

Editorial foreword

Competition law systems in Central and East European Member States of the European Union, EU candidate countries, and the members of the European Neighbourhood Instrument are facing various enforcement and institutional challenges. These include: deficiencies of the institutional capacity of their national competition authorities (NCAs), slow-growing enforcement records, modest fining policies, low levels of media visibility of both the NCAs and their competition advocacy efforts, insufficient competition culture, as well as the limited experience of national judges with respect to (EU) competition rules, including the lack of specialisation.

Despite a strong EU influence and, in some countries, the mechanism of EU conditionality, the national characteristics of these jurisdictions continue to prominently shape their competition law systems, within the limits permitted by EU *acquis* (applying national competition rules in the absence of “effect on trade” under Regulation 1/2003,¹ exercising legislative discretion in implementing the Damages Directive² and the ECN+ Directive³). These national practices may present a challenge for the harmonised application of competition law throughout the EU, and in its immediate neighbourhood, and hence require an in-depth understanding of the competition law systems in the discussed jurisdictions.

By taking a “bottom-up approach”, this volume of the Yearbook of Antitrust and Regulatory Studies (YARS) explores the specifics of the national competition law systems of the discussed countries looking at particular challenges faced by the individual jurisdictions that derive from the distinct features of their legal traditions.

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¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

² Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

³ Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

The articles section of this Yearbook includes five papers exploring national characteristics with the backdrop of EU competition law standards. Two papers relate to Slovakia and one to Poland, both examples of EU Member States, while the remaining two relate to Serbia (an EU candidate) and Kosovo⁴ (an EU potential candidate) respectively.

In his paper titled ‘More Than a Decade of the Slovak Settlement Regime in Antitrust Matters: From European Inspirations to National Inventions’, Ondrej Blažo provides a quantitative and qualitative analysis of the use of the settlement procedure in Slovakia. Blažo shows how the Slovak system was “horizontally” inspired by the Czech example, rather than via “top-to-bottom” harmonization from the EU. In addition, he shows how in both Slovakia and Czechia, settlements developed without being regulated by law, at best on the basis of non-binding NCA guidelines, with the NCAs being very generous in terms of fine reductions while also applying settlements to a wide range of infringements that extend beyond cartels.

The article by Mária T. Patakyová and Mária Patakyová titled ‘Inspections in Private Premises Under Slovak Competition Law: Did the Implementation of the ECN+ Directive Miss the Point?’, addresses the inadequacies of the Slovak transposition of Article 7 ECN+ Directive, which requires NCAs to have the power to carry out inspections of non-business premises. The authors focus in particular on potential issues related to the implementing the notion of the “guardian”, a natural person that should be present during an inspection. In this sense, they point to problems of legal certainty, as it is not clear what type of persons could be appointed as guardians, as well as note the lack of non-disclosure obligations on the side of guardians.

In his paper titled ‘Selective Enforcement and Multi-Party Antitrust Infringements: How to Handle “Unilateral Agreements”?’, Jan Polański addresses a peculiar enforcement practice applied by the Czech and Polish NCAs when dealing with vertical agreements, such as resale price maintenance arrangements that involve numerous parties. In such cases, the NCAs choose to identify and prosecute solely the organizers of specific distribution networks, as opposed to prosecuting all cartel members in horizontal agreement cases. This practice of what could be called “unilateral agreements”, as developed at the national level, would need to withstand scrutiny under EU competition rules if, and when it reaches the Court of Justice of the European Union (CJEU). The author makes proposals on how to accommodate this enforcement practice under Article 101 TFEU, without curtailing the enforcement powers of the NCAs.

⁴ This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

In the paper titled ‘Focus on Competition Law Enforcement in E-commerce Sector in Serbia’, Darija Ognjenović and Ana Krstić Vasiljević discuss the wide range of activities of the Serbian NCA in the e-commerce sector. The authors point to certain shortcomings, such as the lack of NCA guidelines, and provide recommendations for going forward.

Avdylkader Mucaj and Isuf Zejna, in their paper titled ‘The Role of the Judiciary in Effective Enforcement of Competition Law in New Jurisdictions: the Case of Kosovo’, critically examine the functioning of the judicial system in Kosovo when it comes to judicial review in competition cases. The authors address in particular the changes of the designation of the court competent to hear such cases, as well as focus of judicial review on procedural aspects.

The legislative developments and case law section of this Yearbook contains two papers. The first summarizes competition policy developments in Serbia; the second tackles the CJEU ruling related to services of general economic interest.

Among the dynamics observed in the younger competition law regimes, is the slow start of competition advocacy, aimed to educate undertakings and the general public about the merits of market competition and the applicable rules designed for its protection. Serbia’s example presented in the paper titled ‘Overview of New Soft-Law Materials Designed to Promote Competition Law Compliance in Serbia’, authored by Maja Dobrić, presents a different picture. She shows that after accumulating substantial experience in enforcing competition law, the Serbian NCA turns to competition advocacy in the form of compliance programmes in order to foster voluntary compliance with competition rules. The toolbox of the Serbian NCA now includes guidelines on designing corporate compliance programs, templates and checklists, all to assist companies in developing and implementing compliance mechanisms from the “bottom-up”.

In his paper titled ‘Between Scylla and Charybdis. Whatever a Member State Does, It May Expose Itself to Attacks From Both Sides. *Lux Express Estonia AS*’, Marek Rzutkiewicz comments on the CJEU ruling in *Lux Express Estonia* (C-614/20) assessing the legality of imposing the duty to provide services of general economic interest on private undertakings with, and without compensation through the prism of EU state aid law.

In the conference reports section, Jasminka Pecotić Kaufman provides an account of the 8th Competition Law and Policy Conference in memory of Prof. Vedran Šoljan “Goals of Competition Law and the Changing World” that took place in Dubrovnik in May 2023. Jurgita Malinauskaite reports then on the webinar “Judicial Review of Competition Cases: The CEE and SEE Countries Perspectives” that took place in June 2023.

Finally, we would like to express our sincere gratitude to Maciej Bernatt (YARS Editor-in-Chief) for inviting us to co-edit this volume, to Laura Zoboli (YARS Managing Editor) for efficiently guiding us through the process, and to Michał Rzemyszkiewicz (YARS Editorial Assistant) for aptly assisting us in the completion of the present volume.

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