# "AGREEMENTS", "DECISIONS" AND "CONCERTED PRACTICES": KEY CONCEPTS IN THE ANALYSIS OF ANTICOMPETITIVE AGREEMENTS

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**Abstract**

*In their economic activity, undertakings conclude many agreements between them. But agreements between undertakings which can distort the competition -anticompetitive agreements- are prohibited. The Romanian and EU law prohibit "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition". However, the terms "agreements", "decisions" or "concerted practices" are nowhere defined in the EU Treaties or in the Romanian law. These terms are key concepts in the analysis of anticompetitive agreements which can distort the competition. In the lack of a legal definition, these concepts have generated a complex body of jurisprudence, which has to be identified. The analysis of these key concepts necessarily entails the conceptual delimitation of the notions. On this purpose, the relevant legal provisions will be identified in the Romanian and EU law, as well as the decisions of the European Court of Justice in this matter. The present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.*

**Keywords:** *anticompetitive agreements, agreements between undertakings, decisions by associations of undertakings, concerted practices, parallel behaviour.*

## Introduction

The purpose of this paper is the analysis of the notions "agreements", "decisions" and "concerted practices", which represent key concepts in the analysis of the anti-competitive agreements which can distort the competition. The desire to maintain themselves on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings to adopt an anticompetitive behaviour more easily. This may result from the existence of anticompetitive agreements and concerted practices, especially in light of recent economic crises. Agreements between undertakings which can distort the competition - anticompetitive agreements- are prohibited. The analysis of any anticompetitive practice begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

The Romanian and EU law prohibit all "agreements between undertakings", "decisions by associations of undertakings" and "concerted practice" which have as their object or effect the prevention, restriction or distortion of competition. The study of these notions is important because they are key concept in the analysis of anticompetitive agreements which restrict natural competition. Also, these notions are nowhere defined in the EU Treaties or in the Romanian law; as such, the concepts has generated a complex body of jurisprudence, which has to be identified.

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With the purpose of determining the meaning of anticompetitive agreements, we will analyse the special significance of each of these three notions, ”agreements”, ”decisions by associations of undertakings” and ”concerted practices” in the context of competition law, we will identify and analyse the main normative dispositions with regard to these aspects, both at national and European levels, and we will present many jurisprudential solutions of the European Law Court, from which are resulted the criteria that have to be taken into consideration for the identification of anticompetitive agreements.

In comparison with other already existent specialty literature on competition law, the present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.

**Content**

**1. The notion of “anticompetitive agreements”.**

The existence of a competitive and undistorted milieu is a fundamental condition for the existence of a functional market economy. Thus, it is necessary to protect the market against acts or facts that could lead to the prevention, restriction or distortion of competition. Among these, the anticompetitive practices of undertakings are especially harmful, irrespective of the way in which they take place: anticompetitive agreements or the abuse of dominant position on a certain market.

There are two main types of anticompetitive practices: the anticompetitive agreements concluded between two or more undertakings in order to coordinate their market behaviour and the undertaking’s abuse of dominant position on a certain relevant market. The object of the present analysis is represented by the anticompetitive agreements within the activity of undertakings as the main form of anticompetitive practice. In their economic activities, undertakings conclude naturally a large number of agreements between them, without becoming illicit in this manner. However, those anticompetitive agreements within the activity of undertakings whose object or effect is the prevention, restriction or distortion of competition are prohibited. In these circumstances, it is necessary to analyze the notion of “anticompetitive agreement” in order to determine whether or not the agreements concluded in the activity of undertakings become illicit from a competitive point of view. In order to become competitively illicit, the agreements between undertakings must regard a coordination of the undertaking’s behaviour on the market, to the detriment of free competition.

In the European Union Law, The Treaty on the Functioning of the European Union (EU Treaties/TFEU)[1], contains the primary legal regulation with regard to competition, which applies to undertakings and associations of undertakings. According to article 101 TFEU, “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”.

Similarly, in the Romanian Law, the Competition Law no. 21/1996[2] prohibits ”any agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it”.

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/1, 30.3.2010. *Brevitas causa*, throughout the present study, it will be indicate by the abbreviation TFEU.

[2] Official Gazette no. 88/30.04.1996.

As a result of the abovementioned regulatory provisions, the European and national legislation prohibit, without expressly defining: agreements between undertakings, decisions of associations of undertakings and concerted practices. These are forms in which one can express the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996 which we will designate in a general concept of *anticompetitive agreement* that includes any and all forms of expression, whether it is an agreement/understanding between undertakings, a decision of the association of undertakings or a concerted practice of two or more undertakings.

Moreover, from the same regulatory provisions revealed we may conclude that an anticompetitive agreement is prohibited if the following conditions are met: i) the existence of an anticompetitive agreement between undertakings, whether it is an "agreement between undertakings", a "decision of an association of undertakings" or a "concerted practice"; ii) the anticompetitive agreement brings prejudice to the competition: through its object or its effect, the anticompetitive agreement hinders, restricts or distorts the competition; iii) if the anticompetitive agreement reached distorts the competition in the internal market thus affecting trade between Member States, the provisions of the TFEU become applicable.

Concluding, the **anticompetitive agreements** are *any agreements between two or more undertakings, regardless of their form of expression, concluded in order to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition*.

**2. Forms of expression of anticompetitive agreements.**

The anticompetitive agreements may take various forms:

a) Depending on the undertakings' market level, whether or not they are competing with each other, we distinguish between: horizontal anticompetitive agreements and vertical anticompetitive agreements.

The *horizontal anticompetitive agreements* are agreements concluded between undertakings that operate on the same market level and compete with each other, for example the agreements between two manufacturers or two distributors.

