The Impact of the EU Cartel Regulation on the Internal Market

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MASTER'S THESIS

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Zagreb, 2022

I declare that I have written my graduate thesis/final specialist thesis *The Impact of the EU Cartel Regulation on the Internal Market* that I submitted to my mentor Professor Melita Carević for evaluation, independently and that it is entirely in my authorship. I also declare that the paper in question has not been published or used to fulfil teaching obligations at this or any other institution of higher learning, and that I did not obtain ECTS credits based on it.

Furthermore, I declare that I have respected the ethical rules of scientific and academic work, particularly Articles 16-19 of the Code of Ethics of the University of Zagreb.

Klara Đurkin

Table of contents

1. **INTRODUCTION**...……1

2. **WHAT ARE CARTELS AND WHY DO THEY EXIST?..**.....2

3. **EU ANTI-CARTEL ENFORCEMENT**……8

4. **ADVERSE EFFECTS OF CARTELS ON THE INTERNAL MARKET – CASE STUDIES**……12

5. **ADVERSE EFFECTS ON THE INTERNAL MARKET REGULATED BY ARTICLE 34 TFEU AND ITS COMPARISON TO ARTICLE 101**……...…….…….…….…….17

6. **CONCLUSION**……..23

LIST OF REFERENCES……..25

ABSTRACT……30

1. INTRODUCTION

Conspiracy in a business world is not a novelty. It has already been omnipresent when Adam Smith wrote about it in the *Wealth of Nations*, arguing that "people of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[1] Nowadays, such arrangement manifests itself as cartels. A cartel prevents, restricts, or distorts competition, or at least aims to do so, thereby enabling the participating firms to make money. They operate in multiple different ways, producing significant adverse effects on the internal market through practices which affect trade between Member States and are therefore prohibited under Article 101 of the Treaty on the Functioning of the European Union (TFEU).[2] Given its purpose of protecting competition on the internal market, Article 101 TFEU can be compared to Article 34 TFEU which protects free movement of goods on the internal market. Article 34 TFEU has at its core the prohibition of measures having equivalent effect to quantitative restrictions, which also produce adverse effects on the internal market. Both articles to some extent contribute to ensuring uniform conditions for market freedom and competition on the internal market, and consequently its functioning, in cases when trade between Member States is being affected. Nevertheless, Articles 34 and 101 TFEU regulate different types of practices. One the one hand, Article 34 TFEU which ensures the free movement of goods, aims at regulating the behavior of Member States and exceptionally, private subjects which control the access to the market of a Member State. On the other hand, competition law and Article 101 TFEU primarily regulate behavior of undertakings on the market, regardless of their market power, as long as they are involved in prohibited practices such as cartels.

The beginning of this thesis provides an introduction into the concept of cartels and reasons behind their existance. It will likewise explain how cartels operate, providing some examples of notable cartel arrangements. The following part of the thesis lays out the actors and mechanisms employed in anti-cartel enforcement in the EU. With the aim of demonstrating what Article 101 TFEU prohibits, the paper then proceeds to analyze case studies, indicating adverse effects of cartels which prevent, restrict or distort competition. The succeeding

[1] Adam Smith, *An Inquiry into the Nature of The Wealth of Nations*, (W. Strahan and T. Cadell London 1776), p. 105-106

[2] European Union, "Consolidated Version of the Treaty on the European Union" (26 October 2012) Official Journal of the European Union 47-390

section describes adverse effects of measures having equivalent effect to quantitative restrictions. It will likewise include a comparison of the Articles 34 and 101 TFEU in order to expand on similarities and differences presented above.

2. WHAT ARE CARTELS AND WHY DO THEY EXIST?

Even though cartels are prohibited by competition law systems worldwide, a definite comprehension of what constitutes a cartel "remains elusive."[3] Still, it is probable that the vast majority of antitrust lawyers would without doubt be able to identify "a hard core or plain vanilla cartel" when they would see one.[4] The difficulty arises with "crafting an effective legal definition," which is an extremely arduous process.[5] It should likewise be appreciated that, "[…] typically a lawyer's definition of a business cartel may be different from that of an economist, stressing the normative characteristics of such activity, differing from the economist's preoccupation with its quantitative character."[6] Such definition usually includes matters of definition and identification which are cumbersome and arduous,[7] and "the ambivalence and generality of legal language relating to cartels"[8] are omnipresent. Still, there are some widely-embraced definitions of what constitutes a cartel and the list of adverse effects of cartels is fairly harmonious across different jurisdictions.[9] While the Sherman Act in the United States describes a cartel as "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," Article 101 of the TFEU prohibits "agreements, decisions of associations, or concerted practices which prevent, restrict or distort competition."[10] A very comprehensive definition is provided by the Organization for Economic Co-operation and Development (OECD), according to which cartels, as explicit forms of collusion, are formed for the mutual benefit of the participating members, mainly to earn higher profits, through agreeing "on such matters as prices, total

[3] Niamh Dunne, "Characterizing Hard Core Cartels Under Article 101 TFEU" (2020) 65(3) The Antitrust Bulletin 376-400, p. 376
[4] ibid.
[5] ibid.
[6] Christopher Harding and Jennifer Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion*, (Routledge London 2020), p. 25
[7] ibid.
[8] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, (3rd ed. Oxford University Press 2010), p. 14
[9] International Competition Network Working Group on Cartels, "Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties: Building Blocks for Effective Anti-Cartel Regimes" (2005) Volume 1, ICN 4th Annual Conference, Bonn, Germany, p. 2 < https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf > accessed 15 January 2022
[10] European Union (2012), p. 326

industry output, market shares, allocation of customers, allocation of territories, bid rigging, establishment of common sales agencies, and the division of profits or combination of these."[11] Regardless of the uncertainty surrounding the definition of a cartel, it may be obvious that one of the cartels' features is that they organize themselves without legal means, i.e. formal legal control.

This lack of formal legal means must be an aggravated circumstance under which cartels are managed, led, and controlled. It shall be noted, however, that there are anomalies. The *Lombard Club*[12] cartel case, which involved eight Austrian banks participating in a wide-range price fixing, exemplifies a cartel set up and run as a formal institution. As Mario Monti, Competition Commissioner at the time asserted, "The institutionalized set-up of this cartel and its comprehensiveness, both in terms of the banking services covered and geographical scope, makes it one of the most shocking cartels ever discovered by the Commission."[13] They conducted at least 300 meetings in four years in Vienna alone and a separate committee, comprising of competent, management-level employees, was devoted to each and every banking product.[14] Regardless of the fact that most cartels lack formal legal control, they still employ very sophisticated tools to maintain their existence over a prolonged period of time.

