

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website <http://www.kluwerlawonline.com/toc.php?pubcode=COLA>

Anne C. Witt, *The More Economic Approach to EU Antitrust Law*. Oxford: Hart Publishing, 2016. 384 pages. ISBN: 9781849466967. GBP 70.

Different political and societal developments in the late 1990s gave rise to the emergence of a more economic approach towards the application of EU antitrust law (Arts. 101 and 102 TFEU as well as the Concentration Control Regulation). The purpose of doing so was to develop a “competition policy fully compatible with economic learning” (p. 1). By virtue of this approach, the European Commission significantly overhauled its interpretations of Articles 101 and 102 TFEU as well as the Concentration Control Regulations (4064/89 and 139/2004). Taking a “consumer welfare” perspective when applying those provisions, the Commission changed the ways in which competitive harm is defined and was to be assessed. Doing so, however, has caused frictions with the ECJ’s long standing interpretations of the same provisions. Almost two decades after the more economic approach was brought to the forefront, many questions therefore remain about its scope and the compatibility of this approach with the EU Treaty framework.

Despite the important impact of this approach on the application of EU antitrust law, an English-language legal monograph dedicated to the more economic approach was still lacking. Witt’s clear and easy-to-read monograph fills that gap in a most commendable way. Seeking to define the essence of the more economic approach (p. 1), the book succeeds in explaining how exactly this approach came to being before charting the changes in Commission decision practice and case law evolutions that have followed from it. That analysis subsequently allows the author to reflect on potential problems and gaps caused or exacerbated by the Commission’s more economic preferences.

Proceeding in three main parts, the first part analyses the background against which the more economic approach could be developed and the processes that made this approach and the substantive law modifications it entails possible. A first chapter dedicated to triggers and catalysts argues that four related factors contributed to the rise of the more economic approach: transatlantic conflicts on different interpretations of law in the merger cases of *Boeing/McDonnell Douglas* and *GE/Honeywell* (p. 11), the annulment of three Commission decisions for lack of developed reasoning by the Courts (p. 27), the increase of international cooperation amongst antitrust agencies (p. 36) and the appointment of Mario Monti as Commissioner for Competition in 1999 (p. 34). All factors set the scene for the development of an agenda aimed at revamping the interpretations of antitrust law (Ch. 3, p. 55). As the second chapter details, the processes through which such revamping took place did consist generally in the adoption of new soft law instruments (p. 40), the modification of the Concentration Control Regulation (p. 41) and the increased hiring of economists as members of Commission antitrust case handling teams (p. 47). Taken together, those different developments allowed for a more economic approach to be developed more fully.

The second part assesses how the Commission conceptualized the more economic approach. Doing so, the author argues convincingly, has required modifications to the interpretation and application of the EU legal framework on multiple levels. Throughout the different chapters, the old approach and the new economic approach are compared in a most structured way. The chapters additionally map how those features and interpretation changes have gained ground gradually. A first chapter in this part is dedicated to the objectives of competition law. The author shows how Commission shifted away from earlier positions, clearly opting for a consumer welfare objective as guiding the interpretation of EU antitrust law. At the same time, however, it did not discard completely the original objective of internal market completion (Ch. 4). Clarity surrounding the objectives of EU antitrust law also resulted in a more economic approach taken towards the concept of competitive harm (Ch. 5) and justification tests to be invoked by businesses (Ch. 6). In both ways, the Commission has shifted from a multi-focused EU antitrust law regime also taking environmental and other policy concerns into account to a narrower legal framework focused on economic efficiencies and consumer welfare. The Commission's soft law guidance on the matter has also allowed to determine some more practical features of a more economic test taking shape in the Commission's decision-making practice (Ch. 7) and the increase of more informed economic methodology and quantitative analysis techniques (Ch. 8).

The third part of the book reflects on the advantages (Ch. 9) and pitfalls of the more economic approach. On the one hand, those pitfalls generally relate to the lack of full compatibility of the ECJ's case law with the Commission's proposed more economic approach. Simultaneously, both institutions appear to read different objectives to be protected by antitrust law provisions (Ch. 10). It is clear that the Court still follows its earlier case law and thereby relies on a more form-based perspective than the one tolerated by the more economic approach, which is almost exclusively effects-oriented. The author clearly showcases where the case law aligns with and where it differs from the Commission's proposed interpretations. On the other hand, the author identifies consistency and manageability concerns associated with the more economic approach, which also give rise to elevated costs for both courts and businesses (Ch. 11). The analysis of both advantages and pitfalls allows the author to conclude that whilst the Commission considers its approach to be better, the Court does not seem convinced that this is the case. She therefore calls on both institutions to align their interpretations of EU antitrust law (pp. 308–309).

In general, this monograph offers a useful and very well-structured introductory analysis into the specificities of the more economic approach. Written in a very accessible style, the author succeeds in comparing the old and new approaches towards EU antitrust law. Focusing on the Commission decision-making practice additionally allows more fully to grasp the impact of this approach on the ways in which EU antitrust law is actually applied.

Despite this accessible structure and well-written style, the book suffers from three shortcomings. Firstly, the author offers a state-of-the-art overview of the implementation and

manageability problems associated with the more economic approach and the different interpretations maintained by Commission and Court, but refrains from offering more concrete solutions seeking to realign both institutions. One could expect a monograph pinpointing the problems also to reflect a bit more extensively on different alternative ways forward and on their compatibility with the current EU law framework. Secondly, the author analyses in Chapter 6 how countervailing effects play a role, concluding that only countervailing economically informed effects can be invoked. Whereas that claim is indeed largely confirmed in decision-making practices, the analysis refrains from referring to cases such as those involving fixed book prices or other State-induced anticompetitive practices. In those cases, the Commission – albeit reluctantly – still appears to accept cultural policy or other non-economic arguments aimed at justifying anticompetitive practices. It would have been interesting to discover how such arguments and contexts have an impact on the author's argument that the more economic approach is entirely in vogue in the Commission's current take on EU antitrust law. Thirdly, whilst the book seems to cover the majority of ECJ case law, it appears that legal doctrine after 2010 is only scarcely present in the author's analysis. It would have been interesting to see how the author distinguishes herself or aligns with other opinions taken on the more economic approach in recent EU law scholarship.

However, those minor shortcomings should not discourage readers from engaging with this book. The author truly succeeds in weaving together the different threads of the more economic approach, offering a useful and insightful panorama of the challenges it raises. That in itself makes it a useful and thought-provoking instrument for anyone wishing to take part in a more informed way in discussions on the scope, format and desirability of the more economic approach accompanying EU antitrust law.

Pieter Van Cleynenbreugel
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