

Abstracts

Main Track Speakers

Pinar Akman

Commercial Agency in the Digital Era: The Legal Characterisation of Online Platforms under Competition Law

Commercial agency is a common means of delegation in business life where the agent acts for and on behalf of the principal in return for payment, normally a 'commission'. Two-sided digital markets and platforms that operate in such markets pose two fundamental legal questions regarding the legal characterisation of such platforms: (a) are platforms agents of the sellers and/or buyers which the platform brings together to facilitate a transaction?; and (b) if platforms are not agents of the sellers and/or buyers, what is their correct legal characterisation? The answers to these questions have fundamental implications not just for the commercial law understanding of the traditional concept of 'agency' as challenged by the digital economy, but also for application of competition law. This is because the competition law prohibition of anticompetitive agreements (Article 101 TFEU and Sherman Act Section 1) does not apply to agreements within a 'single economic entity' and a finding that platforms are agents of the sellers/buyers on the platform would potentially take agreements of platforms out of the scope of competition law, even where these may be anticompetitive. The purpose of this article is to establish the correct legal characterisation of online platforms for the purposes of competition law, critique the 'single economic entity doctrine' and propose any necessary changes to the doctrine.

Maciej Bernatt

Anti-institutional Populism and Antitrust. Setting the Scene

The aim of the paper is to identify the processes triggered by the rise of populist, illiberal governments that may adversely affect competition law enforcement. It is argued that these processes are of three-fold nature: 1) they may involve the limitation of independence and expertise of institutions responsible for application of competition law (competition authorities and courts), 2) they may translate into protectionist use of competition law, and 3) they may affect the regional competition law systems. To illustrate anti-institutional features of populism, the paper analyses the risks to competition authorities and courts posed by reforms introduced in Poland since 2015.

Jan Blockx

Policing Price Bots: Algorithms and Collusion

A number of authors have in recent years stated that current antitrust rules may not be able to police supra-competitive price levels (or indeed other undesirable market outcomes) which may result from the use of algorithms in online markets. This paper discusses what tools are available in EU antitrust law to tackle collusion by price bots, based on the existing legislation, the case law of the European courts and the practice of the European Commission. It argues that, while tacit collusion will continue to present a gap in enforcement, there are a number of tools already available to avoid this turning into a chasm, even when prices are set with artificial intelligence. The case law of the CJEU shows that unlawful collusion can result from the

disclosure of sensitive information from one undertaking to another, even in the absence of evidence of an anticompetitive intention. Although evidence of such an intention can be relevant in practice, it remains to be seen whether algorithms are opaquer than humans in this respect. Furthermore, undertakings can be liable for the actions of the (self-learning) algorithms they create or use. Undertakings have a positive obligation to ensure compliance with the EU antitrust rules and cannot plead ignorance of what their employees or price bots are doing. And even if there would be circumstances where undertakings could not be found to have been negligent in how they supervise their employees and price bots, the toolbox of the European Commission is large enough to stop practices for which no undertaking is to blame.

Marco Botta and Klaus Wiedemann

EU Competition Law Remedies vis-à-vis Exploitative Conducts in the Data Economy: Exploring the Terra Incognita

This paper analyses the enforcement of EU competition law *vis-à-vis* exploitative conducts by dominant online platforms. Firstly, it looks at the case law of the Court of Justice of the European Union (CJEU) concerning excessive and discriminatory pricing, as well as unfair contract clauses under Art. 102 TFEU. Afterwards, the challenges faced by National Competition Authorities (NCAs) and the EU Commission in investigating exploitative conducts in data markets are discussed with a view to the CJEU case law. Finally, the paper looks at potential remedies that NCAs and the EU Commission could design in relation to exploitative conducts in data markets. The paper does not discuss the definition of the relevant market and the issue of market power of online platforms. It is argued that the data economy is characterized by a number of market failures that, in principle, justify EU competition policy intervention. Contrary to a view expressed in the literature, the authors argue that EU competition law should be enforced in digital markets, in spite of the overlaps with data protection and consumer law. In particular, it is argued that these three policy areas pursue different goals, have different scopes of application and different enforcement structures. Consequently, in spite of their “family ties”, one policy area should not prevent the enforcement of the others. At the same time, the authors recognize that – in view of the CJEU case law – Art. 102 TFEU should only be enforced *vis-à-vis* exploitative conducts in exceptional circumstances – i.e. in relation to “super dominant” online platforms and in markets characterized by high and stable entry barriers. Secondly, the paper argues that in view of the existing CJEU case law on excessive and discriminatory pricing, the NCAs and the EU Commission would face a very high burden of proof to sanction these practices in data markets. At the same time, the enforcement of Art. 102 TFEU might indeed be expected as regards unfair contractual terms. The current investigations by the *Bundeskartellamt* in the *Facebook* case and the recent *Facebook/WhatsApp* merger case could indicate a new enforcement trend to this regard. Finally, in terms of remedies, the paper argues in view of the lack of precedents in this area that NCAs and the EU Commission should conclude behavioural commitments with dominant online platforms, rather than imposing financial penalties coupled with cease and desist orders. In particular, when designing these remedies, the NCAs and the EU Commission should take into consideration the new General Data Protection Regulation (GDPR), in order to fill the gaps in the current regulatory system via behavioural commitments.

Margherita Colangelo

Antitrust Implications of Most Favoured Nation Clauses in Online Markets

Recently antitrust enforcement in the EU has focused on the use by online platforms of some peculiar forms of Most Favoured Nation (MFN) clauses, giving rise to a wide discussion involving scholars, competition authorities and legislators. In online settings the typical situation consists of an upstream supplier that sells its products through a downstream online platform and guarantees that the price and terms it sets for a particular product on that platform is no higher than the price and terms it sets for the same product on another platform. Whereas there is an established literature on traditional MFN clauses, the same cannot be said for platform MFNs. This paper explores the peculiar features of platform MFNs and analyses them in the light of the business models adopted by online platforms (with a particular attention to digital comparison tools), examining the role of such intermediaries, how their activities may affect competition and how the enhanced transparency typical of the Internet impacts on the markets concerned and on consumer trust and behaviour. After a review of the anticompetitive effects and justifications associated to MFNs in traditional and online settings, the paper focuses on the European experience and the existing cases in the field of platform MFNs, in particular concerning the investigations into the online hotel booking sector. The contribution then questions the theories of harm and the main critical issues deriving from the cases analysed and aims at highlighting the difficulties hidden in the adoption of a generalized approach in the competitive assessment of these clauses. The paper finally suggests that, given the differences between the wide and the narrow version of platform MFNs, antitrust assessment must properly take into account the significance of the free riding argument as a potential justification for the adoption of the latter clauses and the multi-sidedness of the markets concerned, which would imply the careful consideration of the price structure. Moreover, the combined effects of platform MFNs with other clauses, such as Best Price Guarantees, must be deeply investigated.

Niccolò Colombo

Virtual Competition: Human Liability Vis-À-Vis Artificial Intelligence's Anticompetitive Behaviours

The progressive demise of bricks-and-mortar and the rise of the online merchant are not to be ostracized per se, as the virtual nature of potential anticompetitive behaviours will not change the substance of the antitrust enforcement. The fil rouge if the present contribution is to be found in the pivotal role of human liability as the logical premise for whatsoever theory of harm. All those challenges coming from the interaction between Big data and Artificial Intelligence are thus to be welcomed as the future of competition law goes hand in hand with the technological progress of innovative markets.

Wolfgang Kerber

Data Governance in Connected Cars, Access to In-Vehicle Data, and Competition Law

The huge amount of data that are produced in connected cars can be used for many services that can be offered to car drivers and passengers. In the EU there is a controversial policy discussion about access to "in-vehicle data and resources". The "extended vehicle" concept of the car manufacturers, which transmits all data to their own proprietary servers, leads to a de

facto exclusive control of the data by the car manufacturers. Other independent service providers complain about this privileged access of the car manufacturers to these data, which would lead to less competition and innovation for aftermarket and other complementary services in the ecosphere of connected driving. Therefore a broad coalition of stakeholders (including consumer associations) would prefer other different technological solutions (as, e.g., the on-board application platform), which would allow the car drivers to decide whom to grant access to the connected car and the in-vehicle data. The car manufacturers defend their solution as necessary for safety reasons. This problem can be seen on one hand as a typical competition problem as it is well known in regard to competition and innovation in automotive aftermarkets, for which in the EU already a regulated access to technical information exists for protecting competition of independent repair and maintenance service providers. On the other hand, the problem is much more complex, because it also encompasses the entirely new discussion about "data ownership" or, more precisely, what the optimal governance solution for in-vehicle data in connected cars is. Due to the non-rivalrous character of data it is very doubtful whether the de facto exclusive control of these data by the car manufacturers is an optimal "data governance" solution. Additionally, it has to be taken into account that most of these data are personal data that are subject to EU data protection law, granting the car drivers (at least theoretically) strong rights about these personal data. This paper analyzes this policy problem from an economic perspective. After explaining this problem and giving an overview about the current controversial policy discussion, it is analyzed whether the "extended vehicle" concept of the car manufacturers can be defended. Important results are: The concerns of independent service providers about negative effects on competition and innovation are justified. There might also be serious problems in regard to contracts with the consumers about giving consent to the processing of personal data due to information and behavioral problems. Despite the importance of safety and security issues, these arguments cannot justify the exclusive commercial control of the in-vehicle data of the car manufacturers. It is also doubtful whether the exclusive control of the data can be defended by industrial policy arguments. However the extent of possible negative effects depends also much on the intensity of competition between car manufacturers, which might force them to less closed systems for connected cars. However the extended car concept can itself be interpreted as a collusive technological solution that might restrict competition with other technological and data governance solutions. In the last part the paper discusses different regulatory solutions. They can encompass regulations about access at the technological level (alternative technological solutions), the specification of rights on data, as, e.g., access rights and data portability rights, the development of a sector-specific regulatory solution for the governance of data in connected cars, and - last but not least - solutions for the access to (or governance of) data that might be possible through the application of European competition law (Art. 102 TFEU, Art. 101 (3) TFEU, and §20 of German competition law). Although the EU Commission has acknowledged the existence of a problem for the access to in-vehicle data, it is so far very reluctant in regard to specific regulatory activities.

