



**CONSILIUL
CONCURENTEI
ROMÂNIA**



The International Conference

The Challenges of Regulating and Enforcing Competition Law

Conference presentations

BELGIUM

Professor Wouter DEVROE - Katholieke Universiteit Leuven / Maastricht University

Abuse of economic dependence

Ever more Member States are making use of the mandate under Regulation 1/2003 to adopt rules against the abuse of economic dependence. On the basis of practical examples and in a context of convergence between competition law and B2B unfair market practices law, the focus will be on: (a) the nexus (buyer power) and differences with traditional competition law, (b) the diversity of national regulatory options, (c) the advantages and disadvantages of the options and their diversity, and (d) the impact of Directive (EU) 2019/633 on unfair B2B trading practices in the agricultural and food supply chain.

DENMARK

assoc. prof. Christian BERGQVIST - University of Copenhagen

What does EU 2017 Google Shopping Decision tell us about self-favoring as a competition law infringement?

During the late 2000s, several jurisdictions, including the EU and the U.S., opened investigations into potential antitrust violations by the Internet search firm, Google, for alleged bias in the ranking of the links returned in response to search queries. While the outcome have differed substantially between jurisdiction, the factual allegations against Google are almost indistinguishability. Moreover, EU decision, and the articulated theory of abusive self-favoring, have formed the core of parallel investigations into other IT-companies making it relevant to dissect the theory of abusive self-favoring under Article 102.

FRANCE

prof. Martine BEHAR-TOUCHAIS - Université Panthéon-Sorbonne Paris 1

The conflict between European antitrust law and national law of unfair commercial practices B to B: the Booking case

Can the law of unfair trade practices prohibit what European antitrust law allows? Is the principle of the primacy of the European Union law, mistreated by the extraordinary expansionism of the significant imbalance which exists now in the French commercial law (Art L442-6 C.com, became L442-1 in 2019)? The Regulation n ° 1/2003 allows the Member States of the European Union under certain conditions to keep alongside antitrust law, laws like our law of unfair trade practices, contained in Title IV of Book IV of the Commercial French Code. However, it seems that the movement consisting in using the law of unfair trade practices to circumvent antitrust law is increasing. The Booking case illustrates that. But we think that national judges should refrain from applying Article L 442-6 of the Commercial Code in the field of application of cartel law, whenever this undermines the effectiveness of the antitrust law of the Union. If the national judges do not want to comply with this rule on their own, at least it would be necessary to seize the Court of Justice of the difficulty, in a case where, as in the case of Booking, the encroachment would be flagrant.

GERMANY

prof. Bernd OPPERMANN - Leibniz University of Hannover

Market Law Aspects of Automatic and Autonomous Driving

Recent developments in artificial intelligence research and data-driven technologies as autonomous driving lead to new challenges for the law. A first approach is concerned with questions, when autonomous machines are safe enough to justify their admission on national and international level, of the human liability in private and criminal law, as well as ethical implications thereof. A deeper analysis must envisage matters of consumer and data protection, modifications of distribution contracts, and consequences for market law and competition law.

GREECE

prof. Dimitris TZOUGANATOS - University of Athens

Selective Distribution and third-party online platforms - In Search of the Scope of the Coty Rules

In its Coty preliminary ruling the CJEU clarified the scope of its Pierre Fabre judgment and held that in a selective distribution system the ban imposed to authorized distributors on the use of third-party online platforms falls out of the scope of Art 101 (1) TFEU, when that ban has the objective of preserving the luxury image of those goods and satisfies the criteria of Metro I. Not entirely clear is the scope of the legality presumption of the ban on third-party platform sales in a selective distribution system: does it/should it only apply to luxury goods? What is the exact meaning of a luxury good?

