
THE PRIVATE AND THE PUBLIC IN THE CONTEMPORARY COMPETITION LAW

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Abstract: *The paper looks at the protection of the existence of competition (antitrust) from the perspective of the traditional division of law into public and private. The basis for the paper is the fact that competition law has, since its birth at the end of the 19th century, hovered between the limits and principles of public and private law. The first part describes current “invasions” of competition law into both the private and public spheres with the objective of achieving greater effectiveness of public law protection of competition. The second part illustrates the difficulties caused by the blurred line between the protection of the general or public and the private interests on the national level in the context of the protection of suppliers of large retail chains and on the level of the European Union in the first attempts to regulate the competition among multisided online platforms. Despite certain critical comments, the paper does not deny the benefit of competition law in maintaining a competitive market economy and achieving social acceptance thereof by preventing the excessive concentration of market power in the hands of some competitors.*

Key words: *protection of competition, private law and public law, significant market power, multisided platforms*

INTRODUCTION

Competition law or law protecting the existence of competition (sometimes also referred to as antitrust law) is a good model for illustrating the thesis that “the private” and “the public” are not two separate worlds in modern society; rather they are very often intertwined within a single branch of law. It is even possible to claim that competition law is one of the branches that have in the long run defied the traditional division between public and private law, irrespective of whether the interests, subordination, or organic theory is applied.

Given that competition law should be concerned with protecting the existence of competition as such rather than of individual competitors, it should also logically be true that this branch falls into public law. The substance of this branch of law consists in interventions by public authorities in business relations with the aim of protecting open competition on the market against the concentration of economic power through cartel agreements, mergers and takeovers, or through the abuse of a dominant position on the market. To achieve this objective, the branch of law is governed by special regulations that generally vest the supervision of the functioning of the competitive environment in a specific public body that must intervene in all significant disruptions of competition, i.e., not in the case of minor and individually important disruptions,

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but only if disruptions pose a risk of long-term structural impact on the relevant markets.¹

This perception of competition law as public law, however, is rather a theoretical generalisation appropriate for teaching about its substance and basic features. In practice, the decisions are very often made by the courts which aggrieved competitors, clients, or consumers turn to (in the USA the share of complaints filed by private plaintiffs under the federal Sherman Antitrust Act remains at a steady 90%²), rather than the competition authorities, and in the case of many decisions it is not clear at all whose interests were primarily protected – those of competition in general or those of individual competitors. Competition law features a number of overlaps and blurred interfaces with other predominantly private branches of law that are not at all accidental ones as their deepest source lies in the never resolved ambivalence of interests (or goals) protected by this branch of law.³ This is why it has been repeatedly accused of inappropriate interventions in business freedom, autonomy of contracts, and in other branches of law designed to protect the private interests of individuals. It is therefore also accused of being unconstitutional and harmful to the economy, and thus there have always been voices calling to eliminate or at least significantly curtail the applicability of this branch of law.⁴

In historical terms, competition law lies somewhere between law against unfair competition – since it originated to a certain extent as a reaction to insufficient instruments of this private law protection against acts of excessively strong competitors – and consumer protection law, which was formed when it turned out that even developed protection of competition cannot protect the interests of end users and consumers. The protection of the existence of competition can therefore to a certain extent be seen as a “patch” designed to be applied in those cases when the democratic state respecting the rule of law does not want to and cannot excessively restrict market competition through regulation (or even replace it with state business activity or planning), but at the same time realises that the instruments of private law protection do not sufficiently prevent the

¹ Such perception of competition law is due mainly to the German ordo-liberal school of political economy that had a decisive influence on the European Union antitrust. See HERRERA ANCHUSTEGUI, I. Competition Law through an Ordoliberal Lens. In: *Oslo Law Review*. 2015, No. 2, pp. 139–174.

² For the ratio of public and private actions in the USA see HOVENKAMP H. J. Quantification of Harm in Private Antitrust Actions in the United States. *SSRN Electronic Journal*. February 2011 [online]. [2016-10-03]. Available at: <https://www.researchgate.net/publication/228191083_Quantification_of_Harm_in_Private_Antitrust_Actions_in_the_United_States>. Many economists in the USA in particular also perceive antitrust law as basically private branch of law designed to make sure that competition on the market drives individual businesses out of the market only due to poor efficiency and not due to various practices designed to squeeze the competition out of the market, cf. BARNETT, R. E. Four Senses of the Public Law-Private Law Distinction. *Harvard Journal of Law and Public Policy*. 1986, Vol. 9, No. 2, pp. 273–274.

³ For the discussion on goals of the EU competition law see MOISEJEVAS, R., NOVOSAD, A. Some Thoughts Concerning the Main Goals of Competition Law. *Jurisprudence*. 2013, Vol. 20, No. 2, pp. 627–642.

⁴ According to American libertarians, both private and public law protection of competition is essentially anti-competitive because the decisions that should be made by the competitive market are instead replaced or at least guided by the decisions of public authority, i.e., outside the market and the competitive balance. Cf. BARNETT, R. E. Four Senses of the Public Law-Private Law Distinction. *Harvard Journal of Law and Public Policy*. 1986, Vol. 9, No. 2, pp. 273–274 and also ARMENTANO, D.T. *Proč odstranit protimonopolní zákonodárství*. Praha, 2000.

weaker players from being squeezed out of the market, consumers being forced to pay excessive prices, etc.⁵ This is why the mechanisms protecting competition often lack consistent public law features and in many cases prefer effective enforcement over legal purity.

