International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN) 'EU Competition Law Enforcement: Challenges to Be Overcome' 26th and 27th May 2022

On May 26th and 27th 2022, the Centre for Antitrust and Regulatory Studies (CARS) hosted an International Conference on "EU Competition Law Enforcement: Challenges to Be Overcome". The Conference was organized by Maciej Bernatt, Laura Zoboli, Federico Ghezzi, Mariateresa Maggiolino and Marta Sznajder within the frame of the Jean Monnet Network on EU Law Enforcement (EULEN) and the joint collaboration of the Bocconi University of Milan.

Maciej Bernatt and Laura Zoboli (University of Warsaw) opened Day 1 with a brief welcome address, leaving the floor to the keynote speech of Anna Gerbrandy (Utrecht University), titled *Moving towards sustainability as a case study for thinking about challenges for EU competition law*. The presentation focused on competition challenges to be faced vis-à-vis sustainability. It encompassed considerations regarding article 101 TFEU and cooperation for sustainability, with the key issue being the interpretation of "benefits" in outbalancing agreements. The presentation paved the way for a discussion about the boundaries of competition law and the hierarchy of values that are likely to form new parameters of the antitrust assessment, no longer bound by pure econometrics but purporting a wider consideration of new factors such as child-labor implications, animal welfare, environmental impact and so on.

The first panel, chaired by Federico Ghezzi (Bocconi University), focused on "ECN+ and beyond" and featured the first presentation by Kamil Dobosz (Krakow University of Economics) on "*National competition law – time to say goodbye?*". The speaker highlighted new obstacles that national competition Authorities face in applying domestic competition law in the framework of the ECN+ Directive Those obstacles can be of political nature or brought about by the effort to ensure major conformity with the scope of the Treaty and a more uniform application of competition law among the Member States.

The second panelist, Jasper Sluijs (Utrecht University) presented on A*nticompetitive Behavior by Public Entities: Experimental Evidence and Implications for Enforcement*. Sluijs introduced the economic traits underpinning Commercial Government Initiatives (CGIs) and the antitrust-related challenges, which include predation on private competitors. The speaker showed the evidence-based results of the deep-pocket

experiment and how it can inform enforcement efforts of the NCAs *vis-à-vis* CGI's anti-competitive behaviors.

The third presentation was given by Jasminka Pecotic Kaufman (University of Zagreb) on the topic *Judicial Interpretation and Competition Rules: Excessively Stringent Standard of Proof as a Threat for Effectiveness of Competition Law Enforcement*. The speaker stressed the importance of judicial review underlying the legal interpretation, for it pushes forward the development of competition law. On the contrary, a bad judicial review has the effect of stifling the effective application of competition law. Kaufman charted the main issues, such as the excessive formalism in judicial review, which assumes different forms in west and east Europe, the trans-nationalization of market values, as well as the semantic dissonance and the gap between NCAs and Courts (the latter not being able to address complex technicalities as effectively as the NCAs). Finally, the speaker summarized the sources of cautious optimism.

The second panel of Day 1, chaired by Maciej Bernatt (University of Warsaw), focused on "Procedural challenges". Kati Cseres (University of Amsterdam) presented a policy paper titled *Priority Setting in EU Competition Law Enforcement* co-authored with Or Brook (University of Leeds,). The presentation featured the significance of setting priority for competition authorities and deciding which case to pursue and which one to disregard. The priority setting project consists in framing the theoretical outlook and in understanding it throughout three stages (i.e., pre-decision, decision and post-decision). Such a project also emphasizes what are the principles that mark the success of priority setting and points out the empirical findings underpinning policy recommendations. This presentation was commented on by Mariateresa Maggiolino (Bocconi University), who stressed the reasons why an understanding of priority setting is very much needed in the first place and laid out the concerning points; secondly, the commentator suggested additional points that can be furthered by the project.

The second presentation *Enforcement of competition law in times of crisis: is guided self-assessment the answer?* was given by Bruce Wardhaugh (Durham University), who outlined the risks of answering the call to relax competition rules in times of crisis. The reasons supporting the preservation of competition enforcement rules include the prevention of market failures and the fact that the crisis is used as a tipping cause for concentration. On the other hand, Wardhaugh emphasized the importance of self-assessment because not all collaborations are anticompetitive and sometimes the sole idea of infringing competition law virtually refrains undertakings from carrying out fair collaborations, especially in the sustainability space. The speaker presented concrete cases and provided guidance on the way forward, entailing setting up a concrete dialogue between firms and NCAs, and major use of comfort letters. While commenting on this presentation, Federico Ghezzi (Bocconi University) stressed that concerns about the *ex-post* enforcement of competition rules *vis-à-vis* these kinds of agreements may be overrated because too burdensome and of uncertain outcomes; on the contrary, an *ex-ante* authorization would be better approach.

