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Editors

The Consistent Application of EU Competition Law

Substantive and Procedural Challenges

 Springer

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Foreword

It is a great pleasure to introduce and welcome this new book, *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges*, edited by, and with contributions from, Dr Adriana Almășan and Dr Peter Whelan. The chapters contained in this book examine the important question of how a number of the procedural and substantive challenges created by Regulation 1/2003 have been dealt with in the 10 years following that Regulation's coming into force.

Prior to Regulation 1/2003, the EU antitrust laws (Articles 101 and 102 TFEU) were enforced principally by the European Commission (the 'Commission'). In 2004, however, the Regulation transformed the enforcement landscape by abolishing the notification and exemption system and removing the Commission's exclusive right to decide on the compatibility of an agreement with Article 101(3). These steps have enabled the Commission to focus its resources on, and prioritise, more serious violations of the antitrust laws and paved the way for greater enforcement of the rules at the national level. A more decentralised system has consequently been able to emerge, involving both a network of competition authorities, the European Competition Network (ECN), comprised of the Commission and the national competition authorities (NCAs), and the courts and tribunals of the individual Member States (the national courts). Indeed, both NCAs and national courts are now playing an increasingly important part in the enforcement of Articles 101 and 102.

The changes introduced by Regulation 1/2003 have provided the opportunity for more effective enforcement of the EU antitrust laws across the EU. At the same time, however, they have created a number of significant challenges, for example, how investigations should be coordinated, and cases allocated, between the Commission and NCAs, how cases should be prioritised, how guidance on the compatibility of new business conduct with the antitrust rules can be given, how national and EU law should operate together in this sphere, how parallel proceedings in national courts should be dealt with and how it can be ensured that the various investigators and decision-takers act consistently.

The chapters in this book focus on the issue of consistency and examine the different mechanisms which exist to ensure that discrepancies in procedure and/or in the substantive interpretation of competition law do not undermine an effective,

efficient and robust competition law system. With more than 10 years of practice to analyse, they consider whether EU competition policy, the Court of Justice of the European Union, the national courts and a number of the NCAs have successfully combined to achieve consistent application of EU competition law.

This book provides a valuable and timely study of how the competition laws have been enforced since 2004 and how the various actors have sought to meet the challenges posed. It is widely researched and sets out a clear analysis of the complex issues arising. No doubt, it will provide helpful assistance to practitioners, students and researchers working in this area.

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June 2016

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Preface

Competition law has been a core European competence since the foundation of the European Union. Over the past 60 years, it has proven difficult to achieve the optimal balance of Member States and European Commission involvement in determining the substantive and procedural scope and application of Articles 101 and 102 TFEU. Regulation 1/2003 sought to set out to address the overburdening of the Commission in this area and to carve out a clearer role for the Member States, initiating a move towards a more decentralised and collaborative approach. Over the past 10 years, this has created more space for national actors, both courts and competition authorities, while retaining a central role for the Commission in particularly significant cases and as coordinator through the European Competition Network.

This volume, edited under the expert guidance of Almășan and Whelan, highlights the substantive and procedural challenges that remain 10 years into this new era of EU competition law. In doing so, this volume addresses several key areas of research with great value for practitioners and academic commentators alike.

The contributions of Chirițoiu and Rusu in Part I set out the remaining coordinating and centralising features of the system through discussion of the European Competition Network and the role of the Commission. Judge Collins, Nagy and Gherghina build on these coordinating features by discussing the role of the Court of Justice of the European Union and its harmonising influence. Relatedly, Judge Toader and Stuyck's commentary on preliminary rulings in Part IV shows what instruments may be used in order to secure the consistent interpretation of EU competition law. In contrast, in Parts III and V of the volume, Whelan, Thouvenin, Almășan, Oppermann, Amaro, David, Papp and Kowalik-Bańczyk discuss how jurisdictional challenges and national applications of Articles 101 and 102 TFEU require further attention in order to balance this system of decentralisation and coordination.

The topics confronted by this volume are important and timely in their own right. Their combined treatment by this varied group of scholars in a single volume allows us to identify synergies, clashes and overlaps between practices that would otherwise go undetected. In addition, the inclusion of experiences of Member States that have joined the EU since the adoption of Regulation 1/2003 incorporates perspectives that are vital to the future development of EU competition law.

The expertise combined in this contribution speaks directly to our mission of advancing the critical analysis of European economic law in all its iterations. It therefore gives us great pleasure to welcome this rich volume in the *Studies in European Economic Law and Regulation* series.

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July 2016

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Introduction

Articles 101 and 102 TFEU contain the EU rules on competition law, and they constitute part of the internal competition law for the European Union Member States, in addition to the specific rules set forth in their domestic legislation. When there is an effect on trade between Member States, a Member State must apply EU competition law when applying national competition law. With anticompetitive agreements in particular, the application of national law cannot be any stricter than the rules contained within Article 101 TFEU. Therefore, a thorough understanding of the EU competition law rules is essential not only for the European Commission and the Court of Justice of the European Union but also for the correct interpretation and application of each Member State's competition law.

