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ANTI-COMPETITIVE PRACTICES AND THEIR EFFECT ON THE ECONOMIC ENVIRONMENT

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SUMMARY

INTRODUCTION

Global unprecedented events made a visible impression on last years. Unpredictable and sometimes unimaginable changes were imposed, affecting all areas of life, including the economic one. “Pandemic” changes have ruined many businesses and destroyed entire branches of industry, offering the essential benefits to others in return. Optional economic activities appeared instead of traditional ones. It was foisted the need for enterprises’ economic behaviour development and the state involvement in regulating the task in the sectors of interest.

Taking a historical retrospective during the years after the US Civil War, there were practically two technological revolutions in transportation and communications, and the development of the railroad and the telegraph changed the business environment. Thus, we can see the creation of the situation that drove the basic evolution in the legislative framework and the adoption in 1890 by the US Congress of the first competition law, called the Sherman Anti-Trust Act. Historical changes, accumulating in the critical mass, imperatively require legislative changes, and the 21st century can undoubtedly be associated with technological progress and the IT revolution.

The antitrust report of the US House of Representatives marked the end of 2020. After a 16-month investigation into the market power of IT giants such as Amazon, Facebook, Google and Apple concluded that "internet giants" took advantage of their position to eliminate competition.

Of course, the parties concerned challenged the statement, but the drastic conclusions contained in 449 pages of the report will inevitably lead to the initiation of discussions at various levels, which will most likely lead to the adoption of new legislation. The implementation of competition law also by combating anti-competitive practices, aims to protect and support free competition. Competitiveness, influencing multiple sides of economic and social life, will ensure the fundamental principle of the market economy, regardless of the development stage.

Given the need to understand the anti-competitive practices phenomenon and its effect on the economic environment in terms of actual changes and studying the literature in the theoretical and existing practice, the author aimed to systematize reference information and formalize a methodology for evaluating the effect of anti-competitive practices on consumer welfare, taking into account all parameters of competition: quantity, price, quality, innovation and variety.

CHAPTER 1. ANTI-COMPETITIVE AGREEMENTS

1.1 The concept and elements of anti-compeitive agreements

Anti-competitive agreements represent a form of collaboration between companies. They aim to reduce existing competitive pressures on the market that lead economic operators to innovate and improve their offers - asking price and quality of goods and services offered. As a result, anti-competitive agreements can harm consumers' interests, who end up paying more for goods and services of a lower quality than the payment on a competitive market.

Anti-competitive agreements represent a generic name for entente, anti-competitive agreements, monopolistic arrangements, cartel, and others, used by representatives of different schools and jurisdictions. At the same time, at the European level, the principal regulation providing the interdiction and sanctioning of anti-competitive agreements is contained in art. 101 TFUE. Thus, according to paragraph (1) of Article 101 TFEU, any agreements between undertakings, any decisions of associations of enterprises and any concerted practices which may affect trade between the Member States and which have as their object or effect impeding, restricting or distorting competition within the common market, are forbidden and prohibited by the internal market.

Elements necessary to establish anti-competitive agreements:

a) There are the independent enterprises

b) There is an agreement between undertakings, a decision of associations of enterprises and a concerted practice;

c) Object or effect - impediment, restriction or distortion of competition.

Recognizing an agreement between companies that restricts competition can be an issue. There are, of course, types of restrictions in which the answer to the question is self-evident, such as traditional pricing agreements or market-sharing agreements. However, concerning non-cartel cooperation and vertical agreements, opinions on the competition restrictions are divergent.

1.2 Forms of anti- competitive agreements

Article 101 TFEU, following the declaration of a general ban, lists several typical cases in which the agreement is incompatible. This list can only be considered as a list of examples, which intends to show the nature of the transaction considered typically anti-competitive by the legislator, and therefore subject to sanctions. If an agreement or concerted practise corresponds to one of the examples listed, it is easy to qualify as an anti-competitive agreement. At the same

time, this list is not exhaustive. In the practical activity, other actions are taken as anti-competitive agreements.

Depending on their nomination in the TFEU, the forms of anti-competitive agreements are:

1. Anti-competitive arrangements referred to in Article 101 (1) TFEU
   - **a)** establish, directly or indirectly, purchase or sale prices or any other trading conditions;
   - **b)** limits or controls production, marketing, technical development or investment;
   - **c)** share markets or sources of supply;
   - **d)** applies, in the relations with the commercial partners, unequal conditions to equivalent services, thus creating to them a competitive disadvantage;
   - **e)** the parts sign the contract by accepting additional services that are not related to the object of these contracts by their nature or commercial usages.
2. Anti-competitive agreements identified by EU case law:
   a) participation with rigged bids in tenders or any other form of tender;
   b) restricting or impeding access to the market and the freedom to exercise competition by other undertakings, as well as agreements not to buy or sell to certain enterprises without reasonable justification, and others.

1.3 Typology of anti-competitive agreements depending on economic effects

At the theoretical and normative level, agreements between undertakings that prevent, restrict or distort competition are divided into horizontal agreements and vertical agreements. The classification criterion in this case is the type of business relationship.

Horizontal agreements are between two or more enterprises operating in the market at the same (s) level (s).

Depending on the effects on competition, horizontal agreements fall into two categories prohibited per se and non-per se. The term "hard cartels" is also used to refer to horizontal agreements per se.

In the 1998 Recommendation, the Council of the Organization for Economic Co-operation and Development (OECD) defined the cartel as an anti-competitive accord, concerted anti-competitive practice or an anti-competitive agreement between competitors on setting

prices, rigged bids, exit restrictions or quotas, the division or distribution of markets by assigning buyers, sellers, territories or lines of commerce.

The "non-per se" group consists of cooperation agreements, which are considered less harmful to competition. Their effect on competition depends, among other things, on the nature of the agreement and market conditions. First, their evaluation is performed on a case-by-case basis.

Vertical agreement means an agreement or concerted practise agreed between two or more undertakings, where each operates, within the meaning of the agreement or concerted practice, at different levels of the production and distribution process, referring to the conditions under which the parties may purchase, sell or resell certain goods or services. Competition law is usually much more tolerant of vertical restrictions of competition because such agreements contribute to the occurrence of new products, increased competition between brands (even to the detriment of competition within the same brand), accompanied by competition-limiting side effects. One should consider that in some countries, such as the United States, there is no vertical ban equivalent to a horizontal one, and vertical restrictions are pursued depending on the presence of market power.

Depending on the effects they produce, the agreements can be delimited in:

- Anti-competitive agreements with obviously negative effects for the economy and consumers;
- Anti-competitive agreements that do not significantly limit competition and can have a positive economic impact.