This paper deals with the balancing of competition law between “the public” and “the private”, and with those who create and enforce this law constantly failing to respect its public law logic. With respect to the limited scope, it is not the purpose of the paper to illustrate and analyse all aspects of conflicting private and public law elements in competition law, nor to offer a new theory that would define and make more focused the protection of the existence of competition after more than 120 years of its existence. Even though such an attempt would certainly be interesting, the author is a sceptic who believes in the value of incessant effort and partial achievements rather than finding the one and only answer that would offer an optimal solution to a variety of restrictions on perfect competition irrespective of time, place, industry, absolute or relative status of the competitors involved, development dynamics, traditional and new regulation, and so on. The further analysis will thus focus the EU’s and the Czech situations only, taking specific examples of the current protection of economic competition solely from this geographic area.

The first part of this paper shows two current “invasions” of competition law into the private and public spheres made with the intention of improving the effectiveness of the public protection of competition. The second part, on the other hand, focuses on demonstrating the difficulties brought about by the blurring of borders between the protection of general and private interests on the national level in the case of protecting suppliers to large retail chains, and on the level of the European Union in the case of the first attempts at competition regulation of multi-sided online platforms.

Improved effectiveness as a motive for EU competition law to exceed its traditional boundaries

Even in the optimistically liberal 1990’s, when competition law was spreading from the West to all continents and when the protection of competition reached a historical high, expert estimates revealed that in the then European Community only 13–17% of existing cartel agreements had been disclosed.⁶ Improving the effectiveness of the protection of competition has been and remains a permanent fixture among the declared intentions of the European Commission as well as the national competition authorities even now. This is why some “expansive” trends in current competition law can best be understood as a manifestation of the effort to increase effectiveness in protecting competition.

Majority of the results, returned by an Internet search for the combination of *public-private-competition* in any search engine, deal with the public and private enforcement

⁵ Such understanding of competition law became dominant in the Western world especially after World War II as a response to abuses linked to the Great Recession and in the atmosphere of the substantial change of economic paradigms which had previously characterized the liberal era of modern capitalism.

⁶ DAVIES, S., ORMOSI, P. L. The economic impact of cartels and anti-cartel enforcement. *CCP Working Paper*. 2014, Vol. 2, p. 4.

of competition law. This stems from the fact that after discussions and preparation work in the past decade, the European Union is now trying to expand the possibilities of private law enforcement of competition law by adopting Directive 2014/104/EU whose implementation deadline expired at the end of 2016. The full title of this directive is “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”,⁷ and, despite its length, it does not say much about the intention of the harmonisation. It does indicate that its purpose is not directly the fight against cartels and monopolies, and that the directive is concerned primarily with the private law claims of individuals for damages, i.e., strictly speaking a partial harmonisation of procedural regulations of Member States, which is not directly concerned with the definitions of limits, objectives, concepts, and instruments of public law protection of competition. However, the recital three of the Preamble of this directive clearly states that the first of the objectives of the harmonisation implemented by the directive is to achieve the effective enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), i.e., those public law prohibitions contained in these articles.

This is also the reason why a considerable part of this new EU directive is devoted to making sure that the future development of the enforcement of private interests of individuals in damages does not weaken the effectiveness of the instruments of public law protection of competition, such as the so-called settlement and leniency.⁸ The main aim of the directive is to strengthen the deterrent effect of public competition law in general. What at first glance gives the impression of a consumer-friendly effort to ensure the compensation of private injury sustained by individuals, is in the EU interpretation rather an effort to boost the effectiveness of public law protection of competition by involving private initiative in deterring potential infringers.

At this point, it is impossible to foresee how soon and to what extent this new trend in the enforcement of competition law will take hold in continental Europe, whether the improved effectiveness expected from the directive will be achieved, and whether the number of private law claims that do not simply follow the decision of public competition authorities on infringement of competition will grow. The subsequent actions for damages are far less interesting for the identification of the limits, objectives, and definitions of competition law than the situations when the courts must assess and decide from the beginning on their own whether there was a significant violation of competition as such and whether a public-law delict was committed that at the same time caused injury to the individual companies or consumers who filed the action. Such contentious proceedings before the courts would open the issue of defining the limits between the direct protection of individual competitors and consumers on the one hand, and their indirect collective protection through functioning competition on the other.

⁷ 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 (OJ L 349, 5.12.2014, pp. 1–19).

⁸ See, in particular, Articles 6 and 7 of the Directive restricting disclosure of evidence included in the file of competition authority and limits on the use of evidence obtained solely through access to such file.

If such proceedings ever come to pass, it will be interesting to observe how the prospective improved effectiveness of public law protection of competition will be developed through court decisions. In such cases, the independent courts of EU Member States will, similarly to the courts in the USA, seek to identify the limits of significant, possibly unreasonable restriction of competition and the limits of what is for the competition on the market a natural level of risk, uncertainty, and loss that must be tolerated, or that should not be solved by instruments of public law but should rather be referred to other branches of law for resolution. The actual development of private law enforcement of competition law, despite convergence mechanisms stipulated by the Regulation 1/2003,⁹ may become a challenge for the leading role of the Commission in applying Articles 101 and 102 TFEU.