At its core, every successful cartel must have an incentive scheme aimed at maximizing profits for conspirators to remain loyal to the agreement rather than withdraw from it.[15] Closely related, as a supportive system to the incentive scheme, there are some controls in place, namely the internal policing mechanism so to ensure that all participants adhere to the agreement.[16] Therefore, those cartel participants who, for example, decide to depart from the agreed price and sell at a lower price in order to attract more customers, will be confronted by the cartel who will engage in a price war in order to sanction such behavior. A completely different and rare way of ensuring that profits within the cartel are maximized is a collective,

[11] R. S. Khemani and D. M. Shapiro, "Glossary of Industrial Organization and Competition Law" (1993) OECD, p. 18-9 <https://www.oecd.org/regreform/sectors/2376087.pdf> accessed 21 December 2021
[12] European Commission, "COMMISSION DECISION of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: Austrian banks — 'Lombard Club')" (2002) 56 Official Journal of the European union 1-75
[13] European Commission, "Commission fines eight Austrian banks in «Lombard Club» cartel case" (11 June 2002) Press release IP/02/844, n.p. <https://ec.europa.eu/commission/presscorner/detail/en/IP_02_844> accessed 13 December 2021
[14] John Ratliff, "Major Events and Policy Issues in EC Competition Law 2001-2002 – Part 1" (2003) 3 I.C.C.L.R. 39-114, p. 62
[15] Michael Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies*, (Edward Elgar Cheltenham 2011), p. 61
[16] ibid.

band-wagoning-like sentiment within a well-run cartel, in which undertakings that sell above their expected projections may compensate undertakings that fail to meet their allowed sales quota; the purpose is, indeed, to protect cartel stability from potential internal threats.[17]

Despite the lack of a formal legal control within a cartel, an internal hierarchy consisting of managers and executives at a variety of levels of individual firms somehow successfully compensates for the absence of the formal control. They actively discuss progress and any adjustments needed following unpredicted altered circumstances in the market.[18] On top of that, cartels are especially sophisticated. For instance, as a cartel-friendly alternative to "the conventional trade association for monitoring the price and output of individual firms," they hire separate organizations, such as independent data collection consultancy firms, to gather and circulate data for them.[19] Providing such services, undoubtedly exemplifies cartel facilitation under Article 101 TFEU, which will be discussed later as the basis for cartel prohibition in the EU. One of the most famous among European cases of sophisticated cartels is the case of *Cartonboard*.[20] With cartonboard producers at its core, this cartel had the Fides Trust Company, strategically registered in Switzerland, exchange information with it, which constituted a "facilitating device," thereby allowing the producers to oversee the market and adjust their conduct.[21] This case furthermore demonstrates the highly secretive and discrete *modus operandi* of cartels and their facilitators, maintaining them under the radar and consequently hardly discoverable, even the very prominent ones, such as the Fides Trust Company. Interestingly enough, they still manage to last, on average, between five and seven years, a period during which they set a significant overcharge of some 20% over the competitive price, with an average of four to seven members.[22] Even more, when cartels are involved in their operations of price fixing, bid rigging, market sharing or fixing production or sales quota, they distort the internal market by creating market subdivision and minimizing competition. Price fixing and bid rigging will be explained in some more detail, in order to elaborate on what kind of agreements cartels conclude.

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[17] ibid., p. 62
[18] ibid.
[19] ibid., p. 61
[20] European Commission, "COMMISSION DECISION of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (95/601/EC)" (1994) 243 Official Journal of the European Communities 1-78 <https://op.europa.eu/en/publication-detail/-/publication/3e7f47e8-20f3-4471-b0e5-9e88187bfa1a/language-en> accessed 19 December 2021
[21] Gonenc Gurkaynak, Ceren Özkanlı, Su Şimşek, and Nazlı Ceylan Mollaoğlu, "Shady Contours of Cartel Liability of Service Providers" (2017) 13(1) Competition Law International 79-95, p. 81
[22] Iwan Bos, Stephen Davies, Joseph Harrington, and Peter L. Ormosi, "The deterrent effect of anti-cartel enforcement: A tale of two tails" (5 November 2015) CCP Working Paper 14-6 v2, p. 2

Firstly, when competitors take part in price fixing, they essentially agree to fix prices of products which they sell or buy. Nonetheless, it is not required that the agreement fixes the selling or purchasing price, either expressly or directly.[23] Rather, simply agreeing on "certain parameters of the price composition, such as the amount of rebates given to customers, would suffice to constitute price fixing."[24] One of the numerous definitions reads that price fixing is an agreement concluded between sellers willing to increase or fix prices at which goods or services are sold; the ultimate goal behind these acts is restricting competition between the companies in order to earn higher profits.[25] When cartels set their prices well above competitive levels, they are referred to as excess prices.[26] These excess prices are a result of the price fixing agreements and run contrary to the notion that price flexibility is critical for a market economy where the basic method of organizing production is via the price system.[27] In brief, prices must fluctuate if supply and demand are to be brought into equilibrium. Thus, when shortages in supply emerge or there is the increase in demand, prices will rise, increased production will be incentivized, and new supplier will enter the market.[28] This would exemplify the ideal interaction between demand, supply and prices, absent any cartel-like agreements to fix prices.

Price fixing can manifest itself in multiple forms, all of which restrict price competition, including but not limited to: establishing or adhering to price discounts; holding prices in place; eliminating or reducing discounts; adopting a standard formula for computing prices; maintaining certain price differentials between different types, sizes, or quantities of products, adhering to a minimum fee or price schedule; fixing credit terms; and not advertising prices.[29] Responding to competitive pressure by fixing the prices is not only illegal under the EU law but also economically devastating for the EU in its entirety. Price fixing eliminates competition and minimizes uncertainty among firms. This affects other producers, outside of the cartel, who "must charge high prices to compensate for their lack of

[23] European Commission, "Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice" (25 June 2014) C(2014) 4136 < https://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf > accessed 13 January 2022, p. 6
[24] ibid.
[25] Khemani and Shapiro (1993), p. 69
[26] ibid.
[27] ibid., p. 43
[28] ibid.
[29] United States Department of Justice – Antitrust Division, "Price fixing, bid rigging, and market allocation schemes: What they are and what to look for – An Antitrust Primer" (February 2021), p. 2 <https://www.justice.gov/atr/file/810261/download> accessed 7 January 2022

efficiency," which is not alluring to the customers and ultimately translates to lower demand and overall level of industrial production."[30] Accordingly, behind every successful price-fixing agreement is the elimination of one form of competition through price coordination. This emerges as a consequence of the power to fix prices, which enables control of the market, as well as setting arbitrary and unreasonable prices.[31] Altogether, horizontal price-fixing by cartels and equivalent collusive behaviour, are deemed as so likely to have negative effects, particularly on the price, quantity or quality of the goods and services, that it may be regarded redundant to prove that they have actual effects on the market for the purposes of applying Article 101 TFEU.[32]

Secondly, cartels as bid rigging conspiracies represent a significant element of concern for public tenders.[33] Bid rigging is used by cartels to effectively increase prices of goods and services, frequently acquired by federal, state, or local governments, by soliciting competing bids.[34] As an overview, what cartel participants do is agree in advance who will submit the winning bid on a contract that goes through the competitive bidding process, without the need that all bidders participate in the conspiracy.[35] Bid rigging also appears in various forms and usually falls into one or more of the following categories: bid suppression; complementary bidding; bid rotation, subcontracting.[36] There is no purpose of synthesizing those bid rigging schemes; it is only significant what almost all of them have in common, which is "an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors."[37] In the EU, as opposed to the US, for instance, bid rigging is also regulated through law on public procurement. Public procurement is of paramount importance for the EU's economic growth, social progress and the fulfillment of one of the key objectives of its Member States: "to provide good quality

