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2013 Competition Case Law Digest

A synthesis of EU and national leading cases

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Foreword

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The purpose of this book is to compare and contrast EU competition case law with European Members States competition case law, and Members States competition case law with each other. To the best of our knowledge, no such a study had been carried out until today at this level, topic by topic, business sector by business sector. Such a study cannot be fully comprehensive; this volume is the first of a series, to be released each year to build a body of comparative law in Europe. Its 51 EU contributions led to the following comments:

1. There is substantial consistency and natural harmonization between EU and European Members States competition case law;
2. However convergence is not general and complete and many divergencies may still be found;
3. Both convergence and divergency are part of the successful decentralization of EU competition law which has led to a "Copernican revolution" in which antitrust enforcement is gradually led by NCAs rather than by the Commission;
4. An important component of this revolution is the development of private enforcement.

We will go through these four comments below.

1. Substantial consistency and natural harmonization between EU and European Members States competition case laws

De minimis is a good example of convergence on substance. As noted by Pablo Ibáñez Colomo (London School of Economics) and Inge Govaere (Ghent University / College of Europe) national competition authorities (NCAs) are more likely to be regularly confronted with agreements of relatively minor importance. The case summaries reported in *e-Competitions* reveal that the policy approach favored by the Commission has become the standard in national competition law systems, some of which have been amended to align themselves with the 2001 EU Notice. When applying these instruments, NCAs remained faithful to EU principles and practice. This may indicate that coordination and co-operation mechanisms developed by the ECN are proving effective in creating and preserving a common legal culture.

The interpretation of dominance shows convergence as both national courts and the NCAs of the Member States use the EU basis to define dominance. As noted by Brenda Sufrin (University of Bristol), although some national laws may articulate this notion in different ways, and/or have a presumption of dominance at a lower threshold than that set at EU level, the outcome is not discernibly different. Member States must apply EU law directly where there is an effect on inter-Member States trade and do not seek to apply different principles where there is no such effect. Competition law cases are highly fact-specific and the actual application assessment of dominance may always be open to criticism but such differences of views may result from different interpretations of the facts rather than from divergences on the concept of dominance.

Such convergence may be also found in the area of mergers. A majority of Member States tends to converge in the way they analyze and assess coordinated effects. As Stéphane Hautbourg and Alexandra Lamothe (Gide Loyrette Nouel) point out, this is explained by the fact that the compatibility tests applied in the various Member States are now identical, for the majority, to the SIEC test adopted by EC Regulation No.139/2004. Moreover, NCAs are required to apply the principles laid down by EU case law under the terms of the primacy of European law principle. When applying this principle, the NCAs sometimes explicitly refer to EU case law in guidelines relating to their practice. However, the authors often suggest that, in spite of the noted convergence, there are still some national particularities in existence.

These examples of convergence are also confirmed in the EC Regulation No. 1/2003 Amicus Curiae proceedings. Georges Vallindas and Julie Brohée (European Court of Justice) note that national judges have often followed the Commission's interventions and reasoning as Amicus Curiae. The authors even note that making the Commission's submissions publicly available may have a negative impact on the independence of national courts vis-à-vis the European competition enforcement body.

It is also interesting to note that there is also convergence on some procedural issues. Taking the example of the NCAs' interim measures decisions, Eric Barbier de la Serre and Marguerite Lavedan (Jones Day) show that EU law has exercised a major influence on the substantive conditions and procedural rules of interim measures ordered by NCAs. According to their analysis of the national statutes, these rules have spontaneously converged, although, as allowed by the principle of procedural autonomy, some discrepancies remain (see below). Beyond legal convergence, the practice of interim measures in Europe has significantly evolved towards a unified model.

Convergence also exists in the implementation of competition law to given business sectors across Europe. As noted by Alison Jones, David Aitman and Alastair Chapman (Freshfields Bruckhaus Deringer), at a time when billions of euros of public money have gone towards propping up banks, the most striking point to note from a review of the cases summarized in *e-Competitions* in recent years is the manner in which competition authorities have continued to believe in the benefits of competition and the role that the enforcement of competition law plays in delivering those benefits. While some competition authorities might have adopted more flexible procedures in order to assist failing financial institutions, their application of substantive competition law principles has generally been firm. Thus, troubled financial institutions have not been given a free pass from competition law in order to prevent their collapse. In the area of financial services it has been, as Commissioner Kroes indicated, business as usual in cartels, mergers and antitrust. Enforcement by the Commission and NCAs appears to have been consistent across Europe. Substantive merger analysis has remained rigorous and a number of Article 101 and 102 TFEU cases have been brought.