And comfort letters were the subject of Selçukhan Ünekbaş's presentation (European University Institute): *The resurrection of the comfort letter: Back to the Future?*

The speaker began by outlining the use comfort letters have served in recent years and how such instrument has been revived during the pandemic. Ünekbaş suggested that such a tool, resurrected in time of emergency, may be fated to endure as part of the European Commission's post-pandemic praxis. However, numerous questions have been raised on whether comfort letters possess external and internal binding effects, thus posing problems of legal uncertainty. In his final remarks, the speaker recommended the adoption of article 10 of Regulation 1/2003 as a more suitable solution.

The last presentation of the day was given by Lena Hornkohl (Max Planck Institute Luxembourg), titled *European and Regulatory Procedural Law, Leave it to the professionals: a call for expert judges in private enforcement of competition law*. The speaker gave an introductory overview of cartel damages calculation and why expert lay judges can foster the understanding and assessment of such a mechanism. Subsequently, Hornkohl brought some examples of expert lay judges employed to a different extent across various jurisdictions, such as in Austria and Belgium for disputes concerning labor law and commercial law, in Sweden for disputes related to intellectual property law, as well as in France and Germany for agricultural land disputes. The speaker then outlined what are the advantages and disadvantages of employing expert lay judges, but also the way risks can be mitigated. Commenting on the presentation, Jasper Sluijs (Utrecht University) endorsed the need for competition economists as lay judges in private enforcement. In contributing to the development of the paper, Sluijs pointed out that expert opinions are already employed consistently in damage estimation for non-contractual liability and therefore there might be room to further such practice in antitrust damage litigation. The audience also reacted to the presentation by sharing comparative perspectives and inputs to expand the research.

Day 2 of the conference opened with a brief introductory remark from Maciej Bernatt (University of Warsaw), who also moderated the first roundtable, which featured a debate among five competition experts about the rule of law and the enforcement of competition. Speakers of this session were Adam Bodnar (SWPS University in Warsaw), Małgorzata Kozak (Utrecht University), Giorgio Monti (Tilburg University), Kati Cseres (University of Amsterdam), Dawid Miąsik (Polish Supreme Court and Polish Academy of Sciences).

The third panel, chaired by Adam Jasser (University of Warsaw), and focused on "frontiers of competition law enforcement", began with Isabella Lorenzoni (University of Luxembourg), who introduced her research titled *Why do competition authorities need artificial intelligence?*

Lorenzoni started from the assertion that, with the fourth industrial revolution, undertakings may deploy more sophisticated means to circumvent antitrust rules and therefore NCAs may need to adapt their enforcement tools to the point of developing AI-powered software or establishing *ad hoc* units to investigate digital markets. Some examples are the Forensic Investigation Detection Unit in Greece, the economic intelligence unit in Spain and the DaTA unit in the UK. In Italy, instead, the competition authority has been testing a solution based on a combination of data analysis, AI and ML. The speaker stressed the importance of developing AI tools to

offset the decline in leniency applications, enhance efficiency and reverse-engineer companies' algorithms which can undermine competition through self-preferencing and cartel implementation. In the final remarks, the speaker also stated the importance of legal adaptation.

Marta Sznajder (University of Warsaw) presented *The role of competition law enforcement in preserving media pluralism*. After a brief introduction on the role media pluralism and competition play in strengthening democratic processes, Sznajder argued that competition can either directly or indirectly foster pluralism, for it is designed to fight monopolistic structures. In supporting this argument, the speaker discussed three case studies of mergers in the media industry, namely PKN Orlen/Polska Press, Agora/Eurozet and KESMA, exemplifying how the concentration of ownership threatens pluralism and indicating merger review as a way to prevent such outcome.

Marek Martyniszyn (Queen's University Belfast) introduced his research titled *Extraterritoriality in EU Competition Law: Shifting the Paradigm?*, which touched on the importance of addressing cross-border violations spotlighted by the recent development of extraterritorial enforcement – see, for example, the cases Intel (2017), iiyama (2018), Air Cargo (2022) – and the application of "the effects test". According to the effects doctrine, it is possible to ground the EU jurisdiction on the competitive harm caused by entities operating abroad. In the light of the recent case law, Martyniszyn emphasized that the application of the effects doctrine is likely to be expanded and therefore additional attention should be paid by competition scholars and specialists on such topic.

The fourth panel, chaired by Laura Zoboli (University of Warsaw), focused on "Antitrust enforcement and EU regulation of digital markets" and featured the first presentation by Nataliia Mazaraki and Anzhelika Gerasymenko (Kyiv National Trade and Economics University) on *Competition law enforcement in Ukraine: challenges from the Big Four and national online giants*. The speakers provided an overview of competition law enforcement in Ukraine, focusing on the impact of digitalization across sectors and the approach adopted by the Antimonopoly Committee of Ukraine (AMCU). Contrary to other NCAs and jurisdictions, the AMCU has not engaged in any case pertaining to digital markets or even questioned the need to rethink the current legal framework to adapt enforcement tools to new challenges brought about by tech giants. However, this scenario may change shortly thanks to opening opportunities for the "Europeanization" of the national legal framework, which may lead to strengthening and adapting investigative and enforcement tools and engaging with other public bodies to address issues resulting from digital markets.