[30] Richard Baldwin and Charles Wyplosz, *The Economic of European Integration*, (5th ed. McGraw-Hill Education London 2015), p. 265
[31] Henry Einhorn, "The Success of Economic Defenses In Price Fixing Cases: An Analysis" (1988) 2(1) Journal of Forensic Economics 89-99, p. 89
[32] European Commission, "COMMISSION DECISION of 27.9.2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 - Trucks)" (2017), para. 232 <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8754_5.pdf> accessed 13 December 2021
[33] Stefan E. Weishaar, *Cartels, Competition and Public Procurement: Law and Economics Approaches to Bid Rigging*, (Edward Elgar Publishing Cheltenham 2013), p. 1
[34] US Department of Justice (2021), p. 2
[35] ibid.
[36] ibid., p. 3
[37] ibid.

service to its citizens."[38] This is possible because public procurement's purpose is to provide works, goods or services directly used by citizens who have the right to have public money spent in an efficient, transparent, accountable and fair way. Therefore, when illegal agreements between economic operators, with the aim of distorting competition in award procedures, take place, then the benefits of a fair, transparent, competition-driven and investment-oriented procurement market are undermined by restricting the access of companies to that market and limiting choice for public buyers.[39] This should not be shocking. Any market in which collusion is present is unattractive to non-participating members. For instance, if there are collusions on a procurement market, law-abiding operators are normally discouraged from participating in the respective award procedures or from investing in public-sector projects; this must have a particularly ruinous effect on companies aspired to develop their business, even more so small and medium enterprises.[40] No less harm occurs to companies capable and willing to develop and employ innovative solutions to meet the needs of the public sector. Finally, a rough estimate of the increase of the costs that public buyers pay compared to what they would pay under customary market conditions is up to 60%.[41] Likewise, one single case of collusion in a multi-million award procedure can cost the taxpayers in the EU "millions of euros of excess payments to the detriment of efficient and accountable public spending."[42]

In brief, cartels are sophisticated and use different mechanism through which they deprive customers of a fair deal, while other competing businesses struggle to survive and grow as they are not part of the cartel.[43] They create unnatural conditions of competition pertaining to "the nature of the products or services offered, the size and number of the undertakings and the volume of the said market."[44] Therefore, cartels prevent, restrict, or distort competition in multiple ways, leaving behind significant adverse effects on the internal market through practices which affect trade between Member States.

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[38] European Union, "Information and Notices" (18 March 2021) 64 Official Journal of the European Union 1-49, p. 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2021:091:FULL&from=EN> accessed 8 January 2022
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.
[43] David Harper, "Business cartels: understanding competition law" (*Companies House*, 19 October 2018) <https://companieshouse.blog.gov.uk/2018/10/19/business-cartels-understanding-competition-law/> accessed 11 December 2021
[44] European Commission (2017), para. 235

Now that the concept of cartels has been studied, the paper proceeds to investigate the EU cartel regulation and enforcement. This part will be devoted to the source of the cartel prohibition and the bodies which enforce the same, including the means they use in their fight against cartels. The following part provides the comparison of Articles 34 and 101 TFEU. In the situation of the effect on trade between Member States, both articles contribute to ensuring uniform conditions for market freedom and competition on the internal market. However, they regulate different types of practices. Article 34 TFEU ensures the free movement of goods and aims at regulating the behavior of Member States and exceptionally, private subjects which control the access to the market of a Member State. Article 101 TFEU and competition law primarily regulate behavior of undertakings on the market, regardless of their market power, as long as they are involved in prohibited practices such as cartels.

3. EU ANTI-CARTEL ENFORCEMENT

Article 101 TFEU, which serves as a main source of cartel regulation in the EU, prohibits "all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[45] Undertakings are considered to be "any legal or natural persons engaged in economic or commercial activity,"[46] namely the sale of goods or provision of services, "regardless of its legal status and the way in which it is financed."[47] In addition to individual companies, there are other entities regarded as undertakings, including professional orders, professional associations, public agencies that do not exercise the prerogatives of a public authority, sports federations and associations, and entities working in the social sector.[48] Companies which constitute cartels sell similar goods. Thus, their arrangements constitute horizontal anti-competitive agreements.[49] However, Article 101(1) TFEU is equally applicable to vertical agreements, between undertakings at different levels of the production process, for instance, between distributor and retailer, or manufacturer and distributor.[50] The

[45] European Union (EU), "Consolidated Version of the Treaty on the European Union" (26 October 2012) Official Journal of the European Union 47-390, p. 50
[46] Elvira Aliende Rodriguez, *Cartels & Leniency 2021: A practical cross-border insight into cartels & leniency*, (14th ed. International Comparative Guides 2021), p. 46
[47] Case C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH, ECLI:EU:C:1991:16, para. 21
[48] Neil Campbell, *Cartel Regulation 2021*, (Law Business Research London 2021), p. 101
[49] Baldwin and Wyplosz (2015), p. 278-279
[50] Craig and de Búrca (2015), p. 1065

extent to which these agreements are economically harmful is controversial, even more so because the Court and Commission's approach to vertical agreements has not been constant.[51] On the contrary, Article 101(1) TFEU includes a non-exhaustive list of practices considered as anticompetitive. These practices include fixing purchase or selling prices, limiting, or controlling production, sharing markets or sources of supply, applying dissimilar conditions to equivalent transactions, and subjecting the conclusion of contracts to unrelated additional obligations.[52] In short, they make the worldwide economic harm from cartels very substantial, conservatively exceeding many billions of US dollars a year.[53] Consequently, the rigorous and efficient enforcement of cartel laws is crucial, even more so during an economic downturn when such approach "has the potential to speed up an economy's recovery by preventing artificial price hikes."[54]

Anti-cartel enforcement in the EU is carried out either by the European Commission or the national competition authorities (NCAs), "principally through the imposition of administrative fines against undertakings […]."[55] Whereas the Commission is focused on the most serious infringements with a significant impact on trade within the EU, NCAs are committed to those practices which have a significant impact within their respective territories.[56] The Commission and NCAs closely cooperate so to ensure "the coherence of the EU competition policy in the framework of the European Competition Network."[57] This cooperation is significant, especially during the last decade due to the increased "level of cartel enforcement against antitrust conspiracies across the European Union."[58] The legal maximum that the Commission and NCAs have the power to impose in regard to fines for substantive and procedural infringements, should not "exceed 10% of the total turnover in the preceding business year of" undertakings who participated, intentionally or negligently, in a

