

Foreword

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This 4th edition of the Competition Law Digest provides readers with a synthesis of leading European and international antitrust cases from 1990 to 2019. It is a unique opportunity to draw comparisons between competition case law and policies in the EU and its Member States as well as select foreign jurisdictions.

Although the study cannot be fully comprehensive, the contributions illustrate the status of the harmonization process of competition laws in critical substantive and procedural areas. Harmonization, whether regulated or “spontaneous”, has always been at the forefront of European integration. Spontaneous harmonization is a natural convergence of rules of the Member States following the example of comparable rules in the European Union. Such spontaneous harmonization has notably taken place in the area of competition law. Congruously, key jurisdictions such as the US and Turkey present compelling examples of international convergence in specific areas. The forty-one contributions reveal that while substantive law harmonization – whether regulated or spontaneous – has been successful in some areas, there are still some other aspects of national competition laws that are not harmonized (for example, procedural rules).

In addition to analyzing the harmonization process, the contributions in this Digest examine certain business sectors – such as energy and environment, transport, digital, healthcare – and specific topics – unilateral practices, gun jumping and private enforcement. In the following paragraphs, we provide a few examples – based on the contributions’ analysis – of some areas of successful harmonization, those in which the lack of harmonization leads to differences and potential conflicts, and the Digital/antitrust interplay.

1. Areas of Successful Harmonization

In the previous edition of this Digest, we would likely have identified Private Enforcement as an area of marked divergence among jurisdictions. Today however, as note Anna Morfey, Michael D. Hausfeld and Alex Petrasincu - Hausfeld *‘the implementation of the Damages Directive over the course of the past two years across virtually*

all European Union jurisdictions brings about a new era for private enforcement of competition damages claims.’ Luís Campos - Frontier Economics - goes further, asserting that *‘the Directive aims to harmonise national legislation to facilitate damages claims resulting from infringements of competition law. It seeks in this way that all parties harmed by a competition infringement are able to obtain full redress of their losses in courts. Although more will be needed to achieve this ambitious objective, the Directive is seen as an important first step in that direction.’*

On the sectoral front, the field of energy and environment is ripe for significant consensus. In a paper in which he studies more than 120 cases, John Ratliff - WilmerHale - considers that *‘as regards enforcement at national level, several NCAs are addressing similar issues to the EC’* in terms of dominance in the energy sector. Regarding environmental issues, Annalies Outhuijse - University of Groningen - establishes that at every level there is a *‘tension between compliance with competition law and environmental protection.’* The same applies for State aid in the energy sector. Patrice Bougette and Christophe Charlier - CNRS - point out that *‘energy transition is at the heart of many European Union (EU) supported projects.’*

Turning to international antitrust, Gönenç Gürkaynak, Esra Uçtu and Onur Özgümüş - ELIG Gürkaynak Attorneys-at-Law - in their paper *Turkish Antitrust*, present a paragon of harmonization between national and European Union competition law. They state that *‘pursuant [...] to the Ankara Agreement and its Additional Protocol, Turkey was obliged to harmonize its legislation on competition in compliance with the acquis communautaire and to ensure the effective application of these rules. In this context, the Turkish competition law is closely modelled after the European competition law model, thus incorporates various features of the legislative framework of the European Union.’*

2. Differences and Potential Conflicts

Interim measures highlight a key area of divergence between the European Commission (Commission) and National Competition Authorities (NCAs). Alec J. Burnside and Adam Kidane - Dechert - point out that the Commission underuses its power to impose interim measures because of a combination of procedural and substantive factors, while complainants at the Member State-level are able to apply for them. However, the authors conclude on a positive note, confident that *‘there is scope for an increase in the use of interim measures in most ECN jurisdictions’* and that *‘there are growing signs that the rules and procedures governing the use of interim measures may be reformed.’*

Similarly, the recognition of the Legal Professional Privilege provides another example of variation between Member State and EU law. Philippe Coen - European Company Lawyers Association - affirms that *‘the legal privilege topic is an ever developing one with ups and downs.’* Indeed, while half of the Member States have accepted the Legal Professional Privilege the EU remains reluctant towards its espousal. He signals that

‘the future of EU and National Case Law will tell if Europe wants to be able to compete with LPP equipped continents such as North America in order to compete arm lengths.’

More generally, we can also see divergence in other procedural areas. Commenting on Rights of Defence, Simon Holmes and Sir Marcus Smith QC - UK Competition Appeal Tribunal - declare that *‘rights of defence and an effective system of review continue to be seen as of fundamental importance and an essential part of the general principles of EU law’* while *‘there has been a sustained attack in the UK on the rights of the defence.’* Speaking of Judicial Review, Nicholas Levy - Cleary Gottlieb Steen & Hamilton - mentions that *‘despite some inevitable differences in approach, EU and national courts have demonstrated a willingness and ability to provide effective judicial review in judgments that have shaped enforcement practice and provided checks on agency decision-making.’*

3. Digital and Antitrust

The new challenges raised by the Digital sector are the heart of upcoming cases in competition law. As Cristina Caffarra - Charles River Associates - underlines, the current understanding of digital platforms compounds together a very *‘heterogeneous collection’*, so a distinction should be made between aggregators and platforms. She also argues that the current antitrust tools *‘can and should be powered up to deal with concerns in digital space.’* For example, the notion of foreclosure is one of the available theories of harm which can be applied effectively.

Regarding the EU Merger Review of online platforms, Ioannis Kokkoris - Queen Mary University - and Lydia Gavriilidou - Karatzas & Partners - point out that *‘the lack of flexibility in the legal instruments which the authorities use in order to have jurisdiction on such transactions sometimes cause an enforcement gap.’* The tools of EU Merger Review are unfit for assessing mergers of online platforms. For example, *‘turnover on these markets are not always the most suitable indicator of market power;’* so *‘many concentrations that have taken place on the digital economy sector have escaped the application of EUMR provisions, due to low turnovers of the involved companies.’*

Tackling another pressing matter, Giuseppe Colangelo - Stanford University - attempts to answer the big question: Is EU competition law equipped to confront the privacy concerns raised by the use of Big Data, and should it be? There seems to be a consensus on two key principles: a privacy violation should not automatically constitute an antitrust violation and *‘data protection concerns may be part of an antitrust assessment by developing a privacy-quality theory of harm.’* It is surprising to note that while the Commission distinguishes between antitrust provisions and data protection rules, some NCAs are employing competition or consumer laws against privacy issues.

Harmonization and divergence of competition law are part of the successful decentralization of EU competition law, which has also led to a growing awareness of the development of competition laws and cases in national jurisdictions. Indeed, the approach of one jurisdiction to a particular aspect of competition law may in the future affect another jurisdiction. Monitoring and comparing different national approaches to similar cases has therefore become crucial for practitioners and academics to understand and predict the future direction of competition law at EU, national levels and beyond.

We trust that the *e-Competitions* initiative – with its online Bulletin and this Digest – contributes towards building a corpus of information on doctrine, legislation and precedent in the EU, US and worldwide, that constitutes a useful tool to better interpret the forthcoming challenges and direction of competition law.

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