Prohibited anti-competitive agreements (with obvious negative effects)

i. **Prohibited horizontal agreements "per se"**

One of the most serious infringements of competition law recognized by all jurisdictions is the cartel. Detecting and combating the cartel has become one of the top priorities of competition authorities in Europe and worldwide. Recently, several measures have been taken to increase the effectiveness of countering cartels. According to the OECD recommendation, the cartel is an anti-competitive agreement, concerted anti-competitive practice or anti-competitive arrangement of competitors to set prices, make fraudulent offers, set production or quota restrictions or divide markets by allocating customers, suppliers, territories, or commercial lines. In other words, a cartel is nothing more than a functioning regulation of a particular market carried out by its participants in private interests, excluding or restricting competition. A well-functioning cartel can be as damaging as a government malfunctioning regulation. The active state intervention in the economy under the pretext of protecting the

public interest can disturb the market, reducing its efficiency. The cartel members do the same, not to protect the public interest but to follow their business interests.

Depending on the agreement objectives between the competitors, there are mainly:

1. cartel of price,
2. cartel for market division;
3. cartel by cheating offers
4. cartel regarding the limitation of production or the establishment of quotas;
5. cartel based on the exchange of information.

Cartels were often complex in nature, combining the influence of prices, the division of markets and the limitation of production with the establishment of various control mechanisms in which one can exchange confidential business information.

ii. **Prohibited vertical agreements**

In EU competition law, unlike in the US, vertical agreements are examined much more closely. The political objectives pursued by the EU determine this reason. Vertical agreements could prevent the creation of a single market and the economic integration of EU member states, issues that are not characteristic of the US. For these reasons, they examine closer the vertical agreements, and if they could restrict competition or trade between the Member States - prohibited.

Provisions prohibited "per se" in vertical agreements refer to the division of the market by territory and group of customers or to the limitation of the buyer's ability to determine his resale price. The first category can be further divided into restrictions of the buyer's and supplier's freedom to sell.

- *Sales restrictions for buyers*
- *Sales restrictions for licensees*
- *Sales restrictions for the supplier*
- *Maintaining the resale price*

Unsanctionable anti-competitive agreements

In some cases, despite the fact that the agreement meets the conditions provided by law in order to qualify as punishable, reasons related to maintaining competition in efficiency parameters do not require the penalty. The sanctionable or non-sanctionable character is related to the competition policy, whether it is the policy applied by the Member State or at the EU level. The hypotheses that are not sanctionable have in common the impact on the market, the justification from the prevalence of the economic perception on the competition law over the

legal vision. Causes of exoneration from liability can be grouped into: exemptions regarding minor agreements; individual exemptions; block exemptions.

- Exceptions regarding minor agreements

As regards the determination of the agreements' aim which do not significantly restrict competition and which do not need sanctioning, the Commission considers two situations:

• In the case of agreements between competing undertakings, it will check whether or not the cumulative market share held by the agreement parties exceeds 10% in any of the relevant affected markets;

• In the event of agreements between non-competitors, the Commission will verify whether or not the market share held by each of the agreement parties exceeds 15% in any of the relevant affected markets.

If it is difficult to determine whether it is an agreement between competing undertakings or, as the case may be, non-competitors - the 10% thresholds will be applied, and where competition is restricted by the cumulative effect of agreements concluded with different suppliers and distributors (cumulative blocking effect), the thresholds will be reduced by 5%.

Exceptions to minor agreements do not cover the ones which have as their object the prevention, restriction or distortion of competition within the common market. Thus, the exemption does not apply to agreements between competitors containing restrictions, which, directly or indirectly, have as their object:

(a) fixing the selling prices of products to third parties;

(b) restriction of production or sales;

(c) the allocation of markets or customers.

- **Individual exemptions and block exemptions**

Individual exemptions and block exemptions shall be granted according to provisions of Article 101 (3) TFEU. The provisions of par. (1) may be declared inapplicable in the case of

- Any agreements or categories of agreements between undertakings;

- Any decisions or categories of decisions of associations of undertakings;

- Any concerted practices or categories of concerted practices which contribute to the improvement, distribution of the production to the technical or economic progress promotion, while ensuring fair share of the benefit to consumers and which:

(a) Do not impose restrictions that are not essential of those aims on the undertakings concerned;

(b) It does not give undertakings the opportunity to eliminate competition in respect of a significant part of the products concerned.

The agreement (agreement, decision or concerted practice) should contribute to improving the production and distribution of products, to the development of technical and economic progress. Thus, economic advantages must accompany the restriction of competition.

The exemption is granted individually to those agreements, which meeting the conditions provided by law, allow a level of compatibility with the functioning market. This exemption relies on the idea that legal rules are an instrument made available to protect the market from aggression, and the application of sanctions must take into account the real market effect on the facts. In exceptional cases, anti-competitive agreements may be tolerated based on national interest.

The block exemption refers to the exemption from the application of competitive sanctions to business relationships by relating them to an exemption standard. Anti-competitive agreements exempted by positive effects, which are indispensable for the development of a certain type of business relationship, have been grouped into categories that receive the uniform exemption insofar as they meet the conditions corresponding to the category. Block exemptions are allowed in case of horizontal agreements, called competition agreements of competitors, and vertical agreements.

- ***Cooperation of competitors***

Agreements between competitors, called horizontal agreements, depending on the purpose of the parties and the nature of the agreement, can be divided into two broad groups: cartels that are anti-competitive by object and cooperation agreements designed to support more successful and effective market participation. in the end, to increase competition.

Non-cartel cooperation between competitors is known as joint venture, regardless of the legal form or organizational framework in which it operates. The parties may set up a joint venture, an organization for this purpose, but their cooperation may be based exclusively on a contractual basis. Unlike cartels, cooperation is not hidden, so it is embodied in a well-designed contract or package of contracts.

- ***Allowed vertical agreements***

The group exemption from vertical restraints is based on the "economy-oriented approach". Thus, only restrictions imposed by companies with significant market power deserve to be analyzed under competition law, in this respect a threshold of 30% of market share has been introduced. Below this threshold, all restrictions are exempt from the prohibition, while agreements between undertakings with a market share above this value are subject to an individual assessment.

Vertical agreements are not concluded by competitors, but by undertakings, located at different levels of the value chain and considered to be less harmful to competition. Due to the distinct perception of the degree of danger of the agreements, their treatment is also different, in essence, the competition policy is more severe in terms of horizontal agreements.