[51] ibid.
[52] EU (2012), p. 50
[53] Organization for Economic Co-Operation and Development (OECD), *Fighting Hard-Core Cartels: Harm, Effeective Sanctions and Leniecny Programmes*, (OECD Publication Services Paris 2002), p. 76
[54] Andreas Stephan, "Price Fixing in Crisis: Implications of an Economic Downturn for Cartels and Enforcement" (2012) 35(3) World Competition 511-28, p. 511
[55] Ingeborg Simonsson, "Criminalising Cartels in the EU: Is There a Case for Harmonisation?" (2011) in Caron Beaton-Wells and Ariel Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing Oxford 2011), n.p.
[56] Philippe Chappatte and Paul Walker, "The Cartels and Leniency Review: European Union" (2 March 2021) in Christine Varney and John Terzaken (eds), *The Cartels and Leniency Review*, (5th ed. Law Business Research London, 2017), p. 82
[57] Campbell (2021), p. 130
[58] Jones Day, "European Law Enforcement Against Antitrust Conspiracies – Recent Trends" (September 2016), n.p. <https://www.jonesday.com/en/insights/2016/09/european-law-enforcement-against-antitrust-conspiraciesrecent-trends> accessed 13 December 2021

cartel.[59] While there has been the decline in the quantity of cross-border cartel investigations undertaken by the Commission, NCAs have become increasingly active vis-à-vis "the volume of domestic investigations and the levels of fines."[60] This comes as no surprise as Regulation 1/2003[61] abandoned the Commission as the body playing a central role in the enforcement of Article 101 TFEU with national courts and NCAs gaining jurisdiction to apply Article 101 TFEU in its entirety.[62] Even though the Regulation revolutionized the enforcement of EU competition law by introducing three major changes (direct applicability of Article 101(3) TFEU, decentralization of enforcement and supremacy of EU law), it also introduced broader investigatory powers for the Commission.[63] As a result, powers granted to the Commission by Regulation 1/2003 under Article 20, when conducting an inspection include: entering any premises, land and means of transport of undertakings and associations of undertakings; examining the books and other records related to the business, irrespective of the medium on which they are stored; taking or obtaining in any form copies of or extracts from such books or records; sealing any business premises and books or records for the periods and to the extent necessary for the inspection; asking any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and recording the answers.[64] Besides the Commission carrying out its own investigation to detect cartels, it also employs the leniency programme and whistle-blower tool, additional "institutional innovations."[65]

The leniency programme refers to the lenient treatment the Commission is prepared to offer to those "businesses that come forward with information about cartel in which they are

[59] European Commission, "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003" (2006) 210/2 Official Journal of the European Union 2-5, para. 32 < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN> accessed 29 November 2021

[60] Jones Day (2016), n.p.

[61] Council of the EU, "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" (2003) 1 Official Journal of the European Commission 1-25

[62] Alain Georges, Brian Sher and Andreas Weitbrecht, "EC Regulation 1/2003: a systematic change in the enforcement of Articles 81 and 82" (18 August 2003) <https://uk.practicallaw.thomsonreuters.com/9-102-4430?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a286996> accessed 3 December 2021

[63] ibid.

[64] Council of the EU (2003), p. 14 "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" (4 January 2003) L 1/1 Official Journal of the European Communities 1-25, p. 14

[65] Christopher Spaeth and Sven Grüner, "Does whistleblowing make combating cartels more effective? – An experimental study," (23 December 2021), p. 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992288> accessed 3 January 2022

involved."[66] Adopted by the Commission in 2006, the Leniency Notice[67] is settled on two principles. Firstly, the earlier an undertaking contacts the Commission, the higher the reward and, secondly, the value of the reward will be proportional to the usefulness of the materials supplied. It is even possible for an undertaking to receive full immunity from fines. It will be granted either to "the first undertaking to provide the Commission with information and evidence that enables it to carry out a targeted inspection in connection with the alleged cartel; or the first undertaking to submit information and evidence enabling the Commission to find an infringement of Article 101 TFEU."[68] The Commission requires a corporate statement and other evidence relating to the alleged cartel, including any evidence contemporaneous with the infringement, which may be in the form of written documents signed by or on behalf of the undertaking or made orally.[69] By 2007, the leniency programme had turned out to be so fruitful that it in fact imperiled "the effectiveness and credibility of its zero-tolerance policy."[70]

In its fight against cartels, the Commission also employs a whistleblowing tool, through which "individuals can either report a cartel directly to the Commission if they are willing to reveal their identity or use the new anonymous whistle-blower tool launched by the Commission in March 2017."[71] In *Stanley George Adams v Commission*,[72] it was held that the Commission is obliged to "to keep the identity of a whistleblower confidential where the information is supplied voluntarily and under a confidentiality request."[73] In addition, whistleblowers are to be protected under and generally benefit from the Whistleblower Directive (EU) 2019/1937,[74] whose aim is to "strengthen the protection available to natural or legal persons who report actual or potential breaches of EU law under EU Member State

[66] Chappatte and Walker (2021), p. 82
[67] European Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases" (8 December 2006) 298/17 Official Journal of the European Union < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN > accessed 29 November 2021
[68] ibid., p. 85
[69] ibid.
[70] Jonas Koponen and Jorge Marcos Ramos, "EU: Settling Antitrust Cartel Conduct Matters with the European Commision" (2 February 2021) in Mark Hamer (ed), *The Settlements Guide* (Law Business Research London 2020), p. 13
[71] Aliende Rodriguez (2021), p. 52
[72] Case 145/83, Stanley George Adams v Commission of the European Communities, ECLI:EU:C:1985:448
[73] Patrick Bock and Richard Pepper, "Cartel leniency in EU: overview" (1 November 2020) <https://uk.practicallaw.thomsonreuters.com/0-517-4976?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 12 November 2021
[74] European Parliament and Council of the EU, "DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law" (2019) 305 Official Journal of the European Union 17-56 < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937 > accessed 19 Deceember 2021

laws, including in relation to breaches of EU competition rules."[75] This kind of whistleblower protection at Member State level should increase the potential "of the Commission and the national competition authorities to detect and bring to an end competition law infringements."[76] Regardless of the guaranteed protection, the whistleblowing tool is "still only rarely used in the EU."[77] Still, the leniency programme and whistleblower tool complement well the EU's anti-cartel enforcement, namely as innovative mechanisms in fight against cartels whose sophistication is ever-growing.

4. ADVERSE EFFECTS OF CARTELS ON THE INTERNAL MARKET – CASE STUDIES

This section is reserved to bespeak adverse effects that cartels have on the internal market through the case studies of cartels which have been discovered and sanctioned. It is indeed of service to have the data on the existence of cartels in the EU, provided by the Commission which has published its very detailed decision documents for over 25 years.[78] However, it should be noted that this "literature and conventional wisdom" is limited as it "based on cartels which are observed and successfully prosecuted, and necessarily ignore those other cartels which are not observed – either because they go undetected or because they are deterred."[79] Yet, recorded cases alone clearly indicate adverse effects of cartels on the internal market and are as such of remarkable assistance.