Claudio Lombardi

Digital news for a rave new world: Competition and public interest in the scramble over data

This paper examines the effects on competition, freedom of speech and democracy as a whole, of the use of behavioural targeting and algorithmic curation in the online news sector, and the institutional alternatives available to tackle them. In particular, it firstly maps out the relationships between advertisers, publishers, data aggregators and other third parties, and the technology used to sort select the news we receive. It then considers the different dimensions of competition in the collection and elaboration of the data needed to perform behavioural targeting, therefore also arguing whether competition law should find application. This study also relies on an empirical research on behavioural tracking in the online news sector, which – by displaying the network of parties involved in the process and the users’ data they share demonstrates the central role of some platforms in shaping demand and the different levels of competition existing between ad networks, publishers and newspapers. Moreover, this paper considers the effects on the quality of news reporting, on diversity of information disseminated and on democracy as connected to the competitive dynamics established in the market. Targeted advertisement and tailored webpages are part of a new type of behavioural targeting hinging on the elaboration of data obtained from the digital identities of the users. In the market for news, information and ultimately ideas) the creation of a tailored digital environment may bring about not only economic effects but also distortions of the democratic process. Brexit and the last American Presidential elections made clear that this kind of dissemination of news may have the effect of exacerbating tensions already existing in society, ultimately encouraging the spread of unverified news and false statements (i.e. post-truth society). What are the public and private interest concerns impacted by this practice? Can this algorithm-driven selection of news be captured by competition laws? What are the institutional choices, besides competition law, fitted to deal with the shortcomings of this devious form of production of news and information? In Part I, this paper presents the mechanisms through which behavioural targeting is made possible on the internet in particular through audience targeting. Part II shows the result of the empirical analysis performed by recording all tracking cookies on a selection of 100 different news websites and examines the (potential) competitive issues existing between publishers, ad networks and newspapers. Part III explores the related scenario of the creation of an online environment through algorithms, which shapes the information, the ideas and eventually the behaviours of internet users and consumers. Part IV will discuss whether competition law may expand its reach beyond the mere pricing mechanisms, ultimately promoting the protection of public interest concerns and constitutional rights, such as the one to correct information, and compares the application of competition laws to the other institutional alternatives. A conclusion follows.

Mariateresa Maggiolino and Giuseppe Colangelo

Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case

The emergence of multi-sided media platforms occurred in parallel with the success of business models that revolve around the collection and use of personal data, generating revenue from user-data-based profiling and advertising. In such a context, data protection rules do not appear to be very effective, and thus the main privacy concerns relate to users’ ability to control their digital identities. However, together with mere privacy issues, another concern lies

at the heart of the debate about the data economy: that the collection and aggregation of data (including personal data) by dominant firms entrenches their dominant positions. This paper discusses these issues by analysing the Facebook case initiated by the German Competition Authority. The Bundeskartellamt takes the view that Facebook is abusing its dominant position by leveraging its social network to amass, without limitation, a broad range of data generated by its users when they visit third-party websites. Facebook then merges this data with users' Facebook accounts. By focusing on these activities, the Bundeskartellamt takes the position that Facebook may use such data to optimize its commercial activity and tie more users to its network. Based on a consideration of both EU and U.S. legislation, this paper will analyse the conditions under which the Facebook's conduct could fall within the scope of antitrust rules.

Salil Mehra

Too Soon? Against Antitrust's Counter-Revolution

A spectre is haunting the American antitrust community – the spectre of the New Brandeis Movement (“the Movement”), sometimes called less graciously, “hipster antitrust.” Despite only a couple of years of legal academic and policy expression, the Movement has already inspired calls for action against a “structural lack of competition” and fears that a new “monopoly problem in the United States is threatening [its] economy and democracy.” Directly in the crosshairs of the Movement's partisans lies the keystone of the Chicago School: the perhaps misnamed consumer welfare standard. The defense of the Chicago School orthodoxy – the “Counter-Revolution” – has quickly set its battle lines. Symposia panels are being assembled to defend consumer welfare's role in antitrust policy. A Heritage Foundation report warns that the Movement's call for “excessive and misguided antitrust intervention threatens serious harm to the public good.” To a large extent, these two camps have talked past each other – the heart of their dispute involves giant tech firms and their business models involving network effects, multi-sided platforms, information and non-traditional pricing practices. As this Essay will explain, the two sides are dealing with a current epistemological gap between existing law and theory and new business models. This Essay discusses several of these divergences between existing theory and 21st century business models and, building on the Chicago School's own logic, sets forth several related, but modest, proposals for presumptions to address sustained zero-dollar pricing, turbocharged price discrimination (individualized pricing) and mass vertical contracting that supplants existing observable markets. The point of these presumptions is not so much to determine outcomes but to recalibrate the cost benefit balance regarding when deeper inquiry is worthwhile and so generate real antitrust data on these new business models. By doing so, antitrust can begin to interrogate empirically two areas at the heart of the New Brandeis Movement/Chicago School debate: predation and vertical restraints.

John Newman

Are Digital Markets Different?

At the turn of the millennium, the antitrust enterprise underwent an intense bout of soul-searching. Prompted in large part by the high-profile *Microsoft* litigation in the United States, the question was raised: is antitrust doctrine, most of it developed during a bygone era of smokestack industries, appropriately designed for use in digital markets? Writing in 2000,

Richard Posner responded that “antitrust doctrine is supple enough . . . to take in stride the competitive issues presented by the new economy.” His answer has become the modern consensus. Under the prevailing view, there is a single, coherent set of antitrust doctrine that governs all potentially anticompetitive conduct. That set of doctrine does not, and should not, vary when an analyst is confronted by a digital market. But is that view correct? And, if so, is this unified approach appropriate? Is it an effective (and cost-effective) means of promoting the consensus goal of modern antitrust law? Or are digital markets, in fact, different—and different enough that they warrant different antitrust rules? Was Posner wrong? This article argues that digital markets are different, in ways that deserve—even demand—unique treatment under the antitrust laws. Digital markets require different rules.

Ulrich Schwalbe

Algorithms, Machine Learning, and Collusion

This paper discusses the question whether self-learning price-setting algorithms are able to coordinate their pricing behaviour to achieve a collusive outcome that maximizes the joint profits of the firms that use these algorithms. While the legal literature generally assumes that algorithmic collusion is indeed possible and in fact very easy, the computer science literature on cooperation between algorithms as well as the economics literature on collusion in experimental oligopolies indicate that a coordinated and in particular tacitly collusive behaviour is in general rather difficult to achieve. Many studies have shown that some form of communication is of vital importance for collusion if there are more than two firms in a market. Communication between algorithms is also a topic in artificial intelligence research and some recent contributions indicate that algorithms may learn to communicate, albeit in a rather limited way. This leads to the conclusion that algorithmic collusion is currently much more difficult to achieve than often assumed in the legal literature and is therefore not a particularly important competitive concern. In addition, there are also several legal problems associated with algorithmic collusion, for example questions of liability, of auditing and monitoring algorithms as well as enforcement. The limited resources of competition authorities should rather be devoted to more pressing problems as, for example, the abuse of dominant positions by large online-platforms.

Claudia Seitz

Digitization in the Life Sciences in the Light of Competition Law

Advances in sciences – both in information technology and molecular biology – have enabled new understandings of biological processes, advanced forms of therapies and new treatment options which lead to an ongoing paradigm shift. In the last several decades digitization has become a major trend in the life sciences sector. New forms of data collection and electronic documentation have created strong health benefits and have reduced costs. In the EU the e-health card has been introduced for medically necessary, state-provided healthcare, which uses technically sophisticated telematic infrastructures for interconnecting medical professionals. Ehealth data collections store a huge amount of health data, such as treatments and prescriptions, and have been criticized for the insufficient protection of data. The so called “see-through or transparent patient” with genetic fingerprint is increasingly enabling an individual approach of medical prediction and treatment and raises questions of legal

protection. Indeed, digitization raises new technical and regulatory concerns due to its specific characteristics: the vast amount of data generated at an unprecedented speed, by using internet search engines and algorithms, comprises data from virtually any field and presents challenges on various levels of data flows, ranging from extraction of information to data analysis. This results in an exponential growth of generated data which may lead to innovation and new products and services. The rise of digitization in the life sciences sector, especially in biotechnological research, genome sequencing and the development of new pharmaceutical treatment options lead to specific challenges in terms of privacy, security, data ownership as well as data stewardship and governance. Besides these questions competition law raises unexpected issues regarding the questions of new markets, the definition of the relevant product market as well as questions of market dominance and the need for access to these markets in the sense of the essential facility doctrine. The paper shall address the technical progress and advances of digitization in the life sciences sector, especially in the context of new technologies and the challenges of the application of competition law on a national and global level. It shall address whether data collections such as biobanking or databases of genetic information could be seen as markets from a competition law perspective.

Yane Svetiev and Giacomo Tagiuri

The Opportunities and Dislocations of Technological Change: EU Law as a Coping Mechanism?

This contribution focuses on the question of whether EU law enables and even aggravates the dislocation effects of the processes of technological change and globalization on local ways of economic life. According to a critical stream in EU scholarship, EU law – given its market orientation – facilitates digital markets to ease cross-border transactions, but cannot adequately respond to the interests of the losers of the ensuing processes of social change. Our aim is to demonstrate a different role for EU law as a coping mechanism – helping both Member States and private firms – to adapt to technological change without necessarily discarding socially protective or culturally valued market institutions. The two examples elaborated feature EU law’s responsiveness to a plurality of interests beyond market integration and its function as the trigger for a regulatory pastiche – incorporating national market regulation and private law mechanisms – that allows for the emergence of differentiated market institutions.

Simonetta Vezzoso

FinTech, TechFin, and Competitive Markets: What Could Possibly Go Wrong?