Vertical restrictions on competition are more likely to be accompanied by positive economic impacts than coordination between competitors. Some of the benefits of vertical agreements:

- can facilitate entry into new markets;

- can promote forms of competition that go beyond price competition;

- can serve as an effective means of tackling the problem of "free-riding",

- ensure the marketing economy resulting from economies of scale,

- to contribute to the increase of quality and sales.

CHAPTER II: ABUSE OF A DOMINANT POSITION

2.1 The conceptul of abuse of a dominant position

Abuse of a dominant position means an illegal business practice that uses its economic power, rights and business opportunities, including the means available in a way that limits competition, harms society and consumers. In assessing abuse, it is necessary to distinguish between correct business conduct and behaviour that is abusive in nature. A fair competitive environment cannot be ensured without equal opportunities for businesses. Thus, the abuse of a dominant position concerns the conduct of an undertaking with substantial market power, which, as a result, distorts the competitive environment or prevents effective competition in the market.

A particular situation characterizes a dominant undertaking. Due to its substantial market power, one must pay greater attention to its market behaviour. Thus, a dominant company must abandon certain practices that under normal competitive conditions in the absence of a dominant position could be regarded as a regular business practice. The finding of abuse of a dominant position does not require an analysis of the subjective side of that infringement, so it does not matter whether the action was committed intentionally or recklessly. Thus, the abuse of a dominant position is generally prohibited. At the same time, in case of penetration price abuse, it is necessary to have a plan of eliminating the competitors.

According to the settled case law of the CJEU, abuse of a dominant position refers not only to practices that may directly harm consumers but also to those which are harmful to them through their impact on effective competition. A dominant undertaking has a special responsibility not to allow its conduct to affect undistorted effective competition in the common market.

The finding of abuse of a dominant position and the application of competition law, respectively, must be made as a result of a complex and objective analysis of all the conditions respecting the rule of reason. Thus, some practices that appear to be abusive at first sight can be explained by the existence of certain objective factors.

For example, the different transport, tax system or market characteristics explain the different price costs. To assess the existence of anticompetitive effects, it is necessary to examine whether that pricing policy, without objective justification, results in the actual or probable exclusion of that competitor to the detriment of competition and, consequently, of the interests of consumers.

The competition authority in cases of abuse of a dominant position has to demonstrate the distortion or possibility of distortion of competition, which is not justified by objective reasons.

2.2 Criteria for finding the existence of abuse

There are two methods of finding the abuse of a dominant position: based on the traditional (form-based) approach and the effect-based approach.

The effect-based approach in the process of assessing the abuse of a dominant position gives more importance to anti-competitive effects and less importance to verifying the existence of a dominant position, except in cases of de minimis.

In the case of the effects-based approach, the verifiable result of significant injury to competition is evidence of the existence of a dominant position. Traditional models of establishing dominance based on market structure information are rather indicators for determining background dominance, the ability to have market power and to behave abusively towards other market players.

In the effect-based approach, abuse of a dominant position is only possible if the undertaking has a dominant position, ie a demonstration of dominance is not considered necessary. At the same time, in the case of investigations conducted by competition authorities, the traditional approach, respectively going through all stages (determining the relevant market, establishing the dominant position, analyzing the anti-competitive effects) disciplines the competition authorities.

In order to classify the conduct of the undertaking as an abuse of a dominant position on the basis of the traditional approach, it is necessary to clarify two main issues:

I. If the undertaking holds the dominant position;

II. And if so, then if he is abusing this position.

An undertaking can be dominant only if it has substantial market power. The determination of the dominant position can be made based on direct or indirect methods. Direct methods involve the accumulation of economic evidence of substantial market power, for example, the company's ability to behave independently of competitors, customers and consumers. Indirect methods are based on the presumption of a dominant position, in particular by having a large market share, usually more than 50%.

In order to establish the existence of abuse of a dominant position, a number of factors were identified and several tests were carried out to assess the abusive nature of the company's conduct.

According to the EC Commission Communication on abusive exclusionary practices of dominant undertakings, 7 relevant factors for the assessment of abusive practices are highlighted:

1. Position of the dominant undertaking;
2. Relevant market conditions;
3. The position of the dominant undertaking's competitors;
4. Position of customers or suppliers;
5. The intensity of the alleged abusive practices;
6. Possible evidence of blocking;
7. Direct evidence of the exclusion strategy.

It is necessary to clarify that none of the seven factors listed in paragraph 20 of the EC Commission Notice on the abusive foreclosure practices of dominant undertakings can't be used in isolation or even together to prove anti-competitive foreclosure. These should always be included in a plausible theory of harm to consumers.

When classifying the conduct of the company as an abuse of a dominant position, it is much more important to assess the effects of the abuse of a dominant position on consumers and the competitive process, than the form, manner of committing the abuse of a dominant position. The conduct of the dominant undertaking may be considered abusive if its effects are direct (eg price increase) or indirect, by discouraging new entrants, reducing the intensity of competition and consequently reducing diversity and innovation.

2.3 Typology of abuse of a dominant position

The doctrine knows several criteria for classifying the types of abuses of the dominant position. A criterion for classifying abuses may be based on their purposes:

1) oriented towards the illegal modification or maintenance of prices, tariffs (for example, the practice of excessive or predatory prices);
2) aimed at preventing the free development of economic activity (for example, imposing the contractor on unfair trading conditions);
3) oriented towards limiting the market access (exit from the market) or eliminating the economic agents from the market (for example, creating obstacles in the way of market entry / exit of other economic agents);
4) oriented towards the illicit dissatisfaction of consumer demand (for example, limiting production, despite the existence of favorable production conditions, unfounded waiver of the contract with some buyers (beneficiaries) when there is a possibility of production or delivery of those goods).

Another classification criterion is the way or method of manifestation of abuses:

1) contractual, related to the fact of concluding the contract with the enterprise, which holds a dominant position, as well as to the conditions and the way of its realization;
2) non-contractual, the purpose or result of which is to raise prices, limit production, marketing or technological development to the detriment of consumers, etc.

3) mixed, to which can be attributed: the creation of barriers to entry of other enterprises, the application in relations with trading partners of unequal conditions to equivalent benefits, thus creating a competitive disadvantage.

It is also possible to classify abuses according to the subjects they affect:

1) abuses directed against the contractor, who is a party to the contract, ie against sellers and consumers;

2) abuses against companies operating in the same market, ie against real and potential competitors.

The doctrine of Community competition law classifies abusive practices into two subgroups: exclusion and exploitation.