The first cartel that will be analyzed related to two cartels concerning Colour Display Tubes (CDTs) and Colour Picture Tubes (CPTs), used for computers and TVS, respectively.[80] In 2012, one of the highest cartel fines totaling approximately €1.47 billion was imposed on Philips, LG Electronics, Panasonic, Toshiba, Samsung, Technicolor and MTPD in what was described by the EU Competition Commissioner Joaquin Almunia as a textbook cartel case which features "all the worst kinds of anti-competitive behavior that are strictly forbidden to

[75] Ingrid Vandenborre and Thorsten Goetz, "European Union: Cartels & Leniency 2019 (The Proposed Whistleblower Directive)" (31 October 2018) <https://www.mondaq.com/uk/cartels-monopolies/750238/cartels-leniency-2019-the-proposed-whistleblowers-directive> accessed 4 December 2021
[76] ibid.
[77] Spaeth and Grüner (2021), p. 1
[78] Bos, Davies, Harrington and Ormosi (2015), p. 2
[79] ibid.
[80] Case 82/13, Panasonic Corp. & MT Picture Display Co. Ltd. v European Commission, ECLI:EU:T:2015:612, p. 1

companies doing business in Europe."[81] The eight undertakings, including Chunghwa which was granted a full immunity under the leniency programme, took part in either one or two separate cartels on the market for Cathode Ray Tubes (CRTs).[82] They infringed the EU rules by: consenting to target or bottom prices for different CRT sizes; sustaining a price gap between identical products marketed in Asia and Europe; carefully monitoring the pricing arrangements; concluding agreements deciding which producer would communicate a price increase to which customer; agreeing on market shares and coordinated restrict production with the ultimate goal of reducing supply and increasing or maintaining prices; exchanging commercially sensitive information on regular basis.[83] "Such infringements are by their very nature among the most harmful restrictions of competition."[84]

Their anti-competitive agreements confirmed that they adhered "to a common plan which limits or tends to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market."[85] What is worse, one of the most organized cartels ever investigated by the Commission, the two cartels recurrently had multilateral and bilateral meetings all around the world, "reflecting the scope of the business,"[86] involving different corporate levels of the undertakings up to the executive level.[87] They even openly expressed to each other their "willingness to communicate with nearby CRT makers."[88] During these meeting, the cartel members would specifically discuss how to "create more of collaboration than competition."[89] They would also agree "to focus on profitability, not volume."[90] All of these discussions speak to ways in which cartels operated and disturbed the market, as well as that they were above and beyond aware of the discussions and agreements. When they would not meet in person, cartelists would

[81] Foo Yun Chee, "EU imposes record $1.9 billion cartel fine on Philips, five others" (*Reuters*, 5 December 2012) <https://www.reuters.com/article/us-eu-cartel-crt-idUSBRE8B40EK20121205> accessed 17 December 2021
[82] General Court of the European Union, "The General Court reduces the fines imposed by the Commission on Panasonic and on Toshiba for their participation in a cartel on the European market for tubes for television sets" (9 September 2015) Press Release No. 97/15 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150097en.pdf> accessed 19 November 2021
[83] Case 82/13
[84] ibid., para. 1059
[85] ibid., para. 603
[86] Case 82/13, para. 503
[87] European Union, "Summary of Commission Decision of 5 December 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement" (19 October 2013) Official Journal of the European Union 303/13, p. 14 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1019(02)&from=EN> accessed 3 December 2021
[88] Case 82/13, para. 506
[89] ibid., para. 504
[90] ibid.

communicate with each other, discussing the ways in which to "address the decline of the CRT market in a collusive way, to the detriment of consumers," for instance, by suggesting that "producers need to avoid price competition through controlling their production capacity."[91] In essence, this cartel's practices included price fixing, market sharing and customer allocation, and output limitation. The cartel participants agreed on target prices, what to tell customers about the reason for the price increase and which producer would communicate the price increase to which customer.[92] Furthermore, the price increases in CRTs were sometimes "passed on to the downstream market of production of computer monitor tubes."[93] The cartel members also arranged market shares, "both overall market shares or shares at particular customers, agreeing thereby who would sell to a particular customer."[94] In order to reduce oversupply and achieve target prices and market shares, the members practiced coordinated output restrictions, which "began as arrangements to shut down production lines for a period of days and gradually developed into arrangements to shut down entire production lines."[95]

All members, except for two, brought actions for annulment of the Commission's decision before the General Court, which upheld the substantial part of the Commission's decision.[96] Most importantly, the judgments affirmed that the Commission had the right to sanction cartels whose infringements involved products made from components which had a foreign origin and were not themselves sold within the European Economic Area (EEA).[97] Even though the cartels were not formed within the EEA, their "arrangements directly influenced the setting of prices and of volumes delivered to the EEA either as direct sales or as processed products."[98] The adverse effects of these two cartels were even more so devastating for competition as, at the time, CRTs were one of the most crucial components in the production of television and computer screen, accounting for 50 to 70% of the price of a

[91] European Commission (5 December 2012), n.p.
[92] Case 82/13, para. 109
[93] ibid.
[94] ibid., para. 110
[95] ibid., para. 111
[96] Nicholas Hirst, "General Court upholds historic cartel fine" (*Politico*, 9 September 2015) <https://www.politico.eu/article/court-decision-cartel-fine-philips-lg-samsung-panasonic-competition/> accessed 19 December 2012
[97] Case 82/13, Samsung SDI v European Commission, ECLI:EU:T:2015:611; Case 92/13, LG Electronics, Inc. v European Commission, ECLI:EU:T:2015:605; Case 92/13, Koninklijke Philips Electronics NV v European Commission, ECLI:EU:T:2015:605
[98] European Commission, "Commission welcomes General Court rulings upholding TV and computer monitor tubes cartel decision" (9 September 2015) Press release <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5616> accessed 18 December 2021

screen.[99] That being said, it is only up to one's imagination as to how much serious harm such illegal behavior had caused both "to television and computer screen producers in the EEA, and ultimately the harm it caused to the European consumers over the years."[100]

The second covered case is a recent European cartel case against banks involving price fixing. The official decision by the Commission has not been published yet as Directorate General for Competition and the companies involved are still working on creating a version that omit any business secrets and confidential information. On 2 December 2021, the European Commission fined banking giants €344 million for participating in a Foreign Exchange price fixing cartel.[101] The five banks which "undermined the integrity of the financial sector at the expense of the European economy and consumers" included UBS, Barclays, RBS, HSBC and Credit Suisse.[102] Some of the traders in charge of the Forex spot trading of G10 currencies, the most liquid and traded currencies in the world, acted on behalf of the five banks and "exchanged sensitive information and trading plans," now and then coordinating "their trading strategies through an online professional chatroom called *Sterling Lads*."[103] Such exchange of information has allowed the traders to bring "informed market decisions on whether and when to sell or buy the currencies […] in their portfolios," thereby avoiding acting independently and taking an inherent risk involved in taking these decisions.[104] Moreover, the traders also utilized these information exchanges as means to coordinate, for instance, when some of them would trade while others would temporarily refrain from doing so in order to not interfere with other traders, a practice known as "standing down."[105] In short, as EU competition chief asserted, "the collusive behavior of the five banks undermined the integrity of the financial sector at the expense of the European economy and consumers."[106]