The use of technology to support the production and delivery of financial services has a long history, spanning from the written records of financial transactions in Mesopotamia, to much more recent developments, such as the first use in 1995 of the World Wide Web to provide online account checking, and the introduction of high-frequency trading. In the last ten years, however, the adoption of digital technology in the financial sector, generally known as FinTech, has undergone a dramatic acceleration, both in the West and the East. In the latter, arguably, the magnitude of the transformative powers at work is most visible. Ant Financial Services Group, a spin-out of e-commerce platform Alibaba, lately achieved a market value of around €127 billion (\$150 billion) based on the success of its digital payments system Alipay and money market fund Yu’e Bao. Tencent’s popular instant-messaging app WeChat incorporates an online

payment service, WeChat Pay, which is used by a substantial proportion of its one billion monthly users. A strong trend towards mobile payments is also experienced in other countries, such as India. Ongoing transformations in the financial sector are significant and global, which creates opportunities and challenges for consumers, traditional and non-traditional financial service providers, and regulators alike. Incumbent banks have expressed concerns about the disruptive potential and the dangers of Big Tech, which the Paper calls TechFin adopting the definition of Alibaba's CEO, Jack Ma. While banks brace themselves for potentially unsettling market developments, financial regulators discuss the impact of new technologies on processes and business models, as well as the need for a changed supervisory methodology. The challenge for most financial regulators is to ensure that the multiple benefits offered by these new technologies are realized without hampering consumer protection and compromising the stability of the financial system. The Paper embraces a different perspective and explores some of the likely consequences of FinTech in terms of market structure and competition. Keeping the literature strands on platforms in the background, we analyse the current push towards the "platformization" of banking services. If the financial sector moves towards production and distribution models where the banks see their pivotal role diminished, this is certainly of concern to financial regulators, who should at the very least adapt their supervisory methodologies to the new situation. From a competition policy perspective, however, it is important to identify the types of market structure that could better satisfy consumers' banking and financial needs. The Paper makes the point that the analysis of the possible impact of the FinTech revolution on competition dynamics in the financial sector is particularly relevant especially to make sure that the benefits of innovation are harnessed for the good of consumers. This perspective is solidly ingrained in the "long term" view of competition policy.

Spencer Waller

Antitrust and Democracy: Democracy in Antitrust

This article analyzes two critical and related questions regarding the eternal quest for better understanding the purposes and tools of competition law and policy. It first looks at the role of democracy as a policy goal of competition policy. It also looks at the role of democracy in the enforcement of competition law, regardless of the normative goals of any given competition law system. Part I examines the promotion of democracy as one of the historical and contemporary values for competition law. Part II explores how to promote democracy in the enforcement of competition law, regardless of the values adopted in the formulation of that system's competition law. Part II also examines in detail the meaning of democracy in legislative action, agency enforcement, executive branch conduct, judicial review, private rights of actions (including collective actions), and in civil society. Part III provides a taxonomy and hypothetical example for democracy in antitrust, outlining how the roles of the different actors combine to form a virtuous feedback loop. In this feedback loop, explicit values are debated and enacted by the democratic branches of government and society. These democratically formulated values are then implemented by the more technocratic branches of government. All the while, each of the parts of the system provide feedback to the democratic branches to allow continued debate and revisions over time. Part IV concludes.

Ramsi Woodcock

The Efficient Queue: The Case against Dynamic Pricing

From surge pricing by Uber, to last-minute fare hikes by airlines, to paid fast lanes on highways, the use of price hikes to determine who should gain access to scarce resources has swept the business world in recent years, enabled by the easy access to information on what consumers are willing to pay, and the power of algorithms to act on that information, that characterize the information age. This practice, often euphemistically called dynamic pricing, has been defended on the ground that higher prices are required to equilibrate supply and demand. Lower prices, the argument goes, would lead to wasteful queuing. In fact, the same technological advances that have enabled dynamic pricing have also driven the cost of queuing nearly to zero, by allowing consumers to place orders online, which amounts to standing on instantaneously self-clearing queues. Firms engage in dynamic pricing not because the practice is better at rationing access to scarce resources, but because charging higher prices is more profitable. This in turn makes dynamic pricing of concern to antitrust law, which can respond by treating dynamic pricing as a form of monopolization prohibited by Section 2 of the Sherman Act.

Nicolo Zingales

Antitrust intent in an age of algorithmic nudging

This paper revisits the role of intent in abuse of dominance cases under EU competition law, in particular discussing its relevance in the context of algorithmic decisions that direct (“nudge”) consumers towards a particular provider of goods or services. To do so, it critically reviews the case-law, highlighting gaps and inconsistencies; and draws the systemic implications from the European Commission’s use of intent in the establishment of the self-favouring abuse formulated in its *Google Shopping* decision. It concludes suggesting that courts and competition authorities should only take into account a defendant’s subjective state of mind under a “qualified intent” test: a test requiring proof of immediate, substantial and foreseeable anticompetitive effects arising from a purported conduct. It also proposes a negligence-based “safe harbor”, in order to constrain the scope of application of the actionable duty of algorithmic self-scrutiny, which replicates the dynamics of a notice and takedown regime, while also promoting adherence to cross-industry best practices in algorithmic design.

Parallel Session Speakers

Mor Bakhoun and Francisco Beneke and Jörg Hoffmann

Digital Markets, Mobile Payment Systems and Development - Competition policy implications in developing countries in light of the EU experience

The digitization of economic activity has important socio-economic development implications and at the same time creates challenges for antitrust analysis. These implications and challenges have been met differently in jurisdictions around the world. In this paper we analyze the different experiences in the EU and developing countries, focusing on mobile payments. We find that this market exhibits special characteristics that need to be taken into account in the analysis of competition conditions. First, it is enabled by mobile telecommunications infrastructure and is offered by network operators, which causes competition in both markets

to be closely linked. Second, there are factors, such as the lack of interoperability and geographical reach that make network effects in this industry different from those present in other platforms. Third, since mobile payments in developing countries serve a niche—the population underserved by mainstream banking—the definition of the relevant market is not straightforward. We propose the criteria to be applied when making such definition. Finally, since mobile payments have associated financial services, there is an interaction between competition and financial stability that needs to be considered.

Konstantina Bania

The Effects of Broadcasting Digitization on EU Competition Law: A Tale of EU Copyright Policies

In recent years, buzzwords such as 'geo-blocking', 'online content portability', and 'passive sales' have been making rounds in EU policy circles. This is attributed to several initiatives the EU has undertaken in order to create a digital single market where barriers to the cross-border provision of content will no longer exist. The most notable of these initiatives is the 'Digital Single Market Strategy', an ambitious reform the objective of which is to ensure seamless access to online services. Pursuit of this objective is partly based on the European Commission's conviction that breaking down national frontiers will strengthen the competitiveness of the EU vis-à-vis third countries and appears to be largely driven by the assumption that limiting the exclusivity of copyright would stimulate competition in content markets. Against the background of EU competence limitations in the field of copyright, the unwillingness of the Member States to permit significant EU interference with national copyright policies, and the popularity of global US firms in European audiovisual markets, this paper will demonstrate that EU Competition Law has vainly been instrumentalized to complete a single market for copyright-protected broadcast content. Based on *developments*, such as the *Murphy* judgment, the *pay-TV* case, and the E-Commerce Sector Inquiry, which may either challenge widespread licensing practices or extend the ill-founded reasoning underlying past decisional practice to online transmissions; *sector-specific economics*; and *the case law* that deals with whether and if so, under what conditions competition enforcement can introduce limits to copyright protection, this study will show that, in an attempt to create a single market for content, the EU has unjustifiably interfered with copyright *and* that unjustified interference with copyright is simply inadequate to promote competition or market integration.

Peter Behrens

Globalization and the Protection of Competition in the EU: The Extraterritorial Application of EU Competition Rules

Wherever global market participants pursue strategies that undermine competition among them, more than one nation's market may be affected. Competition law, however, is still, in principle, a matter within the jurisdiction of nation states. In order to protect domestic competition against restraints originating from foreign territories, competition authorities and courts tend to apply their national competition rules "extraterritorially". The same applies to the EU. A State's jurisdiction to legislate (prescriptive jurisdiction), to adjudicate (curial jurisdiction) and to enforce (enforcement jurisdiction) may be based on either the territoriality principle or the personality principle. According to the fundamental holding of the PCIJ in the *Lotus* case (1927) States are left with a wide measure of discretion when it comes to the

extension of their jurisdiction to persons, property and acts outside their territory. According to the holding of the ICJ in the Barcelona Traction case (1970), a “genuine link” must be shown however. There is only one clear restriction imposed by international law: a State may not exercise its power in any form in the territory of another State. This limits States’ enforcement jurisdiction. With regard to competition law, States have initially limited the exercise of their jurisdiction to persons and restrictive practices located within their territory. The US Supreme Court held in *American Banana Co. and United Fruits Co.* (1909) that the prohibitions of the Sherman Act 1890 did not extend to acts done in foreign countries even though done by citizens of the US and injuriously affecting other citizens of the US. It was not before the famous *Alcoa* case of 1945 that Judge Learned Hand seized the opportunity to introduce the so-called “effects doctrine” which extends jurisdiction over persons and acts outside the national territory on the basis of anticompetitive effects within the territory. The ECJ has come to accept the “effects doctrine” only very recently in the *Intel* case (2017). Until then, the Court has developed other concepts in order to justify the extension of its jurisdiction to persons and acts outside the territory of the EU. The development may be divided into three phases. Phase 1 began with the *Dyestuffs* case of 1972 where the ECJ based its jurisdiction over foreign parent companies who had subsidiaries within the EU on the “single economic entity” doctrine. Phase 2 began with the *Wood pulp* case of 1988 where the ECJ expanded its extraterritorial jurisdiction by introducing the “implementation” doctrine. Phase 3 began 1999 with the merger case *Gencor* where the General Court tentatively established its jurisdiction on the basis of “immediate, substantial and foreseeable effects” of an exclusively foreign merger on the market structure within the EU. It was, however, only last year (2017) that the ECJ in its *Intel* judgment finally followed suit and accepted the “qualified effects doctrine” in order to exercise jurisdiction over exclusionary practices of a market dominating US based undertaking targeted at another US competitor. The “long arms” of US antitrust laws and EU competition rules are finally equally long!

