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INSTITUT de droit de la concurrence
Revues, conférences, bases de données

e-Competitions

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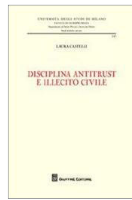
This section selects books on themes related to competition laws and economics. This compilation does not attempt to be exhaustive but rather a survey of themes important in the area. The survey usually covers publication over the last three months after publication of the latest issue of Concurrences. Publishers, authors and editors are welcome to send books to stephane.rodrigues-domingues@univ-paris1.fr for review in this section.

Cette rubrique recense et commente les ouvrages et autres publications en droit de la concurrence, droit & économie de la concurrence et en droit de la régulation. Une telle recension ne peut par nature être exhaustive et se limite donc à présenter quelques publications récentes dans ces matières. Auteurs et éditeurs peuvent envoyer les ouvrages à l'intention du responsable de cette rubrique : stephane.rodrigues-domingues@univ-paris1.fr



Disciplina antitrust e illecito civile
CASTELLI Laura
Giuffrè editore, Milan, 2012, 236 p.

European competition law can be enforced by both public authorities (European Commission, national competition authorities) and private parties (competitors, suppliers, consumers). In recent years, much attention has been given to private enforcement of competition law, and much has been written about it. This debate was significantly intensified by the decisions in *Courage v. Crehan* (Case C-453/99) and *Manfredi* (Joined Cases C-295/04 to C-298/04), which established that "any individual" can sue for damages consequent to breach of antitrust rules. Inputs to the debate came also from the European Commission's White Paper on damages action for breach of EC antitrust rules, published in 2008.

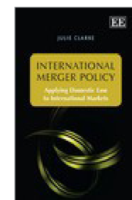
However, as often is the case, transposing and applying principles or apparently "clear rules" adopted or created at EU level into domestic legislation is not necessarily an easy task. Indeed, private enforcement of competition law at national level remains for many EU jurisdictions a goal yet to achieve. This is also the case, as testified by the book under review, of Italy. The book deals with the remedy of compensation for damages caused by breach of antitrust rules.

In the first part, the work focuses on the examination of the illegal conduct and the fate of the so-called "downstream agreements" (or downstream contracts), which are based on violations of competition rules. The author navigates the different and conflicting theories emerged in the academic debate, as well as the cases decided by Italian courts. For examples, it is disputed if the fate of the downstream agreements is to be found in the lack of lawful content or purpose. Often one of the party entering in a downstream agreement is not aware of the violation of antitrust rules which has taken place in a previous moment at a different level. In this case, the contract is not void. At the end of the analysis, the author comes to the conclusion that, except in some specific cases, the only applicable remedy is compensation for damages suffered.

In the following two chapters, the author focuses on recent national and EU interventions in the field, especially in the light of regulation No 1/2003, and on the interference between Italian courts and the competition authority in the assessment of the offense. The author points out that, in the silence of laws and regulations, the court should be free to decide if a specific behavior infringes competition law and what role should be recognized to an administrative act deciding on the same behavior. In the fourth chapter, attention is placed on issues relating to *locus standi*, the causal link between abuse and damage, the relevance of the subjective elements and the prescription of the right to compensation. The final fifth chapter deals with the quantification of damages.

The author always provides a comprehensive analysis of different theories and of the evolution of case-law. The overall impression emerging from the book is that the debate on the relation between contract law, compensation for damages and infringement of competition rules is far from being closed.

R. S.



International Merger Policy. Applying Domestic Law to International Markets
CLARKE Julie
Edward Elgar, 2014, 320 p.

As there is no international organization or treaty governing the way in which transnational mergers should be regulated from an international antitrust perspective, this book intends to provide a comparative assessment of domestic merger control laws and procedures through identified themes. It also intends to detail the current legal instruments of international cooperation, especially on the basis of the work of the OECD and the ICN. Noteworthy, the author develops interesting ideas to improve current regulations in order to reduce the cost burdens associated with transnational merger review.

Although surprisingly devoid of almost any case-law references, it does not mean that this book is too theoretical as the author has clearly identified the main aspects at stake for those practitioners who are used to dealing with transnational mergers subject to review by a large number of antitrust agencies in various jurisdictions. Antitrust practitioners and researchers will find in this book clear, accessible, and well-organized comparative developments on the way transnational mergers are regulated in a large number of jurisdictions, and not only on US/EU aspects (for a detailed review on US/EU aspects, *see* S.A. Vandergrift and J.J. Lucas, The GE/Honeywell Saga? Ehh, What's Up, Doc? A comparative approach between US and EU merger control proceedings almost 15 years after, [2014] 35 *ECLR* 172). Helpful and extensive references are made to the OECD's formal recommendations, commissioned reports, and regular roundtables (pp. 182-188) along with the ICC Recommendations to OECD on international merger control best practices (p. 185), and the ICN's Eight Guiding Principles for Merger Notification and Review, Recommended Practices for Merger Notification Procedures, and Recommended Practices for Merger Analysis (pp. 188-216). The final chapter, which deals with proposals for reform, is certainly a must-read.