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[99] European Commission, "Antitrust: Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels" (5 December 2012) Press release <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1317> accessed 18 November 2021
[100] ibid.
[101] Finextra Research, "EU fines banking giants €344 million over FX price fixing cartel" (2 December 2021) https://www.finextra.com/pressarticle/90550/eu-fines-banking-giants-344-million-over-fx-price-fixing-cartel accessed 19 December 2021
[102] European Commission, "Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel" (2 December 2021) Press release <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548> accessed 29 November 2021
[103] ibid.
[104] ibid.
[105] ibid.
[106] Pietro Lombardi, "EU fines banks €344M over "Sterling Lads" foreign-exchange cartel" (*Politico*, 2 December 2021) <https://www.politico.eu/article/eu-fines-big-banks-e344-million-over-forex-cartel/> accessed 5 December 2021

This last section studies the case in which record fines were imposed by the Commission, named *Trucks*.[107] In brief, over 13 years "several truck manufacturers throughout Europe agreed on the selling price of their trucks over six tons, which generated additional costs of 10% to 15% passed on the price paid by their customers."[108] Through collusive meetings and contacts with the settling parties within different forums and on different levels which evolved over time, the top managements of the cartel members "discussed their pricing intentions, the future gross price increases, and occasionally agreed their respective gross price increases."[109] They also "discussed and occasionally agreed on the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards and exchanged other commercially sensitive information,"[110] such as delivery periods, order intake, stock figures, current net prices, gross price lists and truck configuration.[111] With the purpose of being able to decide "with greater accuracy when to introduce new technologies leading to increased truck prices as well as when and how to increase gross prices," the cartel members envisaged to further reduce the remaining uncertainty in the market.[112] Rather than contributing to healthy competition in the market, the parties were involved in co-ordination and cooperation through which they boosted practical co-operation and eliminated the risks of competition.[113] Such collusive behavior as practiced by the truck cartel members has adverse effects, especially on the price, quality or quantity of goods and services.[114]

Instead of adapting themselves intelligently to the existing or anticipated conduct of their competitors, and determining independently the policy which they intend to adopt on the internal market, the members decided to have direct or indirect contact between them, as the main tool to "create conditions of competition which do not correspond to the normal conditions of the market in question."[115] Such exchange of information between competitors is incompatible with rules on competition if it reduces or removes the degree of uncertainty

[107] European Commission (2017)
[108] Pauline Dessèvre, Alice Mollot, Marco Plankensteiner, et. al., "Trucks Cartel: Within Four Months, the CJEU Provides Enlightening Procedural Clarifications on Follow-On Actions Through Two Preliminary Rulings" (26 October 2021) <https://www.kramerlevin.com/en/perspectives-search/trucks-cartel-within-four-months-the-cjeu-provides-enlightening-procedural-clarifications-on-follow-on-actions-through-two-preliminary-rulings.html> accessed 19 December 2021
[109] European Commission (2017), para. 75
[110] ibid., para. 79
[111] ibid., para. 238
[112] ibid., para. 210
[113] ibid., para. 214
[114] ibid., para. 232
[115] ibid., para 235

as to the *modus operandi* of the market in question. As a result, "competition between undertakings is restricted as the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information."[116] This can be of paramount pertinence on the trucks market for the gross prices or upcoming changes to the gross prices for trucks are neither published, nor advertised, nor available through freely accessible public sources.[117] Moreover, "the exchange of future prices or future gross price increases for coordination purposes between competitors" cannot be regarded as a legitimate means to achieve efficiency gains, as one of the competitors attempted to argue.[118] The competitively most sensitive parameter is the price of a product and, thus, a mutual exchange of information on future prices can eliminate strategic uncertainty, save when it "comprises objective market data."[119]

In short, this cartel has had a tremendous impact on the internal market. It was involved in agreements and practices covered or implemented in several Member States, thereby rendering them, by their very nature, "capable of affecting trade between Member States."[120] Moreover, the members of this cartel operated in a market that was highly concentrated, with them holding together above 90% of the European market for medium and heavy trucks. This possibly is the reason for, or at least a contributing factor to, a record amount of €2.93 billion over emissions technologies and participating in a cartel.[121] Such sanction speaks to the seriousness of adverse effects of cartels on the internal market. These adverse effects will now be compared to adverse effects arising from national measures having equivalent effect to quantitative restrictions, as prohibited under Article 34 TFEU.

5. ADVERSE EFFECTS ON THE INTERNAL MARKET REGULATED BY ARTICLE 34 TFEU AND ITS COMPARISON TO ARTICLE 101 TFEU

Adverse effects of cartels, which are prohibited under Article 101 TFEU, are distinguished from adverse effects of national measures having equivalent effect to quantitative restrictions,

[116] ibid.
[117] ibid., para 241
[118] ibid., para 260
[119] ibid., para 261
[120] ibid., para 354
[121] European Commission, "Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel" (19 July 2016) Press Release <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582> accessed 13 January 2022

as prohibited under Article 34 TFEU. In order to determine adverse effects of such national measures, two cases will be presented. Nevertheless, a succinct overview of Article 34 TFEU will provide firm basis for further analysis. Article 34 TFEU prohibits "measures having equivalent effect to quantitative restrictions" between Member States. It has vertical direct effect,[122] thereby being enforceable "against a broad category of state or quasi-state defendants or bodies acting in place of the state."[123] As such, it so far has not been established that it applied to individuals as it is intended to regulate the behavior of Member States and private subjects who can limit the access to the market for other undertakings. Article 101 TFEU, on the other hand, prohibits any agreements between undertakings which affect trade between EU countries and prevent, restrict, or distort competition. That being said, while actions between individuals are constrained by the regime of competition rules (Articles 101 and 102 TFEU),[124] it has been debated among academics whether Article 34 TFEU should also have horizontal direct effect.[125] Nevertheless, the Court[126] and most academics contend that Article 34 TFEU is addressed to the Member States rather than "private parties who should be able to contract freely, unconstrained by Article 34 TFEU."[127] Article 34 TFEU thus prohibits Member States from "placing quotas on the amount of goods that could be imported, or restricting their flow by measures that have an equivalent effect to quotas."[128]

In regards to the quantitative restrictions, a broad definition has been provided in the *Geddo* case: "measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit."[129] Equally ambiguous was the interpretation of measures having an effect equivalent to quantitative restrictions in *Dassonville*:[130] "All trading rules enacted by Member States which are capable of hindering,