Marco Botta and Federico Ghezzi

Protectionism and national champions v. European merger control; The possible spill-over effects of the draft ECN + Directive and FDI Regulation

Under Reg. 139/2004, a merger and acquisition has to be notified to the European Commission when it has a “Community dimension”, defined in accordance with the turnover thresholds indicated in Art. 1. However, such thresholds are particularly “high”; thus several concentrations that have a structural impact on the competition in the market are not notified to Brussels. In particular, when the merging parties generate 2/3 of their turnover in a single EU Member State, the concentration does not have a Community dimension; in such case, national merger control may be applicable. Unlike Art. 35 Reg. 1/2003, Reg. 139/2004 does not formally require the EU Member States to establish a national system of merger control enforced by a NCA. The lack of coordination and harmonization of the national systems of merger control leaves the door open to the protection of national champions and industrial policy interests. In particular, NCAs can be “more lenient” when they review concentrations involving major national champions, while they might be “stricter” in their assessment in case a major national firm is acquired by a foreign investor. Besides the NCA intervention under the national system of merger control, the national government can adopt ad-hoc rules to safeguard the interests

of a national champion facing financial troubles; rules which might encourage its acquisition by a national firm rather than by foreign investors. Under Art. 21 Reg. 139/2004, the EU Member States may take “appropriate measures to protect legitimate interests” in cases of concentrations of Community dimensions which fall within the jurisdiction of the European Commission. The paper aims at assessing whether and to what extent the current system of EU merger control should be reformed, in order to “isolate” the national systems of merger control from industrial policy considerations. In particular, the paper will assess the spill-over effects of draft ECN + Directive on the enforcement of the national systems of merger control. The draft Directive would only be applicable to cases of enforcement Art. 101-102 TFEU. Nevertheless, the Directive provisions concerning the NCA independence could have a positive spill over effect on national merger control; such institutional provisions, in fact, could strengthen the autonomy of the NCA when reviewing concentrations involving industrial policy considerations. Secondly, the paper will look at the draft EU Regulation on screening extra-EU FDIs. The legislation, currently pending for approval by the Council and the European Parliament, would introduce a system of cooperation between the EU Commission and the EU Member States in screening of incoming FDIs affecting public interest considerations. In particular, the Regulation would allow the EU Commission to monitor more closely the public interest screening by national authorities, by thus having a positive spill-over effect on the enforcement of the EU Merger Control.

Or Brook

Priority setting as a double-edged sword: how modernizations strengthen the role of non-competition interests in Article 101 TFEU

Regulation 1/2003 entrusted EU Commission and NCAs with powers to set their own enforcement priorities. Alongside the positive effects of the new enforcement regime lays a serious concern that non-competition interests could direct the choice of enforcement priorities. This could result in detrimental effects on the effectiveness, uniformity and legal certainty of the enforcement and goes against a “more economic approach” of EU competition law. Based on the coding of approximately 3,000 decisions decided by the Commission and NCAs of five Member States, this paper provides an empirical overview of the application of the priority setting powers. It shows that in the past the Commission actively incorporated non-competition interests within Article 101 TFEU. Since the modernisation, however, the Commission and NCAs have predominantly chosen cases that lack genuine non-competition interests. Consequently, they have essentially eliminated the debate on the role of public policy considerations in the enforcement of Article 101 TFEU. The paper argues that this development is a double-edged sword. Averting the debate on the role of non-competition interests under Article 101 TFEU and the legal scrutiny of such agreements have actually increased the role of noncompetition interests. In fact, undertakings can reasonably assume that restrictions of competition that produce non-competition benefits will not be subject to Article 101 TFEU scrutiny, even if the four conditions of Article 101(3) are not fulfilled.

Anca Chirita

Data-Driven Mergers under EU Competition Law

The conference paper is based on research on data-driven mergers, including but not limited to major conglomerate mergers involving large scale of individual user data, known as big data, by Facebook (WhatsApp), Microsoft (Yahoo!, Skype and LinkedIn), Google (Double Click) and so on. These mergers have been unconditionally cleared based on the traditional law and economic review of mergers, known as the significant impediment to effective competition. This legal test disregards public policy concerns, including the economics of privacy, i.e. data analytics; data sharing with third parties, e.g. publishers or retailers; and data selling. The paper draws on my previous research on the rise of big data and the loss of privacy which shed light inter alia on the ineffectiveness of the data, consumer and competition rules and the intrusive privacy policies of the various digital platforms. My new paper argues that the current assessment of mergers has to activate the public policy clause and to consider the implications of privacy following a merger. No merger should be cleared unconditionally if it involves a large amount of users' data. It arrives at the conclusion that the new data protection framework is insufficiently robust (the informed consent test with clear potential to share anonymised and aggregated data means that digital platforms are able to exploit data protection loopholes and abuse users' trust in digital platforms). In addition, the paper looks at the treatment of innovative digital platforms from the perspective of Schumpeterian economics and therefore identifies the fallacy of too great a reliance on ephemeral market shares. And the paper discusses more critically the expectation of a robust and coherent theory of harm to consumers in the context of digital markets.

Victoria Daskalova

Counterproductive Regulation? The EU's (mis)adventures in regulating Unfair Trading Practices in the Food Supply Chain

Ever since the 1970s, the grocery retail sector in the EU has experienced substantial concentration. Concentration has resulted in a change in the balance of power between retailers and producers. For decades already, EU food producers have complained about increasing concentration on the purchasing markets for food in Europe, aggressive bargaining on the part of retail chains, including ever increasing demands for low prices and dubious commercial practices such as unfair use of proprietary information and unilateral changes to contract terms. Complaints have resulted in much discussion both at the EU level and at the Member State level. Members of the European Parliament have pressed for enforcement of the competition rules and for reform of the Common Agricultural Policy (CAP). Additionally, a pan-European private self-regulatory initiative has been in place since 2013. However, where complainants have had the most success is at the national level. Making use of the exception in Art. 3(2) of Regulation 1/2003, EU Member States have introduced a variety of new laws, in particular stricter competition rules and rules on unfair B2B contractual practices, in order to regulate the exercise of buying power in the food supply chain. These laws deviate from 'mainstream' EU competition law and may even be seen as a form of protectionism-in-disguise. Today only 5 out of 28 Member States have no specific regulation, with some Member States having put several types of legislative instruments in place. This paper raises the question about the appropriate role of EU competition law in addressing concerns with unfair trading practices

(UTPs) in the food supply chain in the context of an integrated market. It will firstly explain the background to the problem and what the role of EU competition law has been until now. It will map the developments at the Member State level and will distinguish three main approaches: a stricter competition law approach, a stricter contract law approach, and a private regulatory approach. Next, the paper will discuss some of the curious side effects which have surfaced in enforcing stricter national rules. By referring to Grabosky's typology of counterproductive regulation (1995), the paper will shed light on some of the important yet overlooked perverse side effects which arise when regulation of buyer power or UTPs occurs at the national level in the context of an integrated market like the EU. The paper concludes with the argument that, although the key to UTP regulation may not be exclusively tied to competition law, EU competition law should perhaps play a more prominent role in regulating the conduct of powerful buyers operating in an integrated market.

Francesco Ducci

Rule of Reason Analysis in Two-Sided Markets

It is now conventional wisdom that the economics of two-sided markets have important implications for the application of competition laws. The paper suggests that there is however an important potential mismatch between the economic consequences and doctrinal impact stemming from the two-sided nature of a market. Even once the fallacy of applying a single-sided approach is avoided, there remains a fundamental question as to how to correctly incorporate the specific features of two-sided markets into legal doctrines. The paper uses the question of market definition and the balancing of anticompetitive and procompetitive effects to show how such a mismatch can occur. In particular, it compares different procedural routes that have been applied across jurisdictions under a rule of reason framework, to show how the boundaries of the relevant market have obtained the undue role of determining the allowed welfare trade-offs and burdens of proof in platform cases. The paper concludes that a correct balancing framework should be independent from how market definition is carried out and should remain substantially equivalent in platform and non-platform cases.

Juliana Domingues

Big Data and the Brazilian Antitrust Law: Management and Competence

Several papers were produced since the beginning of this century, and we may find legitimate arguments for the required big data secrecy (mainly related to personal privacy). Even though, when we put this phenomenon in the center of the antitrust analysis, the profitability of the Big data – and also its potential effect - is still something not clear. Many different questions emerge when we are also based on the antitrust theory, and we still did not find any solid answers from the case law, and not only in Brazil. In the light of the antitrust law, the analysis of the treatment applied to personal data in Brazil becomes salutary for a better understanding of the big data concerns. For this purpose, we have some Bill proposals from the Brazilian legislative perspective. Thus, this research is also trying to point out the conceptual and legal clipping that the treatment of the big data (and the personal data) is currently receiving in Brazil. In this sense, some recent Brazilian cases may also illustrate how this abstract painting is hard to figure out. The fact that there is still no law in Brazil in which the authorities can be based on to regulate at least the collection, storage, processing, and disclosure of personal data

is just the tip of the iceberg. The traditional and mostly static scheme of antitrust analysis should be reviewed and calibrated to scrutinize issues involving innovation markets and big data. The inclusion of the competitive aspects that covers the big data are still incipient in Brazil: no Brazilian legislation regulates the way in which the processing of personal data will be given. The data market is becoming increasingly prominent in all fronts, and it is impossible to conceive the economic activities dissociated from the treatment and analysis of these data. Because of this, the Brazilian antitrust authority cannot ignore this reality. It is essential to develop methodologies capable of analyzing the financial and economic impact of data processing in companies that undergo its regulation. It is possible to conclude that the merger filing assessment between a technology company and a Brazilian competitor should take into account not only the customer portfolio and market share of each one but also the potential level of development of its algorithms and the impact of their performance when they concentrate. Big data (or access to it) is sometimes the most critical asset of the companies. A suggestion of methodology to be applied to these new markets would, itself, merit the treatment through independent research, due to the inherent complexity of the subject. The Brazilian antitrust authority does not hold legal competence to regulate the big data. However, although it does not have the natural power to do so, it can and should be cautious advocating about the effects of this phenomenon (the big data), and its abusive use by dominant economic agents. It is in this sense that the authorities, such as CADE, should carefully evaluate sectors of the economy that somehow deal with the big data (either as an input, or as a vehicle, or whatever) in order to avoid the behavior of dominant players that artificially create barriers to the use of the big data by its competitors, or even through acquisitions or investments, to eliminate or deter entry into innovation markets.