The *vertical anticompetitive agreements* are agreements concluded between undertakings that operate on different levels of the manufacture - distribution chain and do not compete with each other.

b) Depending on the materialization of the agreement of the involved undertakings, we distinguish between express anticompetitive agreements and tacit anticompetitive agreements.

The *express anticompetitive agreements* are proper agreements concluded between undertakings for the purpose of meeting their expression of will, irrespective of their way to externalize the expression of will (it is irrelevant whether or not the expression of will is materialized through a document *ad probationem*).

The *tacit anticompetitive agreements* represent a coordination of the prohibited behaviour, concluded between two or more undertakings, such practice being initiated by an undertaking and subsequently followed precisely by another undertaking.

c) Other forms of expression of anticompetitive agreements.

No matter if they are express/tacit or horizontal/vertical anticompetitive agreements, the anticompetitive agreements may be represented in 3 main forms of expression: *proper agreements between undertakings, decisions of associations of undertakings or concerted practices.* Since they are fundamental concepts in the analysis of anticompetitive agreements, they will be specifically described below.

**3. Conceptual distinctions between the forms of expression of the anticompetitive agreement.**

The analysis of any anticompetitive practices begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

Both the European and the national legislators govern three main forms of expression of an anticompetitive agreement – "agreements between undertakings", "decisions of associations of undertakings" and "concerted practice of undertakings" – without, however, defining them. An extensive jurisprudence of the European Courts allows, however, the observation of the main definitive notes of these concepts and thus the determination of the scope of the interdiction governed by art. 101 paragraph 1 TFEU and art. 5 of Law no. 21/1996.

According to a general principle formulated in the jurisprudence of the European Courts, any undertaking must determine autonomously the behaviour it intends to adopt on the market[3]. Given this fact, the European Courts have defined the "agreements", "decisions" and "concerted practices" as European law concepts which allow a differentiation between the unilateral behaviour of an undertaking and the coordination of behaviours or the collusions between undertakings[4]. The unilateral behaviour falls under article 102 TFEU and art. 6 of Law no. 21/1996 on the abuse of dominant position.

The type of coordination of behaviours or collusion between undertakings that falls under article 101/1 TFEU consists in the situation in which at least one undertaking binds itself in relation with another undertaking to adopt a certain behaviour on the market or in which, following the relations between the undertakings, any uncertainty concerning their market behaviour is removed or at least significantly reduced[5]. The coordination does not have to be necessarily express but it may also be tacit. In order to be able to consider that an understanding has been concluded by tacit consent, an undertaking must expressly or tacitly invite another undertaking to achieve a common goal[6].

The forms of manifestation of an anticompetitive agreement can be extremely diverse. As suggestively underlined in the doctrine, the only important question is whether or not more undertakings had a common will to behave in a manner that would bring prejudice to competition[7]. In this context, we distinguish the main forms of expression of an anticompetitive agreement:

**3.1. "Agreement between undertakings".**

The concept of "agreement between undertakings" is not legally defined in the European law. In the Romanian law, article 5 of Law no. 21/1996 only prohibits it, however without defining it by correlation with article 49 of the same Law[8]. It appears that it regards "any commitments, conventions or contractual clauses that relate to an anticompetitive practice".

[3] As an example, we will cite the Anic Partecipazioni Case, C-49/92, consideration 116; The Suiker Unie joined cases, C- 40- 48/73, consideration 173. This case, like the other to which we refer throughout this paperwork is published on the website of the European Union Court of Justice, *www.curia.eu.int*.

[4] Consideration 108 of the decision of Anic Partecipazioni, cited in the above note and Sandoz Prodotti Case, C-277/87.

[5] Cimenteries joined cases CBR, T-25/95, considerations 1849 and 1852; British Sugar joined cases et al., T-202/98, considerations 58 – 60.

[6] Bundesverband der Arzneimittel-Importeure joined cases, C-2/01 and C-3/01, consideration 102.

[7] André Decocq, Georges Decocq, *Droit de la concurrence*, 4th edition, L.G.D.J., 2010, p. 305.

[8] According to art. 49 of Law no. 21/1996, "Any agreements or decisions prohibited by articles 5 and 6 herein, as well as by articles 101 and 102 in the Treaty on the Functioning of the European Union are null

The European case law interprets extensively the analyzed concept. Thus, it includes any type of agreement, written or oral, conditional or gentlemen's agreement, the concept of understanding being centered around the existence of an expression of will between at least two parties, whereas the form in which it manifests itself is not important[9].

Considering the multitude of ways of expression of an agreement between undertakings, in the analysis performed on this concept we distinguish between:

**3.1.1. Proper agreements.**

An initial definition must be made in the analysis performed: any way to express an agreement between undertakings must be analyzed only if it has an anticompetitive object or effect. In this sense, the doctrine rightfully noted that the term of agreement between undertakings "involves in the competition law a more accurate content than the one in the common law (that includes any agreement regardless of its purpose) and can only regard the agreements whose object or effect would be anticompetitive"[10] and that "therefore are kept in view the condemnable agreements that affect the freedom of the relevant market[11].

As regards the proper agreements, the Court of Justice of the European Union[12] set out a general formula, stating that "in order for art. 101/1 TFEU to be effective, it is sufficient for the agreement to be the parties' expression of will, without the need for it to constitute a valid and binding contract according to the national law"[13] and then underlined that "in order to have an agreement, it is sufficient for undertakings to have expressed their joint will to behave in a certain determined way on the market"[14]. The contract must not necessarily be concluded in writing[15].