Theoretical framework for merger law and policy

In the first chapter, the author presents a normative analysis of the approach that ought to be taken to merger regulation from both a domestic and a global perspective. The readers will find an interesting study of the policy objectives of merger control regulations, especially regarding traditional and modern consumer welfare theories. Regarding merger regulation, specifically within the context of Premerger Notification (PMN) systems, a number of criteria should be observed in order to avoid unnecessary and inappropriate costs to the parties. According to Ms. Clarke, merger regulation must be capable of identifying and preventing most anti-competitive mergers prior to consummation. The cost of this regulation should not exceed the cost of allowing anti-competitive mergers to proceed, on the one hand, and what is necessary to identify and prevent those mergers having likely anti-competitive effects. In addition, the cost of complying with this regulation should not be such as to unduly burden parties to those mergers which are unlikely to have any anti-competitive effects. Last but not least: merger control regulations should be clearly stipulated and be capable of operating within a commercially realistic and predictable time-frame.

Substantive merger law

After having explained the substantive merger tests that have been implemented so far—the competition test and the dominance test—the author identifies key sources of convergence and divergence in the analytical approach for transnational merger review, including: the role of market definition, market share, and concentrations, the theories of harm applied to assess competitive effects, the relevance of one of the firms being a failing firm or a maverick, the role of barriers to entry, buyer power, and the role of efficiencies in merger analysis. According to the author, the two key areas in which there remains greater divergence related to the role of market definition and efficiencies.

Merger review procedure

In a very interesting chapter, the author compares merger control proceedings in several jurisdictions (e.g. USA, EU, Australia, China) as for several key issues such as: structure and powers of the local antitrust agencies, including the role of the courts of justice, notification requirements (i.e. thresholds, timetable, administrative fees, forms and requested information), process and time schedule for assessment, transparency of decision-making, confidentiality issues and negotiation of remedies. Particular attention is also given to the limited number of jurisdictions which implement a voluntary system of notification (e.g. Australia, Chile, New Zealand, Venezuela, and the United Kingdom). The author discusses the pros and cons of such a voluntary system (pp. 94-104), particularly in the case of smaller economies. Ms. Clarke accurately points out that: "*the effectiveness of voluntary regimes* [depends] *upon the consequences of failure to adhere. For example, the high notification rate in Australia arguably results from the potentially high penalties for failure to notify combined with the reputation of the authorities as willing to vigorously pursue those mergers which raise anti-competitive concerns and are not notified.*"

Merger remedies

The author emphasizes the role of remedies, analyzes the different types of remedies imposed by the antitrust agencies and compares their approaches. She points out a clear preference for structural remedies and concludes accurately her study by pointing out that "*agencies should coordinate consideration of remedies with other interested jurisdictions to ensure consistency and avoid unnecessary overlap.*" This position echoes some of the more recent decisions, especially in the hard-disk drive industry. In *Seagate/Samsung* in 2011, the Chinese MOFCOM imposed significant remedies which contrasted with the unconditional approvals granted by the EU (*see* European Commission, *Seagate/HDD Business of Samsung*, Case COMP/M.6214, Decision of 19 October 2011) and US agencies.

Extraterritorial application of national laws

The chapter on extraterritorial application of national laws details the funding principles which govern the extraterritorial application of competition laws, and especially within the context of transnational merger review.

The role of comity and cooperation

In a dedicated chapter, the author discusses the extent to which comity (within the meaning of the author, comity could be defined broadly as the consideration given by regulators and the judiciary to the laws and interests of other nations when applying their domestic regulations, *see* p. 13) has impacted national merger enforcement proceedings and the nature of cooperation. The author goes on to explain the role of current bilateral and multilateral agreements to promote convergence and convergence. Special and careful attention is given to the intergovernmental work of the OECD since the 1960s (pp. 182-188) and the cooperation between antitrust agencies via the ICN from the date of its creation in 2001 (pp. 188-216).

The cost of transnational merger regulation

The author identifies the significant costs related to the current regulation of transnational mergers for the parties, antitrust agencies, and the consumers. As accurately stated by the author, "*the cost of transnational merger regulation on transaction presenting little, if any, competitive concerns are currently unreasonably and unnecessarily high.*"

Proposal for rationalization

In order to reduce the existing costs and to maximize consumer welfare, the author points out that various possibilities have been proposed in the past two decades. However, "*outside the EU (…) supranational options for transnational review seem unlikely and in most cases undesirable.*" The recent supranational merger control regime implemented by the Common Market for Eastern and Southern Africa (COMESA) Competition Commission since the beginning of 2013 is a good example to illustrate how difficult it is to implement a supranational system.