Christophe Carugati (Paris Centre for Law and Economics) presented his research about *the role of national authorities in the Digital Markets Act* considering how the Commission will likely enforce the DMA and whether the NCAs can apply a similar Regulation within national borders. After a thorough overview of the current national enforcement praxis in digital markets, Carugati pointed out the opportunities of replicating the EUMR (Merger Regulation) allocation mechanism with the DMA and of setting up *ad hoc* legal frameworks to allow NCAs to enforce DMA-like cases when one of the following conditions is met: the NCA has strong know-how in

a certain area; the NCA has the expertise of local platform and conditions; the NCA has developed or develops technological tools. In the final remarks, Carugati issued two recommendations. With the first, the speaker encouraged the adoption of the EUMR-like allocation mechanism; with the second, he put forward that the DMA and DMA-like competition cases should be enforced in cooperation with non-competition enforcers and the support of the high-level group. Commenting on this research, Giuseppe Colangelo (University of Basilicata) questioned whether the DMA would be the ultimate solution to the problems brought about by the digitalization of markets and the gatekeepers' power, as well as whether the EUMR is the proper legal basis to achieve decentralization. In this regard, Article 114 TFUE appears to be the right legal basis but it would not untangle the main problem, being that the involvement of NCAs would generate risks of overlapping and conflicting decisions.

The last panelist, Tabea Bauermeister (University of Hamburg) presented her paper titled *The German "Lex GAFA" – lighthouse project or superfluous national solo run?*, discussing the newly-established Section 19a of the German Competition Act. Bauermeister first summarized section 19a, which defines norm addressees and forbidden conduct; then, she underlined what are the criticalities of this provision and the consequences that may hamper its implementation: excessive vagueness, legal uncertainty and limited geographical scope. On the other hand, Section 19a has the merit of serving as an interim norm, by bridging the time gap with the application of the DMA.

The fifth panel, chaired by Mariateresa Maggiolino (Bocconi University), dedicated to "The challenges and perils of the digital economy", hosted the presentation of Pauline Phoa (Utrecht University) under the title *Conceptualizing the power of big tech companies and its implications for competition enforcement*. Phoa first delved into the foundation of market power and how data fuels that power in digital markets. She introduced the concepts of "dimension of power", meaning a power that is instrumental, structural (i.e., able to influence the agenda setting) and discursive across four "domains of power": political, social, economic and personal. When combined, such power funnels into a "modern bigness" with the potential to channel data and digital capacity on an ongoing basis. The result is that such modern bigness ultimately vests the corporation with the ability to shape the existing framework of norms and market, and consequently, to influence discussions about competition law and policy.

Jeanne Mouton (Université Côte d'Azur) presented her research: *The digital economy as a threat to the private enforcement of competition law*, which explores the reasons behind the existing gap between the growing number of public enforcement cases in the digital market and a few follow-on cases of damage claims. Mouton argued that such discrepancy may be due to diversity in objective, procedural/investigative means and methods. The complexities arising from the structure of digital markets also exacerbate the shortcoming of Directive 2014/104/EU when it comes to proving harm and quantifying damages. In the final remarks, Mouton identified potential development and put forward possible solutions to the cited issues.

The last presentation featured Giuseppe Colangelo (University of Basilicata) discussing the paper *Amazon Buy Box case: the dawn of self-preferencing case law?*,

co-authored with Laura Zoboli (University of Warsaw). Colangelo gave a comprehensive introduction about self-preference and the relevant case law, including an overview of the case *'Google Shopping'* (EC 2017, CoJ 2021), thus exploring whether the case *'Amazon Logistics'* (AGCM 2021) dovetails with this context and how this case furthers the debate about unilateral anti-competitive conducts. Commenting on this paper, Giorgio Monti (Tilburg University) questioned that the case *'Amazon Buy Box'* is really about self-preferencing and that major attention should be paid to how the implementation of the DMA can shift the assessment of self-preferencing under article 102 TFUE.

Lastly, Maciej Bernatt's and Laura Zoboli's remarks closed this outstanding two-day international Conference which gathered together participants from various countries in a hybrid format after almost two years of full online events. More details on the conference are available at: https://cars.wz.uw.edu.pl/en/events/conferences-and-seminars/1200-conference-eu-competition-law-enforcement-challenges-to-be-overcome.html, while the working papers discussed during the conference can be found here: https://jmn-eulen.nl/papers/.

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