Therefore we may conclude that a *proper agreement* represents a *contract* in the meaning of the Civil Code[16], materialized or not ad probationem in a document, in whole or in part (one or more contractual clauses) through which undertakings coordinate their behaviour on the market so as to restrict the competition.

*Regardless of the form.* The agreements concluded may be bi/multilateral and may be in any *form*: sale-purchase, rent, concession, memorandum of association, etc. Their common denominator is the monopolistic purpose pursued by the concerned undertakings[17].

*Regardless of the nature of the contract in which the agreement is stated.* Pragmatism - the essence of competition law – implies that the *apparent nature* of the contract must not be

and void, i.e. any agreements, conventions or contract provisions concerning anticompetitive practices, as well as any acts which violate the provisions under article 9 herein".

[9] Bayer vs. Commission Case, T-41/1996.

[10] Azema, Jacques, *Le droit francais de la concurrence*, Paris, 1989, p. 304.

[11] Căpăţînă, Octavian, *Commercial Competition Law. Pathological Competition. Monopolism*, Lumina Lex Publishing House, Bucharest, 1993, p. 41.

[12] *Brevitas causa*, throughout the present study, The Court of Justice of the European Union will be named *The Court* or indicated by the abbreviation *CJEU*.

[13] Sandoz Case, C-277/87.

[14] Petrofina vs. Commission Case, T-2/89; BASF vs. Commission Case, T-4/89; Hüls vs. Commission Case, T-9/89.

[15] The Decision of the Commission of 9 December 1998 on the Greek Ferries, OJ no. L. 109 of 27.05.1999.

[16] According to art. 1166 of the Civil Code, the contract is an agreement of wills between two or more persons with the intent to establish, modify or extinguish a legal relationship.

[17] O. Căpăţînă, *op.cit.*, p. 41.

taken into account. Can therefore be qualified as proper agreements the statute of a company[18], the shareholders' pacts[19], an agreement on intellectual property rights[20].

The apparent nature of the contract does not matter. Thus, the convention on fixing the port services rates in the port of Constanţa, sanctioned by the Competition Council (vertical and horizontal agreements had been concluded between several manufacturers of chemical fertilizers and several service providers), was called "negotiation protocol"[21].

The Court of Justice held that an anticompetitive agreement can be inserted in a transaction, stating that "prohibiting the agreements between undertakings, the Treaty makes no distinction between agreements whose object is to end a dispute and agreements aimed at other purposes"[22].

*Regardless of the validity of the agreement.* Regarding the validity of the agreement between undertakings (of course, apart from its incompatibility with the competition rules), the Court underlined that it is not necessary for the parties' expression of will to represent a valid contract according to the national law[23]. In this respect, also the European Commission explained that "in a secret agreement, the parties do not expect their collusive arrangement to have contractual force and no enforcement procedure is required, as a civil contract would have"[24].

### 3.1.2. Apparently unilateral agreements

The general framework of the business relationships between two or more undertakings may confer to a unilateral document, by its content and form, the features of a bi/multilateral agreement. This is the case of an apparently unilateral decision of an undertaking to which another undertaking (generally, part of the distribution network of the first) shall conform its behaviour. Since the conditions set by the issuing undertaking are accepted, usually in a tacit manner (however being put into practice) by the recipient undertakings, we may speak about an expression of will of the parties, so that in reality, there is a genuine anticompetitive agreement, subjected to the provisions of art. 101 TFEU and art. 5 of Law no. 21/1996. The distinction between agreements and unilateral behaviours is important to be made, because agreements fall under art. 101 TFEU, while unilateral behaviours are regulated by art. 102 TFEU.

The more common examples of apparently unilateral agreements met in practice are the documents (letters, circulars, invoices, invitations, etc.) addressed by a manufacturer to its distributors, containing various "directions" concerning the market behaviour, often tacitly accepted by its recipients and which were classified as agreements in the sense of art. 101 TFEU, such as: a circular addressed by Ford - Germany to its resellers, by which it informed them to no longer accept orders for right hand drive vehicles (to be sold in the United Kingdom)[25]; an invoice addressed by Sandoz to its distributors which had printed overleaf the

[18] Hendrik Evert Dijkstra vs. Friesland Cooperation Case, C-319/93.
[19] The Decision of the Commission in the Cegetel 4 Case, 20 May 1999, JOCE L 218 of 18 August 1999.
[20] The Telecom Development Decision, 27 July 1999, JOCE L 218, 18 August 1999.
[21] The Decision of the Competition Council no. 24 of 5 May 1998, in the *Competition Council Report 1998*, p. 89-93.
[22] Bayer vs. Société de constructions mecaniques Rennecke Case, C-65/86.
[23] Sandoz Case, C-277/87.
[24] The Decision in the PVC Agreements Case din 21 December 1988, JOCE no. L 74 of 17 March 1989.
[25] Ford AG vs. Commission Cases, C- 25-26/84, Decision of 17 September 1985.

annotation "prohibited for export"[26]; the "invitation" addressed by BMW to its distributors to stop delivering vehicles to independent leasing companies[27].

We may therefore conclude, based on a constant European case-law[28], that if we can demonstrate the express or tacit acceptance by the other parties of the measures adopted or imposed in an apparently unilateral way by an undertaking, an apparently unilateral behaviour of an undertaking in the contractual relations with its distributors can form the basis of an agreement between undertakings within the meaning of art. 101/1 TFEU. It is however essential to demonstrate the express or tacit accord of the addressee undertakings regarding the behaviour proposed by the issuing undertaking[29].

**3.1.3. Informal agreements; gentlemen's agreements.**

In order to have an anticompetitive agreement, it is not necessary for it to be legally binding under the applicable rules of the national civil law. What matters is that the agreement represents the parties' expression of will, under which they held themselves responsible. Consequently, simple moral commitments, promises, simple mission statements can therefore be regarded as agreements.