This is confirmed by Anne MacGregor (Cadwalader) who focuses her review on the failing firm defence. The author mentions that, since the global financial crisis began in 2008, there has been a renewed interest in the failing firm defence in antitrust circles. However, European competition regulators have maintained a policy of stringent review when considering whether to accept the defence at both EU and national levels.

To conclude, one should note that this convergence process is both spontaneous and regulated. One goal of the European Union is to reach a certain level of legal homogeneity. Increased business and cultural exchanges has lead to common views in some areas. These trends are not limited to a EU context, as shown by the development of criminal sanctions both inside and outside the EU due to the influence of US antitrust law (Peter Whelan, University of East Anglia). But one should not forget that, according to recital 21 in the preamble to Regulation No. 1/2003, consistency in the application of EU competition law requires that cooperation be established between the courts of the Member States and the Commission. Ultimately, as recalled by Georges Vallindas and Julie Brohée, one must still keep in mind that the final word about the application and interpretation of the EU treaty still remains in the hands of the EU Court of Justice, via the preliminary ruling procedure.

2. Divergence

Despite its importance, the above-mentioned convergence process is neither complete nor generalized. In various areas of competition law substantial differences remain across Europe, and between Member States and the EU.

This is notably the case of most procedural issues, where national regimes adhere to the general legal principles applicable in their country. For example, the area of nullity of concerted practices is one in which an important divergency between Member States continues to exist. Given that the nullity of anticompetitive agreements, except for Article 101(2) TFEU, is still a question for national civil law, José Rivas and Geoffroy van de Walle de Ghelcke (Bird and Bird) note that is doubtful that the applicable principles will converge across Member States.

Interim measures are also an area for natural discrepancies. Divergences remain, especially at procedural level, and practice in this area is still in a developmental phase. It remains to be seen whether, over time, the convergences are confirmed or the divergences reinforced. Where EU law and national law have not converged, this is explained by both the principle of procedural autonomy and the synergy of actions by the European Commission and NCAs (Eric Barbier de la Serre and Marguerite Lavedan).

However, divergences also concern substance, and they clearly show the limits of any natural convergence process.

Concerning rebates cases, some national courts and NCAs analyze effects to a greater or lesser extent before deciding whether to prohibit loyalty rebates under Article 102 TFEU and/or national equivalents, as noted by Lars Kjølbye (Covington & Burling). Others reject this method and apply the strict approach of the EU Courts. The national cases also illustrate some of the factors that are relevant in the analysis of loyalty rebates. Interestingly, the complex predation test developed by the Commission in the Guidance on Article 102 TFEU does not appear to have been applied at the national level. Several national cases illustrate current analysis of loyalty rebates under Article 102 TFEU. There is no consistent approach. Some national competition authorities and courts apply an effects-based approach while others consider such rebates almost *per se* prohibited. There is also no consistency in terms of the factors that are taken into account and how they are applied. By contrast, there is a much higher degree of consistency in the assessment of other forms of rebate schemes, in particular those that support well-established restrictions of competition

such as absolute territorial restriction and resale price maintenance. The Commission's Vertical Restraints guidelines have promoted consistency whereas the Guidance on Article 102 TFEU has not.

With regard to mergers and joint ventures, although many regimes take a similar approach to key jurisdictional questions and, in many cases, explicitly follow the approach set out by the Commission in its Jurisdictional Notice, there are significant divergences between some countries. Notable examples are the level of control required to define a concentration, the question of minority stakes, as well as whether arrangements such as licences or outsourcing agreements constitute concentrations, whether joint ventures are only notifiable if they meet the full functionality criterion, how the turnover generated by joint ventures should be allocated to the parent undertaking, the approach to the geographic allocation of turnover. Moreover, in certain jurisdictions, there remains a lack of clarity on some critical issues, for example whether the turnover of the seller group needs to be taken into account when determining whether thresholds are met, or whether the jurisdictional thresholds relate to worldwide or national turnover. Kyriakos Fountoukakos and Molly Herron (Herbert Smith) regret that this causes practical challenges when conducting multi-jurisdictional assessments of multi-national transactions.