Apart from this involvement of private interests in the enforcement of public prohibitions of anti-competitive conduct – which for the time being is embryonic and welcome without excessive expectations,¹⁰ – it is possible to show another expansive tendency of competition law directed at defining the limits of public law decisions of the state and public bodies rather than at the regulation of business activities in competitive markets. Public bodies exercising public authority on the basis of their statutory powers are not competitors (undertakings in the wording of EU competition law), i.e., persons to whom the competition law is addressed by definition. Nonetheless, they are increasingly becoming involved in the applicability of this branch of law both at the national and EU levels.

Thanks to the initiative of deputies,¹¹ since 2012 the Czech Republic has included in Act No. 143/2001 Sb. on the Protection of Competition section 19a which vests in the Office for the Protection of Competition the supervision of “public bodies” which are not allowed to infringe competition when acting *iure imperii* without justifiable reasons either by excluding competition from the market completely by their decision, by favouring certain competitor(s), or putting other competitors in an unfavourable po-

⁹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25) regulates in Articles 15 and 16 the cooperation between the Commission and the Member States' courts in the application of EU competition law. The Commission as well as the competition authorities of Member States may in proceedings before national courts appear as *amicus curiae* and the courts, irrespective of their independence, cannot in the same case decide against the decision already adopted by the Commission and must also avoid issuing a decision that would contradict the decision the Commission intends to adopt in the proceedings launched.

¹⁰ For example, one of the experts in the field, Professor A. Jones from King's College in London, evaluated the impacts of the directive stating that it “is not likely to lead to over-enforcement”. The directive constitutes only minimal and partial harmonisation of the relevant procedural regulations and contains a number of measures against the development of a litigation culture of the US style – i.e., against avalanches of collective redress, over-compensation of the injured, and exorbitant fees of specialised law firms. Cf. JONES, A. Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US. *TLI Think! Paper*. 2016, No.10, The Dickson Poon School of Law, King's College London. King's College London, [2016-10-03]. Available at: <<http://ssrn.com/abstract=2715796>>.

¹¹ Section's 19a inclusion into the Act was initiated by the deputies of the right-wing Civic Democratic Party. The centre-right majority controlled at that time the Assembly of Deputies of the Czech Parliament.

sition.¹² These are not cases when the “authority” embarks on business activities using its assets, and starts competing with the “private owners”. i.e. when the “authority” fulfils the definition of a competitor under competition law. Nor are they cases of wrongful acts of public administration (or local self-government), that are dealt with by “related” regulations on public procurement and the provision of state aid or that constitute decision-making under administrative or tax regulations. They are cases when the “authority” acts *iure imperii* fully in accordance with other legislation and by doing so it makes competition impossible where it previously existed or creates conditions that enable only certain entrepreneurs to do business, or possibly forces competitors to act in an anti-competitive manner, etc. As pointed out by the Office for the Protection of Competition in the Information Bulletin dedicated to this relatively recent legislative novelty: “Public administration bodies fall under the jurisdiction of the Act on the Protection of Competition also when they exercise public powers.”¹³

Even though the Articles 101 (prohibition of cartels) and 102 (prohibition of abuse of dominant position) TFEU do not contain similar provisions related to the exercise of public authority, EU law also penalises such conduct of States, their bodies, or bodies of self-governing units, and in a more extensive manner than the Act on the Protection of Competition. Article 106 (1) of the TFEU prevents Member States from enacting or maintaining in force any measures – in this case in favour of undertakings that have been granted by them special or exclusive rights - that would be contrary to the rules contained, among others, in Articles 101 and 102 of the TFEU.¹⁴ Even outside the framework of undertakings having an exclusive position, which excludes them from all or the majority of competitive pressures, EU law remains applicable through Article 101 and 102 TFEU in conjunction with Article 4 (3) of the Treaty on European Union (loyalty obligation). With reference to these articles, the Court of Justice of the European Union has repeatedly decided since the 1990’s that Member States are not allowed to enact or maintain in force any legislative or administrative measures that would endanger the effectiveness of the competition rules applied to

¹² But this is not breaking news in the Czech Republic, as a similar legal regulation was provided in section 18 of the Act No. 63/1991 Sb. on the Protection of Competition. It was missing, however, from the Act on the Protection of Competition which substituted this law in 2001 and was included in the 2001 law as of 1 December 2012. Additionally, it is possible to argue that the general principle prohibiting public bodies from acting in an anti-competitive manner applied also before this new law.

¹³ OFFICE FOR THE PROTECTION OF COMPETITION. Supervision of the public administration bodies. *Information Bulletin*. 2014, No. 4, p. 5. Among others, the Office for the Protection of Competition provides as a model case of conduct falling under section 19s of the Act on the Protection of Competition (p. 10) the following: “A municipality owns a building which is used as a funeral hall within the local cemetery including premises necessary for the work of the mortician. The municipality allows an organisation receiving contributions from the municipal budget, which among others provides funeral services, to use the building at more favourable conditions. Other undertakings, potential competitors of this mortician, are either not allowed to use the funeral hall and the premises at all, or for a high rent and upon stringent conditions. At the same time, the municipality allows only the above organisation, which does not cooperate with others, to carry on the excavation works necessary for burial in the municipal cemetery.”

¹⁴ It shall, however, be emphasized that unlike under the section 19a of the Czech Act on the Protection of Competition described above, Art 106 TFEU does not normally apply to State acting *iure imperii* but only *iure gestiois*, i. e. as a part of normal economic transactions.

undertakings.¹⁵ Member States are therefore not allowed to support or grant a general binding effect to acts of undertakings that would be contrary to Articles 101 and 102 of the TFEU or to force the undertaking to engage in such acts through measures enacted by a Member State. In particular, in cases when the State through its measures does not give the undertakings any discretion, the State itself (rather than the undertakings acting on the market) becomes liable for infringement of EU law by the acts of the undertakings against free competition within the meaning of Article 101 or 102 TFEU, because such acts are based on the procedure of state that is contrary to its loyalty obligation towards EU law under Article 4 (3) of the Treaty on European Union.