Both the doctrine[30] and the jurisprudence[31] acknowledged to the commitments of honour, *the gentlemen's agreements*, the features of anticompetitive agreements.

The term *gentlemen's agreements* (Anglo-Saxon specific term) designates an informal agreement, whether or not materialized in a document, between two or more parties, whose essence is that the fulfillment of the obligations assumed is based on the honour of the parties and not on the coercive force of the law.

The integration of the agreements of honour in the concept of anticompetitive agreement was justified in doctrine by the fact that every legal system governing the anticompetitive activity must have provisions to sanction the less formal types of agreements. If competition rules would work only when an express, official agreement is concluded then they would have little practical utility, since the undertakings will try to achieve their anticompetitive goals through less formal means[32].

A typical example of sanctionable agreement of honour was illustrated in the Quinine Cartel Case. A Dutch company manufacturing chemical, pharmaceutical and related products signed with other European manufacturers of such products an export arrangement on the price fixing and market allocation, which affected the trade with non-member states. They also concluded a gentlemen's agreement which extended the arrangement to sales within the European internal market and the parties agreed that the breach of the agreement represents, ipso facto, a breach of the export arrangement. The Court held the violation of the competition rules by the gentlemen's agreement concluded according to which the manufacturers were protecting their own national market and were restricting the competition within the internal market. The

[26] Sandoz Case, C-277/87, Decision of 11.01.1990.
[27] VW vs. Commission Case, C-62/98.
[28] Cases 32/78, 36/78 - 82/78 BMW Belgium et al. vs. Commission par. 28 - 30; Ford and Ford Europe, par. 21; Case 75/84 Metro vs. Commission (Metro II), par. 72 and 73; Case C-277/87 Sandoz vs. Commission, par. 7 - 12; Case C-70/93 BMW vs. ALD, par. 16 and 17.
[29] Bayer vs. Commission Case, T-41/96, par.71.
[30] Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, ed. 6, Litec, Paris, 2010, p. 311; A. Decocq, G. Decocq, *op,cit.,* p. 306.
[31] The Quinine Cartel Case, C- 41, 44 and 45/69.
[32] Craig, Paul; Grainne de Burca, *EU Law*, 4th edition, Hamangiu Publishing House, Bucharest, 2009, p. 1190.

assertion that, in fact, the gentlemen's agreement ceased has been removed, because the analysis of the parties' behaviour demonstrated that they have complied with their agreement (even if it was informal)[33].

Consequently, informal agreements can be sanctioned under art. 101 TFEU and the mere fact that the parties claim to have abolished them will not be considered determinant. It is necessary to carefully analyze the facts in order to establish if it was plausible, in economic terms, for the market behaviour to be achieved in the absence of the secret agreement.

To the same effect, it was decided that informal agreements can be classified as anticompetitive agreements even if they are not compulsory by their nature and the absence of formal measures to monitor the implementation does not necessarily affect the gravity of the violation[34].

Concluding, we can remark that an "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of competition, regardless of the form of the joint expression of will, the nature of the contract in which the joint expression of will is included or the validity of the contract.

### 3.2. "Decision by association of undertakings".

The association of undertakings is a group carried into effect on professional criteria, of more undertakings that operate on the same relevant market, while its members keep their behavioural autonomy. The European case law held that a professional group will represent an association of undertakings if it adopts rules that are the expression of will of the representatives of members of a profession and that aim to obtain a specific behaviour from the members of the said profession within their business activity[35].

Bringing together undertakings under an associative form in itself is not prohibited by law. However, when, through the decisions adopted by the association of undertakings, the same restricts the competition, this behaviour falls under the rules of competition and is prohibited.

"The decision by association of undertakings" is one of the forms of expression of an anticompetitive agreement. As ensued from the provisions of art. 101 TFEU and art. 5 of Law no. 21/1996, *the decision by association of undertakings represents* any decision of the governing body of an association of undertakings whose object or effect is the restriction of competition. In order to have this object or effect, the said decision should have the power to impose certain behaviours to the association members in their economic activity on the market. The way in which the said decision is formally presented has no relevance and the title or apparent nature of the document is also irrelevant.

If the decision of the association is meant to impose upon its members a certain economic behaviour on the market, it represents a decision prohibited by the rules of competition law, even if formally it takes the form of a simple recommendation, with non-binding features[36]. The decisions of the association should guide the behaviours of its members as an understanding between undertakings[37].

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[33] The Quinine Cartel Case, C- 41, 44 and 45/69.
[34] Henbach vs. Commission Case, T-64/02.
[35] Wouters Case (J.C.J. Wouters, J. W. Savelbergh and PRICE Waterhouse), C- 309/99, the Decision of the Court of 19.02.2001regarding the Netherlands Bar Association, par. 64.
[36] The Commission, 13 Apr 1994, *Stichting Certificatie Kraaverhuurbedrijf*, JOCE, L. 117, 7 May 1994. To the same purpose: Case C-45/85, Verband der Sachversicherer, Decision of 27 January 1987.
[37] Augustin Fuerea, *Business European Union Law*, Universul Juridic Publishing House, Bucharest, 2006, p. 218.

The decisions by associations of undertakings may take various *forms*, such as directives, internal regulations, circulars, etc., which the adherent undertakings apply effectively, complying with the provision sent from the center[38]. Since such decisions (regardless of their name: decisions, protocols, minutes, etc.) of the governing body are mandatory for all the association members, we are virtually reaching a similar result to that generated by a proper agreement. The anticompetitive threat is equally serious, which explains the legal assimilation of decisions with the monopolistic agreements[39].

