

MARKET AND COMPETITION LAW REVIEW

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EDITORIAL

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Editorial

*Pieter Van Cleynenbreugel**

Guest Editor

EU competition law enforcement will soon be facing increasing “competition” from new EU regulatory initiatives in the making. The emerging Digital Markets, Artificial Intelligence and Data Acts all leave competition law largely intact, but simultaneously envisage alternative or supplementary regulatory and enforcement tools to ensure that markets function effectively. In addition, they would create new avenues for private liability actions against businesses. Against that background, it is no surprise that reflections on how to improve, harmonise and regulate existing public and private competition law enforcement frameworks have captured the attention of scholars, policy-makers and practitioners alike. The four articles in this issue call either for an upgrade of the existing public and private enforcement systems or for a better streamlining of competition law and new regulatory initiatives.

The first two articles take public enforcement as a starting point. In her article, Dr. Etsuko Kameoka zooms in on the concept of legal professional privilege in EU competition law. Although the Court of Justice has long recognised that communications between a lawyer and her/his client are protected and cannot be relied on, the scope of legal professional privilege remains open for debate. Identifying the gaps in the Court of Justice’s case law, Kameoka proposes a constructive way forward and calls for more harmonisation.

The second article, by Jérôme De Cooman, contextualises the existing EU competition law public enforcement framework against the background of the EU’s Artificial Intelligence Act. Although the latter in principle leaves

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competition law enforcement untouched, De Cooman identifies potential frictions generated by the use of artificial intelligence technologies in existing public enforcement frameworks. Both articles make clear that there is still important room to make the existing EU competition law public enforcement system future proof.

Moving from public to private enforcement, Clélia Jadot's article tackles the largely uncharted question of the private enforcement of State aid law. The author particularly questions what an undertaking could do to obtain compensation when a public authority has given a selective advantage to another undertaking. Looking at the scope and limits of the 2014 Damages Directive, Jadot examines the extent to which a harmonised legal framework for private State aid enforcement could be a solution. She identifies a clear legal possibility to move forward in this field, calling on policymakers to take those options seriously.

A similar conclusion emerges in the fourth article, written by Dr. Béatrice Schütte and Lotta Majewski. They focus on private liability for defective artificial intelligence products. Given the lack of harmonisation for harm caused by artificial intelligence, the authors call for more harmonisation similar to – but also more ambitious than – the damages framework set up by Directive 2014/104. It remains to be seen to what extent the proposals made in both articles will result in legislative action in the (near) future. Both articles nevertheless show that, as a matter of EU economic law, important steps could be taken to make more effective and streamlined private enforcement a reality.

Keeping with the theme of public and private enforcement of competition law, this issue also contains two book reviews. A first review, by Dr. Marc Veenbrink, is devoted to Cristina Teleki's book on due process and fair trial in EU competition law. The book focuses on the public enforcement system and the impact of the right to a fair trial to its structuring. As Veenbrink shows, it contains a lot of interesting insights, especially from the point of view of the European Court of Human Rights case law.

The second review, by José Pedro Pinto, reviews Rafael Amaro's edited collection on the private enforcement of competition law in Europe and beyond. The review makes clear that many open questions remain, which potentially hamper the success of private enforcement of competition law at the level of EU Member States. In both cases, the book reviews show that debates surrounding public and private enforcement of EU competition law are far from settled at this point in time.