Proposals for reform

The author calls for reform. She interestingly suggests some priorities for the future direction of transnational merger review. According to the author, the OECD Council should adopt a new targeted recommendation on several aspects: e.g. translation requirements, notification thresholds, timing of notification, fee waiver for initial notification, time limits for premerger review, transparency, theories of harm, and coordination of agency reviews. The author also pays a great tribute to the work of the ICN and UNCTAD for their support to develop and implement best practices and facilitate dialogue between jurisdictions.

This is a very helpful comparative study of the context of antitrust regulations on transnational mergers.

J. L.

European Merger Remedies. Law and Policy
HOEG Dorte
Hart Studies in Competition Law, vol. 5, Hart Publishing, 2013, 288 p.

Dorte Hoeg has recently obtained her Doctor of Philosophy from King's College London, based on a thesis on EU merger remedies. Her book seeks to identify and examine the most important aspects of merger remedies developed by the European Commission within the framework of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings over the past 20 years. The author explains that the policy of the Commission to remedy mergers used to be virtually unregulated and characterized by an ad hoc approach, yet that it is now "*arguably the most guided and regulated area in merger control enforcement*" (p. 1).

It is explained that the merging parties propose, in response to competition concerns raised by the Commission after an initial investigation, amendments to their notified concentration and, if the latter are

deemed acceptable, the Commission renders them enforceable while enforcing them as conditions and obligations when approving the merger.

The readers learn that the art of remedies consists in striking the right balance between the preservation of competition through adequate remedies and the retention of the overall commercial and financial incentives, as well as benefits that facilitated the merger.

The analysis is structured in accordance with a typical remedies lifecycle: the negotiation, submission, assessment, adoption, implementation and enforcement of remedies. It is argued that the current sophistication and complexity of enforcement may, in some instances, risk weakening and undermining some of the enforcement successes accomplished, if the Commission does not consider further improvements or adjustments to its current remedies regime.

The first chapter is an introduction to the Commission's past and present policy, providing a chronological overview of the latter's remedies framework over the past two decades. It explains how the policy of the Commission has gone through three main phases, which are: learning, acceleration, and consolidation.

The second chapter sets out an analysis of the substantive and procedural provisions governing the Commission's remedies policy. It is explained that there is a consensus amongst competition authorities that they should consider remedies only if a threat to competition can be identified. It is only once the Commission has clearly identified and communicated its competition concerns to the parties that they can address them by proposing commitments. The author comments that while the responsibilities when proposing, submitting and accepting remedies have become significantly more clear-cut, formalized and consistent in recent years, the fact remains that the negotiation process and the tactics involved are of such a nature that, in reality, the Commission "*informally indicate*[s] *to the parties what is broadly needed in order to secure a conditional clearance decision and then it is up to the parties to consider whether they wish to propose remedies along those lines*" (pp. 39-40).

The third chapter sets out the essential features of divesture remedies, on the basis of the Commission's guidelines and decisional practice, with references to the findings in the Commission's Remedies Study and other reviews. Dorte Hoeg writes that it is undisputable that the viability of the assets to be divested constitutes a key component to a successful remedy. However, there is allegedly a fine balance between ensuring viability and potentially over-fixing the competition concerns by, for example, adding and separating such assets early in the proceedings before the resources and needs potential purchasers are established.

The fourth chapter examines the main post-decision features and modalities when the remedies are being implemented. Traditional implementation issues are dealt with, such as interim preservation, hold-separate provisions and the appointment and tasks of trustees. The chapter also highlights newer and slightly more controversial issues such as re-selling restrictions on the purchaser and re-acquisition prohibitions on the merging parties. As the foreseen and actual time period used by the parties in order to implement their remedies are not made publicly available by the Commission, it is allegedly difficult to make general statements about the duration of divesture periods. However, it is submitted that, based on the data in the Commission's Remedies Study, it must be assumed that divestures are generally implemented within the standard duration of around 6 months, taking into account the sector in question and the modalities of the remedies. According to the author, third parties are best advised to concentrate on arguing their case before the Commission during the market test in the administrative proceedings rather than in subsequent judicial review. It is also, allegedly, fair to say that "*sanctions for breach of remedies are confined to a theoretical possibility rather than a genuine policy*" (p. 179). As for the lengthy proceedings before the General Court, they make it "*difficult, if not impossible, to unwind already implemented remedies as assets and personnel are likely to be fully integrated at the time of a Court ruling and, moreover, the market conditions may have changed*" (p. 185). That explains why there are relatively few merger cases before the General Court of the EU.

The fifth and final chapter reviews a number of critical issues in the Commission's past and present remedies policy and practice. The aim of that chapter is to critically discuss and verify whether the existing shortcomings are of such a nature and extent that they may risk diminishing or even undermining some of the accomplished successes as well as to evaluate these shortcomings in the context of the overall objectives of the Commission's remedies enforcement. The author thinks that there are valid reasons for arguing that the Commission should be mindful of and possibly reconsider some of its existing priorities: for example whether the need for speed and standardization comes at too high a cost and possibly to the detriment of other important considerations, such as proportionality, due process and impartiality. It is submitted that the Commission would benefit from "*taking a step back to reconsider whether the evolution in merger transactions and accompanying remedies practice in recent years justifies a change of some of its existing priorities in order to safeguard and maintain the best possible remedies proceedings the benefit of all parties involved*" (pp. 212-213).