The foreign doctrine stated that the decision by association of undertakings may be also represented by the association's *articles of incorporation*[40]. The Romanian literature held to the contrary, that the monopolistic decision adopted by the governing body of an association of undertakings must be adopted during its activity, and not before its coming into existence; the decision is issued during the activity of the association of undertakings and should not be confused with the articles of incorporation itself, because if the articles of incorporation would have monopolistic features, it would represent a proper agreement[41].

In my opinion, the articles of incorporation of an association of undertakings may represent both a proper agreement (in the relationships between the undertakings that form the association) and a decision by association of undertakings (towards third party undertakings wishing to subsequently join the association).

In the European Union case-law, the concept of *decision by associations of undertakings* has been broadly interpreted.

A *regulation* such as the one adopted by the Netherlands Bar Association concerning the collaboration between lawyers and other liberal professions was regarded as representing a decision by an association of undertakings[42].

The *resolutions* adopted at a meeting of the association or the *recommendations* of an association may constitute decisions of the association of undertakings when they indicate the decision of the said association to coordinate the behaviour of its members[43]. An act qualified as recommendation can be regarded as violating the provisions of art. 101 of the Treaty, whatever the legal status of this act, if it constitutes the expression of will of the association of economic agents to coordinate its members' behaviour on the market[44].

The *binding* decisions or resolutions of the Board of Directors, of the association or the rules belonging to the association's President that limit to a certain extent the commercial freedom of the members represent decisions by an association in the meaning of the competition law.

Moreover, a *recommendation* of an association of undertakings may constitute a decision of the association when, regardless of its legal status, it is an expression of its policy to coordinate the behaviour of its members[45]. Even if the *recommendation is not binding or it has not been fully applied*, it may constitute a decision of an association and will be prohibited if, in fact, its purpose was to determine, or was able to have the effect of determining the behaviour of

[38] O. Căpăţână, *op.cit.,* p. 44.
[39] Căpăţînă, Octavian, The New Antimonopoly Regulation in Competition Law, in Dreptul no. 7/1996.
[40] Wish, Richard, *Competition Law*, 4th edition, Butterworths Publishing House, London, 2001, p. 82; Jones, Alison; Sufrin, Brenda*, EC Competition Law, Text, Cases & Materials*, 3rd edition, Oxford University Press, 2008, p. 173.
[41] Căpăţînă, Octavian, The New Antimonopoly Regulation in Competition Law, op.cit.
[42] Wouters Case, C-309/99.
[43] IAZ International Belgium NV vs. Commission Case, C-96/82.
[44] Verband der Sachversicherer e.V. vs. Commission Case, C-45/85, Decision CEJ of 27 January 1987; The Decision of the European Commission in the FENEX Case, par. 41 and 42.
[45] Verband der Sachversicherer e.V. vs. Commission Case, *above cited*, note 2.

its members. The non-binding recommendation represents a decision in the meaning under review, if it is implemented by the members of the association[46].

The European courts have ruled that a recommendation of the association of water suppliers addressed to its members, by which they should not have connected "unauthorized" applications (without a conformity tag provided by another association) to the main system, represents a decision capable to restrict competition[47].

In another case[48], the Commission found that the practice of the association to prepare and forward recommended rates to its members falls under the Treaty. Thus, while it is normal for an association/organization to offer assistance to its members, it must not exert any direct or indirect influence over the competition between members, particularly by sending rates applicable to all undertakings, regardless of the cost structure of each of them. An association's communication of recommended rates is a practice likely to determine the involved undertakings to align their own rates, regardless of their costs. Such method determines the undertakings that obtain reduced costs to drop the prices, thus creating an artificial advantage for those undertakings that do not have control over production costs. According to the decision of the European Commission in this case, a recommendation of an association on the application by its members of certain rates is anticompetitive if the following conditions are met: the association members have a common interest in influencing the market by increasing the prices; the nature of the recommendation, which, although described as non-binding, highlights, in binding terms, a collective increase of the rates; the association's statute allows it to coordinate the activity of its members.

Nationally, the Competition Council assessed that the decision of the Board of Directors of the Romanian Grain Storage Merchants Association represents a decision by an association of undertakings, having the object to influence the competitive behaviour of its members and to restrict the competition on the grain storage market in the South - South-East and West of Romania, by communicating certain rates to be applied by its members[49].

Furthermore, a decision adopted by the Board of Directors of the Dental Technicians National Association establishing certain reference rates for dental prosthetic works and their publication in the Association's journal, was regarded as representing a decision by an association of undertakings. It was noted that the recommended rates, even if classified by the association as reference rates, had as an object the coordination within the relevant market of the economic behaviour of dental technicians. And the publication of reference rates is likely to affect the competition on the dental prosthetics market because it allows the players of this market to anticipate with a high degree of certainty the pricing strategy of their competitors[50].

Likewise, it was determined that the decision of the management and governing executives of the Body of Expert and Licensed Accountants of Romania (CECCAR) to adopt a Regulation setting out in mandatory terms virtually all the professional fees and its publication in the Body's journals and, starting with 2009 in the Official Gazette of Romania, part I, reflects their decision to coordinate the behaviour of CECCAR members in conformity with the provisions of the Regulation and represents a decision by association of undertakings within the meaning of art. 5 alignment (1) of the Law and art. 101 of the Treaty. It was held that, although CECCAR argues that the decision to adopt this Regulation represents a punctual work required by its members as a direction in order not to deviate from the quality standards and to protect on

[46] van Landewyck Case, C-218/78.
[47] IAZ International Belgium NV vs. Commission Case, C-96/82.
[48] The Decision of the Commission published in OJ no. L 181/28 of 1996.
[49] The Decision of the Competition Council no. 63 of 7 December 2009.
[50] The Decision of the Competition Council no. 19 of 26 March 2008.

these lines the customers, in reality the Regulation represents more than a guiding methodology for setting the fees, its adoption decision being taken with the purpose of influencing the commercial behaviour of its members and thus falling under art. 5 alignment (1) and art. 101 of the Treaty[51].