Magali Eben

Market Definition and the Mystery of the Candidate Market: The Quest to Find the Focal 'Product'

Market definition is an essential component of competition law investigations. The process of market definition starts with an initial, provisional market, called the 'candidate market'. This market is 'candidate' because it is a preliminary, but plausible relevant antitrust market, taken as a starting point for the market definition exercise. The candidate market should be drawn as narrowly as possible (in line with smallest market principle), generally containing only the focal product of the investigation. If there are multiple focal products, there may be multiple candidate markets. It is the substitutes to this 'focal product' that will be included in the market, in order to arrive at the final 'relevant market'. The choice of focal product significantly influences the resulting relevant market. As *Europe Economics* argue in their report on market definition in the media sector, prepared for the European Commission: '(...) some of the problems found in media market definition would have been mitigated had market definition started with a clear specification of the relevant services.' It is vital, therefore, to know *what the focal product is*. Identifying the focal product is important in all investigations. It has particular consequences, however, in so-called 'dynamic' industries, where companies, products, and industries are continuously changing and competing for that 'new' thing which will give them an edge. In the context of online services, a particular issue can emerge which makes it that much more important to pay careful attention to the focal product. We will call this the

'product-or-feature problem'. This problem occurs when a product consists of multiple components, which could (potentially) be offered separately. The question then is whether it is the 'bundle' which is the focal product, or whether the individual components themselves are focal products. To answer this, one has determine whether these components are features, or products. The product-or-feature problem can arise in many industries, both 'online' and 'offline'. After all, almost any product can be broken down into smaller parts: a coat's buttons, a desk's drawers, a car's tyres, a book's chapters, and so on. It is particularly pressing, however, in industries characterised by rapid innovation, as is the case for online services. Online services are frequently bundled and unbundled, split and reassembled, with the same components in different ways, or with totally new components. This dynamism means that it is not easy to pinpoint when the combination of several services means a new product has arisen. This paper attempts to explain the importance of correctly identifying the focal product, and provide some guidance as to how the product-or-feature problem could be addressed in practice. A topical illustration of this issue are the statements made by Facebook CEO Zuckerberg in his hearing before the United States Senate's Commerce and Judiciary committees. When he was asked who his biggest competitor is, Zuckerberg tried to argue that his company faced competition from various companies, because Facebook "overlap[s] with these in different ways". He argued that Facebook "provide[s] a number of different services." This assertion goes to the heart of the issue in this paper: what services the company provides. If Zuckerberg is correct in asserting that Facebook is a platform offering multiple services, then there may be different focal products, and ultimately different markets with different competitors. For example, if the instant messaging service offered by Facebook is a distinct service (and thus focal product), it may be competing with Skype, Google Voice, and others. If its 'marketplace' (where individuals can place ads) is a focal product, it may be competing with the likes of Craigslist or Gumtree. These are only two of multiple components of the Facebook platform. Many more markets could be defined. If, on the other hand, the product at hand is *the whole of the platform*, including all of its services, it may indeed be difficult to find substitutes to include in the market. In that case, Senator Lindsey Graham's intimation that Facebook is a 'monopoly' may well be true. The paper uses the example of Facebook to illustrate the issues and proposals discussed.

Valeria Falce

Sui generis right on data and competition law in the data driven economy: Is the abuse of right doctrine a possible alley?

Machine-generated data and automated data collection play a crucial role in the Data Era, thus urging a fresh analysis on the existing European regulatory framework with the view either to confirm its consistency or to suggest some adjustments. Moving from such request, in the following it will be verified whether the existence and exercise of the rights on data granted by Directive 96/9/CE may erect excessive barriers to the entry of new players in those sectors characterized by the presence of few undertakings which can rely on considerable information sources and on the most advanced technologies, and, if so, whether and to which extent the abuse of right doctrine may limit the exploitation of databases rights beyond the scope of the European architecture.

Xiaomin Fang

Merger Control in China under the Influence of Globalization

The global economy increases possibilities for cross board consequences of M&A practices. During introducing the doctrine of “extritoriality” in §2 of the Chinese Antimonopoly Law (AML) we see challenges to the same M&A practices by Chinese jurisdiction and other jurisdictions. There is much convergence but also a margin of divergence between the Chinese merger control law as well as its enforcement and those of other countries. Several cases indicate that MOFCOM maintains its independence of authority as well as a certain level of global coordination. There are a couple of reasons to expect, that China would like to contribute proper standard of its own for the global merger control. While some rules in the Chinese AML directly show the consideration on the influence of globalization from the legislator, for instance the “extritoriality” clause, the threshold of merger filing combining the global turnover with the domestic turnover etc., other several regulations such as the multiple goals of the merger control, the vague standard for merger review, the social public interest as the main exemption issue, weak requirement of due process etc. give the authorities more space for a flexible interpretation and enforcement of the AML, which also makes significant impact on the balance of competition concern and international competitiveness of the national economy in a merger case in the global context. Nowadays China benefits from an open and competitive global economy rather than fosters inclusive growth in a context of blocked markets. The global standard with core value “competitive neutrality” makes big challenge for Chinese merger control regime, which already get more and more attentions in academic research, policy making and business compliance. “Fair Competition Review” and “Reform of SOEs” are in a real process, though it still takes a long way to establish own reasonable standard and find out how to equally apply the merger control law (AML) to the all market subjects. The trend is clearly that the global economy with widely recognized standard also for the across-the-board merger control promotes the market-oriented reform in China and increases the development of Chinese merger control law and practices.

Robin Feldman and Nick Thieme

Competition at the Dawn of Artificial Intelligence

AI is in a state of perpetual and increasing revolution, with the scale of each change fully eclipsing the last. Although truly sentient machines are science fiction, experts believe society is on the verge of a technological tipping point, making future advancements unrecognizable by today’s standards. This transition may shortly resemble the shift from analog to digital technology—or from personal computing to the Internet—in which, both actively and passively, consciously and unconsciously, willingly and unwillingly, no aspect of our daily lives remains untouched. As we navigate this extraordinary gateway, what types of intellectual property policies will foster the innovation that secures our place at the head of the revolution? And more specifically, how should the United States protect its competitiveness?

At the heart of this issue lies the question of how to manage forms of invention in which a computer participates, or even dominates, the inventive process. The question can be thought of as a matching problem, trying to connect the entity that invented a product, on one side, with the proper allocation of inventor rights on the other. Within the theoretical framework of the patent system, the aim of this matching problem is to incentivize innovation. Specifically, if

the group of potential inventors includes both humans and computers, any invention must be either 1) created by humans alone, 2) invented in tandem by humans and computers, 3) invented by computers alone, or 4) “invented” by no neither. The paper examines each aspect of the matching equation, recommending a pathway for optimizing innovation and competition.

Pinelopi-Alexia Giosa

Damages Claims for Bid Rigging in Europe: A Storm in a Tea Cup?

The effective enforcement of Article 101 TFEU -which prohibits anti-competitive agreements between rival businesses- ensures the achievement of the goals of workable competition and has a direct impact on the functioning of the internal market. In this context, the promotion of private enforcement of EU competition law by public authorities in the EU Member States is of great significance, especially in a time of economic crisis in which attempts are made to reduce public expenditure and secure budget savings. Hence, any shortcomings in the effective enforcement of EU competition law should be promptly identified and addressed. This paper investigates the reasons why contracting authorities are discouraged from lodging actions for damages against tenderers engaged in bid rigging and other collusive practices and whether the new EU Damages Directive has managed to overcome these problems and bring advantages over the longstanding damages claims based on tort law. As it will be proved, the steps that the new EU Damages Directive has taken are not adequate to boost the number of damage litigations initiated by public contracting authorities. The paper therefore makes a number of recommendations and explores whether there are alternative remedies to the standard tort law litigation, which would enable contracting authorities to access compensation more easily.

Stefan Holzweber

Tying and Bundling in the Digital Era

Hardly any doctrine of competition law was modified more significantly by digitization than tying and bundling. While it was originally developed for the combined sale of two products, this concept was applied to cases where consumers were nudged to demand supplementary products – like software integration or the prioritized display in search engine rankings. Based on a revised economic theory of leveraging, this paper seeks to shed some light on the legal framework the European Commission applied in the Google Shopping Case.

Maria Ioannidou

“Digital Agoraphobia”: an enforcement perspective

Technological advancements have radically transformed consumers’ choice. They have empowered consumers. Yet, simultaneously, they have created new causes for consumer vulnerabilities and undermined consumers’ trust. This paper advances the claim that it is time to re-think consumer participation in digital markets in order to tackle the emerging problem of “digital agoraphobia”. “Digital agoraphobia” connotes consumers’ fear, inability and lack of trust when engaging in various transactions on digital marketplaces. Despite the very substantial benefits of digital markets, this paper posits that in the light of their particular characteristics, consumer transactions entail a number of risks, which in turn complicate the exercise of consumer choice. Three main types of such constraints are identified. The first type

is associated with the – seemingly – enhanced choice in online markets (“enhanced” choice constraints), whereas the second with the rather predominant model of free choice (“free” choice constraints). Finally, the third type of constraints relates to the increased delegation of choice making powers to digital assistants (“delegated” choice constraints). In light of these three main types of constraints on consumer choice, the paper argues that it is time to reconceptualise consumer participation in retail digital markets and revise the enforcement tools.

Galyna Kostiukevych

Cartels in chains: tackling anticompetitive conduct in global value chains through public enforcement of competition laws

In today’s globalized world, products are not manufactured in one single country. Before a finished product reaches a consumer, its parts are made in different countries and several stages of its transformation take place around the world. This helps producers specialize and thus achieve economies of scale. However, cross-border manufacturing processes also face some challenges. The bigger the number of participants who are involved in the production process, the higher the risk that the process can be somehow disrupted. For instance, if producers of a component decide to fix prices, companies on the downstream markets will be affected. In this case the price rises and a direct purchaser faces a difficult choice – (1) either to pass on the costs further to the downstream company, (2) or to lose a part of their profit, (3) or eventually to challenge the cartelists. As there is a high level of interdependence within global value chains, the third option could be disruptive for the production process. That is why the companies very often choose to pass on the costs to their purchaser who in turn passes on the costs further. As a result, consumers of the final product pay a higher price. But which competition authority can take action? The one in the territory where the anticompetitive conduct occurs or the one where it produces effects? This article focuses on how such cartels could be challenged and analyses two questions. First, how the jurisdiction could be established in cases of public enforcement. Second, how the fines should be calculated when finished products contain a cartelized component.

