

Preface

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The intense debate about the enforcement of competition law has been apparent for some time now. All agree that the way in which substantive competition rules are enforced plays a crucial role in achieving the goals of competition law. For this reason current studies focus more and more often on the institutional structure of competition law enforcement, the procedure used in proceedings before competition authorities and sanctions are imposed for violation of competition rules. This book, however, remains precisely within the field of such studies. It is focused on procedural fairness. The book's authors concentrate on procedural guarantees that should be provided in competition proceedings. Still, they very often pose the question of the importance of procedural fairness vis-à-vis a need for effective enforcement of competition law. Special attention is paid to such guarantees as the right to be heard (with focus on access to evidence collected in the case file, access to oral hearings and proper justification of anticompetitive charges), the right of defense (with a focus on privilege against self-incrimination, legal professional privilege, guarantees of proportionality of inspections), the right to protection of business secrets and exchange of confidential information as well as the right to judicial review.

At the same time, the book questions the need for greater convergence of procedural rules used in competition proceedings. It may be observed that the substantive rules of competition law prohibiting practices restricting competition and those regulating concentration are becoming more and more alike all over the world. By contrast, significantly less synchronization takes place with respect to the procedural standards that govern the enforcement of substantive rules of competition law. This raises the question of whether convergence is desirable between these procedural rules and, if the answer is to be in the positive, what sort of convergence should then take place.

These two lines of topics are discussed in the book from different jurisdictional points of view. A lot of attention is paid to European Union's system. Such an approach is justifiable in the light of the tenth

anniversary of the entry into force of EU Regulations 1/2003 and 139/2004, which organize the enforcement of competition law in the EU and the EU accession to the European Convention on Human Rights. Interestingly, the discussion incorporates the perspective of countries that have recently joined the EU and in which competition law systems are less mature. Non-European systems including the United States and Australia are also included in the book. One of the book's chapters directly addresses the enforcement of competition law in the WTO. Different solutions to similar problems that influence the level of the observance of procedural fairness in competition proceedings are discussed.

In the first part of the book *general issues concerning procedural fairness* are discussed. Caron Beaton-Wells argues that lawmakers and enforcement authorities should take a broad and sophisticated perspective on the range of factors that influence compliance with competition laws. She rejects the approach predominantly focused on economic considerations and argues that the perceived fairness of the competition law and its enforcement affects compliance on normative grounds. Specifically, she posits that for enforcement to be perceived as fair, both deterrence and compensation need to be valued.

On similar lines, Pieter Van Cleynenbreugel claims that respect for due process values is an institutional precondition to effective decentralized enforcement of EU competition law. He argues that the Court of Justice of the EU (the CJEU), by using Article 6 of the ECHR standards, is potentially able to restructure national competition authorities' functioning in the light of due process conditions. In such a way, 'effectiveness through fairness' on the level of the decentralized application of EU competition law may be achieved. In his opinion the CJEU should support developments aimed at greater adversarial character of competition proceedings.

Albert Sanchez Graells and Francisco Marcos take a different perspective and argue against extending human rights guarantees on corporate defendants in antitrust cases. They believe that such an approach may inhibit effective enforcement of competition law. The first part of the book ends with the analysis of the importance of procedural fairness in the context of proceedings before the World Trade Organization (WTO). The author, Amedeo Arena, posits that adherence to procedural fairness standards should be regarded as a necessary precondition for the development of a WTO antitrust jurisprudence through cross-fertilization from other international antitrust institutions such as OECD, the UNCTAD, and the ICN.

The second part of the book is dedicated to the *right of defense and right to be heard*. Maria De Benedetto discusses its importance in the context of inspections. She argues for convergence when it comes to the principles that govern inspections. She also observes that more attention should be paid to the way the compliance may be achieved. In this context inspections should be used in moderation. Other tools may also prove useful in achieving such result.

Giacomo Di Federico touches upon a different issue. He is dissatisfied with the scope of the mandate for the EU Hearing Officer – an institution playing a crucial role in guaranteeing the right of defense of the parties to the proceedings before the Commission. He posits that despite reforms the main problem has not yet been solved: the Hearing Officer is still part of the Commission's staff and has limited decision-making powers. For this reason he claims that independence from the Commission should be introduced by attaching the Hearing Officer to the EU Legal Service and with his/her appointment for an unrenovable term. He argues also for changes when it comes to the rules governing access to internal documents and adoption of specific rules on the organization and conduct of the hearings.