Concluding, the "decision by association of undertakings" means any decision: i) originating from the governing body of the association and having an anticompetitive object or effect; ii) regardless of the form it takes and the apparent nature of the act (it may be a regulation, circular, directive, recommendation, protocol, minute, etc.); iii) which is intended to require from its members a certain market economic behaviour; iv) if it is not binding and if it does not have as object the restriction of the competition, it is reprehensible if actually implemented by the associated undertakings because only this way will be fulfilled the requirement that the decision of the association of undertakings must have the effect of restricting competition.

### 3.3. "Concerted practice"

#### 3.3.1. Concept

The concept of "concerted practice" has its origins in the American antitrust law, section 1 of Sheman Act using the concept of "conspiracy", the name being afterwards widespread as "concerted actions". The concept was taken over by the European legislation and thus is also found in the Romanian law. The term "arrangements", with a similar meaning, is also found in the English law, in the UK Restrictive Trade Practice Act.

Neither the Treaty on the Functioning of the European Union nor Law no. 21/1996 defines the concept of concerted practice. Strictly etymologically, the concerted practice suggests a conscious and deliberate alignment of undertakings to a certain market behaviour.

The scope of the concept has been established in the European Union case-law. The analysis of the concept has its onset in two famous cases, called the "dyestuffs matter" and "European sugar industry", an interpretation that settled and was afterwards constant in the subsequent decisions.

In the Dyestuffs matter case[52], the Court defined the concerted practice as representing *a form of coordination between undertakings that, without reaching the level at which a proper agreement would have been concluded, knowingly substitutes the practical cooperation to the risks of competition*.

In the European sugar industry case[53], the CJEU defined the concerted practice in the same way and concurrently stressed the main principle of the European competition concept: any undertaking must determine autonomously its policy on the market, including the choice of addressees of its own offers and sales. In these circumstances, the Court concluded that that mentioned principle rigorously opposes any direct or indirect contact between undertakings, having as its object or effect either to influence the market behaviour of an actual and potential competitor or to disclose to the competitor its own market behaviour, as such established or only projected.

From the case-law highlighted defining notes, we can conclude that the *concerted practice is a form of coordination between undertakings of their economic behaviour in a certain market which, without reaching the stage of achieving a proper agreement, leads to the*

[51] The Decision of the Competition Council no. 47 of 2 November 2010.
[52] Joined cases C- 48-49 and 57/69 I.C.I. vs. Commission (Dyestuffs), Decision CJCE of 14 July 1972.
[53] Suiker Unie Case, C-40-48, Decision of 16 February 1975.

*disappearance or reduction of the competition uncertainties that would have existed if undertakings would have established autonomously their market behaviour*.

The doctrine[54] emphasized that the concerted practice requires the gathering of objective and subjective elements, both with a negative condition. The objective element is given by the existence, at a certain time, of a similar and parallel behaviour of the undertakings concerned. Moreover, there must be also a subjective element: the parallel behaviour must be consciously adopted by each undertaking, in exchange for achieving a common goal; the intentions must be convergent and lead to an effective cooperation. The alignment to the common behaviour is usually achieved through the exchange of relevant information between undertakings. The negative condition implies, by assumption, the exclusion of the proper anticompetitive agreement as the basis of the similar behaviour, because otherwise we would return to the first assumption, the proper agreement.

### 3.3.2. Ways of achievement

The concerted practice results from the knowledge of the economical policy of the opponents and is usually achieved by organizing often secret meetings/*gatherings*, as it happened in the Polypropylene Case[55], or through the *exchange of information* accomplished in any way (through discussions between representatives, by telephone, by fax, by e-mail, even by professional press etc.)[56], without the necessity for the volume and quality of the information provided to be mutually equal[57].

It is however necessary for the exchange of information to be mutual (even if the information exchanged are not of equal value), because only this way we may hold the fraudulent "common arrangement", which, by definition, assumes the participation/involvement of all the undertakings concerned (any anticompetitive agreement, including any concerted behaviour, assumes by definition at least two undertakings), which by the mutual exchange of information on their future economic actions eliminate the risk of competition (when an undertaking knows the future strategy of the competitor, any competition risk is removed because it can "adjust" its behaviour by reference to the one expected by the adversary).

In the European case-law it was noted that the participation at meetings related to price fixing and sales volume level setting, during which information was exchanged between competitors regarding the prices they intended to charge, their profitability thresholds or sales figures constitute a concerted practice. This is because the participating undertakings were unable to disregard such information disclosed in determining their future market behaviour[58]. Furthermore, it was decided that the exchange of information between competitor undertakings regarding their deliveries represents a concerted practice[59].

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[54] O. Căpăţînă, Commercial Competition Law. Pathological Competition. Monopolism, op.cit., p. 45.

[55] The Commission, 23 April 1986, The Polypropylene Case; The Commission, 21 February 1994, *AIE*, JOCE, L. 68 of 11 March 1994, for the exchange of information between the members (oil companies) of an association (The International Association for Energy).

[56] Mihai, Emilia, *Competition Law*, All Beck Publishing House, Bucharest, 2004, p. 73. The author cites a case in which the Romanian Competition Council assessed as "concerted behaviour" the exchange of information between two companies, in order to falsify an auction (Decision no. 66 of 28 Oct. 1998).