Björn Lundqvist

Standardization for the Digital Economy: The Issue of Interoperability v. Industrial Policy

The article attempts to show and discuss the opposing incentives for both industry-players and political leaders of creating global interoperability for the data-driven markets, while trying to get “their” technology inside the technical standards that will de jure or de facto become the relevant standards. The article specifically focuses on the application of competition law vis-à-vis the firms included in the standardization of the Digital Economy. The article concludes that general competition law may be applicable to access technical standards, ecosystems, or digital platforms when system leaders control these, or when joint standard-setting in consortia has been conducted to exclude or obstruct access to relevant markets. The main issue under competition law in the Data Economy, in its current development, is to create a levelled playing field by trying to facilitate the implementation of Internet of Things.

Maria Fernanda Caporale Madi*Vertical agreements in online markets and the new regulatory dilemma*

Vertical agreements, both in online and offline markets, have always been a paradoxical topic and constitutes one of the most dynamic disputes for antitrust enforcement. The reason for that is the fact that those alliances among companies can bring mixed effects on the competition process. On one hand they carry important economic efficiencies in the shape of cost savings to companies. On the other hand, they also bring about several anticompetitive concerns, such as risk of collusion or market foreclosure (in a form of selective distribution, geo-blocking, among others). These puzzled characteristics justify conflicting positions when it comes to their regulation. Over the decades, both the US and the EU have become more flexible towards vertical agreements and accepted that those contractual strategies can bring pro-competitive effects to markets rather than only anticompetitive concerns. The question raised in this paper is whether this shift to the application of the rule of reason or the sole ex-post control of vertical agreements should remain the same with the raise of new types of contractual arrangements in online markets. To answer to this question the paper firstly presents the economic analysis of vertical agreements. Then it describes how different legal systems (US and EU) have been dealing with these issues. Finally, the paper gives an illustrative example of vertical restraints in online market recently judged by the European Court of Justice, the Coty Case. The conclusion indicates that although authorities around the world have been trying to figure out the best way of adapting (or not) their legislation or case law to this new digital reality, there is still no right answer to the problem and further research is needed in this regard.

Beata Mäihäniemi*Lessons from the Recent Commission's Decision on Google. To Favour Oneself or Not, That is the Question*

The paper in question analyses the decision of the European Commission on Google Search that has been published in full. It is especially concerned with the nature of the abuse as a result of algorithmic bias, arguing that an algorithm can never fully be neutral in its design. What are the consequences of it for search bias? The paper also decodes the theory of harm applied by the European Commission as a hybrid of leveraging and discrimination, one that is not necessary novel. Finally, the paper aims at offering four criteria for the application of this hybrid theory of exclusionary discrimination. These are: appreciable effect of the abuse on the adjacent market, potential foreclosure, harm to innovation, as well as no existence of less distortive alternatives for the conduct.

Klaudia Majcher*The concept of coherence: theorizing about the intersections between competition and data protection law*

Constructing synergies between EU competition and data protection law in the digital context has been the subject of intense debates in the recent EU legal discourse. Although discussions abound, what seems absent is a comprehensively formulated theoretical grounding that could both justify the attempts to render the two legal areas more synergetic and systematize the arguments. The article undertakes to address this theory-oriented conundrum by placing at the

core of the analysis the concept of *coherence*, to which the European Data Protection Supervisor makes semantic references in his efforts to strengthen the relations between competition and data protection law. To this objective, the article largely relies on – but also develops – the expositions of coherence in legal theory. As showed in the analysis, following legal theory would imply that the rules of competition and data protection could be referred to as coherent if they were non-contradictory (consistent) *and* reached an even higher level of integration by serving common values or principles. Arguably, values such as fairness, market integration, or innovation, could be used to test the existence of coherence in this context. If established, such coherence between the two legal fields would entail that a new type, namely sectional coherence, should be added to the dichotomous distinction between local coherence (within one legal field) and global coherence (within the entire legal system) that currently exists in legal theory. Having asserted that coherence is a gradual concept, the article also suggests a set of indicators of different degrees of coherence, such as value attribution, value construction, and value qualification, which could be used in providing coherence-centred interpretations of competition and data protection rules. Finally, the analysis scrutinizes the normative force of the coherence ideal and the extent to which the argument from coherence could be decisive in interpreting relevant legal rules in the EU.

Daniel Mândrescu

Applying (EU) competition law to online platforms: Reflections on the definition of the relevant market

Future Art. 102 TFEU cases concerning online platforms will require revisiting the process of the market definition in light of the complexities that are likely to arise due to the two- or multisided nature of such platforms. This distinctive nature will firstly require determining the number of relevant markets that need to be defined in each case before the scope of such markets can be accurately delineated. Unfortunately, however, the current approaches to this first, new step, of the market definition process are incompatible with business reality due to their overly static and specific nature. Therefore this article provides an alternative approach to this complexity, which is better suited to guarantee the trueness of the market definition findings. Accordingly, this article indicates that the number of relevant markets in each case should be determined based on the typology of the interactions facilitated by the online platform and the degree of substitutability of such online platform with other non-platform undertakings from the perspective of its customers groups. This approach allows reaching findings of market power in a manner that adequately reflects the business reality of such platforms in the digital economy and the degree of competitive pressure they may experience in practice.

Francisco Marcos

Cosmetic antitrust and procrastination in the enforcement of antitrust rules

In the last three decades different forces have influenced and lead to the extensive adoption of competition laws in many countries. Generally, this spread has been welcomed as a positive phenomenon, evidencing the recognition of the beneficial effects of markets and competition for economic growth and consumer welfare. However, in many cases, enforcement and effectiveness of the new competition rules has been rather limited. Even in more mature

competition law systems, there is evidence of occasional stagnation and hesitation in the enforcement of the rules playing havoc with their goal of deterring anticompetitive behavior and enhancing consumer welfare. This paper analyzes these developments as signs of the same conundrum regarding the essence of competition law systems. Both new and established systems face a challenge in enforcing and making competition rules effective and they confront powerful forces opposing that task. Although the causes and manifestations may adopt disparate shapes in each of them, this paper examines the common features that can be identified and argues that the ultimate causes and explanations of such negative patterns are related. Competition rules introduce broad commands that may be subject to different interpretations and the discretionary powers of competition authorities may be influenced by considerations of convenience and political opportunity.

Antonio Robles Martin-Laborda

Harmonisation and Divergence in European Tort Law: Causation and Fault in Antitrust Damages

According to the principle of procedural autonomy, in the absence of Community rules it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the right to claim compensation for antitrust damages, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed. Although the characteristics of tort law vary from one legal order to another, it features a common basic structure, establishing liability when –at least- three factors are present: (a) wrongful conduct, (b) damage, and (c) a link between the conduct and the damage. In particular, the link between the conduct and the harm requires the existence of a causal relation; in addition, besides the objective element of causality, many jurisdictions employ a subjective criterion to further exclude liability: lack of fault or negligence. Causation and fault are, therefore, legal concepts primarily governed by national law employed to exclude liability, whose application in concrete cases may lead to diverging results given the significant specificities of Member States' tort law. The Directive 2014/104/EU does not deal directly with the requirements of the link between an infringement of competition law and a particular harm, which are therefore mostly governed by the national rules of the Member States. However, partial harmonization in this field also occurs passively through the principles of effectiveness and equivalence as interpreted by the case-law of the Court of Justice. This paper tries to determine the impact of the principle of effectiveness, employed as an elimination rule and as a hermeneutical principle, on the national rules on causation and fault in antitrust damages cases.

Marek Martyniszyn

Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward

A globalised economy means that, when assessing anticompetitive conduct, one must consider the ways that entities in one jurisdiction cause economic harm in another. Transnational anticompetitive conduct leads to a transfer of wealth from the affected state to the state hosting violators. Yet regulation of such activities is attempted at the domestic, not the international level, except for some instances of regional integration. In the latter cases, the issue is addressed insofar as such approaches provide for effective enforcement of competition law, and generally only within the given group of countries. This article analyses the current

regulatory regime governing anticompetitive conduct, showing that it is composed of a patchwork of rules and instruments of diverse origin and nature. These are both hard and soft laws. Some are domestic, others are international. The analysis identifies some of the key gaps within this regulatory framework which currently allows for enforcement lacunae, providing room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. Therefore, this article challenges the dominant paradigm of progress in dealing with such violations by showing that the current regime *de facto* works for the select few, principally developed states, but offers little recourse to other countries affected by transnational violations of competition law. In doing so, it identifies the issue of wealth transfer, which should inform any approaches to rectifying violations. The current system of competition law enforcement requires a realignment to recognize and overcome some of its pitfalls. This article proceeds with a series of clear policy recommendations, addressed principally to competition agencies and their respective constituencies. The proposals focus exclusively on pursuing international cartels, which constitute the most rampant example of competition law violation and which are virtually universally condemned. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.