1) On one hand, exclusive abuses are those practices, which are not based on normal business performances, which seek to affect the competitive position of current or potential competitors of the dominant company or to exclude them altogether from the market, which tend to change the structure of the market. (eg exclusivity agreements, conditional discounts, etc.).

2) Abuses of exploitation, on the other hand, involve the dominant undertaking 's attempt to exploit the opportunities offered by its market power, with the aim of directly affecting customers, for example, by imposing excessive prices. They harm consumers.

3) Some authors also point to a third group, namely retaliatory abuses, when the dominant company punishes another company, for example, for negotiating with a competitor.

2.4 Forms of abuse of a dominant position

The internationalization of economic activity requires the creation of favorable conditions for business development by harmonizing the rules of the game. A sensitive area in this regard is competition, which, if regulated differently in different countries, can be an obstacle to economic development.

To overcome this challenge, the United Nations Conference on Trade and Development (UNCTAD) proposed in 2007 a model law on competition, which contains the fundamentals needed for a competition law.

The forms of the abuse of a dominant position manifestation provided by Chapter IV of the Model Law on Competition (UNCTAD) are:

(a) Predatory behaviour towards competitors, such as the use of cost prices to eliminate competitors;

(b) Discriminatory (for example unduly differentiated) pricing, in terms or conditions of supply or purchase of goods or services, including through the use of pricing policies in transactions between affiliated undertakings, which increase or decrease the price of goods or services purchased or provided compared to prices in similar or comparable transactions outside affiliated companies;

(c) Determining the prices at which goods sold may be resold, including those imported and exported;

(d) Restrictions on the import of goods which have been lawfully marked abroad with a mark identical or similar to the protected mark as identical or similar goods in the importing country where the marks in question are of the same origin, for example, belong to the same owner or are used by undertakings between which there is economic, organizational, managerial or legal interdependence and where the purpose of these restrictions is to maintain artificially high prices;

(e) Actions that do not ensure the achievement of legitimate commercial purposes, such as quality, safety, proper distribution or service:

As a rule, undertakings have contractual freedom, so that the imposition of insufficiently justified conditions by the dominant undertaking could be anti-competitive.

The analysis of the experience of the European Union allows us to describe the forms of abuse of a dominant position listed in Article 102 TFEU, but also those found by the courts of the European Union, including:

1) Discount schemes
2) Binding and grouping
3) Exclusivity agreements
4) Predatory price (ruining ones)
5) Margin compression
6) Refusal to contract or limit access to essential facilities
7) Predatory product design or refusal to disclose new technology
8) Excessive price or unfair delivery conditions
9) Abuse of administrative procedure
10) Economic concentration as an abusive practice
11) Elimination of competing products from the retail network
12) Initiation of minor disputes

13) Enforcement of bans based on intellectual property standards

14) Petition for the imposition of anti-dumping duties on competitors

CHAPTER III: CURRENT RESEARCH STATE OF OF THE ANTI-CMPETITIVE PRACTICES ECONOMIC IMPACT

3.1. Analysis methodology of the impact of anti-competitive practices

Analyzing the impact of competition policy, the effects of anti-competitive practices and the decisions of competition authorities is a constant concern. Thus, public authorities and in particular competition authorities seek to justify the use of public resources to promote competition policy, representatives of the business environment and international bodies seek to standardize competition rules so that they do not harm business development, etc.

The European Commission, the OECD, competition authorities in several countries, and academia have proposed several methods and techniques that would quantify the harm caused by anti-competitive practices, the economic effects of competition policy and the intervention of competition authorities.

In the opinion of OECD experts, the methods and techniques used to assess the impact of competition authorities' decisions on anti-competitive practices can be divided into:

- methods based on comparison;
- methods based on market structure;
- qualitative methods: surveys and interviews.

3.1. The microeconomic effect of anti-competitive practices

The impact of anti-competitive practices on price

Most research on microeconomic assessment of the effects of anti-competitive practices relies on a comparison of actual developments following the intervention of the competition authority with what would have happened in the absence of such an intervention ("counterfactual").

Such a comparison makes it possible to assess the progress made by the objective of competition policy because of public intervention. The overall objective of enforcing competition law is to increase consumer welfare.

The microeconomic effects of anti-competitive practices materialize in the direct impact on the businesses involved, customers and consumers.

The microeconomic indicators that allow us to analyze the economic effects of anti-competitive practices are in particular the price, quantity and surplus of the consumer. At the same time, it should be noted that the microeconomic effects of anti-competitive practices and their combating could be direct and indirect.

More precisely, combating anti-competitive practices and controlling economic concentrations is the application of competitive policy. Various qualitative and quantitative methods are used for the microeconomic assessment of competition policy. Quantitative methods are the methods that lead to a numerical estimation of the progress made towards the objective of competition policy.

On the contrary, qualitative methods do not lead to a numerical estimate, but reflect the perception of the phenomenon by the respondent. A combination of qualitative and quantitative methods is often welcome in order to get a more comprehensive assessment of competition authority intervention in combating anti-competitive practices.

Among the qualitative methods, one can distinguish surveys, interviews and peer reviews between competition authorities, judiciary control of decisions taken by the competition authority.

Evaluations based on such qualitative methods are often focused on determining whether expectations at the time of competition policy intervention have proved to be true. Evaluations using quantitative methods tend to focus and establish a causal relationship between public intervention and progress made towards achieving the objectives of competition policy - increasing consumer welfare, assimilated with consumer surplus.

Most quantitative assessments of the impact of cartel counter-decisions start with an estimate of the size of the surcharges (ie the difference between the collusive price and its competitive counterfactual price) resulting from the cartel. It is expected that the cartel ban will eliminate such surcharges. In addition, it acts as a deterrent to companies considering their involvement in current and future cartels.

Much of the empirical work on the impact of cartel policy enforcement is based on the work of John Connor, who has built over the years a database of over 2000 overload estimates, covering over 500 active cartels at a time in the last three centuries. In the database, the median surcharge is 23% and the average value of surcharges is almost 50% of the reference price, the price that is observable on the market in the absence of collusion.

Connor notes that surcharges have been declining since the end of World War II, as competition law enforcement regimes became more stringent. However, for two types of cartels (eg bidding and "legal" cartels) there was no significant decrease in average surcharges.

Connor also notes that the surcharges in cases of illegal and convicted cartels are on average 19% higher than unpunished legal cartels. The cartel is usually banned and considered illegal, while the legal cartel appears in the case of regulated markets where active cooperation between competitors is allowed, in order to exclude competitive pressures.