[122] Case 249/81, Commission of the European Communities v Ireland, ECLI:EU:C:1982:402; Case 171/11, Fra.bo SpA Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) —Technisch-Wissenschaftlicher Verein, ECLI:EU:C:2012:453
[123] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (6th ed. Oxford University Press 2019), p. 77
[124] Case 82/77, Openbaar Ministerie of the Netherlands v. van Tiggele – Opinion delivered by Advocate General Capotorti on 24 January 1978, ECLI:EU:C:1978:10; Case 65/86, Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Süllhöfer, ECLI:EU:C:1988:448
[125] Christoph Krenn, "A missing piece in the horizontal effect 'jigsaw': Horizontal direct effect and the free movement of goods" (2012) 49(1) Common Market Law Review 177-215, p. 177
[126] Case 159/00, Sapod Audic v Eco-Emballages SA, ECLI:EU:C:2002:343
[127] Barnard (2019), p. 78
[128] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, (6th ed Oxford University Press 2015), p. 699
[129] Case 2/73, Geddo v Ente Nazionale Risi, ECLI:EU:C:1973:89, para. 7
[130] Case 8/74, Procureur du Roi v Dassonville, ECLI:EU:C:1974:82

directly or indirectly, actually or potentially, intra-Communnity trade […].”[131] Thus, the Court has taken “a broad view of measures that hinder the free flow of goods.”[132] The Court’s approach to discriminatory import or export restrictions has always been extremely strict. Firstly, it has held that import or export licenses are caught under Article 34 TFEU.[133] Secondly, subjecting imported goods to requirements not imposed on domestic products is contrary to Article 34 TFEU, as portrayed in *Cassis de Dijon*.[134] Also, in the same case the seeds that were sowed in *Dassonville* bore fruit and it was held that there is no requirement for the rules to actually discriminate between domestic and imported goods. Furthermore, if a state promotes of favors domestic products to the detriment of competing imports, this will be caught by Article 34 TFEU. Sometimes, states engage in a campaign to promote the purchase of domestic as opposed to imported goods, whereas at other times they impose rules on the origin-making of specific goods.[135] The list of matters which can constitute measures having an effect equivalent to quantitative restrictions are specified in Article 2 of the Directive 70/50[136] and include: minimum or maximum prices for imported products; less favorable prices for imported products; lowering the value of the imported product by reducing its intrinsic value or increasing its costs; payment conditions for imported products which differ from those for domestic products; conditions in respect of packaging, composition, identification, size, and weight, which are applicable only to imported goods or which are more difficult to satisfy than for domestic goods, etc.[137] In brief, this list is comprised of a variety of ways in which the importing state can discriminate against goods.

The most restrictive measures a Member State can adopt from the perspective of the free movement of goods is a ban on imports and ban on the marketing of a specific product or substance. For instance, in a case covering a French ban on the addition to beverages of caffeine above a certain limit, employing the proportionality test, the Court held that the ban did not represent necessary means to achieve consumer protection. In other words, measures

[131] ibid, para. 5
[132] Craig and de Búrca (2015), p. 702
[133] Cases 51-54/71, International Fruit Company NV and others v Produktschap voor Groenten en Fruit (No 2), ECLI:EU:C:1971:128; Case 68/76, Commission v French Republic, ECLI:EU:C:1977:48; Case C-54/05, Commission v Finland, ECLI:EU:C:2007:168
[134] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), ECLI:EU:C:1979:42
[135] ibid., p. 703-704
[136] European Commission, “COMMISSION DIRECTIVE of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty” No L 13/29 Official Journal of the European Commission 17-19
[137] ibid., p. 18-19

less restrictive of intra-Community trade should have been used.[138] While performing the proportionality test, the Court concluded that there are less restrictive, thus more proportionate measures, such as "appropriate labelling, informing consumers about the nature, the ingredients and the characteristics of fortified products, can enable consumers who risk excessive consumption of a nutrient added to those products to decide for themselves whether to use them."[139] Thus, while the French Government, after conceding that "its national legislation is capable of hindering trade between the Member States," attempted to justify it on the grounds of public health and consumer protection,[140] the Court was clear about the adverse effects of such national measures. It clearly asserted that legislation such as that at issue, "which requires for the marketing of foodstuffs fortified with vitamins and minerals prior inclusion of those nutrients on an authorized list, makes the marketing of such foodstuffs more difficult and more expensive, and consequently hinders trade between the Member States."[141] In fact, such legislation must provide "for a procedure enabling economic operators to have that nutrient included on the national list of authorized substances."[142] In this case, this would entail the procedure that is readily accessible, can be completed within a reasonable time, and, in the case of a refusal, the decision "must be open to challenge before the courts."[143] In short, too many marketing authorizations would not be granted should these measures remain in place and, consequently, too many economic operators would encounter hindrances to the market. It is undisputable that this is contrary to the idea behind the EU internal market and as such represents the negative impact on it.

Furthermore, Article 34 TFEU was also applied on several occasions to national regulations on price controls, notwithstanding that the Treaty itself lacks a specific provision on national regulations on price controls. These regulations employ measures such as "minimum and maximum prices, price freezes, minimum and maximum profit margins and resale price maintenance."[144] As an example, setting a minimum "a minimum price fixed at a specific amount, although applicable without distinction to domestic and imported products, can restrict imports by preventing their lower price from being reflected in the retail selling

[138] Case 24/00, Commission of the European Communities v French Republic, ECLI:EU:C:2004:70, para. 52
[139] ibid., para. 75
[140] ibid., para. 19
[141] ibid., para. 23
[142] ibid., para. 26
[143] ibid.
[144] European Commission (2021), p. 53

price."[145] The adverse effects that this measure has is the impediment for importers to use their competitive advantage[146], as well the prevention of the consumer to take advantage of a potentially lower price.[147] Unfortunately, they are not the only adverse effects of such measures.

In the case law of the EU, there is a range of cases discussing the optimum market model to set the boundaries of negative integration, including *Keck*,[148] *Cassis de Dijon*, *Dassonville* and *Italian Trailers*,[149] all in search for the test the Court should apply to Article 34 TFEU. One of these cases is interesting to this thesis for different reasons. In *Italian Trailers*, significant conclusions were reached about the adverse effects of national measures which are prohibited under Article 34 TFEU. This was a case of the Italian law prohibiting "the use of trailers on motorcycles and mopeds on highways," which the Court declared was a violation of Article 34 TFEU.[150] The reasoning behind the decision was that, "a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behavior of consumers, which, in its turn, affects the access of that product to the market of that Member State."[151] Since they knew about the prohibition "to use their motorcycle with a trailer specially designed for it," customers, expectedly, "have practically no interest in buying such a trailer."[152] When there is no demand in the market, this will hinder the importation of not-demanded products. Similar findings were presented in *Commission v Portugal*,[153] in which it was held that potential customers, traders, or individuals lack any interest at all in buying tinted film due to the fact that, "affixing such film to the windscreen and windows alongside passenger seats in motor vehicles is prohibited."[154] Provisions such as those in the two cases consequently lead to adverse effects on the market. In the case of Italy, where "no motorcycle can obtain type-approval to tow a trailer and no trailer to be towed by a motorcycle," the undesired consequence of the prohibition on using such vehicles and trailers simultaneously is that Italian undertakings are indifferent to "manufacturing motorcycles equipped to tow trailers or trailers intended solely to be towed by such

[145] ibid.
[146] ibid.
[147] Case 231/83, Cullet v Centre Leclerc, ECLI:EU:C:1985:29
[148] Cases 267/91 and 268/91, Keck and Mithouard, ECLI:EU:C:1993:905
[149] Case 110/05, Commission of the European Communities v Italian Republic (Italian Trailers), ECLI:EU:C:2009:66
[150] ibid., para 55
[151] ibid., para. 56
[152] ibid., para. 57
[153] Case 265/06, Commission of the European Communities v Portugal, ECLI:EU:C:2008:210
[154] ibid., para. 33

vehicles."[155] Even though it is undisputable that, motorcycles can comfortably be used without a trailer, it could not be more true that a trailer "is of little use without a motor vehicle that may tow it."[156] Thus, "in the case of trailers specially designed for motorcycles, the possibilities for their use other than with motorcycles are very limited," if not hypothetical.[157] As such, the provisions in questions hindered free movement of goods and limited free access to the market.