A. P.

Building New Competition Law Regimes: Selected Essays
LEWIS David (ed.)
Edward Elgar, 2013, 224 p.

Mexico, Hungary, South Africa, Thailand and Zambia are featured in this collection. Although this is a limited sample, each country has a story to tell that is partly unique but also partly similar to those of other countries that have undergone the difficult task of introducing a competition law ethos and competition law institutions where there were essentially none before. Perhaps a conscious decision was made to exclude most of the BRICS, save one. I can start with a small criticism, which is that a horizontal chapter of lessons, for both new and old jurisdictions, might have served to unify the chapters. However, the reader can always write his own imaginary chapter for this purpose. And, as compensation for this apparent omission, the book does contain two bonus chapters, one on international antitrust problems and institutional responses, and one on regional (customs union or common market) agreements with competition provisions.

A particularly thoughtful (52-page) chapter on the evolution of competition law and enforcement in Hungary is provided by Csaba Kovács and Andreas Reindl. They fully explore the international influences (with interesting perspectives on Hungary's accession process and the mixture of "reception" and selective adaptation of EU norms), the domestic political economy and the inter-institutional struggles that have shaped the GVH in its two-decade history. Although one of the authors is a GVH fellow, the chapter does not fail to acknowledge the authority's own shortcomings and miscues. Competition authority officials should take note of the usefulness of this constructively candid approach, as opposed to the familiar refrain of—here is where we've made tremendous strides, and we're at the top of our game. No deficiencies and we can only get better. The chapter seems to have been written before Hungary's "watermelon" saga began, but the ploys by the Government to throw its weight around, favoring collusion in agriculture and seeking to weaken the GVH, are consistent with the unsettling trends highlighted by the authors. As they conclude, the GVH's hard-earned effectiveness and accomplishments are fragile, and the increasingly inhospitable political environment in Hungary, coupled with the incompleteness of cultural change in surrounding institutions, has generated conditions of "systemic risk" (pp. 73-74).

The chapter on Mexico, by Eduardo Pérez Motta and Heidi Claudia Sada Correa, will appeal to anyone interested in "triage" regulatory reform in countries that start from a gloomy state-controlled economy, rife with industry-wide alliances and bloated

public enterprises. The authors describe the undoubtedly difficult shift from the basket-case model to a market-based economy with a horizontal rather than vertical industrial policy; and they describe the very active and necessary advocacy efforts of the Federal Competition Commission (now replaced by the Federal Economic Competition Commission), as well as important amendments made to Mexico's competition law in 2006 and 2011. Further significant institutional reforms in Mexico, including the establishment in 2013 of specialized courts to review infringement decisions, were adopted following the completion of the chapter. And indeed, the process of reform has not settled down yet; new proposals were tabled in February 2104 (*see* A. Perrot and A. Komninos, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404022).

The next chapter, by Janice Bleazard, discusses South Africa. Understanding competition policy in South Africa means, first of all, reading the speeches and essays, and most recently the monograph, of David Lewis. But the present chapter differs in that it is an entirely legal analysis. With reference to the case-law of the Competition Appeals Court and South Africa's Supreme Court of Appeal, Bleazard recounts how, time after time, the courts have clipped the wings of the Competition Commission and the Tribunal. In some cases this was a matter of substantive interpretation, but above all it has resulted from the way the courts have interpreted procedural requirements. The net effect of the jurisprudence is to substantially limit the authorities' ability to investigate and adjudicate cases in a flexible manner. As Bleazard points out, the formalistic and conservative rulings of the appellate courts (in vivid contrast to the Tribunal's purposive interpretation) have played into the hands of vested corporate interests, as it has become increasingly difficult to ensure that cases are considered on the merits. Bleazard thus concludes that the courts have frustrated the will of the South African legislator, which had conceived the Competition Act not just as a piece of economic legislation but as a transformative tool of democratization and economic-social inclusion. She adds, however, that the landmark judgment of the Constitutional Court in the *Senwes* margin squeeze case (generally supporting the Competition Commission's inquisitorial powers and overruling the SCA's scrupulous adherence to a technicality) may point the way toward more supple judicial interpretations.

As if to eclipse the sad story from South Africa, Deunden Nikomborirak recounts the dismal failure of the competition law enterprise in Thailand. This country, like others, illustrates the need for stable political and social institutions as a pre-condition for the serious pursuit of competition policy. For Thailand, we must recognize that such stability is simply out of the question for the foreseeable future (in May of 2014, the situation is dire). Since there is little to say about Thai competition law, Nikomborirak turns to discuss the regime in South Korea, which might be used as a source of inspiration for countries which face enormous challenges, as Thailand does, in establishing a credible competition law regime. Nikomborirak recounts some of the South Korean "Cinderella" story and provides a helpful comparative discussion of the different economic environments that have characterized the two countries, the stark differences in their economic structures, political economies and (independence, relevance and capacities of) institutions, and the equally contrasting levels of public support for the competition law enterprise, a cause and effect of price regulation that has tended to keep necessities generally affordable, thereby sustaining the vicious circle.

