial and professional reputation of firms or companies or directors or their owners to the extent that it is proved later that the claims are false, s/he will be sentenced to six months to two years jail terms or to cash fine equaling the amount of damage inflicted or be subject to both the sentences.

Article 75: Anybody. assigned per this chapter with the duty of keeping inside information of companies, firms or others secret, discloses them or uses the information to his or others' benefit, will be sentenced to six months to two years of jail terms or cash penalty of forty million (40,000,000) rials to four hundred million (400,000,000) or both the punishments as well as compensation for the damage caused by the disclosure or circulation of the information.

Article 76: Any member of the Competition Council, members of the Retrial Board, heads and staff of the National Competition Council and also any of their wage earners and their contract parties and any other person who abuses regulations stipulated in the law to harm national interests or commercial and profession reputation of the legal or real entities, will besides payment of damage be sentenced to three to five years in prison or fines of fifty million (50,000,000) rials to five hundred million (500,000,000) rials or both the punishments.

Article 77: Violation of each of the paragraphs (1), (2), and (3) of the Article (68) of this law will be considered a disciplinary offense and the one committing the offense will, while being subject to punishments envisioned in the law, be tried and punished in one of the references mentioned in paragraph (5) of Article (55).

Article 78: Anybody causing any sort of restrictions for research and inspection of officers and inspections of the National Competition Council, will be sentenced to a fine of five million (5,000,000) rials to twenty million (20,000,000) rials and if case of continuing the obstruction s/he will have to pay one million (1,000,000) rials in addition to the amount originally set as fine.

Article 79: The legal entities will be subject to following punishment:
1. Legal entities and their directors committing any of the crimes mentioned in articles of this

chapter will be subject to punishments envisaged by the law for the real entities.
2. If the crime attributed to the legal entity is the result of failure and shortcoming of any of his/her staff, it will be dealt with according to paragraph (1) and the offender will receive penal punishment per the law.
3. If any of the directors or paid employees of legal entities prove that the crimes had been committed without their knowledge or that they had done all in their power to prevent the offence or immediately informed the Competition Council or related authority of the offense, s/he will be exempt from punishments envisaged for the crime.
Note- If the damage is deemed to be compensated, the legal entities will, along with the people, be held accountable to the law in case such a thing is called for in the by-law with related persons involved in the case.

Article 80: Request for damage per the law will be possible once related plea is presented to a competent court.

Article 81: If in the case of the crimes, cited in this chapter, harsher punishments are envisaged in other laws and regulations the stiffer penalties will be used.

Article 82: Crimes that are the concern of articles (72) to (78) this chapter will be dealt with in prosecutors' offices and public courts per current regulations and laws ahead of schedule.

Article 83: In this connection, the Justice Department officials will have to cooperate with the Competition Council, the Retrial Board and the National Competition Council.

Article 84: The amount of penalty, cited in this chapter, will be based on a proposal by the Competition Council and cabinet approval and be adjusted every three years commensurate with the growth in consumer goods and commodities price index as is officially announced by the Central Bank of the Islamic Republic of Iran.

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