HUNGARY

prof. Csongor Istvan NAGY - University of Szeged

EU competition law's centralized interpretation and decentralized enforcement: procedural challenges

The enforcement of EU competition law features a remarkable peculiarity that distinguishes it from other antitrust/competition systems: it is a unitary/centralized system in terms of substantive law and (partially) decentralized in terms of enforcement. This dichotomy, which is attributable to the very special structure of EU law's enforcement at large, raises various practical issues concerning

both public and private enforcement and impacts on the effectiveness of EU competition law. The paper gives an overview of the key issues (such as actions for damages, rule of law, independence of national competition authorities, regulatory capture and uniform application) and analyzes the efforts EU law has made to increase the effectiveness of EU competition law's enforcement, while respecting Member States' procedural autonomy.

lecturer Monika PAPP - Eötvös Loránd Research Institute / Eötvös Loránd Tudományegyetem, Budapest

The Transformation of EU State Aid Law and Policy

The presentation gives an insight into the development of the regulation of EU State aid law and the transformation of State aid policy.

ITALY

Professor Enrico CAMILLERI - Università degli Studi di Palermo

The right to full compensation in passing-on cases

The Directive 2014/104/UE does allow either a defensive or an offensive use of passing-on, coherently with its general provision (art. 3) according to which any person who suffered harms caused by an infringement of competition law has the right to compensation for actual loss and for loss of profit, plus the payment of interest. However, such a "full compensation" target, once applied to cases of passing-on raise many concerns as to the main features of the remedy of non contractual liability, among which the existence of a causality nexus and the (compensation-oriented).

LUXEMBURG

Chamber President Anthony Michael COLLINS - General Court of the European Union

Some limitations on the judicial enforcement of Competition Law

The nature of judicial procedures militates against the Courts from acting as an efficient mechanism for the enforcement of Competition Law. The speaker will examine a number of the external and internal restrictions on judicial enforcement.

NETHERLANDS

prof. Anna GERBRANDY - Utrecht University

The challenges of applying competition law in the digital economy

The digitization of the economy raises many challenges for competition law and its enforcement by NCA's and courts. Depending on the other contributions so as to prevent overlap, I will either zoom in on the challenge of Big Tech, or provide an overview of several challenges: touching upon the (conceptualisation of) powerful positions of Big Technology companies and the response of competition law; the interplay between competition law and other regulatory regimes; the application of the cartel prohibition in the digital arena.

PORTUGAL

prof. Miguel SOUSA FERRO - Universidade de Lisboa

Antitrust damages in the EU: lessons and dreams

This presentation will focus on the developments that have occurred at EU and national level since the adoption of Directive 2014/104/EU and the lessons which can be learned from those developments for future practice, from the perspective of external and in-house lawyers and judges. It will also include some forward looking considerations, with special emphasis on the situation of antitrust private enforcement in Romania.

ROMANIA

assoc. prof. Adriana ALMĂȘAN - University of Bucharest

Rose is a rose is a rose: the NCA autonomy within the ambit of ECN+ Directive

The ECN+ Directive sets the autonomy of the NCAs as general principle, paramount for the consistent application of competition law within the European Union. This objective is heavily challenged however, at practical level, by the financial autonomy, the appointment of the NCA decisional bodies, the political system enabling interference and even the competence of the operational staff of the NCA. This paper aims to tackle the most relevant challenges in search for both the level of risk entailed by each challenge and possible solutions thereto.

prof. Lucian Bercea - West University of Timisoara

Market for Lemons under Pressure: Recent Developments in ECJ Case-Law on Price Transparency

The "market for lemons" theory provides an explanation for market failures in optimizing the quality of standard form contracts in favour of the consumers. The negative standardization of contract terms is the result of their systemic uniformization market-wide. The low quality of contract terms allows sellers and suppliers to offer products or services at a lower price, acquiring a competitive advantage. This presentation critically analyses the evolution of recent ECJ case-law on price transparency in consumer credit agreements, which supplements the standard of informative transparency, introducing several requirements on the explanatory transparency and influencing the competitive advantages of intransparent sellers or suppliers.

lecturer Sorin DAVID - University of Bucharest

The communication by competitors in the era of transparency

There is a long standing and generally accepted view competitors should not exchange competition sensitive information. With the rapid development of big data analytics, new means of information and communication, the quest from various stakeholders for more transparency from businesses, it become more challenging to draw the line between genuine communication of market information and exchange of competition sensitive information.