Turning to Zambia, an overview of the relevant competition law regime and institutional context can be found in Alex Kububa's 2012 Peer Review Report for UNCTAD (http://unctad.org/en/PublicationsLibrary/ditcclp2012_Zambia_en.pdf). The chapter in the present collection, prepared by Thula Kaira, does not really set out to depict the competition policy framework in Zambia but it contains an in-depth discussion of the structure of Zambia's economy, with a focus on the role of small, micro and medium-sized businesses (SMMEs). SMMEs operate in both the formal and informal sectors. The importance of the informal sector is understandable: Zambia's economic fortunes turned south in the 1970s as world copper prices declined, and while the country has experienced relatively rapid growth since 2001, poverty and unemployment levels are still staggeringly high. In such conditions one suspects that there are limits to what competition policy can do unless it is accompanied by comprehensive efforts to build sound institutions, even if one can agree that competitive markets tend to encourage desirable wealth transfers and poverty alleviation effects. Be that as it may, Kaira reaches a number of policy conclusions based on Zambia's economic make-up. For example, he suggests that a competition authority should be concerned with anticompetitive practices that harm informal business operators and formal-sector SMMEs, given their crucial contribution to employment and to some equivalent of social protection. Relying partly on the work of the 2008 OECD Global Forum, he also proposes that the proper way to manage the informal sector is to encourage its formalization through the reduction of regulatory barriers and of the cost of market entry. Kaira's other recommendations include making refinements to the Competition and Consumer Act in order to secure more explicit recognition of the importance of SMMEs.

Part II of the book, entitled "Multinational issues and initiatives," consists of two chapters. The first, written by Eleanor Fox, John Fingleton and Sophie Mitchell, looks at the gaps, overlaps and "institutional challenge" of international antitrust. The first 8 pages review the global competition issues and institutional responses and non-responses since the 1940s; this historical summary is written with the astuteness one would expect from these authors. The remaining 10 pages are more forward-looking and concern the global competition issues that remain unresolved, and the ways in which international institutions, and above all the ICN, might contribute to their amelioration. One sympathizes with the authors' plea for the governments of major jurisdictions to liberate themselves from their Palaeolithic nation-centric interests and to embrace a—non-mutually exclusive—vision of "world welfare," in a manner roughly analogous to a vision of true global cooperation in environmental protection. Such a change of perspective and values would likely bring long-term benefits to all jurisdictions and immediate benefits to developing countries, which cannot act effectively by themselves to solve global competition problems. Although nation-states have a hardwired compulsion to privilege more narrow concepts of self-interest, the authors' message is perhaps not hopeless: the evolution of international institutions suggests that unpredictable, post-Westphalian initiatives do occasionally gain momentum. In the meantime, productive cooperation can be achieved even without a cosmopolitan shift to concepts of world welfare. In this regard, the authors run through a variety of issues that require attention, such as, among others, deliberate or negligent state-imposed barriers to competition (sometimes even more pernicious than cynical price-fixing conspiracies) and the high cost of multiplicative merger review reviews (which could perhaps be addressed by a "common clearing-house" for first-stage merger filings: p. 180). Needless to say, the spectre of export cartels continues to haunt the international community. With regard to these and other issues, the authors consider that the flexible, low-stakes nature of the ICN's work will furnish important means for the development of solutions that can later, if necessary, be upgraded to higher levels of commitment. The authors seem to recognize that different instruments, institutions and degrees of obligation will be more or less suited to a given problem. The challenge will be to reach consensus on the means to be used to address the issue at hand, which may involve several layers of controversy, and then implementing, evaluating and improving on those agreed means.

The final chapter is written by Alberto Heimler and Frédéric Jenny. The subject is regional competition law agreements, of which there are many. This chapter too begins with an authoritative summary of the reshaping of the international competition law landscape, especially since the 1990s and with particular attention given to developing countries. The

authors recall the unsuccessful campaign to achieve a hard-law WTO agreement on competition law and further recall that "south-south" bilateral cooperation agreements are relatively few. The rest of the chapter is devoted to the main subject, regional agreements. The authors proceed along a simple line: the main regional agreements are summarized (Mercosur, Andean Community, COMESA, CARICOM, and the WAEMU), and in each case one or more fatal flaws are identified. The authors' conclusion that the major regional agreements are in general deficient—due to, for example, design flaws (or in the case of the WAEMU, questionable judicial interpretation that amounts de facto to a design flaw), jurisdictional ambiguity, lack of political will, capacity or financial constraints, etc.—is consistent with the findings of the 2012 edited volume by J. Drexl, M. Bakhoum, E. Fox, M. Gal and D. Gerber, which I reviewed in this journal last year. In the final part of the chapter, Heimler and Jenny recall some of the building blocks of the "federal" antitrust enforcement structure in the European Union. The EU is, after all, the only clear success story among the existing regional schemes as far as competition law is concerned. The active contributions from the Commission and the Court of Justice, together with other essential elements, can be traced back to important decisions made at critical junctures (such as the negotiation of the Treaty of Rome, the adoption of Regulation 17/62, and, more recently, the design and implementation of Regulation No 1/2003), and the working methods of the European Competition Network certainly deserve to be studied by countries seeking to enhance the efficacy of their regional arrangements. Heimler and Jenny also suggest that regional groupings may wish to adapt and emulate the "twinning" projects that enabled experienced EU jurisdictions to train up officials in neighboring and accession countries, generally with positive results.