The most striking differences seem to concern the area of abuse of dominance. Frederic Depoortere and Ingrid Vandenborre (Skadden Arps) suggest that the enforcement record at the member state level may lead one to question the exclusion of Article 102 TFEU from Regulation No. 1/2003's convergence rule, given that in practice it has blurred the distinction between Article 102 TFEU, the equivalent provisions in national law, and other national laws intended to achieve other objectives. The resulting differences in the application of competition law throughout the European Union complicate doing business across EU Member States and may be viewed as undermining the basic goals of convergence of Regulation No. 1/2003. While the European Commission has emphasized an effects-based approach to the enforcement of Article 102 TFEU with a view to address exclusionary abuses, the Commission's policies and priorities in the enforcement of Article 102 TFEU have not necessarily been embraced by all member states' authorities. The exception to convergence which Regulation No. 1/2003 allows in the context of Article 102 TFEU gives national authorities the freedom to diverge from the Commission's policies in relation to Article 102 TFEU enforcement. It may be worth reconsidering the convergence exception for Article 102. Where Article 102 TFEU is applied to the commercial practices and policies of multinational undertakings, a level playing field may well be equally appropriate under Article 102 TFEU as it is under Article 101 TFEU.

Differences also occur if one looks at sectoral application, as in the case of the Internet sector. For example, Maurits Dolmans and Andrew Leyden (Cleary Gottlieb Steen & Hamilton) regret that in some decisions reported in the *e-Competitions* database, NCAs and courts have taken a hard-line stance against vertical restraints, while in others they have tended to favor traditional retailers over online players. The authors expect that these differences will evolve in the future, particularly in light of the new 2010 Vertical Restraints Block Exemption Regulation and its accompanying Guidelines, which hopefully will lead to greater consistency between NCAs.

One may find some hope in a remark from Andrés Font Galarza et al. (Gibson Dunn & Crutcher): *"Perhaps this is not as worrying as it might seem at first sight. On the one hand, there are effective safeguards ensuring the uniform application of European law. On the other hand, the antitrust markets in which vertical restraints are usually imposed (e.g., motor vehicles, etc.) are usually national and the different Member States have different legal traditions and jurisprudence and it is normal that they take them into account when assessing exclusive agreement, providing this does not hinder the uniform application of*

European law". Although this remark concerns exclusive distribution agreements, it could be applied to competition law in general.

Wherever one may draw the line between consistence and divergency, authors of this Digest seem to agree that decentralization ultimately results in a "Copernican revolution".

3. A "Copernican revolution"… and its limits

The third comment suggested by the articles in this book is that, in various areas of competition law, the decisional practice of certain Member States is more developed than that of the European Commission. The fact that antitrust enforcement is increasingly led by NCAs rather than by the Commission could lead to a situation where the Commission will gradually take on a role as a coordinator rather than as a pioneer (José Rivas and Geoffroy van de Walle de Ghelcke). The authors make this comment about exchange of information, although cartels settlement may be another example.

Mel Marquis (European University Institute) recalls that the European Commission announced, in March 2012, the conclusion of its fifth cartel settlement since the EU cartel settlement regime was adopted in 2008. The pace at EU level has been that of a slow drip, although the Commission anticipates a more steady flow soon. With somewhat more regularity, cartel cases are also being settled or "resolved early" by several of the EU's national competition authorities, in both administrative/inquisitorial and adversarial settings. With the spread of the "great Cartel Crusade" throughout Europe, and with a high, steady rate of leniency applications, it is not surprising that in key discussion fora such as the OECD Competition Committee and the ICN, cartel settlements emerged (between 2006 and 2008) as a hot topic. The low number of cartel settlements at EU level since the adoption of the settlement procedure in 2008 is probably deceptive, in part because the regime is still relatively new and in part for reasons discussed in Marquis' paper. Moreover, it may be deceptive in the sense that it fails to capture cartel settlement activity at the national level. In certain Member States, including some of the larger jurisdictions (France, Germany and the UK), settlements have become a normal part of the landscape. Since all European competition agencies face resource constraints, and since the "great Crusade" paradoxically has not thus far curbed leniency applications through observable greater compliance but rather has kept leniency applications rolling in, the trend toward routine use of expedited procedures and a certain degree of *de facto* appeal avoidance seems likely to continue.

Most of the authors agree that decentralization leads to a greater number of cases decided at national level rather than EU level. Therefore, there are areas in which the decisional practice of certain NCAs is more developed than that of the European Commission. The growing implementation of EU law by both courts and NCAs represent a success of decentralization but there are limits to this "Copernican revolution".

A first obvious limit concerns State aid enforcement. According to Brian N. Hartnett (Squire Sanders), the cases reported in *e-Competitions* show that State aid enforcement remains limited at national level. Several reports are critical of the unwillingness of national courts to apply State aid rules. In certain cases, there has been what is best termed a lack of State aid awareness on the part of certain national judges. There have been to many cases where the national judge confused the obligation to notify an aid with the assessment of its compatibility, or denied the direct applicability of Article 108(3) TFEU and the right of a competitor to request that illegal aid be recovered from the beneficiary. However, one should recall that the study conducted by *e-Competitions* and Jacques Derenne and his Hogan Lovells team for the European Commission showed a substantial track record at national level (*see* "State Aid Thesaurus", on www.concurrences.com, and its 650 national courts decisions reported and examined).