Estimating the probability of detecting the cartel is very difficult, much less measuring the impact of a greater enforcement effort on the detection of the cartel. Connor and Lande cite a number of studies that report detection probabilities between 10% and 33%. Studies have shown that stronger enforcement of the US and EU cartel control policy, in particular, has contributed to the observed decline in excessive prices. There is also considerable variation in average surcharges.

However, the use in question of the levels of appropriate fines of the average surcharge rate of between 15% and 20% would be reasonable. In this regard, there may also be an argument for imposing higher fines on more durable and international cartels, as the surcharges are higher in such cartels.

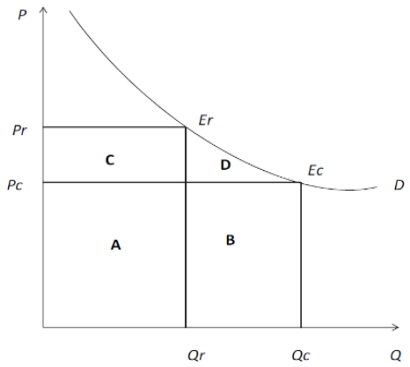
The impact of competition policy on consumer

The impact of competition policy on consumer welfare measures the direct benefits of eliminating anti-competitive practices for consumers (addressing consumer economies).

The data collected by competition authorities in investigations are often used to calculate consumer savings resulting from competition policy interventions, including in particular decisions on anti-competitive practices. Consumer savings calculations are often used to promote competition, for example to justify public spending on competition policies. By using, depending on the case and the information available direct or indirect assessment methods one can calculate the impact on consumer welfare.

The OECD Report on the Analysis of the Impact of Regulations on the Competitive Environment in Romania presents the direct method of assessing the impact on consumer welfare. The effects of anti-competitive practices are usually examined as shifting the equilibrium point on the demand curve. For anti-competitive actions, which have the effect of limiting supply or increasing prices, the injury to the consumer is estimated by assessing the change in the consumer's surplus.

Changes in consumer surplus in the graph below are illustrated by a constant curve of demand elasticity. Competitive equilibrium is different from restrictive equilibrium from two important points of view: lower price and higher quantity.



Where:

Er **-** restrictive balance indicates the balance in the context of distortion or restriction of competition as a result of anti-competitive practice;

Ec **-** competitive equilibrium indicates the equilibrium point in case of effective competition;

Pr **-** the equilibrium price established because of the restriction of competition;

Pc **-** the equilibrium price established in the case of effective competition;

Qr **-** the equilibrium quantity traded as a result of the restriction of competition;

Qc **-** the equilibrium quantity traded in the case of effective competition.

Starting from the presumption of a constant demand elasticity, the impact on consumer welfare (ICW) in Fig. 1 is calculated according to the formula:

$$\boldsymbol{ICW = C + D \approx (P_r - P_c)\, Q_r + \frac{1}{2}(P_r - P_c)(Q_c - Q_r)}$$

If price changes are expected, a standard form of impact on consumer welfare as a result of the elimination of distortions of competition, the impact on consumers is calculated according to the formula:

$$\boldsymbol{ICW = (\Delta p\% + \frac{1}{2} Ecp \Delta p\%^2) CA_r}$$

Where:

Δp% **-** the percentage change in price as a result of the restriction of competition, the reference price (p_c) may be used as the price existing before the restriction of competition, the forecast

price in the absence of restriction of competition or the price in geographic markets where the competition mechanism is not distorted;

Ecp - price elasticity of demand, which determines by the formula:

$$E_{cp} = \frac{\Delta Q\%}{\Delta p\%} = \frac{\frac{\Delta Q}{Q}}{\frac{\Delta p}{p_c}} = \frac{\Delta Q}{\Delta p} \cdot \frac{p_c}{Q_c}$$

CAr - represents the turnover generated by the relevant market undertakings affected during the period of restriction of competition.

If the demand elasticity indicator is not known, but is assumed to correspond to a more elastic demand than in the case of a monopoly market, but up to the elasticity indicator characteristic of a perfectly competitive market, the impact on consumer welfare is calculated, taking into account $|Ecp| = 2$, according to the formula:

$$\boldsymbol{ICW = (\Delta p\% + \Delta p\%^2) CA_r}$$

The OECD also suggests the use of a simple and easy-to-apply methodology: the static consumer benefits resulting from each decision are the product of the size of the turnover affected, the increase in prices avoided and the expected duration of the price effect.

Când informații specifice cazului sunt disponibile despre aceste trei elemente, aceste informații ar trebui utilizate.

The impact of anti-competitive practices on consumer welfare according to the indirect calculation method is assessed depending on the type of infringement, the market affected, the duration and the value of the impact, according to the formula:

$$\boldsymbol{IBC = \text{Calculation basis} \; X \; \text{Impact value} \; X \; \text{Duration}}$$

Where:

Basis of calculation - the turnover of the enterprises involved. Regarding the affected business area, cartel cases and abuse of dominance use the turnover of the cartel members or of the undertaking (s) abusing their dominant position, while for the examination of concentrations a higher definition is used, including the turnover of all firms in the relevant market [OECD, 2013].

Impact value - the turnover percentage of the undertakings operating in the relevant market affected by the practice or action/ inaction leading to the limitation, elimination or distortion of competition;

Duration - is determined depending on the period of the infringement that leads to the limitation, elimination or distortion of competition.

Based on the analysis of the used methods by different competition authorities, the OECD has made several proposals of uniting the principles and assumptions in the calculation and reporting of consumer savings. The OECD Competition Committee has approved the following fundamentals

1. Use case-specific information, if possible.
2. It is assumed that the lack of intervention will have a negative impact.
3. Static consumer benefits are estimated and, where possible, dynamic benefits are included.
4. The competition authorities shall calculate and publish estimates on a regular basis.
5. The results are presented as an annual figure, and as a dynamic average over 3 years.
6. The results are presented according to the type of anti-competitive practices.

Assessment of competitors' injury

Anyone who has suffered damage as a result of an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) has the right to be compensated for that damage. The CJEU argued that this right is guaranteed by EU primary law.

Compensation means bringing the injured party into the situation in which it would have been if there had been no infringement. Thus, compensation includes:

- repairing the damage related to the actual loss suffered (damnum emergens), the actual loss involves a reduction of a person's assets;
- repairing the damage related to the loss of profit (lucrum cessans) means that the assets of the defective enterprise did not increase, which would have happened if it were not for the anti-competitive practice;
- payment of interest related to lost income.

The counterfactual analysis could be evidence to estimate the injury suffered by the victim company as a result of the commission of anti-competitive practices. A more accurate estimate could be made if there were more data on market developments. At the same time, in the process of assessing the failed income of the defective company by using the change of market share, it is necessary to take into account the fact that the market share may be influenced by other factors not only the anti-competitive practices of the infringing company.