Alexandra Mikroulea

Non-Performing Loans, Electronic Platforms and Competition Law

Pursuant to Section 3 (Safeguarding of the financial stability) of the Memorandum of Understanding, which was attached to the Financial Assistance Facility Agreement entered into, among others, by the Hellenic Republic, the European Commission and the Bank of Greece on the 19th of August 2015, the Hellenic Republic undertook the commitment, among others, to develop a credible strategy for addressing the issue of non-performing exposures that aims to minimize implementation time and the use of capital resources, and draws on the expertise of external consultants for both strategy development and implementation. In line with this commitment, law 4354/2015 on the management of non-performing exposures was enacted as subsequently amended and in force, liberalizing the servicing of non-performing loans (NPLs), providing for a legal framework for the assignment of management to licensed - Servicers and the sale of NPLs to potential investors and allowing for the establishment of a strictly regulated secondary NPLs market. Several alternatives are being considered to avoid the negative effects of the NPLs. Managing the NPLs is the most important challenge that the banking system faces in the period ahead. The reduction of the high NPE ratio of the Greek banks is a key requirement for gradually restoring an adequate and efficient supply of credit to the Greek economy and for achieving sustained growth. Towards this direction, commitments of the Greek banks vis-à-vis the prudential regulator were introduced to meet specific operational

targets with regard to NPLs. In this context, the Greek banks have set up comprehensive strategies, including detailed operational measures and actions, prioritized and scheduled, as well as numerical targets to significantly reduce their NPLs over the coming years. The Banks decided, among others, to manage a selected pool of common non-performing loans of the four systemic Greek Banks under a common management and servicing framework. The objective of such collaboration is to maximize recoveries of the portfolio, reduce NPLs exposure, facilitate sustainability of Greek undertakings and enable asset deconsolidation. In order to reach such objectives, the initiative relies on selecting a third-party Servicer capable of managing the portfolio on an independent basis, through a pre-defined set of rules fair to all Banks. A fair treatment of each bank will be assured (each Bank will benefit at least what it could have obtained in the liquidation scenario), while maximizing recoveries of NPLs at portfolio level.

Ittai Paldor

Cross Ownership By Institutional Investors – Is There Really Anything to Fear? A Theory of ‘Unilateral Coordination’

Horizontal shareholding by institutional investors has recently become the ‘hot-button’ issue of both corporate law and antitrust law. Recent scholarly work has argued that the phenomenon of several institutional investors, each of whom is invested in firms that compete in oligopolistic product markets, may be detrimental to competition. Importantly, the argument is that this is the case even if the institutional investors have no control over the firms in which they invest, the investment is completely passive, and the (passive) investors do not coordinate in any way. This view has not only gained scholarly support, but has apparently persuaded enforcement agencies, which have reportedly begun to deal with instances of the phenomenon. The current Paper challenges this newly-developed argument, rapidly gaining acceptance. The Paper argues that horizontal shareholding, or common ownership of firms by institutional investors, is – absent explicit communication – competitively benign. The theoretical argument is bolstered by very recent empirical findings. Enforcement efforts should be abandoned as quickly as they were initiated.

Argyri Panezi

Digitization rush: Claiming new territories in the digital space: A story on Google, French nationalism, and the new frontiers for competition over digitized resources

This paper portrays a competitive phenomenon that I identify as *Digitization Rush*, a rush whereby various stakeholders aspire to extract the value of digitized resources - mainly content and data - and ultimately gain significant competitive advantage in many aspects, including in machine learning applications. For the purposes of the paper digitization is defined as the process required to convert content from a tangible print form into a digital representation. Thus, this paper focuses particularly on the digitization of *books* and other print works sourced by some of the most important libraries in the western world. It presents a number of mass digitization projects that started in both sides of the Atlantic and particularly focus on the renowned Google Books litigation and the various stakeholders involved - Amazon, Microsoft, Yahoo, libraries and others, and also on the competing story of *Gallica*, the French national initiative. In the context of this competitive phenomenon, that results in winners and losers

both in the short run and in the long run, the paper poses a number of questions refocusing on the outcome of the Google Books litigation: Have property rights over what is now an important corpus of digitized books changed hands in the context of the litigation? What is the advantage that an effectively exclusive ownership over the digitized corpus provides to Google? How is this advantage expected to play out, and in which domains and markets beyond the book market? Does a distinct national initiative aim at fostering competition at a transnational level?

Mark Patterson

Modularity, Interfaces, and Competition in Technology Markets

Modularity has become an increasingly important issue in competition law. The issue of modularity, or interoperability, arises most often when a firm with control over an interface seeks to deny competitors the ability to “connect” to it. The typical situation is one of a firm that is dominant in the market for products on one side of the interface but that faces competition or potential competition on the other side. In both cases and commentary, the legal approach to these denials of access is typically to balance the costs of exclusion at a particular interface against the benefits of integration at that interface. This contrasts dramatically with the design literature on modularity, which typically emphasizes the goal of maximizing modularity. Although modularity always has costs and benefits, the design problem is one of choosing the interface that provides the best balance. This paper argues that the law similarly should not ask only whether, given a particular interface, denial of access to that interface is anticompetitive. It is also important to determine whether the choice among possible interfaces was made in such a way as to influence anticompetitively the exclusion-integration balance. Admittedly, this is a challenging task, but it is necessary, particularly in the tech industry, where many competition cases now arise.

Urška Petrovcic

The Unsettled Role of EU Competition Law in Addressing Injunctions for Standard-Essential Patents

Injunctions for standard-essential patents (SEPs) have been at the center of the antitrust debate for more than a decade. Yet the limits that EU competition law poses on the SEP holder’s right to request an injunction remain unsettled. In 2015, the CJEU said that an SEP holder’s request for an injunction shall not trigger a liability under Article 102 TFEU if, before requesting an injunction, the SEP holder satisfied specific requirements. However, courts in member states of the European Union have adopted divergent interpretations of those requirements. Consequently, an SEP holder’s request for an injunction might trigger a liability under Article 102 TFEU in one member state but be perfectly legal in a different state. In November 2017, the European Commission issued a *Communication on SEPs* that sought to reduce the divergences across member states in addressing the SEP holder’s use of injunctions. However, because the *Communication* provides no guidance for the interpretation of Article 102 TFEU, it might have little ability to mitigate the differences in the antitrust scrutiny that arose after *Huawei*. Therefore, even after a long-lasting debate, the circumstances in which an SEP holder’s request for an injunction violates Article 102 TFEU remain yet to be defined.

Petra Pipková

The Harm is Higher than Zero: the “new” presumption that cartels cause harm in the EU

The contribution analyses the notion of the presumption of harm caused by cartels. It tries to explain the roots and reasons for the presumption of harm caused by cartels. It looks, especially, at what it means for the victims of cartels (alleviation of their burden of proof) and for the cartel members (imposition of a burden of proof). The contribution attempts at defining the scope of application of the presumption and to set its limits. It also presents the benefits of the presumption of harm caused by cartels in terms of overcoming the difficulties of determining the amount of cartel overcharge by cartel victims.

Barry Rodger

UK Competition Law Post-Brexit: Divergence from EU Law, Re-nationalisation and Re-politicisation?

2018 marks an important period to consider and reflect on the development of competition law in a particular national context. Despite the increasing significance of the global economy and international convergence of competition law norms, and the importance of the integrated regional EU model of competition law harmonisation and co-operation, the domestic UK competition rules highlight the ongoing significance and role for national competition rules and systems in promoting/developing/protecting domestic economies. 2018 is the 20th anniversary of the radical modernisation of UK competition law starting with the Competition Act 1998, and is also the final year before the anticipated exit of the UK from the European Union, and consequently the EU competition law regime and network. This is a timely setting to consider the potential implications of the re-nationalisation of UK competition law as the influence of EU law and policy network wanes. Accordingly, this paper will explore the following key themes that face a post-Brexit UK competition law and policy system :-1) review the consistency requirement and the extent to which UK competition law and policy will continue to be guided by CJEU jurisprudence; and in that context the likely scope for development of a differentiated approach to unilateral conduct; 2) prioritisation of resources and the extent to which the Competition and Markets Authority (‘CMA’ the UK competition authority) will (continue to) prioritise enforcement resources on resale price maintenance and infringements targeted at the publicly-funded NHS. Consistency and prioritisation are the key themes, but it is also hoped that the paper will have the space and scope to explore 3) the ongoing debate about the re-politicisation of UK merger control and the potential adoption of new mechanisms to review mergers affecting strategic national interests; 4) the future of state aid regulation in the UK.

Catalin Rusu

The Challenges of Boosting the EU Antitrust Domestic Enforcement: A Reframed Formula?

In March 2017, the European Commission issued a Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the EU Internal Market. This legislative proposal follows a Commission Communication and a public consultation, focused on boosting the national competition authorities’ institutional positioning and the investigative, decision-making, and sanctioning powers allotted to them in relation to their enforcement activities. This paper aims to identify the concrete context in which boosting the EU antitrust enforcement performed by the national

competition authorities may be placed. It discusses the status quo as far as the procedural and institutional autonomy of the Member States is concerned, in order to assess the type of intervention which would be best suited for achieving the goal of boosting antitrust enforcement. The paper further evaluates whether the proposed enforcement upgrades embody the correct follow-through of the (more or less) recent (case-law) developments in the field. It also discusses certain residual barriers that may prevent the NCAs from becoming truly effective enforcers of the EU antitrust rules. To this end, this paper draws conclusions which hopefully shed light on whether the enforcement upgrades proposed by the Commission are capable of, and sufficient for aiding the goal of more resource-efficient, uniform, coherent, and forceful enforcement of the EU antitrust rules.

Piotr Semeniuk

Does EU competition law favor particular countries?

This paper is an academic version of a study prepared by the author for the “Pomyśl o Przyszłości” (Think about the Future) foundation in 2017. The study was submitted by the foundation to the Polish government. It was handed over by the Polish deputy prime minister Mateusz Morawiecki (current Poland’s prime minister) to the European Commission’s Commissioner for Competition, Margrethe Vestager during a meeting in which the report was discussed between the two politicians. This was followed by two discussion sessions (moderated by the author) between Directorate-General for Competition’s (DG COMP) and the Polish Government’s representatives which took place in second half of 2017. The author presented the study in June 2016 together with then deputy prime minister Mateusz Morawiecki to eight EU ministers of economy during the Visegrad group’s (countries of Middle and Eastern Europe) Warsaw summit in June 2017. It was also presented and discussed in the European Parliament by a couple of Polish MPs. In general, the study brought about a discussion in several EU countries (Poland especially) on whether and to which extent the EU DG COMP enforcement priorities might be affected by national self-interest of several (mainly western, such as Germany and France) EU member states. The study and the draft paper below discusses a potential “national” capture of a transnational competition authority. Therefore, it seems to fit the 2018 ASCOLA conference. After all, this year’s conference is dedicated i.a. to “effects of nationalism on competition law”. A quantitative analysis of the decisions of DG COMP points to the possibility of unequal treatment of the “old” Member States (which acceded to the Community before 2004) and the countries of the “new” EU as well as firms originating from these countries. The differentiation concerns the application of the EU rules on state aid and anti-monopoly law (prohibiting abuse of a dominant position). Companies from the countries which joined the EU after 2004 seem to be trying to use EU anti-monopoly law to stop competitors from “abusing their dominant position” more than do companies from the old EU. DG COMP, however, rejects their complaints. Taking the size of the economies of the Member States into account, the number of decisions finding an abuse of a dominant position by firms from the new Union, and the fines imposed, appears to be disproportionate to the number of decisions made against companies from the old EU. Since 2004, DG COMP has never sided with a company from a new member state where the case was about abuses by a firm from the old EU. The countries of the old EU seem to be given preference when it comes to the EU’s state aid policy, the responsibility of the European Commission’s DG COMP. Subsidies

given by the old EU states go unchallenged by the Commission significantly more often than in the case of the new EU countries – both in terms of sums involved and the number of the Commission’s recovery decisions. Where the Commission does challenge aid given by the old EU states, its decisions are enforced less rigorously than against new EU countries and the subsidies challenged by the Commission are less efficiently recovered. In addition, for reasons that are not clear, the Commission seems to apply a unique legal instrument, an injunction – an order suspending aid – only to the new countries of the EU.