This collection is not to be used as a quick reference; rather, it is a tool to facilitate a deeper understanding of certain foreign jurisdictions. This implies that its audience may be somewhat selective. But each of the chapters is readable, intelligent and rewarding. The chapter on Hungary alone is worth the price. However, readers with different needs—those seeking more straightforward presentations of rules, doctrine, practice pointers and so on—will want to look elsewhere.

M. M.

La conciliation des enjeux économiques et environnementaux en droit de l'Union européenne. Analyse appliquée au secteur des déchets
VERDURE Christophe
Coll. Droit et économie, LGDJ, 2014, 548 p.

Cet ouvrage, distingué par le prix triennal Jean Rey 2013, constitue une version amendée et mise à jour de la thèse de doctorat défendue par l'auteur à l'Université Saint-Louis de Bruxelles, sous la direction du professeur Nicolas de Sadeleer, qui en signe par ailleurs la préface. Articulé autour de trois parties, l'ouvrage décline la problématique de la conciliation des enjeux économiques et environnementaux au regard de l'appréhension de la notion de déchet, d'abord par le droit primaire de l'Union, dans le cadre de la poursuite des objectifs de protection de l'environnement et de promotion du développement durable (v. art. 11 et 191 à 193 TFUE) et de la réalisation du marché intérieur (à la lumière du principe d'intégration et de l'exigence de proportionnalité) et ensuite par le droit dérivé (avec notamment une analyse détaillée de la directive 2008/98/CE du Parlement européen et du Conseil du 19 novembre 2008 relative aux déchets et abrogeant certaines directives, *JOUE* n° L 312, 22/11/2008, pp. 3-30). Et c'est dans un troisième temps qu'est abordée la conciliation de ces enjeux dans le cadre de la mise en œuvre du droit de la concurrence. De longs développements y sont consacrés (pp. 286-416).

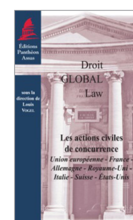
Est ainsi examinée en premier lieu la question de l'application du droit de la concurrence au secteur des déchets. Christophe Verdure met notamment en exergue certaines spécificités quant à la définition du marché pertinent, tant à l'égard des produits concernés (dont la substituabilité n'est pas toujours simple à mettre en évidence) que du champ géographique (compte tenu du caractère étroit de certains marchés en cause). L'auteur s'interroge ensuite sur la prise en compte par les règles de concurrence de considérations environnementales et distingue les régimes des articles 101 et 102 du traité sur le fonctionnement de l'Union européenne (TFUE) : il est soutenu que de telles considérations sont plus aisément intégrées dans le cadre de l'analyse d'une entente (par le recours aux conditions de l'art. 101, § 3, TFUE ; v. aussi dans le cadre du contrôle des concentrations par application du règlement (CE) n° 139/2004) que dans le cadre de la sanction d'un abus de position dominante, dans la mesure où en principe aucune justification non économique n'est alors admissible.

Un titre particulier est enfin réservé à la question des autorisations et des missions de service public, qui conduit l'auteur à s'intéresser à la fois au régime des droits exclusifs et spéciaux (v. art. 106, § 1, TFUE) et à celui des services d'intérêt économique général (v. art. 106, § 2, TFUE, dont la notion de SIEG a été reconnue à l'activité de gestion des déchets dans l'arrêt *FFAD* de la Cour, du 23 mai 2000, C-209/98), étant précisé que ces deux régimes sont étroitement liés, une infraction découlant de l'octroi de tels droits pouvant potentiellement être justifiée, à l'aune du critère de nécessité, en invoquant l'existence de la gestion d'un SIEG.

Au terme de son analyse, M. Verdure prend position pour estimer que la conciliation ne serait pas effective en droit de la concurrence dans la mesure où ce dernier ne tiendrait pas compte, en tant que tel, des enjeux environnementaux dans son application. Aussi, le droit de la concurrence apparaitrait-il ici "*désincarné*" (v. p. 416). Cela pose-t-il alors problème au regard de la nécessité de protéger l'environnement ? L'auteur ne le pense pas et va même jusqu'à soutenir que, dans certains cas, la protection de l'environnement pourrait en sortir renforcée. Ce qui peut inciter le législateur de l'Union à rechercher la conciliation dans la réglementation afin de ne pas endiguer les objectifs du droit de la concurrence, comme il semble avoir réussi à le faire avec la directive de 2008, précitée.