A look into the internal workings of competition law reveals that involving public authority within its ambit poses a question as to who should be punished in specific cases, and who is liable for the disruption of competition – whether the undertakings or the public authority. And this, considering the abundant interaction of public authority with the business activities of undertakings and unclear definitions contained in certain legislative and administrative acts, causes considerable interpretation and application difficulties in competition law, as attested by the not completely consistent historical line of decisions of the Court of Justice of the EU.¹⁶ From the external point of view, on the other hand, competition law becomes yet another (usually unwelcome) limitation of the bodies of State and local self-government, which in addition to limitations set by the public procurement and state aid law must also respect the requirements of public law protection of competition.

Both mentioned examples of the development of contemporary European competition law towards more extensive regulation of “the private and the public”, however, are not the biggest issues facing competition law. The future will perhaps show that only very loose respect for the logic and boundaries of its application helped the protection of competition to become more effective while cultivating competition on the markets. There are, however, other examples of the recent development of competition law that hardly carry similar expectations.

Competition law and the issue of ambivalence of protected interests

The issue of a blurred line between the protection of public and private interest in competition law outlined in the introduction is brilliantly, though probably inadvertently (due to incorrect Czech wording of the judgment), highlighted by the Court of Justice of the EU in the *Telia Sonera* decision of 2011. The Court held that the role of competition rules is “to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union”, but in the Czech wording of the judgment it referred to “the general interest of in-

¹⁵ For the pre-Lisbon decisions of the Court of Justice of EU see, for example, C-96/94 *Centro Servizi Seditporto* EU:C:1995:308, or C-198/01 *Consorzio Industrie Fiammiferi (CIF)* EU:C:2003:430; for the more recent (i.e. post-Lisbon) decisions see, for example, C-183/13 to C-187/13, C-194/13, C-195/14, and C-208/13 *Anonima Petroli Italiana SpA*, EU:C:2014:2147.

¹⁶ Cf. SEMMELMANN, C. Theoretical reflections on the public-private distinction and their traces in European Union law. *Oñati Socio-Legal Series*. 2012, Vol. 2, No. 4, p. 41.

dividual undertakings and consumers”.¹⁷ The problems with the application of public law prohibitions of competition law to date have been related, among others, to the issue of distinguishing when injury caused to an individual entrepreneur or consumer has the significance and extent of injury to general interest. How to distinguish when the acts of a competitor or competitors conflict with the “general interest of individual entrepreneurs or consumers” to such an extent that private law remedies are not sufficient and public authority must interfere in order to protect the interests of the competition as such?

This is often hard to distinguish even for the Legislature and competition authorities, a fact attested by the example of “multi-sided marketplaces,” be they the brick-and-mortar marketplaces such as shopping malls and large retail chains,¹⁸ or the electronic ones represented primarily by multi-sided platforms such as Google, websites comparing prices or providing booking, etc. What these marketplaces have in common is that they integrate scattered supply and demand in a single location which clearly increases the chances of sale and at the same time increases also mutual competition of the sellers. This should be advantageous for the buyers who can access a wide range of offers at competitive prices without major incidental costs. However, such marketplaces do not provide their service to both parties selflessly, they want to make profit and compete with each other in attracting high quality supply and demand in the long run.

Popular and flourishing marketplaces choose, or rather enforce through their position on the market, the business model in which they combine the interests of sellers with those of the buyers for their own benefit. The customers and suppliers (not to mention the competitors of the most successful multi-sided marketplaces) are not always happy with this. The customer often suffers from the marketplaces being too large, flooded with advertising and sometimes with offers of poor-quality goods or services, etc., and, on the other hand, the suppliers are not always able to enter the marketplace they want, not to mention achieving the conditions they might expect or need. It is therefore beyond doubt that the acts of such marketplaces are truly problematic in several aspects. The relationships between different sides of the multi-sided marketplaces are, however, similar to “communicating vessels” and a regulatory intervention of public authority in favour of one, e.g., the supplier side of the marketplace, may have a negative impact (in terms of

¹⁷ Court of Justice of the EU C-52/09 *Telia Sonera* EU:C:2011:83, para 22. The official Czech version of this decision expresses the aim of competition law slightly differently: “zabránit narušení hospodářské soutěže na újmu obecného zájmu jednotlivých podniků a spotřebitelů a tímto přispívat k blahobytu v Unii,” literally translated into English as “to prevent competition from being distorted to the detriment of the general interest of individual undertakings and consumers, thereby ensuring the well-being of the European Union” [emphasis added]. The author, however, is of the opinion that the clearly incorrect Czech translation better reflects the basic issue of targeting of competition law (not only EU), consisting in finding out when and what type of acts between individual competitors are detrimental to such a general extent in its essence that it must be addressed by public law intervention rather than private action.

