
Preface

European Union (EU) competition law has reached an age of maturity. In its fifth decade of effective enforcement it looks very different in many aspects from the frail newborn that came to life in 1962, after a long gestation process of four years, following the enactment of the competition law provisions of the Treaty of Rome. Perceived as a centralising and liberalising tool in the able hands of the European Commission, EU competition law has grown up to be an instrument at the disposal of the National Competition Authorities (NCA) and national courts of the EU Member States, contributing largely to their emancipation from national centres of power and the development of a true competition law culture in Europe. Importantly, EU competition law has successfully incorporated sophisticated economic thinking in the design and implementation of competition rules.

The *corpus* of jurisprudence produced each year by the European and national courts as well as the decisional practice of the European Commission and NCAs illustrate the immense success of the competition law 'enterprise' in Europe. The influence of EU competition law on the competition law regimes of emergent jurisdictions, as well as on the debate over global convergence of competition law rules, constitutes an additional indication of the important progress accomplished so far in creating a legal framework that promotes competition and the public interest in general.

We thought that these achievements should be celebrated by the compilation of a volume examining critically all the different dimensions of EU competition law and its evolution, enabling practitioners and students to comprehend how substantive rules have been interpreted through time and how the sophisticated institutional system implementing these rules has been put in place incrementally during the last five decades. For this reason we commissioned a number of chapters from leading academics and practitioners in this field of law in order not only to provide the reader with a comprehensive analysis of the latest developments but also with a critical commentary that would hopefully sustain through the mists of time.

This volume is dedicated to the analysis of substantive EU Competition law provisions, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and EU merger control,

and their interpretation and application by the EU courts, the European Commission, national courts and NCAs.

The volume starts with some reflections by Ioannis Lianos on the objectives of EU competition law (Chapter 1). The debate over the aims of competition law has been more recent in Europe, in comparison to the United States where it reached its peak in the late 1970s. In both cases, the extensive debate over the aims of competition law followed the turn towards a systematic incorporation of economic analysis in competition law and the consequent transformation of competition law rules dealing with merger control, vertical or horizontal cooperation agreements and abuse of dominant position. The debate has been intensified in Europe over the last few years, with calls for a consumer welfare effects-based approach. As Lianos, however, explains in his contribution, this extensive literature covering the goals of competition law has serious methodological drawbacks as it does not address the important issue of institutional choice, which is a prerequisite for any discussion on the goals of competition law.

The evolution of EU competition law towards an approach that integrates more systematically the possible positive effect of some restrictions of competition on consumers in order to perform a trade-off with anti-competitive effects and determine the optimality of the specific conduct for social welfare, has been particularly salient in the application of Article 101 TFEU to horizontal and vertical agreements. Luís Morais (Chapter 2) examines the rules applying to horizontal cooperation agreements, while Florian Wagner von Papp (Chapter 3) explores, from a law and economics perspective, the rules applying to information exchange in a horizontal context. Both authors thoroughly analyze the recent Horizontal Cooperation Agreements Guidelines of the European Commission, which have been heavily inspired by economic analysis.

The following chapter (Chapter 4) deals with agreements between firms operating at different levels of the production chain (vertical restraints). Gianluca Faella provides a comprehensive analysis of the rules applying to all forms of vertical restraints, while at the same time offering some important insights on the economic theories underpinning the application of Article 101 TFEU in this context. Chapter 5 moves to the most egregious of competition law violations, cartels. Andreas Stephan takes a socio-legal approach examining all the important aspects of cartel prosecution in the EU: the purpose of cartel enforcement, the use of leniency and direct settlement and the relationship between private and public enforcement.

The analysis of the interpretation of Article 101 TFEU would have been incomplete without a proper analysis of the scope of that provision with regard to the determination of the existence of an agreement or collusive conduct. In Chapter 6, Okeoghene Odudu provides a concise analysis of

the recent case law of the UK courts on hub and spoke conspiracies, of particular interest for the implementation of EU competition law in the area of complex relations between suppliers and retailers. The discussion is particularly insightful in view of the recent debates on a more economically oriented definition of the concept of agreement and the risks that this entails.

The application of competition law to oligopolistic settings raises important challenges to legal formalism. The contribution of Nicolas Petit (Chapter 7) perfectly illustrates the difficulties of devising a coherent theory for enforcing Articles 101 and 102 TFEU to oligopolies. Petit provides a thorough and extensive analysis of the ‘oligopoly problem’ in EU competition law, from an economic and a legal perspective, and offers recommendations as to the adequate interpretation of both Articles 101 and 102 TFEU in this context.