Alliant analyse théorique et approche pratique, l'ouvrage de Christophe Verdure aborde une thématique encore inédite, mais dont les enseignements vont bien au-delà de l'objet de l'étude qu'est le secteur des déchets, pour prétendre à une étude généralisable à la nature même de la construction européenne, subtil équilibre entre appréhension/compréhension des réalités du marché et volonté de poursuivre des objectifs qui dépassent le champ de l'économique, à l'instar des objectifs assignés à l'Union européenne en matière de protection de l'environnement.

S. R.



Les actions civiles de concurrence. Union européenne, France, Allemagne, Royaume-Uni, Italie, Suisse, États-Unis
VOGEL Louis (dir.)
EPA, éditions Panthéon-Assas, collection Droit GLOBAL Law, Paris, 2013, 202 p.

Le présent ouvrage, à la rédaction duquel ont contribué les membres de l'équipe de recherche de l'Institut de droit comparé de Paris, sous la direction du professeur Louis Vogel, offre une riche étude comparée des actions privées en droit de la concurrence. Les enjeux d'importance de ce contentieux sont exposés avec une grande clarté, et de stimulantes pistes de réflexion sont ouvertes.

La consécration, par les arrêts *Courage* et *Manfredi* de la Cour de justice de l'Union européenne, du principe d'un droit à réparation au profit des victimes de pratiques

anticoncurrentielles permet aux juridictions d'accorder des dommages et intérêts à toute personne ayant subi un préjudice causé par une infraction aux règles de la concurrence.

Les demandes civiles d'indemnisation à la suite d'une condamnation par une autorité de concurrence revêtent, outre leur fonction réparatrice, une fonction dissuasive pour les entreprises. L'essor des sanctions civiles prononcées à l'issue de ces actions en réparation risque ainsi d'alourdir fortement le poids des sanctions supportées par les entreprises. Face à cette problématique, l'ouvrage propose une étude comparée de différents droits nationaux de la responsabilité civile, afin de tenter d'identifier un *common core* pouvant servir de base à un modèle européen de réglementation des actions en réparation pour infraction aux règles de concurrence.

Dans un premier temps, sont examinés les éléments constitutifs de l'action civile, classiquement la faute, le dommage, ainsi que le lien de causalité. Ce chapitre est notamment l'occasion d'aborder la réflexion autour de l'opportunité des dommages et intérêts punitifs, exclus par la plupart des systèmes juridiques, mais qui permettraient, selon une partie de la doctrine, de renforcer l'efficacité du droit de la concurrence. Une simplification de la preuve du lien de causalité est également préconisée, puisqu'elle constitue le principal obstacle sur lequel achoppe le droit à réparation.

Le deuxième chapitre aborde la qualité pour agir et la répercussion du surcoût. Les actions civiles en réparation pour violation d'une règle de concurrence s'ouvrent à un cercle croissant de personnes habilitées à agir, sous l'influence notable de la Cour de justice. Cette acception large de la qualité pour agir, qui prévaut devant les juridictions européennes, tranche avec celle adoptée dans des États comme la Suisse ou les États-Unis. Si l'ouvrage préconise une appréciation libérale de la qualité pour agir, quelques réserves sont émises, notamment au sujet des acheteurs dits "indirects". Sont également proposées des réflexions en vue de solutionner la question controversée de l'admission du moyen de défense tiré de la répercussion des surcoûts.

La preuve fait l'objet d'un troisième chapitre, qui traite tant de la charge de la preuve que des moyens de preuve. En la matière, tout l'enjeu est d'assurer un équilibre entre l'efficacité de la lutte contre les pratiques anticoncurrentielles et la préservation du secret des affaires.

La coordination de l'action publique et de l'action privée est ensuite examinée. Cette question se pose en effet avec une particulière acuité du fait du renforcement des actions privées en droit de la concurrence. Ainsi, les règles de concurrence doivent-elles être appliquées dans le contentieux privé indépendamment des décisions de l'autorité de concurrence ? Comment prendre en compte les programmes de clémence dans le cadre des actions en réparation ? Autant de questions auxquelles les systèmes juridiques nationaux apportent des réponses diverses, analysées ici avec toujours pour objectif de dégager une solution optimale.

Enfin, le dernier chapitre aborde les actions collectives. Le modèle de la *class action* américaine suscite certaines craintes de la part des États européens. En l'absence d'harmonisation à l'échelle de l'Union, certains États membres ont pu se doter d'un système d'action collective, comme le Royaume-Uni ou l'Italie, quand d'autres, à l'image de l'Allemagne, ne disposent pas de texte autorisant expressément les parties à intenter une action collective. Il convient de préciser que l'ouvrage est antérieur à la loi relative à la consommation du 17 mars 2014, qui a instauré l'action de groupe en droit français.