¹⁸ Admittedly, a marketplace in the strict sense of the word is a shopping mall leasing premises to individual retailers, whereas a retail chain is itself a retailer that both buys from its own suppliers and competes with them by producing its own private labels that are sold alongside the suppliers’ products. But given the current structure of the retail market, the retail chain becomes a necessary link between suppliers of individual types of goods and consumers, and thus also in the case of a retail chain a regulation for the benefit of one side, the “clients”, may potentially be detrimental to the other side.

price, quality, and structure of supply) on the consumer side and vice versa, for example pressing the interest of consumers to get low prices and good quality may have a liquidating effect on small and medium-sized suppliers. The artificial support of competition among marketplaces may result in the destruction of business models that, although perhaps problematic in one way, generated higher efficiency and were beneficial for the society's well-being as a whole.¹⁹

The case of the Significant Market Power Act

Even in the simpler and more transparent type of local brick-and-mortar marketplaces – the case of large retail chains – public law regulation of competition is not easy and could serve as a demonstration of failure to clearly distinguish between public and private interests in competition law, as proven by Czech attempts at regulation of the so-called significant market power. The common denominator of these attempts is the effort to mitigate the negotiating power of large retail chains as wholesale buyers of agricultural and food products. Czech Act No. 395/2009 Sb., on significant market power in the sale of agricultural and food products and abuse thereof (the Significant Market Power Act), which entered into force in 2010 and was significantly amended in 2016, clearly illustrates how difficult it is to incorporate the protection of interests of individual entrepreneurs, consumers, as well as society in competition designed to foster better performance and higher effectiveness in public law protection of competition.

The notion of the abuse of significant market power was not included by the Parliament in the Act on the Protection of Competition, rather a new Act was adopted. But this new law refers at several points to the Act on the Protection of Competition and mainly vests the oversight of the abuse of market power in the Office for the Protection of Competition. However, the purpose of this Office, according to the law that establishes it,²⁰ is to be a central body of state administration designed to support and protect competition against its unlawful disruption (s. 1(1)). As inferred for example, by J. Bejček, this cannot mean anything else than the (public law) protection of the existence of competition and not “assistance to dissatisfied competitors seeking private law protection against stronger partners.”²¹ This is not, however, in accordance with the wording of several provisions of the Significant Market Power Act, neither in the original wording nor the amended one.

Section 3(1) of the original wording of the Significant Market Power Act defined significant market power as a position of the buyer towards the supplier, when as a result of the situation on the market, the supplier becomes dependent on the buyer [...]. As the Act used the singular form, it leaned toward the so-called relative concept of sig-

¹⁹ For instance, the accommodation booking online platforms are good examples of such an ambiguity. They have allowed an unprecedented matching between thousands of individual accommodation seekers and thousands of small hotels on a scale that would have otherwise never happened. The inverted side of such a beneficial effect is the restriction of price competition when booking platforms require the most favorite price guarantee clause in contracts with hotels which leads to a general price uniformity that could amount to a specific barrier to the entry of new platforms to the market.

²⁰ Act No. 273/1996 Sb., on the Powers of the Office for the Protection of Competition.

²¹ BEJČEK, J. Tržní síla (prostá) a tzv. tržní síla významná. *Antitrust*. 2014, No. 4, p. 123.

nificant market power that must be proven in every specific relationship between the buyer suspected of abusing the market power and the individual supplier. This definition, which is more in line with the private law conception of the protection of the weaker contracting party, was not in accordance with section 4 of the same Act according to which the abuse of significant market power consisted in such acts of the buyer that are made with the objective or result of significant disruption of competition on the relevant market. This provision, on the other hand, was directed at traditional protection of the existence of open market competition and made the task of the competition authority a Sisyphean one. As a result, the correct application of the Act would require the competition authority to first document the parameters of every relation between the buyer and the specific supplier in order to determine the significant market power of the buyer, and then to prove that in a sufficiently high number of these significantly imbalanced relations the buyer applied a certain practice prohibited by the Significant Market Power Act in order to achieve significant disruption of competition on the relevant market specific for the product. Within a case the competition authority is supposed to be both the micro-controller of relations between buyers and suppliers and the macro-protector of competition as such. It is not surprising that since the beginning, the competition authority has tended towards the so-called absolute concept of significant market power similar to a kind of quasi-dominance derived from the structure of the market and the position of the relevant buyer on the market. The competition authority has logically preferred the public law approach, which should be typical for the protection of the existence of competition but according to which the fiction of significant market power based in particular on the turnover achieved would apply. A buyer has such significant market power towards all suppliers that it is not necessary to examine the relations between the buyer and suppliers individually.

However, this approach was rejected by the Czech courts in the *Kaufland* case with reference to section 3(1) of the Significant Market Power Act.²² From the point of view of constitutional and general legal principles, it was desirable not to allow a central body of the Executive to follow an interpretation that modifies the wording of the law (and to cease acting in accordance with its wording and within the limits of the law), and rather to proceed in accordance with the rule *in dubio pro mitius*, that is to stick to the interpretation in favour of the person who could potentially be punished. The amendment of the Significant Market Power Act as carried out by Act No. 50/2016 fixed the defect by replacing singular (against a supplier) with plural (against suppliers) in section 3(1), and, in the explanatory memorandum,²³ explicitly stated the absolute concept of significant market power as the one to be applied.²³

²² Judgment of the Regional Court in Brno File No. 30 Af 125/2013 – 191 of 21st April 2016. Decision of the Office for the Protection of Competition issued before the judgment, and in the appeal by the president of the Office in the case of Kaufland under File No. ÚOHS-S160/2/10-11017/2011/460 of 19th July 2011, File No. ÚOHS-S160/2010-7578/2013/460/Apo of 24th April 2013, File No. ÚOHS-R169/2011/TS-2901/2012/320/RJa of 29th May 2012 and File Ref. ÚOHS-R146/2013/TS-20430/320/RJa of 21st October 2013. The “saga” of the Kaufland retail chain is the only case of the application of the Significant Market Power Act so far decided not only by both instances of the competition authority but also by an independent court.