[57] Both the participation at meetings and the exchange of information between parties regarding the industrial sugar price were held by the Commission as forms of concerted practice in the sugar case (*above cited*), even if the effects of such anticompetitive behaviours could not be accurately quantified.

[58] Shell International Chemical Company Ltd. Vs. Commission Case, T-11/89.

[59] Trefilunion SA vs. Commission Case, T-148/89.

In the event that an undertaking participates in a concerted practice but, once informed about the future actions of its competitors, decides not to follow the agreed behaviour, the question arises whether it can be sanctioned for being a concertist? The answer is yes, because the concerted practice has removed for the said undertaking the uncertainty that it would have been given by the existence of normal competition.

If an undertaking is present at a meeting where the parties agree on a particular market behaviour, it may be guilty of violating the competition rules even if its own market behaviour does not correspond to the type of behaviour to which the agreement referred to[60]. The European case-law states that "the fact that an undertaking does not follow the decisions taken in meetings with a clear anticompetitive purpose is not of a nature to relieve it of full responsibility for the participation in the cartel, if it has not publicly distanced itself from the object of the agreement". Such delimitation should take the form of a withdrawal from the agreement and public distance from what has been established in the agreement so that the other participants can unequivocally understand the gesture of leaving the cartel[61].

**3.3.3. Behavioural parallelism in price fixing – evidence of concerted practice?**

As already shown, the concerted practice essentially involves a coordination of the undertakings' behaviours, a form of coordination which does not reach the level of a proper anticompetitive agreement. Therefore, even if we cannot hold the existence of a proper anticompetitive agreement, undertakings are punished for concerting their behaviours. One of the most dangerous anticompetitive agreements is the one whose object is price fixing, because it has particularly important harmful effects on the free competition, to the detriment of the final consumer. Repressed by the European Union legislation and condemned by any national legislation, such anticompetitive practice is generally hidden by its authors.

In this context, since the proper anticompetitive agreement cannot be demonstrated and *idem est non esse et non probari*, obviously, undertakings cannot be sanctioned for concluding a proper anticompetitive agreement on price fixing. Therefore, often, in order to sanction them, must be held the existence of a concerted practice, thus assessing that the fixing of an identical price or the simultaneous increase with the same percentage and in the same periods of time of the prices used by the competitor undertakings demonstrate a concerted practice.

In this sense, the doctrine[62] pointed out that undertakings can be sufficiently astute as to destroy the written evidence or to rely only on verbal agreements; the secret agreement remains however real and the construction of the concerted practice term must be flexible enough to include this fact of the economic life; on the other hand, it was also emphasized the danger of including the parallel price fixing in the concept of concerted practice, which does not operate in oligopoly.

If the price uniformity represents the result of the logical action within an oligopoly and there is no secret agreement, then sanctioning the undertakings is neither rational nor fair. The issue is no longer behavioural in the sense that the parties engage in a behaviour different from that which would exist under normal conditions within the same type of market, but the issue is structural, meaning that this type of market normally generates this type of response[63].

The theory of oligopolistic interdependence has generated criticism. Among the most vehement is the one arguing that the mentioned theory does not explain satisfactorily its essential affirmation, meaning that the members of an oligopoly can get supracompetitive profits

[60] Sarrio vs. Commission Case, T-334/94, par. 118.
[61] ADM Case, T-329/01, par.246, Westfalen Gassen vs. Commission Case, T-303/02, par. 77, 84 and 124.
[62] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit.,* p. 1194.
[63] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit*, p. 1194

without concluding an agreement. The assertion that it is being developed a price leading pattern by which an undertaking increases the price and this fact acts as a signal for the others to follow, is not a very convincing answer that prices remain thus parallel without a conspiracy between the members of the oligopoly[64].

In my opinion, the existence of a parallel behaviour of the competitor undertakings as regards price fixing cannot by itself, *de plano*, demonstrate the concerted practice.

Thus, when in a certain market there is a behavioural parallelism of undertakings in price fixing, there are two possibilities: i) this parallelism is a collusive alignment and if the collusion is demonstrated, we may hold the existence of a concerted practice; ii) it is only the expression of a conscious, intelligent and quick reaction of an undertaking to the challenge of its competitor, without becoming competitively illicit.

The second possibility may exist in several assumptions, such as:

- on a relevant market activates a powerful undertaking that practices a certain price and without any concerting, the other undertakings will practice a similar price, whether they follow the pattern of the first as it turned profitable or they will not be able to charge a price higher than the one of the first undertaking because it will not be paid by the consumers;

- on transparent markets where each undertaking knows the price of the competitors, prices will be equal or roughly similar, without the existence of concerting. The CJEU ruled in this respect in a case where market transparency was determined by the existence of a patent license[65].

- in the case of oligopoly. An oligopolistic competition market is characterized by the existence of a small number of competitors that hold close market shares, without being able to speak about a considerable force of one of them in relation to the others. In such market conditions (for example, the mobile operators market) there is a close link between the competitors behaviour, the action of one of them is followed by a corresponding response from the others and each change of strategy is achieved by taking into account the probable response of the competitors. Consequently, the specific features of the oligopolistic market *can* determine the price alignment (therefore without a concerted practice between competitors).

Especially in cases of oligopoly, it is difficult to determine if the price alignment is a natural result of the oligopolistic market or it represents a concerted practice. This difficulty can be also noticed in the analysis of the Court's decisions.