À noter enfin que l'ouvrage est opportunément assorti d'annexes, permettant de se référer directement aux dispositions juridiques pertinentes du droit de l'Union européenne et des droits nationaux étudiés.

J. R.

À SIGNALER

Ouvrages reçus

(pour recension ultérieure)

Fairness in Antitrust. Protecting the Strong from the Weak
AYAL Adi
Hart Studies in Competition Law, vol. 7,
Hart Publishing, 2014, 220 p.

Competition and the State
CHENG Thomas K., LIANOS Ioannis and SOKOL D. Daniel (ed.)
Collection Global Competition Law and Economics, Stanford Law Books, 2014, 290 p.

Troisième venu dans la toute récente collection Global Competition Law and Economics de l'Université californienne de Stanford, placée sous la direction des professeurs Cheng, Lianos et Sokol, l'ouvrage regroupe treize contributions sur le thème de la concurrence et de l'État, articulées autour de trois parties : d'une part, l'interaction entre le droit de la concurrence et l'intervention ou l'activité de l'État (incluant des thématiques telles que la privatisation ou les partenariats public-privé) ; d'autre part, la question de savoir si un cadre juridique spécifique à l'État se justifie (au regard notamment des règles applicables en matière de contrôle des concentrations ou de réglementation des prix) ; et enfin une approche casuistique faisant état d'autres expériences que celle des États-Unis (sur laquelle se focalisent les deux premières parties de l'ouvrage) : celles de l'Australie, de la Chine, de la Corée du Sud et de la France (sous le prisme de l'analyse économique des contrats de service public dans les transports urbains), tandis que le droit de l'Union européenne fait l'objet d'une étude sous l'angle du contrôle des aides d'État.

S. R.

Sanctions in EU Competition Law. Principles and Practice
FRESE Michael J.
Hart Studies in Competition Law,
vol. 6, Hart Publishing, 2014, 284 p.,
(Lauréat du 2ème prix Concurrences 2013)

Standardization Under EU Competition Rules and US Antitrust Laws. The Rise and Limits of Self-Regulation
LUNDQVIST Björn
Edward Elgar, 2014, 480 p.

L'ouvrage du professeur Lundqvist, de la Copenhagen Business School, aborde un thème encore peu défriché en doctrine : celui de l'application des règles de concurrence aux normes et standards techniques, tels qu'élaborés notamment par les organismes nationaux et internationaux de normalisation. L'analyse privilégie une approche comparatiste mettant en parallèle et en regard le droit antitrust des États-Unis et le droit de la concurrence de l'Union européenne.

S. R.

AUTRES OUVRAGES SIGNALÉS

Protectionnisme et droit de l'Union européenne
BARBOU DES PLACES Ségolène (dir.)
Cahiers européens, nº 6, IREDIES, Paris 1,
Pedone, 2014, 188 p.

Sixième numéro de la jeune collection des Cahiers européens de l'Institut de recherche en droit international et européen de la Sorbonne (IREDIES), cet ouvrage est issu du colloque organisé par cet institut en janvier 2013 à l'Université Panthéon-Sorbonne (Paris 1). Placé sous la direction du professeur Ségolène Barbou des Places, qui en signe les propos introductifs, l'opus regroupe neuf contributions qui déclinent le thème du protectionnisme au regard de plusieurs facettes de l'action de l'Union européenne, à la fois traditionnelles (politique commerciale commune, marché intérieur,

protection de la santé et des travailleurs…) et plus récentes (politique monétaire et régulation des marchés financiers, gestion des flux migratoires…). Même si le droit de la concurrence n'est pas au cœur des développements (v. toutefois la contribution relative à l'impôt direct qui met en exergue le contrôle des aides d'État pour lutter contre la concurrence fiscale dommageable ; à rapprocher de la récente annonce de la Commission d'ouvrir une enquête sur certains accords fiscaux dont auraient bénéficié des sociétés installées en Irlande, aux Pays-Bas et au Luxembourg : déclaration n°14/190 du 11 juin 2014), la tension entre principe du libre-échange et protection d'intérêts nationaux n'est pas sans rappeler certains débats de la dernière campagne des élections au Parlement européen qui appelaient à une réforme des règles de concurrence au nom d'un protectionnisme "à l'européenne". De surcroît, à celles et ceux qui s'interrogent sur l'euro-compatibilité du nouveau décret français relatif aux investissements étrangers soumis à autorisation préalable (v. décret n° 2014-479 du 14 mai 2014), la lecture des actes du colloque ainsi reproduits s'imposera à l'évidence.

S. R.

The Role of EU State Aid Law in Promoting a Pro-innovation Policy. A Review from the Perspective of University-Industry R&D Cooperation
CISNEROS Mario
Ius Commune Europaeum, vol. 27, Intersentia, 2014, 167 p.

Competition Law and Policy in Japan and the EU
KAMEOKA Etsuko
Edward Elgar, 2014, 232 p.

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