It is also possible that, if the infringement has resulted in a decrease in the total market size, then the income of the excluded competitor, assessed on the basis of actual market shares, will be underestimated.

Other geographic or product markets may be used to assess the injury caused by the anti-competitive practice on the basis of the comparison method. Undertakings with similar revenues and costs in a different market can serve as a basis for assessing the income and costs of the affected undertaking if the infringement had not occurred. This approach is very useful if the only competitor of a monopolistic enterprise has been harmed.

Because the market situation does not return immediately to the situation before the infringement, the competing undertaking affected by a competitive practice should also assess the missed future profits. The period taken into account must be reasonable, taking into account the specificity of the relevant market. In assessing the impact of the anti-competitive practice, one must consider that if the excluded competitors are unable to return to the market or can not fully recover their lost market share, the loss of profit of the defective undertaking will be substantial for the following periods, after the violation has ceased.

In cases where a competitor is also a customer of the infringing undertaking, for example in the case of abuse of a dominant position by cutting margins, foreclosure practices could affect the competitor to the extent that it purchases from it. In these situations, the injury caused by the infringement is determined on the basis of increased costs, but taking into account the loss of profit due to the lower volume of production or sales, unless the infringement had taken place.

It can be seen that, for the purposes of quantification, competitors affected by a surcharge are in a similar position as the customers of cartel members or of an undertaking which commits another type of infringement, leading to a surcharge. It can be transferred to customers or borne by the affected company. If the surcharge was transferred to the customers of the company concerned, then its customers were also harmed and may claim compensation for sales volumes lost as a result of the price increase.

3.3. Macroeconomic effects of competition policy

Macroeconomic modeling of competition policy effects

Measuring the overall economic effects of competition policy is a matter of particular importance. The quantification of competition policy impact on the economy as a whole is based on macroeconomic models for assessing the direct and indirect effect of competition policy on GDP growth and other macroeconomic performance.

In addition to calculating consumer benefit, information on the impact of competition policy on macroeconomic variables, such as GDP growth and productivity, is also important for the debate on competition and liberalization. Although there is a consensus in the literature

that competition provides welfare gains, from an empirical perspective it is less clear that competition policy favors competition, which subsequently contributes to economic growth.

The effectiveness and impact of competition policy depends on several factors, including the human and budgetary resources available for its implementation, competition laws and institutions, the quality and number of interventions made by competition authorities.

Several studies are trying to assess whether countries achieve faster economic growth depending on the existence and application of competition law. A distinction is made between studies that analyze the impact of competition policy on economic growth, productivity and GDP growth (GDP per capita) or other intermediate growth factors, such as investment or foreign direct investment (FDI).

Another group of studies looks at the impact of competition policy on growth or other growth factors, such as investment or foreign direct investment (FDI).

Most studies find a positive impact of competition policy on economic growth, mainly due to a positive effect on productivity, while also showing positive effects of competition laws on other intermediate variables, such as the number of enterprises, margins, investments and foreign direct investment. .

The impact of competition policy is significant, as it is found that an improvement in competition policy can lead to one-fifth of productivity growth in the UK. However, the conclusions are not homogeneous, as other studies do not find a significant impact of competition policy on productivity. Therefore, research analyzing the impact of competition policy should be further developed.

Macroeconomic modeling of competition effects

Unlike the macroeconomic impact of competition policy, the macroeconomic benefits of competition are widely recognized and there are many scientific studies in this area, illustrating the macroeconomic effects of competition transmitted through the three pathways:

1. Allocative efficiency, reducing the profit margin and increasing the business dynamism;

2. Productive efficiency, increasing the performance of the enterprise due to improving the performance of managers;

3. Dynamic efficiency, increasing innovation and total productivity of factors of production (TFP).

1. The relationship between competition and allocation efficiency

There are several empirical papers that examine the causal link between profit margins and business dynamism, on the one hand, and productivity and growth, on the other.

Empirical studies confirm the positive effects of declining profit margins on productivity and economic growth. The macroeconomic impact of the profit margin reduction is significant. For example, Bayoumi found that the differences in competition between the euro area and the United States represent half of their difference in GDP per capita.

Another study concludes that a reduction in the margin (by 30%), the alignment of service margins in the euro area with that in the United States, could increase real GDP in the long run (by 4.4%).

IMF World Economic Outlook, April 2003: Growth and Institutions found that promoting a policy that would stimulate competition that would reduce eurozone margins to US margins would ensure GDP growth of 4.3% .

Most empirical studies also conclude that the positive effects of reducing profit margins on productivity are greater in low-competition sectors and countries.

However, in sectors with relatively high competition and high irrecoverable costs, more intense competition affects productivity. Therefore, there is a U-shaped inverse relationship between competition and productivity, too little and too much competition tends to reduce productivity.

The reason is that profit margins must be large enough to cover irrecoverable costs, such as the costs of investing in research and development. If competition is fierce, start-ups will be reluctant to innovate and enter the market, as they will not be guaranteed to cover the costs of investing in research and development. Another noteworthy conclusion is that the gains associated with a reduction in the profit margin are generally observed in the medium to long term.

2. Management quality (productive efficiency)

A classic reference in the literature is Nickell's work which suggests that competition in the product market has a disciplinary effect on managers. More recent empirical research by Vicente Cuñat and Maria Guadalupe linked competition to managers' efforts: an increase in competition increases the sensitivity of the salary to the performance of managers and this encourages them to make more effort to improve the company's results.

An interesting finding is that better management practices are significantly associated with higher productivity and other indicators of corporate performance, including return on

employee capital, sales per employee, increased sales and solvency. At the same time, their impact is great, as management practices determine up to a third of the productivity differences between companies and countries.

3. The relationship between competition and dynamic efficiency

Market structure and conduct may affect the supply of new products and incentives to improve existing products or production processes. Recently, these effects have received increased attention from the competition authorities. Because economic theory does not describe the unequivocal link between competition and innovation, it is all the more important to refer to the lessons to be learned from empirical work in this area.

However, measuring innovation is at least as difficult as measuring competition. In the literature there are various representative variables, such as investment in research and development indicators defined as research and development expenditures, employees in the research and development sector, or research and development intensity (research and development costs over added value), the number innovations, the number of patents or total productivity of factors of production (TFP).

All these indicators also have disadvantages: research and development indicators represent contributions to innovative activities rather than innovation results, the number of innovations are rarely used because it is difficult to identify significant comparable innovations in different industrial sectors, the number of patents may vary enterprises and industries, and TFP is a result of innovation rather than a measure of innovation.