In the Dyestuffs case[66], it was noted that in the dyestuffs industry there were successive price increases, almost simultaneously, with identical percentages, without having occurred an agreement between the manufacturers. They defended themselves claiming that the price increase was due to the oligopolistic structure of the market in terms of dyestuffs. The CJEU rejected the argument, holding the following: "the successive increases in prices and the conditions under which they were made cannot be explained only by the oligopolistic structure of the market, but are the result of a concerted practice. It is not credible that, without a prior thorough concerting, the major manufacturers supplying the European common market would have increased several times, with identical percentages, the price of the same series of products, at about the same time and in many countries in which the conditions of the dyestuffs market are different:"

In the Wood-Pulp case, the Commission held that a large number of pulp manufacturers imposed similar prices and similarly and uniformly changed them, which proved the concerting and did not hold the argument that the price was given by the oligopolistic market on which they

[64] R. Wish, *op.cit.,* p. 511.
[65] Ahlstrom Osakevhtio Case, no. C-89/85.
[66] ICI Case, Decision of 14 July 1972, *above cited.*

operated. The Court removed a significant part of the Commission's conclusions and judged[67] that the behavioural parallelism can be regarded as proof of concerting only if the concerting is the only plausible explanation for that behaviour. Noting that undertakings have the possibility to intelligently adapt their behaviour to the one of their competitors, furthermore the Court held that prices parallelism and their evolution could be explained accordingly by the oligopolistic market trends. It emphasized that a rigorous economic analysis is necessary in order to determine if there is another plausible explanation for the parties' behaviour.

In conclusion, in the absence of concerting evidence, the simple behavioural parallelism in price fixing cannot be regarded as a concerted practice. The existence of a concerted practice could be held only when the analysis performed will reveal that there is no other plausible explanation for the behavioural similarity visible on the market, as it is impossible to determine, depending on the context, a reason other than concerting.

**3.3.4. The concerted practice. The need to implement it on the market**

The Romanian doctrine stated that it is not necessary for the illicit joint action envisaged by the concerted practice to be implemented[68]. As far as we are concerned, we believe that, given that the concerted practice is by definition a *behavioural* coordination, it can be observed only in the existence of a certain market behaviour of the undertakings, which implies the need for its implementation. The same conclusion results from the case-law of the Court, which indicated that the concept of concerted practice implies, besides undertakings concerting together, a market behaviour subsequent to this concerting and a cause-effect link between these two elements[69].

**Conclusions**

The anticompetitive agreements, namely those which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. Therefore to become competitively illicit, the agreements between undertakings must regard, to the detriment of free competition, a coordination of the market behaviour of undertakings.

The European and national legislation, without expressly defining, prohibit: agreements/arrangements between undertakings, decisions by associations of undertakings and concerted practices. These are the forms of expression of the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996, which we describe by a general concept of anticompetitive agreement that includes any form of expression, whether it is an agreement/arrangement between undertakings, a decision by association of undertakings or a concerted practice of two or more undertakings.

The "anticompetitive agreements" are any agreements between two or more undertakings, regardless of their form of expression, concluded to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition.

The forms of manifestation of an anticompetitive agreement can be extremely different, the main forms of expression of an anticompetitive agreement being: "agreement between undertakings", "decisions by associations of undertakings' or "concerted practice".

An "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of

[67] Decision 85/202, OJ no. L 85 of 1985.
[68] A. Fuerea, *op.cit.,* p. 220.
[69] Huls AG vs. Commission Case (Polypropylene), C-199/92.

competition, regardless of the form of the arrangement, the nature of the contract in which the joint expression of will is included or the validity of the contract.

The "decision by association of undertakings" means any decision of the governing body of an association of undertakings which has as its object or effect the restriction of competition. In order to have this object or effect, the said decision should have the power to impose a certain behaviour to the association members in their economic activity on the market. It is not relevant how the said decision is presented in formal terms and the title or apparent nature of the act is unimportant.

The "concerted practice" is a form of coordination between undertakings of their economic behaviour on a certain market which, without reaching the stage of achieving a proper understanding, leads to the disappearance or reduction of the competition uncertainties that would have existed if the undertakings would have established autonomously their market behaviour.

Future research would involve: identifying difficulties in establishing the autonomous behaviour on the market; determining the attribute of undertaking of certain entities that do not have autonomy of decision and act within groups of companies resorting to anticompetitive agreements, in order to establish who is to be applied the sanction; the analysis of the exchange of information as a possible concerted practice.

**References**


- André Decocq, Georges Decocq, *Droit de la concurrence*, ediţia a 4-a, L.G.D.J., 2010.
- Jacques Azema, *Le droit francais de la concurrence*, Paris, 1989.
- Octavian Căpăţînă, *Dreptul concurentei comerciale. Concurenţa patologică. Monopolismul*, Ed. Lumina Lex, Bucuresti, 1993.
- Octavian Căpăţînă, *Noua reglementare antimonopolistă în dreptul concurenţei*, în Dreptul nr. 7/1996.
- Christian Gavalda, Gilbert Parleani, *Droit des affaires de l'Union Européenne*, ed. 6, Litec, Paris, 2010.
- Paul Craig, Grainne de Burca, *EU Law*, ed. 4, Ed. Hamangiu, Bucureşti, 2009.
- Augustin Fuerea, *Drept comunitar al afacerilor*, Ed. Universul Juridic, Bucureşti, 2006.
- Richard Wish, *Competition Law*, ed. 4, Ed. Butterworths, London, 2001.
- Alison Jones, Brenda Sufrin, *EC Competition Law, Text, Cases & Materials***,** ed. 3, Oxford University Press, 2008.
- Emilia Mihai, *Dreptul concurenţei*, Ed. All Beck, Bucureşti, 2004.
- Decisions of the European Court of Justice, www.curia.eu.int
- Decisions of the Competition Council, www.competition.ro