Foreword by Frédéric Jenny

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2018 Competition Case Law Digest

A synthesis of EU and national leading cases

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Foreword

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This 3rd edition of the Competition Law Digest provides readers with a synthesis of EU and national leading antitrust cases from 1990 to 2016. It is a unique opportunity to draw comparisons between competition case law and policies in the EU and in the Member States, and, in some instances, US antitrust law.

Even though the study cannot be fully comprehensive, the contributions illustrate the status of competition laws' harmonization process in critical substantive and procedural areas. Harmonization, whether regulated or "spontaneous", has always been at the forefront of European integration. Spontaneous harmonization is a natural convergence of rules of the Member States following the example of comparable rules in the European Union. Notably, this spontaneous harmonization has taken place in the area of competition law. The thirty contributions reveal that while substantive law harmonization – whether regulated or spontaneous – has been successful in some areas, there are still some other aspects of national competition laws that are not harmonized (for example, procedural rules).

In addition to analyzing the harmonization process, the contributions in this Digest examine certain business sectors – such as sport, transport, financial and insurance services – and specific topics – unilateral conduct, collective dominance and resale price maintenance. In the following paragraphs, we provide a few examples – based on the contributions' analysis – some areas of successful harmonization, those in which the lack of harmonization leads to differences and potential conflicts.

1. Areas of Successful Harmonization

Leniency policies offer a good example of high level harmonization of national and EU competition laws, both in "*terms of legislation, where the Model Leniency Program has become a benchmark, and of implementation*", as Johan Ysewyn and Jennifer Boudet - Covington & Burling - illustrate, even if the authors also note that some of the remaining differences should not be overlooked.

With particular reference to the abuse of dominance in the telecommunication sector, Cani Fernández and Irene Moreno-Tapia - Cuatrecasas Goncalves Pereira - after analyzing over 190 case summaries on European and national decisions before administrative bodies and courts concerning the application of article 102 TFEU, conclude that *"save a few exceptions, national competition authorities are aligned with European practice and case law, at least where the basic features and the need to secure effective competition are concerned"*. According to the authors, this circumstance suggests that the ECN and the cooperation among National Competition Authorities have probably played a relevant role in that situation, together with the guidance of the European Commission and the authority of the European Court of Justice.

The interpretation of the concept of collective dominance is an area of competition law where National Competition Authorities follow the EU lead. Liza Lovdahl Gormsen - British Institute of International and Comparative Law - article focuses in particular on the analysis of the EU concept of collective dominance under Article 102 TFEU, mainly developed in merger control cases. The author explains that "*[t]here remains a large amount of harmonization within EU Member States... However, many recent noteworthy cases and developments have occurred outside of the EU, and they show the amount of divergence in approach that is possible in this area. The Russian structural approach, for instance, now stands in stark contrast with the behavioural approach that is the standard across the EU post-Airtours. Given the pervasive overlap between EU jurisprudence and national jurisprudence on the issue of collective dominance along with the possibility of deviation from EU law norms, an education is available through considering the places where similarities and variations exist between jurisdictions. Lessons may also be learnt by examining the law and practices of non-EU states. This collection, with its detailed analyses of cases relating to collective dominance in a wide range of jurisdictions, is capable of being the source of much learning for competition lawyers everywhere*".

Another example of harmonization, can be found in the energy sector. Over the years, the Commission and the National Competition Authorities have shared the same enforcement objectives. For example, following the 2007 EU Energy Sector Inquiry, the Commission and National Competition Authorities have been particularly active in the enforcement action in the energy sector. John Ratliff and Roberto Grasso – WilmerHale – provide in their contribution an overview of the most important national and European cases regarding unilateral conduct in the energy sector, which usually address traditional foreclosure issues.

2. Differences And Potential Conflicts

Even if the harmonization process has involved some important areas of competition law, through "spontaneous" or regulated convergence, there are other areas where harmonization of Member States' competition laws has not yet been achieved. This may also be one of the side effects of decentralization: antitrust enforcement is increasingly led by National Competition Authorities, which apply – and may favor – strictly national (and not homogeneous) procedures and practices over EU ones.