A second limit concerns Article 106 TFEU on exclusive or special rights. Given the extremely limited number of Article 106 cases initiated by the Commission, one might have expected to see a more substantial number coming before national courts and some of these reaching the Court of Justice via requests for preliminary rulings. This has occurred only to a limited extent. José-Luis Buendia (Garrigues), without claiming to have undertaken an exhaustive investigation, found only 25 national cases and nine cases, which have come before the Court of Justice. All of the national cases refer to State measures (other than State aid), which distort competition but few refer directly to Article 106 TFEU. Often cases are at the boundary of antitrust law, where national competition authorities are not sure what to do about anticompetitive State measures. This is not surprising since NCAs do not normally have the task of applying EU rules to their own Member States. For this reason, they often rely on other legal rules to achieve similar results or limit themselves to making recommendations. Only a few national judges have used the preliminary ruling procedure to question the compatibility of national legislation with Article 106 TFEU. The net result is a limited knowledge of Article 106 at the national level and, as a consequence, a certain lack of homogeneity in the cases reported. Clearly, this situation would improve should the Commission decide to exercise greater leadership in this area. José-Luis Buendia concludes that the review of recent Article 106 TFEU cases shows that the European Commission has only a limited interest in its direct enforcement and often avoids acting on complaints. Therefore, according to the author, it is not surprising that Article 106 TFEU application at the national level is also limited and not entirely consistent from a substantive point of view.

4. Private enforcement

The fourth and last comment suggested by this Digest is that private enforcement of EU competition law is progressively becoming a 'natural' feature of the system. Both economists and lawyers agree on this. For example, Gunnar Niels (Oxera) note that competition practices in law firms and economics consultancies now trumpet their expertise in damages alongside mergers, cartels and abuse of dominance. National judges are increasingly aware of these cases, and have shown interest and confidence in tackling the complex legal and economic issues that arise. Although the question of how courts can deal with uncertainties around damages calculations will remain a topical one, this has not deterred them from setting damages awards, nor from relying on economic analysis.

Assimakis Komninos (White & Case) writes that national courts no longer deal with the question whether there should be a remedy for victims of anti-competitive conduct. An interesting body of national case laws is taking shape. Broadly speaking, the national courts are confronted with the same problems, have similar concerns and respond to the latter in similar ways. This author concludes that private actions in Europe have taken off.

An exception is – once again – State aid damages action. According to Brian N. Hartnett, the first striking outcome of the review of the *e-Competitions* cases is the disturbingly low number of actions for damages.

Ultimately, the successful achievement of the goals of Regulation No. 1/2003, *i.e.* a more effective and efficient enforcement of EU antitrust law, simplified administration, reduced administrative costs and costs for undertakings, actually depends on its implementation by the national courts of the Member States.

* *

National competition case law from Member States and neighboring states is, if not a black hole, a grey hole. And this grey hole contains many useful resources for lawyers and academics, and perhaps also for enforcers. Most NCAs case law is reported on the Internet, but not all cases benefit from detailed English case summaries. Moreover, not all national courts make competition case law available online. Access to cases in a common language for over 27 European jurisdictions is still a challenge. Should we do something about it? Yes because the approach in one jurisdiction can affect other jurisdictions. The contributors to this Digest believe that the *e-Competitions* initiative has started to fill an important gap, *i.e.* the building of a corpus of useful information on European national doctrine, legislation and precedents. We hope this first edition will contribute to a growing awareness of the development of competition law in national jurisdictions.

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2013 Competition Case Law Digest

A synthesis of EU and national leading cases

This EU Digest 2013 is a selection of 51 essays on European competition case laws from the 27 European Union member States and neighboring States. Each essay consists in a synthesis of the leading cases from 2012 and beyond. These essays are organized in two parts. Part I deals with Competition Provisions (Cartels, Dominance, Merger, State aid…) whereas Part II deals with Business Sectors (Automobile, Broadcasting, Healthcare, IT & Telecommunications, Sports…). The purpose of this Digest is to provide a snapshot of the areas of convergence and remaining diversity of competition law in Europe. As noted by Frédéric Jenny in his Foreword below, while this book is not based on a comprehensive study of all national case laws, no such study is needed to identify the main trends in this area. This EU Digest highlights both convergence and divergence in various areas and sectors of European competition law, making it easy for both practitioners and academics to draw comparison between jurisdictions in various areas and sectors of European competition law.

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