²³ Důvodová zpráva k zákonu č. 50/2016 Sb. [Explanatory memorandum on Act No. 50/2016 Sb.]. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 31. 3. 2015 [2016-10-03]. Available at: <<http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=444&CT1=0>>. See point 1.6.

At the same time, this amendment excluded the original (public law competition) requirement of section 4 that the abuse of significant market power must be targeted at or cause significant disruption to competition on the relevant market. In contrast, section 4(2)(a) of the amendment has defined the abuse of significant market power in a very similar fashion to section 433 of Act No. 89/2012 Sb., of the Civil Code, which (within private law protection against unfair competition) prohibits the abuse of business position that creates or exploits the dependence of a weaker party in order to achieve a clear or unjustified imbalance in the mutual rights and obligations of the parties. Whereas the Significant Market Power Act that came into force in 2010 defined significant market power in relative terms (i.e., rather in the private law style) and then fixed the public law criterion for its abuse, the Significant Market Power Act in force since autumn of 2016 proceeds as a mirror image of the previous wording: it defines significant market power absolutely (i.e., in the public law style), but the abuse is defined in the concepts of private law protection against unfair competition. Once again, it is possible to cite J. Bejček in that the amendment of the Significant Market Power Act makes the Office for the Protection of Competition the central out-of-court arbitrator for the inappropriateness of content of contractual relations between parties, without requiring that the appropriateness of the content have an impact on the existence of competition.²⁴

The legislative bodies thus failed to choose whether they want to protect competition as a general good, or whether they want to protect individual competitors, and failed to define the protection of the general interest of individual entrepreneurs. According to the critics of the Significant Market Power Act,²⁵ it has even harmed competition as such as well as consumers, because – if the Significant Market Power Act is effectively enforced – the less efficient suppliers will also survive among the competition and the consumer is then likely to pay higher prices than before without automatically and reliably getting better quality. The effort to use the framework and instruments of the public law protection of competition to remedy the relations between large retail chains and their suppliers of food and agricultural products may result in the exact opposite of the definitional objective of the protection of the existence of competition.

The case of multisided online platforms

The difficulties to tell what interests exactly are protected by competition authorities are in the case of multisided marketplaces multiplied by the Internet and the conditions that have become standard online. Competition law is struggling with the business of so-called multisided platforms for several reasons. First, the theoretical models and analytical tools of the protection of competition generally work with the price, its amount, structure, price to cost ratio, sales, turnover, etc. However, consumers using online search engines, price comparison sites, and booking sites do not pay for the service unless we consider

²⁴ BEJČEK, J. Tržní síla (prostá) a tzv. tržní síla významná. *Antitrust*, 2014, No. 4, p. 125.

²⁵ Cf. for example, Vše k novele zákona o významné tržní síle. In: *Svaz obchodu a cestovního ruchu ČR [Czech Confederation of Commerce and Tourism]* [online]. 2015 [2016-10-03]. Available at: <<http://www.socr.cz/vse-k-novele-o-zakone-o-vyznamne-trzni-sile/>>.

the client data collected on their preferences, location, etc. as payment of a kind. The formulas and premises of competition law based on price indicators are, as a result, of very limited use for online multisided platforms.²⁶ Another group of problems stems from the fact that in the online world everything is dynamic and instant. Neither the competition authorities nor the market players can rely on market structure and the market shares of players, business practices, promised technical solutions, and so on remaining unchanged for a long time. From the perspective of this paper, the third group of problems is the most important one. It is related to the fact that in the online world, almost everything that has been considered as a classic manifestation of the disruption of competition so far, appears to be ambiguous now. Or, as pointed out in an analysis for the European Parliament in 2015, “It is difficult to differentiate anti-competitive motivation from normal business strategy.”²⁷

The basis of success of multisided online platforms is the network effect, which is, in the guidance on the Commission’s application of Article 82 to abusive exclusionary conduct by dominant undertakings from 2009, considered a risk to competition.²⁸ For platforms of the Google type, the network effect forms the basis of all business strategies and also the source of benefits to its users. The ideal of a market fragmented among dozens or hundreds of mutually competing platforms is not economically realistic nor attractive to users. The closed and impermeable character of individual platforms causes a lock-in effect which may solidify the position of the winner “taking all” but also incite innovation and invasion of disruptive technology on the market.²⁹ On the other hand, the mutual permeability of platforms that enables easy migration of clients between them requires mutual agreements on standardisation preventing the fragmentation of basic technical solutions. This, however, may facilitate collusion and inhibit innovation. Exclusivity, closure, tie-in, selective access, and so on in the online world may be both disruptive to competition and necessary for the maintenance of the value of the platforms in the eyes of clients who do not want a slow platform infected by false profiles, and congested with low quality offers or poorly operating applications.

The suppliers of goods or services who would like to attract customers through a platform seek to enforce the so-called neutrality of each platform – i.e., its openness and strictly non-discriminatory attitude to everyone so that none of the players is squeezed out of the market by being denied access. But this is an ideal that is difficult to achieve because every search engine must somehow choose and order the search results, and can

²⁶ Cf. FRIČOVÁ, V. Two-sided markets – Why two-sidedness matters? *Antitrust*. 2014, No. 2, pp. 45-48. Also, O’CONNOR, D. Understanding Online Platform Competition: Common Misunderstandings. In: ORTIZ, A. (ed.). *Internet Competition and Regulations of Online Platforms*. Competition Policy International, 2016, pp. 9–29.