As a result of the adoption of Regulation 1/2003, these particular rules are applied in their entirety by the European Commission and the national competition authorities and courts. The decentralisation of enforcement through the involvement of national competition authorities and courts creates potential for an inconsistent application of the EU competition law rules. The spectre of inconsistency is a worry for those who wish to see an effective, efficient and robust competition law system operate within the EU. The creation and maintenance of such a system require, *inter alia*, certain actions, measures and procedures that aim to render the consistent interpretation of the competition provisions by all of the institutions that have application prerogatives. Indeed, certain instruments, including measures adopted by the European Commission and the jurisprudence of the Court of Justice, not to mention its preliminary rulings, have already been used to smooth the way for the uniform application of competition law. Nonetheless, challenges remain concerning the consistent application of European competition law, despite the existence of all of these instruments. Added to this situation is the fact that the procedural framework concerning the enforcement of competition law may differ across each Member State of the European Union; therefore, the uniform application of competition law across the EU encounters further challenges that stem from the national rules on procedure.

With this particular context in mind, this edited collection examines the main substantive and procedural challenges that relate to the consistent application of EU competition law. Divided into five parts, it comprises 15 detailed chapters.

Part I of the book examines in two chapters how the consistent enforcement of Articles 101 and 102 TFEU operates as a general EU competition policy. The operation of two specific mechanisms is relevant here: Regulation 1/2003, as a whole, and the European Competition Network in particular. Chapter 1, written by Dr Bogdan Chirîţoiu from the Faculty of Business Administration, University of Bucharest, examines the process of convergence within the European Competition Network that is characterised by both legislative harmonisation and the enforcement prioritisation at the level of the national competition authorities. Chapter 2 was written by Dr Cătălin Rusu of Radboud University Nijmegen and thoroughly analyses the assessment contained within the ‘Commission Communication on Ten Years of Antitrust Enforcement Under Regulation 1/2003’, identifying prospective priorities and challenges that are relevant to the consistent application of EU competition law.

Part II of the book comprises three chapters and discusses how the Court of Justice’s jurisprudence acts as an instrument of harmonisation. Several recent landmark cases of the Court of Justice on Articles 101 and 102 TFEU are discussed in this context. These cases clearly help to reduce the potential for inconsistent application of EU competition law; they temper the substantive challenges inherent in this context. Moreover, the Court of Justice case law is often cited by the national courts and by the competition authorities; therefore, they also provide scope for impact upon national competition law. The first chapter in this part (Chap. 3, written by Judge Anthony Collins, General Court of the European Union) analyses the Court’s extremely important recent review on the concept of restrictions of competition ‘by object’. The second chapter (Chap. 4, written by Dr Csongor István Nagy, University of Szeged) presents the landmark cases *Allianz* and *Cartes Bancaires* in comparative assessment with the new De Minimis Notice. The third chapter (Chap. 5, Dr Simona Gherghina, Faculty of Law, University of Bucharest) evaluates the importance of the EU public procurement regulations in the interpretation of the EU competition law provisions.

Part III of the book analyses certain additional, unique jurisdictional challenges to the uniform application of the EU competition law provisions. Three chapters are presented. The first chapter in this part (Chap. 6, Dr Peter Whelan, University of Leeds) examines the extent to which EU competition law (in particular Article 101 and Regulation 1/2003) impacts upon the content and operation of a regime which imposes criminal sanctions for the violation of its cartel law. The next chapter (Chap. 7, Prof. Jean-Marc Thouvenin, Université Paris Ouest Nanterre La Défense) discusses the consistency-related challenges that may result from the private enforcement of competition law under the Brussels 1 Regulation. The final chapter of this part (Chap. 8, Dr Adriana Almăşan, University of Bucharest) focuses on the challenges concerning the applicability of Articles 101 and 102 TFEU in national and international arbitration, which are due in large part to the absence in Regulation 1/2003 of a reference to arbitral courts and to the lack of acknowledged access of arbitration to the preliminary reference process. This is clearly an important issue

that needs to be resolved in order to ensure the maximum amount of consistency in the application of the EU competition law rules.

Part IV of the book comprises two chapters and focuses on one of the most important instruments that can help to achieve the uniform application of EU competition law in cases handled by the national courts: preliminary rulings. The role that the Court of Justice has in establishing a consistent interpretation of Articles 101 and 102 TFEU by virtue of preliminary references is extremely important and deserves analysis. The first chapter in this part (Chap. 9, written by Prof. Camelia Toader, Court of Justice of the European Union and Faculty of Law, University of Bucharest) provides an overview of preliminary rulings and the role played by the Court of Justice in ensuring consistent application of the TFEU provisions to cartel and abuse of dominant position practices. Chapter 10, written by Emeritus Professor Jules Stuyck, University of Leuven (KU Leuven) and Radboud University Nijmegen, further details technical conditions pertaining to the preliminary referrals of the courts and develops a complex analysis of the special issues that can be engendered by referrals for preliminary rulings.

Finally, Part V of the book provides selective examples of how Articles 101 and 102 TFEU are effectively applied at the national level, thereby providing additional input into how problematic the issue of consistent application of EU competition law is in practice. These examples were chosen so as to include founding Member States of the EU as well as ‘younger’ Member States. Its five chapters present analyses of the following jurisdictions and their experiences in applying the EU competition law rules: Germany (Chap. 11, Professor Bernd Oppermann and Ahmad Chmeis, both from Leibniz University of Hanover), France (Chap. 12, Dr Rafael Amaro, Université Paris Descartes – Sorbonne Paris Cité (CEDAG)), Romania (Chap. 13, Dr Sorin David, University of Bucharest), Hungary (Chap. 15, Dr Mónika Papp, Eötvös Loránd University, Budapest) and Poland (Chap. 15, Dr Krystyna Kowalik-Bańczyk, Institute of Law Studies, Polish Academy of Sciences).

Taken together, all five parts of the book contribute towards a detailed review of the issue of consistency in the application of Articles 101 and 102 TFEU and of the major substantive and procedural challenges that can be engendered in this context.

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