Krystyna Kowalik-Bańczyk analyzes the right of defense in the light of the jurisprudence of the CJEU. She observes the specificity of this notion vis-à-vis Article 6 of the ECHR: it concerns administrative proceedings, and not only judicial ones, and so brings positive effects associated with 'juridization' of those proceedings. In her opinion there is a potential of growing convergence of procedural standards of right of defense between the EU centralized procedure under which EU competition law is applied and national procedures of EU Member States. She believes that the EU rights of the defense can be used and protected in national proceedings, particularly those with some EU element.

Clifford A. Jones compares the new EU system of private enforcement with its U.S. counterpart. A great deal of attention is dedicated to the EU private damages directive. He observes that due to the adoption of the Directive the two-way flow of evidence will likely take place. Evidence uncovered in public proceedings by the Commission may lead to successful damages claims for private litigants, and discovery in civil damages actions may lead to more frequent and more effective enforcement by the Commission. He argues that the undertakings' resistance against such a situation framed in unfairness arguments should be rejected.

Luboš Tichý and Petra Joanna Pipková point to the insufficient level of access for a state aid beneficiary to state aid proceedings before the Commission. They believe there is a need for reform in this respect. The

authors propose granting the state aid beneficiary the position of a genuine party to the state aid proceedings before the Commission. They believe that arguments against such a position concentrated on risk brought about by such a solution as to efficiency of state aid proceedings are unfounded and give reasons for that. Most importantly, they argue that Article 108(2) of the TFEU stipulates only the minimum of procedural rights that must be granted to the interested parties and not the maximum.

In the third part of the book the attention is concentrated on the *right to judicial review in competition proceedings*. Daniel Zimmer adds his perspective to the debate about appropriateness of administrative versus judicial systems when it comes to enforcement of competition law. He argues that the courts have a potential to be less efficient in dealing with a large number of cases. They also usually provide a lesser degree of specialization needed to decide antitrust disputes. Thus according to the author the only real alternative is a specialized judicial system. Otherwise the transition to the judicial system might limit the significance of competition law. The author argues for the reform of an administrative model of enforcement by dividing up prosecutorial and decision-making functions to a greater extent.

Albert Foer enriches the collection of chapters in this book by sharing his view in the debate about the fairness of the U.S. public enforcement system. His focus is also on the two-agency system adopted in the U.S. By listing ten well-reasoned arguments, he enters into the polemic from the position that the proceedings before the Federal Trade Commission are unfair as the FTC supposedly always affirms the administrative law judge's initial decision when he/she rules in favor of the FCT staff, and always reverses this decision in cases in which the administrative law judge ruled against the FTC staff. The author is also not against the dual enforcement system. According to him such a system is not perfect. Still, its flaws are not significant enough for reform to be advisable.

Marco Botta and Alexandr Svetlicinii take a comparative approach and analyze the jurisprudence of the courts of the newest EU Member States (Bulgaria, Romania and Croatia) in competition law cases. They ask the question about the sufficiency of judicial review exercised by these courts. They observe that in cases that do not involve the assessment of complex economic evidence the courts of the new EU MS have exercised a thorough review of the factual evidence put forward by the NCAs. On the other hand the courts rarely exercise their unlimited jurisdiction when it comes to fines. When it comes to review of complex economic evidence the authors believe that with the passage of time the courts may start applying stricter standards of review.

The following chapter of the book is by Maciej Bernatt, who poses the question of the compatibility of the deferential standard of judicial review with the requirements of Article 6 of the ECHR – a topic debated by competition law scholars. His general answer is positive. After analyzing broad ECtHR jurisprudence he concludes that this court is likely to find the deferential judicial review compatible with Article 6 of the ECHR standards in administrative cases concerning civil rights or obligations. He observes that when it comes to administrative cases involving fines (criminal ones), deferential standard of review can become more easily problematic. However, he posits that the presence of many of Article 6's procedural guarantees in the proceedings before the administrative authority may serve as an argument in defending a deferential judicial review in a case before the ECtHR.

The book closes with a summary of the key elements put forward by the speakers during their interventions and some indications about questions raised by conference participants.