²⁷ VAN GORP, N., BATURA, O. *Challenges for Competition Policy in a Digital Economy*. Study for Committee on Economic and Monetary Affairs IP/A/ECON/2014-12 July 2015. European Union 2015, p. 26.

²⁸ EUROPEAN COMMISSION. Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (OJ EU C 45, 24.2.2009), paragraphs 17, 20.

²⁹ Cf. LASSERE, B. Regulating Internet Platforms: new players, old tricks? In: *Edition Multimédi@* [online]. 19. 11. 2015 [2016-10-03]. Available at: <<http://www.editionmultimedia.fr/wp-content/uploads/2015/11/Régulation-des-plateformes-internet-par-Bruno-Lassere-Autorité-de-la-concurrence-2015.pdf>>.

display only a limited number of results on the first page. This may seem limiting and discriminatory to suppliers, but an absolutely fair search algorithm has yet to be invented.³⁰ In addition, the fact that most online platforms are trying to attract the highest possible number of users free of charge, in order to interconnect them with one or more groups of providers who want to sell them something, brings the necessity of cross-financing and the uneven distribution of costs and revenues. This may again be perceived by someone as discriminatory and restrictive, however, it is not easy to determine what distribution of costs and revenues would be optimal for all groups of platform users and for the efficient survival of the platform on the market.³¹

This inability to identify what in the conduct of online platforms is a necessary building block of their efficiency and what is anti-competitive behaviour puts an old-new question before competition law with a new urgency: how to define the general interest of individual entrepreneurs and consumers while at the same time supporting the welfare of society as a whole? There is no doubt that every effective platform is a great contribution to competition because it puts together and compares in one point a huge range of supply and demand, it enables the overcoming of geographical and capital limitations to those who otherwise would not be able to realise international distribution (or purchase). At the same time, it is clear that it is difficult for new competition to break into the environment of globally spread networks of online platforms and that the quasi-monopoly position of some of them generates numerous threats to competition (closure of the market) and at the same time to other related areas (client data management, tax evasion, infringement of IPR). An intervention by the competition authority against certain parameters of the online platform business model may harm clients on one or both sides (i.e., consumers and/or suppliers) and distort competition on the market by giving a chance to platforms that may be of worse quality compared to the “regulated” platform in terms of technology or business model.

An illustrative example of these dilemmas is the investigation of the globally most widespread and most frequently used search engine, Google Search, investigation which has been ongoing since 2010 and concurrent and still pending proceedings against it by the European Commission. In the case of Google Search, one of the main Commission’s objections is to the algorithm of the Internet search which allegedly favours Google proprietary specialised search engines (such as Google Shopping), whose search results are displayed before the results of competing specialised search engines.³² The originally considered solution whereby Google would agree to publish the search results of three competitive specialised search engines together with three results of its proprietary specialised

³⁰ The fact was acknowledged for instance in the statement of the (then) EU Commissioner for competition J. Almunia: “The objective of the Commission is not to interfere in *Google’s* search *algorithm*. It is to ensure that *Google’s* rivals can compete fairly with *Google’s* own services.” See ALMUNIA, J. *Statement on the Google investigation*. Press conference in Brussels, 5 February 2014. Speech 14/93.

³¹ On the ambivalence of the behaviour of online multisided platforms see EVANS, D. S. *Multisided Platforms. Dynamic Competition and the Assessment of Market Power for Internet-Based Firms*. In: Ortiz, A. (ed.). *Internet Competition and Regulations of Online Platforms*. Competition Policy International 2016, pp. 78-94, and also O’CONNOR, D. *Understanding Online Platform Competition: Common Misunderstandings*. In: ORTIZ, A. (ed.). *Internet Competition and Regulations of Online Platforms*. Competition Policy International, 2016, p. 23.

³² Cf. EUROPEAN COMMISSION. Press Release IP/15/4780 of 15th April 2015.

search engines was not satisfactory, and admittedly it would seem to be only a makeshift solution. An important aspect of this protracted case is also the fact that Google sticks in the throat of many more European entrepreneurs and their political supporters than actual European consumers, who are the users of Google Search.³³ Protection of the users by means of public law protection of competition is not really necessary because individual search may easily be moved elsewhere in the case of dissatisfaction (unfortunately all global alternatives originate from the USA and not from the EU...) and the fact that the consumers continue to use Google Search would appear to mean that they are satisfied and do not feel “locked in” or lacking the possibility to leave Google Search.

It is difficult to estimate, for both the regulator and competitors, which parameter of operation of a popular platform is decisive for consumers and their loyalty. As users do not pay a fee that can be expressed in monetary terms, it is not easy to determine whether they could be tempted to seek an alternative based on ease of access or range of services, quality and customisation of search results, a limited amount of advertising, or possibly a simple interconnection with other applications. In contrast to comparable search engines, Google Search seems to compete realistically with specialised mobile applications used by customers on their cell phones and tablets to find a hotel, travel information, the best price, specific goods, or encyclopaedic information. Google itself is alleged to consider Amazon and Facebook more serious competition than comparable alternative search engines for Internet content.³⁴ Targetting and justifying the public law protection of competition against a multisided online platform such as Google is not easy at all, especially if we should not listen to Google’s direct competitors and their political supporters, because an intervention in their interest would not be beneficial to European consumers nor the dynamics of competition on the market.