Some authors argue that there is no uniform linear relationship between competition and innovation and that this relationship can be influenced by several factors.

Although there is multiple research on the impact of competition on the economy, the issue of assessing the economic effects of anti-competitive practices is not fully addressed, there are still many challenges we should face.

CHAPTER IV: EVALUATION METHODOLOGY OF ANTI-COMPETITIVE PRACTICES EFFECT

4.1. The aims of competition policy and the effects of competition

The identification and assessment of anti-competitive practices effects on the economic environment starts from the presumption that these enterprises' actions restrict competition, affecting the benefits that can be brought to the economy through competition. Anti-competitive practices have as object or effect the competition restriction, so the effects generated by anti-competitive practices are opposite to those generated by competition.

The implementation of competition law, including the combating of anti-competitive practices (anti-competitive agreements and abuse of a dominant position) aims to protect and support competition. Distortion of competition because of anti-competitive actions by undertakings has an effect on the objectives pursued by the promotion of competition. Competition is not an end in itself, but it is a means of achieving goals that society considers important at a certain stage of development.

Protecting the market from anti-competitive practices is an objective of competition policy that is the responsibility of competition authorities. Of course, the powers of competition authorities may vary depending on the jurisdiction, being more extensive or restricted, but combating anti-competitive practices is within the remit of each of them.

The aim of competition policy and appropriate competition law may vary depending on the jurisdiction, being determined by economic and political circumstances. Despite the national specificity, it is possible to identify some common goals.

One of the common goals of all jurisdictions is to *improve economic performance*. This includes promoting economic growth; using business competition as a way to stimulate the development of new products and services; increasing productivity and reducing costs so that firms, individual sectors and the economy as a whole work more efficiently, to stimulate innovation and, ultimately, for consumers' benefit, both intermediate consumers and end-users.

Certainly, a key objective of competition policy is to improve economic performance, but this goal coexists with others. Another important goal, which we can identify, is to *ensure a fair distribution of wealth*. This can be identified in statements that competition policy, by promoting economic growth, will help *reduce poverty.*

The protection of the small and medium-sized enterprise sector can also be considered an objective of competition policy in some economic systems. The small and medium-sized

enterprise provide a way for new entrepreneurs to enter the market, a vital incentive for economic progress in the form of innovation.

The economic, social and political changes that have taken place because of the transition of several socialist countries from the planned command economy to the market economy have led to the establishment of market economy principles, inviolability and guarantee of private property, free competition - as fundamental principles of state. The role of the state has changed significantly, so from the key player the state becomes the referee.

This is a fundamental and difficult change to make, but competition law can be seen as a bridge to the transition from the planned command economy to the market economy. At the same time, it is necessary to mention that the state keeps its role of central planner, promoting the economic policy of the country.

The objectives of competition law have evolved over time from the economic performance of the company to increasing consumer welfare. Thus, the purpose of economic performance achieved by increasing productivity, reducing costs or stimulating innovation is to contribute to consumer welfare. This consumer-oriented approach tends to subordinate over time the other social and political objectives that accompany the development of competition policy.

Although there are several objectives, competition authorities in the process of enforcing competition law tend to focus on improving economic performance in a way that improves the well-being of individual consumers.

An anti-competitive practice is restrictive in its effects if it harms actual or potential competition to such an extent as to have negative effects on:

1. Production,
2. Prices,
3. Quality,
4. Innovation,
5. Variety.

As mentioned, the purpose of competition policy is to increase consumer welfare. Thus, the restriction of competition, which has a negative effect on production (quantity), price, quality, innovation and variety, affects consumer welfare, and is to be eliminated. The assessment of these parameters is necessary taking into account the market structure, the nature of the product, the maturity of the market, the level of marketing, etc.

4.2. Assessing methodology pf the effect of anti-competitive practices on consumer welfare

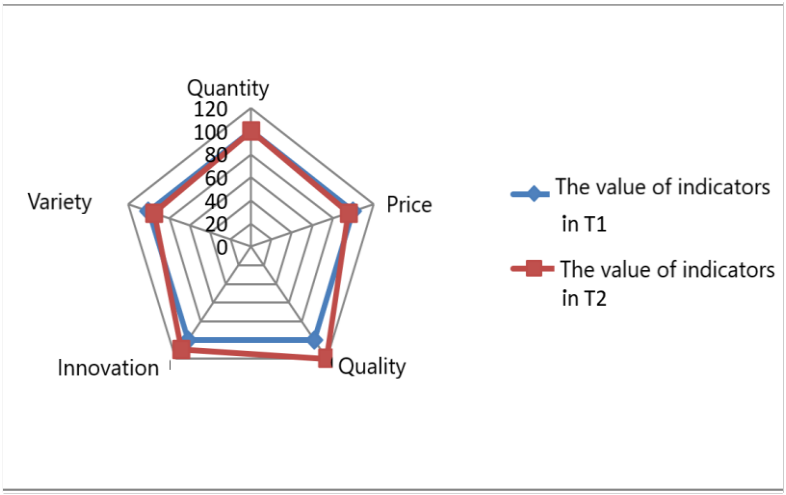
Anti-competitive practices restrict competition, which consequently has a negative effect on welfare. Economic well-being is that state of natural, capital and cultural conditions which ensures the integrity of biological life, the satisfaction of material, social and spiritual needs, which allows the continuous and progressive manifestation of the human personality.

Assessing and quantifying the change in competition parameters is important for evaluating the effects of anti-competitive practices by restricting competition to the main objective of competition policy - increasing consumer welfare.

The impact of competition policy on consumer welfare measures the direct benefits of eliminating anti-competitive practices for consumers (the consumer economy approach). The impact of anti-competitive practices on consumer welfare has traditionally been calculated by assessing the surplus of consumers lost as a result of distortions of competition,

At the same time, in order to appreciate the effect of anti-competitive practices on consumer welfare, it is necessary to take into account all the parameters of competition: quantity, price, quality, innovation, variety. Starting from the effects of the restriction of competition, we can assess the consumer's welfare according to the affected parameters of competition.

Thus, if we imagine that as these five parameters of competition form a pentagon, the surface of this pentagon would constitute the welfare of the consumer determined by the competition. Each parameter has a value, which allows us to identify the surface of the pentagon and to assess the effect on the welfare of the restriction of competition. The change in consumer welfare due to the restriction of competition in formula (3) for example is presented in the histogram below.