As far as judicial review is concerned, mostly divergence and some convergence in the way courts review decisions of competition authorities can be found. Nicholas Forwood and Jérémie Jourdan - White & Case - point out that some degree of divergence is inevitable, for competition laws that are "*still in the making throughout Europe and Member States' judicial practice stems from different traditions and cultures. Convergence is nevertheless desirable: much of the economic activity in Europe, which competition laws purport to regulate, has a cross-border aspect, so that the existence of inconsistent or indeed contradictory legal standards or procedural guarantees is source of legal uncertainty, and therefore inefficient economic outcomes*".

An area where clear divergences exist is the one of private enforcement. Denis Waelbroeck and Antoine Accarain - Ashurst - note that "*[t]he implementation of the EU Directive on antitrust damages actions opens a minefield for private competition litigation in the EU. Some of the provisions of the Directive, most notably those regarding the procedure for disclosing cartel evidence, are entirely new to some EU Member States and require adequate instruments to be put in place to protect business secrets and leniency documents".* The authors explain that "*the different EU Member States will continue to adopt different 'approaches' with regard to certain issues such as the disclosure of cartel evidence and protection of leniency documents, the admissibility of collective claims as well as conflicts of jurisdiction"* making the UK the forum of choice for bringing global cartel damages claims, although the Brexit result will probably impact this too.

An other example of divergences can be seen in the case of cartel settlement. As Haegeman, Patsa, Robinson, and Ghiorghies - Baker McKenzie - illustrate in their chapter, some states have transposed the EU cartel settlement regime and others have kept formal or informal national procedures. The result is that a number of formal and informal regimes continue to co-exist in the EU, with significant differences in terms of their scope and/or the benefits they offer.

Divergences are not only limited to the EU arena, but also involve substantive differences between the US and the EU laws. Richard Steuer - Mayer Brown - writes about resale price maintenance (RPM) in the US, and underlines that this has been the subject of competition law controversy for decades on both sides of the ocean. Until recently in the US, RPM – in its form of a minimum or fixed resale price – was considered illegal *per se*. In 2007, with the famous *Leegin* decision, the US Supreme Court overturned the former legal standard and adopted a rule of reason-based approach. In Europe, only the adoption of the Guidelines on Vertical Restraints in 2010 indicated the EU Commission's willingness to consider a more flexible approach toward the counterarguments of the parties on the likely and actual anti-competitive effects or on related efficiencies more openly.

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Harmonization and divergence of competition law are part of the successful decentralization of EU competition law, which has also led to a growing awareness of the development of competition laws and cases in national jurisdictions. Indeed, the approach of one jurisdiction to a particular aspect of competition law may affect in the future another jurisdiction. Monitoring and comparing different national approaches to similar cases has therefore become crucial for practitioners and academics to understand and predict the future direction of competition law at both EU and national level. We trust that the *e-Competitions* initiative – with its weekly online Bulletin and this bi-annual Digest – contributes to build a useful corpus of information on EU national doctrine, legislation and precedent in the EU, US and worldwide.

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2018 Competition Case Law Digest

A synthesis of EU and national leading cases

The 2018 edition of the Digest is a selection of 30 essays on European competition and US antitrust case law covering cases up from 1990 to 2017.

The Digest is structured in two main parts: Part I deals with competition rules in general (cartels, unilateral practices, mergers…), whereas Part II is dedicated to Specific Sectors (automobile, energy, insurance, sports…). Each essay consists in a synthesis of case summaries published in *e-Competitions* Special Issues. Each of these Special Issues gathers from 30 to 300 case summaries from the EU Member States and foreign jurisdictions. The cases commented concern mainly the 2016-2017 period but substantial reference to previous case law is provided.

This book offers a unique opportunity to draw comparisons between competition case law and policies in the EU, in the Member States, and in the US. In this time of globalization of antitrust law, monitoring and comparing different national approaches to similar cases has become crucial for practitioners and academics to understand and predict the future direction of competition law at both EU and national level. This initiative to build a corpus of information on national doctrine, legislation and precedent in the EU, US and worldwide constitutes a useful tool to interpret the forthcoming challenges and direction of competition law.

We would like to express our sincere gratitude to the authors of the 30 essays as well as to the 850 authors of the case summaries quoted in this Digest.

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