In the following case of *Mickelsson & Roos*,[158] the Court held that the Swedish restriction on the use of personal watercraft (jet skis), which could only be used on generally navigable or on specifically designated waterways, constituted a violation of Article 34 TFEU. As the Court asserted in its judgment, "where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, […], such regulations have the effect of hindering the access to the domestic market in question for those goods […]."[159] This was sufficient to prove that the rules in question, either in total or to a great extent, prevented consumers from using those products. As such, it works against the envisaged construction of the internal market, which is widening consumer choice and generally operating to his advantage by increasing competition.[160]

These two cases portray that, free movement of goods, which is prescribed by Article 34 TFEU, "incorporates many policies and fits smoothly into a responsible internal market which guarantees an easy access to high-quality products, combined with a high degree of protection of other public interests."[161] Thus, adverse effects that national measures prohibited under Article 34 TFEU have on the internal market are as harmful as adverse effects of cartels. While cartels create market subdivision, minimize competition, increase prices and exacerbate quality for buyers, national measures having equivalent effect to quantitative restrictions hinder the intra-Community trade, limit the access of products and

[155] ibid., para. 46
[156] ibid., para. 49
[157] ibid., para. 55
[158] Case 142/05, Åklagaren v Percy Mickelsson and Joakim Roos, ECLI:EU:C:2009:336
[159] ibid., para. 28
[160] Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov, and Justin Lindeboom, *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*, (Cambridge University Press 2019), p. 123
[161] European Commission (2021), p. 41

deprive the consumers of more advantageous prices, the absence of which results from the inability of importers to use competitive advantage. To conclude, one the one hand, Article 34 TFEU prescribes the elimination of national measures capable of hindering trade between Member States. On the other hand, Article 101 TFEU focuses on maintaining effective competition between undertakings whose agreements may affect trade between Member States.[162] Thus, although in different ways, the two articles aim at ensuring the proper functioning of the internal market.

6. CONCLUSION

As a feature of economic life, cartels, although not as we know them today, have emerged centuries ago. And it is hardly possible they will ever disappear. There have been and always will be forces inducing businesses to "rig the game in one's favor," especially when they are forced to work under weak demand conditions and sell products which are undifferentiated commodities.[163] This is where Article 101 TFEU comes into play, with its aim to protect the immediate interests of competitors and consumers, as well as "protect the structure of the market and thus competition as such."[164] As Commissioner Neelie Kroes simply put, "when we break up cartels, it is to stop money being stolen from customers" pockets."[165] Furthermore, cartels are devastating for the internal market of the EU, where they are deemed as a principal impediment "to achieving the objectives of the internal market."[166] Thus, the threat to the EU's internal market will be mitigated only if efficient and sophisticated mechanisms to fight cartels are employed.

This paper highlighted a few important points. Firstly, cartels, as sophisticated as they are, constantly contribute to the distortion of the internal market, through price fixing, output restrictions, market allocation, bid rigging, and other types of conduct mostly utilized by cartels. Secondly, their adverse effects are significant and include but are not limited to raising prices, restricting supply, thereby rendering goods and services either completely unavailable or unnecessarily expensive, as well as establishing "market power, waste and

[162] Cases 177 and 178/82, Criminal Proceedings against Van de Haar, ECLI:EU:C:1984:144, para. 114
[163] Varney and Terzaken (2017), p. vii
[164] European Commission (2017), para. 231
[165] European Commission, "Neelie Kroes European Commissioner for Competition Policy Tackling cartels – a never-ending task Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session Brasilia, 8th October 2009" (8 October 2009) Speech 09/454 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_454> accessed 3 January 2022
[166] Aistė Mickonytė, *Presumption of Innocence in EU Anti-Cartel Enforcement*, (Bril Nijhoff Leiden 2019), p. 2

inefficiency in countries whose markets would otherwise be competitive."[167] Thus, they destroy all the benefits of competition, primarily beneficial to the customers, including but not limited to lower prices, higher quality products, a variety of choices and greater efficiency.[168] Thirdly, the EU anti-cartel enforcement employs multiple mechanisms and actors, all of which play significant role in fight against cartels. Accordingly, the EU cartel regulation must continue, through its mechanisms, to remedy all the adverse effects that cartels produce and to have a constructive, productive, and practical, impact on the internal market. Fourthly, in the context of the protection of competition on the internal market, the thesis highlighted the similarities in differences between Articles 34 and 101 TFEU can be compared and what are the differences between the two. This synthesis of the main findings, as well as the thesis as a whole, underlines that, cartels play a key role in the distortion of competition which has always been central to the EU. Competition is crucial for enhancing efficiency, protecting consumers and smaller firms from concentrations of economic power, and facilitating the creation of a single market. Thus, to preserve its objectives, recognizing the destructive impact of cartels is crucial, as much as the employment of adequate mechanisms equal to the task of suppressing cartels and their adverse effects on the internal market.

[167] OECD, "Hard Core Cartels – Harm and Effective Sanctions" (May 2002) Policy Brief, p. 1 <https://www.oecd.org/competition/cartels/21552797.pdf> accessed 17 November 2021
[168] David Bailey and Richard Whish, *Competition Law*, (8th ed. Oxford University Press 2015), p. 4

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ABSTRACT

The core of this thesis studies adverse effects of cartels on the functioning of the internal market of the European Union (EU). To understand the topic in its entirety, the paper firstly apprehends the nature of cartels, their definition, features, and *modus operandi*. By focusing explicitly on cartel regulation as a distinctive and significant part of competition law, the succeeding section presents the European Commission and national competition authorities, as the main enforcement bodies of the cartel prohibition, as well as the leniency programme and whistleblower-tool, innovative mechanisms employed to fight cartels. Once the enforcement mechanisms have been examined, the paper turns to adverse effects of such prohibited practices on the internal market, including on consumers and other businesses, namely in terms of production, prices, quality, market subdivision and competition. the paper turns. Cases presented should indicate a variety of the adverse effects that cartels have on the internal market of the EU. Additionally, towards the end, the paper provides an overview of Articles 34 TFEU, which prohibits the imposition of quantitative restrictions or equivalent measures on intra-EU imports, and Article 101 TFEU, which, in short, prohibits cartels. The purpose of this comparison is to highlight the similarities and differences between the two articles.

Key words: EU internal market; cartels; anti-cartel enforcement; Articles 34 and 101 TFEU