prof. Simona GHERGHINA - University of Bucharest

State Aid for SGEI Entrusted to Public Companies

The rise in the use of public companies for providing public interest services may be seen as an application of the general principle of liberty to enterprise only if one ignores the limited scope of the exceptions allowed by art. 106(2) TFEU to free competition. Amongst the elements of the thin domain where the financing from public funds of public companies is compatible with the EU law provisions protecting the free competition, the identification of the SGEI and its relation to the Altmark criteria are analysed by reference to specific challenges.

lecturer Doru TRĂILĂ - University of Bucharest

Practical aspects of conciliation between the monopoly rights attached to the IP and the competition regulations

From unhappy marriage - as described in some authors studies - when referring to Intellectual Property Rights and Competition Law to a possible and necessary harmonisation - this is the topic that would be analysed in order to identify and or propose means to create a conciliation between the monopoly rights which naturally occur from Intellectual Property creations and the competition regulation which are aiming to dissolve and impede creating of monopolies.

SLOVAKIA

prof. Ondrej BLAZO - Comenius University in Bratislava

Protection of competition and public procurement integrity protection – true couple or marriage of convenience?

Presentation raises several questions. First, is fight against bid-rigging really case for anti-trust. Second, are these tool and their operation effective? Third, what can be the role of “private enforcement”? Fourth, what are challenges for NCAs? Fifth, what are the challenges for judiciary? The ECN+ pushes MS to adjust their legal framework in order to enhance effectiveness of enforcement of the competition law. However, are suggested remedies effective for fight against bid rigging?

SPAIN

prof. Francisco MARCOS - IE Law School

Design of Merger Control in the EU and beyond: Institutions and Procedure

The presentation looks at the several features that are relevant in introducing merger review as an competition policy tool. Although the US & EU merger review systems are the most consolidated ones, with several years of experience and data on their operation, the paper will look at the key themes that are essential in organizing the system [(A) Institutions and (B) Procedural Steps], it will also examine the values and interests at stake and how they affect the solutions adopted.

SWEDEN

assoc. prof. Julian NOWAG - Lund University

The unintended consequences of EU merger control in the time of protectionism

In a times of increased protectionism the opposition to cross mergers based on public interest grounds seems to be a redeveloping threat within the EU. This paper compares the protection offered under the European Merger Regulation (EUMR) with those offered under general EU law. It shows that the protection offered to large (often multinational companies) under the EUMR against protectionist measures is greater than that offer to small and medium sizes companies within the general framework of EU law.

UNITED KINGDOM

assoc. prof. Marek MARTYNISZYN - Queen's University Belfast

Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward

In a globalised economy, when assessing anticompetitive conduct, one must consider the ways that entities in one jurisdiction cause economic harm in another. Transnational anticompetitive conduct leads to a transfer of wealth from the affected state to the state hosting violators. Yet regulation of such activities is attempted at the domestic, not the international level, except for some instances of regional integration. In the latter cases, the issue is addressed insofar as such approaches provide for effective enforcement of competition law, and generally only within the given group of countries.

This article analyses the current regulatory regime governing anticompetitive conduct, showing that it is composed of a patchwork of rules and instruments of diverse origin and nature. These are both hard and soft laws. Some are domestic, others are international. The analysis identifies some of the key gaps within this regulatory framework which currently allows for enforcement lacunae, providing room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. Therefore, this article challenges the dominant paradigm of progress in dealing with such violations by showing that the current regime de facto works for the select few, principally developed states, but offers little recourse to other countries affected by transnational violations of competition law. In doing so, it identifies the issue of wealth transfer, which should inform any approaches to rectifying violations.

The current system of competition law enforcement requires a realignment to recognize and overcome some of its pitfalls. Drawing from an empirical study of the experiences of developing countries with extraterritorial application of domestic competition legislation (conducted within the UNCTAD's Research Partnership Platform), this article proceeds with a series of clear policy recommendations, addressed principally to competition agencies and their respective constituencies. The proposals focus, in particular, on pursuing international cartels, which constitute the most rampant example of competition law violation and which are virtually universally condemned. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.