Of course, this does not mean that dominant online platforms might not significantly harm consumers and general welfare, but a certain scepticism from some analysts³⁵ as to

³³ Platforms of EU origin currently represent only 4% of the overall market capitalisation of large online platforms and the multisided online platforms clearly dominating EU originate from the USA, cf. EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*. Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe. Brussels, 25th May 2015 COM (2016) 288 final. For example, *Google Search* has 90% market share in the EU, cf. WEBER, R. H. Competition Law Issues in the Online World. 20th In: *St. Gallen Competition Law Forum ICF* [online]. 4-5. 4. 2013 [2016-10-03]. Available at: <<http://www.sg-icf.ch>>. The French minister for technologies, F. Pellerin, openly stated that “in current conditions it is difficult for European champions to break through on a global scale”, quoted from ROBINSON, F., SCHECHNER, S. France Pushes EU to Regulate U.S. Internet Companies. In: *The Wall Street Journal* [online]. 19. 9. 2013 [2016-10-03]. Available at: <<http://www.wsj.com/articles/SB10001424127887324492604579085222987377040>>.

³⁴ STERLING, G. Google’s Eric Schmidt: “Really, Our Biggest Search Competitor Is Amazon”. In: *Search Engine Land* [online]. 13. 10. 2014 [2016-10-03]. Available at: <<http://searchengineland.com/googles-eric-schmidts-berlin-speech-biggest-search-competitor-amazon-205761>>.

³⁵ Cf. for example, HOVENKAMP, H. J. Competition Policy and the Technologies of Information. *University of Iowa Legal Studies Research Paper*: 2014, No. 14–18, June, [2016-10-03]. Available at: <<http://ssrn.com/abstract=2444349>>, or COATES, K. An Emerging Competition Law for a New Economy? Introductory Remarks for the Chillin Competition panel. In: *Twenty First Century Competition* [online]. 2016 [2016-10-03]. Available at: <<http://www.twentyfirstcenturycompetition.com/2016/01/an-emerging-competition-law-for-a-new-economy-introductory-remarks-for-the-chillin-competition-panel/>>.

whether they are issues that can be solved by public law instruments of protection of competition is appropriate. Perhaps other branches of law – such as criminal law, tax law, or copyright – would be more successful in resolving these issues, some of these branches (in particular the law against unfair competition, consumer protection and personal data protection) have the potential to solve situations of competition law overlap. This includes the consumer right not to be misled, for example by the results of an Internet search, or the right to the transferability of one's personal data or an entire profile in the case of social platforms, which would alleviate the potential competition problems attributed to businesses such as Google and Facebook. Regulation of the management of personal data of the platform users – consisting for example in the possibility to maintain the data only for a limited period of time – would resolve the issue of “big data” as the possible basis of market power of online platforms.³⁶

These examples show that in cases when competition law is unable to reliably define its objective, i.e., again, what constitutes the general interest of individual entrepreneurs and consumers and at the same time what contributes to the welfare of society, competition law should question its leading doctrine (who or which value should be protected preferentially), or should prefer restraint and should cede to neighbouring branches of public and private law whose purpose is the protection of very similar values and groups of market players.

CONCLUSION

The protection of the existence of competition resists in many aspects a precise definition from the perspective of the division of law into public and private. In some cases, such as the current EU emphasis on private law enforcement of public law prohibitions of anti-competitive behaviour, a certain ambivalence in competition law may result in the greater effectiveness of protection of open competition. On the other hand, this paper attempts to prove that the blurred distinction between public and private interests in the protection of competition, i.e., a certain balancing of competition law between the protection of competition and individual parties involved, is a source of difficulties in contemporary economically important and dynamic sectors where so-called multisided platforms are active. They show that using public law protection of competition as a “patch” in cases where private law instruments for the protection of fair competition and the weaker contracting party against abuse and unfair competition prove to be insufficient often does not yield socially effective results, let alone the expected legal certainty.

There is no doubt that competition law responds to the objective social need for the satisfaction of which society has not yet found another more effective and at the same time more clear-cut legal instrument. Even though this paper voices some criticism of contemporary competition law in the interest of finding ambiguities and inconsistencies

³⁶ For more on the topic, see LASSERE, B. Réguler un modèle dominant: l'économie des plateformes numériques? Les approches des autorités de régulation. In: *Edition Multimédia* [online]. 7. 4. 2015 [2016-10-03] Available at: <<http://www.editionmultimedia.fr/wp-content/uploads/2015/11/Régulation-des-plateformes-internet-par-Bruno-Lassere-Autorité-de-la-concurrence-2015.pdf>>.

in respecting the limits of the clear public law basis of the protection of the existence of competition, the author is not an advocate of those voices mentioned in the Introduction which propose to significantly restrict this branch of law or even abolish it. In the more than one century (in the case of the EU, more than 60 years) of its application, competition law has done a lot to maintain a competitive market economy and to achieve social acceptance as it prevents, through its interventions, the excessive concentration of market power in the hands of some players. The fact that competition law is still working on the definition of its limits, detailing its objectives, and adapting its instruments mainly relates to transformations of market power operation, as demonstrated by this paper on the example of multisided online platforms. The ambivalence and uncertainties of competition law must be perceived as the price to pay for the effort of regulating phenomena that are complex, dynamic, and in their own right are ambivalent and uncertain in their effects on society.