Toshiaki Takigawa

Super Platforms, Big Data, and the Competition Law: The Japanese Approach in Contrast with the US and the EU

This article examines antitrust/competition issues on super-platforms equipped with big-data, focusing on online platforms which work as intermediators between two-sided (or multi-sided) markets. In order to shed a new light on this hot topic, this article highlights recent initiatives by the Japanese competition agency (Fair Trade Commission: JFTC), as compared to those by the US and EU agencies. First examined is whether competition among platforms would result in select few super-platforms with market power. Market power is shown to have been facilitated by two forces: first, network effects, which are augmented through looping between two-tier markets; second, artificial intelligence (AI) in the form of machine-learning, with which only a few super-platforms are capable of efficiently analyzing big-data. On the other hand, big data itself have not deterred new entrants equipped with new value-creating idea. Each online market, therefore, needs to be individually assessed for determining market power. Next, even when market power is identified, competition agencies may not order super-platforms to change their conduct, solely based on their market power, but are required to prove that they have excluded rivals through abusive methods, the determination of which necessitates balancing exclusionary-effects against efficiency-effects. Following these observations, this article, before addressing abuse-of-dominance issues, scrutinizes arguments for utilities-regulation to be imposed on super-platforms, whose big-data are asserted as rendering their market power permanent. Full utilities-regulation, however, fatally undermines innovation-incentives of platforms. Moreover, even if market power may be determined with super-platforms, the power may not be grasped to be permanent, given historical changes in platform champions. Consequently, for utilities-type regulations, only data-portability mandate may be endorsed, leaving the competition-law enforcement as the key tool for addressing big data and super-platforms, against which the core tool is the provision against exclusionary (unitary) conduct, enforcement of which, initially, concerns whether to order super-platforms to render their data accessible to their rivals. On this point, first, passive (pure) refusal-to-share data needs to be scrutinized under the essential-facility-doctrine, which, nevertheless needs to be attached with rigorous conditions, for not undermining platforms’ innovation incentives. Next, platforms’ exclusionary conduct, going beyond pure refusal-to-share data, calls for exclusionary-conduct regulation by competition agencies, which needs to balance exclusionary effects against efficiency effects. In this regard, the JFTC has tackled platforms’ exclusionary conduct as unfair-trade-practices, which tends to focus on exclusionary effects, neglecting efficiency effects. Finally, this article addresses another aspect of unitary conduct: exploitative-abuse, explaining its relation to consumer protection, concluding that competition-law

enforcement on exploitative-abuse (in contrast with exclusionary-abuse) had better be eschewed against platforms, since it accompanies serious risk of overregulation.

Kanoknai Thawonphanit

Fear of False Positive as Nationalism in Disguise: The Major Challenge to Thai Competition Law

Thailand's competition law was substantially reformed in 2017 that the drafters gave clear intention to correct the two main defects of the old regime: in procedural aspect, the new law revamps weak enforcement by establishing the independent competition authority, and in substantive aspect, state enterprises are under the scope of the new law, albeit with limited extent. Whereas many commentators envisaged these as crucial, the author argues that the current discourse has been lacking interest in the substantive provisions. The underlying reason for many defects of the new law is nationalism with a preference for the national champions. The author aims to show nationalism elements in the new law and in the mind of the societal 'influentials' along drafting process in three dimensions: the control of state-owned enterprise and anti-competitive state practice, the abuse of dominance, and unfair trade practices. Some defects can be corrected by proper interpretation, while some need to be amended anew. Without proper understanding of the basic goal of competition law, that is to protect the competitive process in the market, Thai market economy cannot contribute to the equitable and sustainable development.

Juha Vesala

Artificial Creativity and Antitrust

Artificial intelligence has promising applications in production of content such as music, text, images and videos. These applications often use machine learning to achieve the creative functions. The training of neural networks requires large bodies of suitable training data. Since the data in this context is often protected by copyright, its reproduction typically taking place during the development and sometimes also during the use of the applications infringes copyright, unless authorized by copyright holders. While licensing may enable artificial creativity applications, there are potential obstacles to licensing, such as high transaction costs or exercise of market power by copyright holders. These copyright infringement risks and licensing issues may threaten the development of artificial creativity applications and attainment of its economic benefits. These potential failures of the market could be addressed in copyright and law, the possibility of which this paper examines primarily from an EU perspective. The failures could be remedied with an exception or limitation to copyright or antitrust law requiring the grant of licenses for artificial creativity development or safeguarding artificial creativity developers from unjustified limitations. Doing so could be justified by the benefits of artificial creativity attained. However, artificial creativity applications may also harm content creators and creation where the applications produce competing outputs. Copyright and antitrust interventions may therefore need to be limited to situations where significant harm to content creation is avoided, the likelihood of which particularly depends on the design of the artificial creativity application. In copyright law, international treaties would preclude exceptions and limitations on artificial creativity applications, if they excessively harm copyright holders. Under antitrust law, licensing practices can be justified to the extent necessary for maintaining incentives to create content. For example, licensing terms that prevent artificial

creativity applications from producing content that infringes or otherwise free-rides on the works used in training could be justified on this basis."

Masako Wakui

Liner Shipping Antitrust Exemptions in the Pacific Rim Regions: The Need for International Coordination to Tackle Global Competition Concerns

The Pacific Ocean liner shipping market is cartelised, not only because of the unlawful price-setting activities of car-carrier cartels, but also because of antitrust exemptions for shipping companies' agreements. The current industry consolidation trend driven by economies of scale and digitalisation is likely to nurture the collusion-inducing environment further; as thus, strengthened competition law enforcement associated with the abolition of the exemption system is imperative. The global nature of the service and the experiences thus far indicate the need for internationally coordinated efforts toward that end. This article first explains the current trend in liner shipping services and various factors affecting the market structure to give the readers background knowledge to identify the competitive concerns., Then, it continues on to examines the legal frameworks adopted by countries in the Pacific Rim region, reviews and assesses competition issues and proposes legislative and enforcement measures necessary to the sector.

Peter Whelan

Parental Liability in EU Competition Law: An Examination of Its Deterrence-Based Justification

This article focuses on a controversial aspect of the European Commission's enforcement of EU competition law: the imposition of fines upon parent companies for the competition law violations of their subsidiaries. Specifically, it analyses from both a positive and normative perspective the primary theoretical justification of parental liability for EU competition law violations: the theory of economic deterrence. First, it examines both the current place of deterrence in the enforcement of competition law and its role as a justification for parental liability. The article then examines the extent to which the objective of deterring EU competition law violations can actually be achieved by holding the parent company and its subsidiary jointly and severally liable for the infringement committed by the subsidiary. Following on from this analysis, it argues that, as the EU approach to parental liability goes beyond those circumstances in which it is justified on the basis of deterrence such an approach to parental liability for the anticompetitive behaviour of subsidiaries is not entirely mandated by its objective. The article then acknowledges that, despite the (limited) theoretical link that can be established between the current approach to parental liability and the deterrence of anticompetitive behaviour, it does not follow that the current approach is acceptable in principle. In particular, it posits that the protection of human rights should not be sacrificed in pursuit of deterrence through parental liability. In addition, the article examines a further limitation of the employment of the justificatory theory of deterrence in the context of parental liability: its disregard for the concept of wrongdoing. Finally, the article puts forward, rationalises and critiques an alternative approach to parental liability for the enforcement of competition law. The alternative approach would allow for parental liability in certain circumstances (in order to achieve deterrence) but would do so in a manner that respects the mandatory human rights provisions and injects a degree of 'wrongdoing' into the analysis of the

parent's conduct. In short, it presents a normative account of how to impose parental liability for EU competition law violations in a manner that is theoretically robust, legally sound and workable in practice.

Laura Zoboli and Maria Lilla Montagnani

The European Geo-Blocking Regulation Between Competition and Copyright Law: Servant of Two Masters?

At the European Union level, we can find some contradictions between branches of law in the geo-blocking field. First, European Competition Law and Antitrust appear to have conflicting interests: while the former aims at abolishing geo-blocking to establish a well-functioning digital single market, the latter encourages discrimination – under certain conditions. Second, as far as geo-blocking is concerned, European competition law is in contrast with IP rights and, more specifically, with their territorial nature. An in toto abolition of geo-blocking may constitute a significant step toward a vibrant digital single market. Yet, it would also contradict the territoriality of IPRs as online providers employ geo-blocking in order to respect their contractual obligations and to prevent cross-border access to contents that they are entitled to share only in a specified territory. Although the European institutions recently adopted the Geo-blocking Regulation, published in the EU Official Journal in March 2018, the discussion is still open since the piece of legislation excludes audio-visual content from its scope – i.e. those very products with which copyright is mainly involved with. The paper starts by contextualizing the inherent contradiction in the regulative path being followed by the EU institutions in governing the geo-blocking phenomenon within the *acquis communautaire*. It then tries to understand how this clash can be addressed by proposing three scenarios: (i) the application of the Satellite and Cable model to the copyright management of online territories; (ii) the implementation of multi-territorial licensing schemes for the online use of copyright; and, (ii) the adoption of a unique European copyright.