The area of the pentagon (Q, P, C, I, V) is determined by summing the areas of the triangles formed by the value of the parameters of the restriction of competition, respectively, the area of the pentagon is,

$$S_{QPCIV} = 0{,}9510565(qp + pc + ci + iv + vq)$$

Where;

$$S_{\Delta} = \frac{a * b * sin\theta}{2}$$

$$0.9510565 = \frac{\sin(360/5)}{2}$$

The values q, p, c, i, v determined at time T1 are reflected in%, is 100%, the relative change in the value of these indicators at time T2 is also reflected in percentages. Quantity, variety, innovation and quality are indicators directly related to consumer welfare, the price is inversely related to consumer welfare, so the price increase by 5% at the time of Q2 will be reflected as (100-5%).

The difference between the pentagon area of competition welfare at T2 and T1 allows us to assess the effect of the restriction of competition on consumer welfare. The change in consumer welfare in formula (3) can be represented by:

$$\Delta BC = S`_{QPCIV} - S_{QPCIV}$$

Where: ΔBC – changing consumer welfare;

$S`_{QPCIV}$ – consumer welfare during (T2) anti-competitive practices;

S_{QPCIV} – consumer welfare calculated in the absence of anti-competitive practice (Q1).

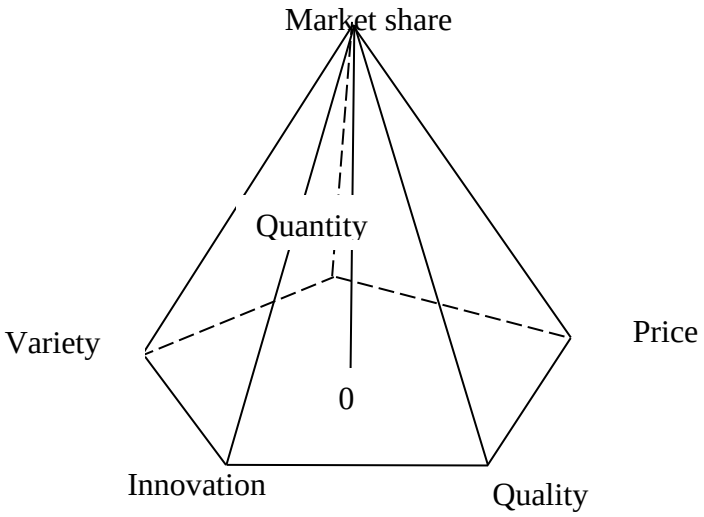
When undertakings have or acquire, individually or jointly, a certain degree of market power, the magnitude of the dismissive effects on competition in the relevant market increases. We can make the appropriate iterations by assuming that significant market power is held by companies with a large market share.

According to ECJ case law, the holding of a market share of more than 50% by a given undertaking for a considerable period may give rise to a relative presumption as to the existence of a dominant position unless there are other factors to the contrary. If the market share held by the undertaking concerned is between 40% and 50%, the dominant position may be established

if other factors are leading to the same conclusion. It was considered that only in exceptional cases, a market share below 10% could give rise to a dominant position.

The impact of anti-competitive practice depends on the market share of the undertakings involved in these anti-competitive practices and if the result of the calculation of formula (7) is negative, it is necessary to assess the extent of the distortion of competition on consumer welfare. The higher the market share, the more significant the impact on consumer welfare. Market share can be represented by the height of the irregular pentagonal pyramid formed on the basis of the pentagon of consumer welfare.

The difference between the volume of the pyramid calculated for T2 and the volume calculated for T1 is the effect of the restriction of competition on consumer welfare, taking into account market share.



The magnitude of the reduction in consumer welfare depending on the market share of the undertakings involved is determined from the volume of the pyramid:

$$V_{QPCIVCp} = \frac{S_{p0q}*Cp}{3} + \frac{S_{q0v}*Cp}{3} + \frac{S_{v0i}*Cp}{3} + \frac{S_{i0c}*Cp}{3} + \frac{S_{c0p}*Cp}{3}$$

S_{p0q} – the area of the triangle formed by the parameters of price and quantity;

S_{q0v} – the surface of the triangle formed by the parameters of quantity and variety;

S_{v0i} -the surface of the triangle formed by the parameters of variety and innovation;

S_{c0c} – the surface of the triangle formed by the parameters of variety and innovation;

S_{i0p} – the surface of the triangle formed by the parameters of quality and price;

Cp – market share (height of the pyramid).

Thus, the effect of the restriction of competition on consumer welfare can be presented as the difference between the volume of the pyramid at T2 and T1:

$\Delta BC` = V_{T2} - V_{T1}$

Where:

$\Delta BC`$ – the effect on consumer welfare depending on the market share;

V_{T1} – The volume of the QPCIVCp pyramid when there is not any anti-competitive practice;

V_{T2} – The volume of the QPCIVCp pyramid when committing the anti-competitive practice;

The result obtained by calculating allows us to make an impression about the direction and effects of anti-competitive practices on consumer welfare.

CONCLUSIONS

Anti-competitive practices have an inviolable effect at both microeconomic and macroeconomic levels. The identification and assessment of the effects of anti-competitive practices on the economic environment rely on the idea that these actions of companies restrict competition, so the results obtained by anti-competitive practices are opposite to those generated by competition.

By ensuring free and fair competition, the state invests considerable efforts in achieving some objectives, which society considers important at a certain stage of development. The effectiveness of combating anti-competitive practices (anti-competitive agreements and abuse of a dominant position) largely depends on the level of knowledge of the premises, causes and conditions for their emergence and development, the forms of manifestation, the proposed goals and objectives of those involved in such activităţi. Effective practical combat is based on theoretical multilateral knowledge of the phenomenon.

The effects of anti-competitive practices on the economic environment can be direct and indirect, forecasted and unexpected, but in the end, they all come down to consumer welfare. The importance of combating anti-competitive practices is difficult to overestimate, as it leads to ensuring a fair distribution of wealth, the integrity of the political process and improving economic performance, achieved by increasing productivity, reducing costs or stimulating innovation, which contributes significantly to consumer welfare competition.

In the reference paper, the author aimed to systematize information in the field of research and formalize a methodology for assessing the effect of anti-competitive practices on consumer welfare, taking into account all parameters of competition: quantity, price, quality, innovation and variety,

The analysis of the phenomenon of anti-competitive practices and their effect on the economic environment provides a favourable platform for formulating proposals to improve the activity of combating them. It is possible by promoting competitive policy with an emphasis on the effects of studied practices, implementation of leniency policy, media competition and that detected participation in anti-competitive practices - practical proposals to streamline the activity of competition authorities.