The following chapters examine the application of Article 102 TFEU and the development of the abuse of dominance case law of the EU courts. Andrea Coscelli and Geoff Edwards (Chapter 8) examine the definitions of dominance and market power in EU competition law and the guidance from competition authorities on how they assess dominance. In light of this analysis they discuss the three main types of dominance assessments in the practice of the competition authorities: quantitative assessments of market structure; qualitative assessments of market characteristics (including assessments of barriers to entry, the nature of existing competition, and buyer power); and direct assessment of prices and profits, before focusing on the complex issues of analyzing dominance in aftermarkets and highly dynamic markets.

The concept of abuse is explored by the three following chapters.

Michal Gal provides a doctrinal and critical analysis of exploitative abuses, in particular the prohibition against excessive prices, one of the ‘most intriguing competition law prohibitions’ (Chapter 9). Understanding the case law in this area requires a moral, economic and sociological exploration, as well as some historical analysis – the prohibition having long roots – and serves as an excellent introduction to the goals of Article 102 TFEU and the assumptions underlying competition law enforcement in this context.

Alison Jones and Liza Lovdahl Gormsen (Chapter 10) reflect on the enforcement of Article 102 TFEU to exclusionary pricing abuses; in particular: predatory pricing; selective low cost pricing; margin squeeze; rebates and price discrimination. The case law illustrates the challenge of constructing rules which identify abusive conduct which strengthens a dominant position or further weakens competition (anti-competitive conduct) and distinguish it from normal competition in products or

services based on traders' performance (competition on the merits). This is a critical issue in the area of pricing conduct where, according to Jones and Lovdahl Gormsen, it is frequently hard to distinguish unlawful exclusionary pricing practices from hard-line price competition.

Renato Nazzini follows up with a critical analysis of the enforcement of Article 102 TFEU in non-pricing exclusionary abuses, in particular, naked exclusion, acquisition of competitors or exclusive rights, abusive litigation and abuse of contractual rights, exclusive purchasing, refusal to supply, tying and pure bundling (Chapter 11). The case law offers a further illustration of the difficulty of articulating clear tests that would distinguish competition on the merits from anti-competitive conduct. In addition, Nazzini examines the operation of the proportionality test in this context and the possibility of dominant firms justifying *prima facie* anti-competitive conduct.

The analysis of the substantive rules of EU competition law is completed by Ioannis Kokkoris' contribution on EU merger control (Chapter 12). Kokkoris examines the important transformation of EU merger control, following the change from a 'dominance' test to a 'significant impediment to effective competition' test in order to address mergers leading to non-coordinated effects in oligopolistic markets. The chapter also provides a thorough analysis of the treatment of efficiencies in merger assessment, by discussing the different types of efficiencies in horizontal and non-horizontal mergers, the relevant welfare standard and the decisional practice of the European Commission and National Competition Authorities relating to efficiencies, in particular some recent UK and Dutch cases where mergers have been cleared on the basis of efficiencies.

EU Competition law is not implemented in a *vacuum*. Often, the application of Articles 101 and 102 TFEU, as well as that of EU merger control, requires a delicate operation of balancing with the objectives pursued by other areas of law or other domains of regulatory action.

The examination of the legal framework of Articles 101 and 102 TFEU would be incomplete if no analysis was provided on the interplay of these rules with intellectual property rights. Steven Anderman highlights the complexity of this interaction, as IP rules have often been used as an argument for limiting the scope of competition laws (Chapter 13). Yet, as he explains in his contribution, competition law and policy are not merely regulatory restraints on innovation; they also help to promote innovation.

In their contribution (Chapter 14), Javier Tapia and Despoina Mantzari observe how, traditionally, competition and regulation were seen as two discrete, opposing categories: an industry was either 'regulated' or 'unregulated', depending on how much firms were left unrestrained to operate in the market. According to this view, the less the State intervenes in the

working of markets, the more room there is for competition. However, as Tapia and Mantzari note, eventually the boundaries between competition and regulation vanished, regulated markets incurring major processes of reform during the last 30 years that have altered both structures and legal frameworks. This has led to an increased fragmentation of regulation across industries and the multiplication of regulatory actors, the Member States of the EU implementing sophisticated regulatory reforms and establishing a plethora of regulatory bodies. One of the specificities of the EU system is the use of competition law enforcement as a means of control of the decentralised regulatory system that has emerged, an issue on which Tapia's and Mantzari's contribution provides important insights.

We hope that the breadth of coverage and the quality of critical analysis provided by this volume will satisfy the various communities of readers that we expect will engage with this work: practitioners, academics and graduate students. The contributors have updated their chapters with the most recent legal developments up to 1 September 2012, although some chapters include more recent developments. The completion of this volume would not have been possible without the important editorial contribution of Andres Palacios Lleras (UCL) and the efficient and diligent assistance of the Edward Elgar Publishing team, and in particular the inspiration of Ben Booth, to whom both editors are grateful.

