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Editorial - Current Competition Law Research: Developing New Themes between Continuity and Change

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The last ten years have witnessed significant development of competition law in Europe as well as further afield: from the Modernisation reforms in the EU, to the adoption of groundbreaking decisions in the US federal courts, such as *Trinko* and *Leegin*,[1] and numerous significant changes have taken place to respond to the challenges posed by an increasingly globalised economy. In addition, the appearance of 'new actors', like the so-called 'emerging economies' in Asia and Latin America, and the occurrence of sometimes unpredictable events have required the existing competition law tools to adapt and respond, often relatively quickly, to new challenges and questions.

However, it is unclear to what extent these reactions to the 'new' actually results in significant change: on the one hand, it is beyond doubt that various factors, notably: the economic crisis, the growing importance gained by states which up to just a few years ago were considered to be developing countries in need of financial assistance, and the changing face of important economic sectors as well as of institutional frameworks have questioned much of the 'established wisdom' which had inspired the evolution of the competition rules and approaches. On the other hand, however, it appears that the competent agencies, including the courts, have often resorted to existing tools and approaches as a means to framing their responses to these new challenges, if necessary by adapting these tools to the changing circumstances.

The papers published in this special issue, aptly devoted to exploring the 'current trends' of competition law research can be seen as mirroring this tension between the 'old' and the 'new' and as reflecting how, in the search for innovative responses to the current challenges the competent authorities often tend to rely on 'tried and tested' approaches and principles. The paper by Bhawna Gulati embodies this trend, in as much as it seeks to examine a 'classic' and widely debated topic, i.e. the implications of resale price maintenance agreements for competition. Her objective is to investigate the reasons why these arrangements have been outlawed in numerous legal systems, including the EU and India and to suggest recommendations as to the possibility of introducing an alternative, more lenient perhaps, legal treatment for these arrangements.

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[1] *Verizon Telecommunications Inc v Legal Offices of Curtis V Trinko LLP*, 540 US 398; *Leegin Creative Leather Products, Inc., v. PSKS, Inc.,* 127 S.Ct. 2705 (2007).

Although it could have been tempting to address such an emotive topic in an equally emotive manner, Gulati succeeds in providing us with a very 'cold-minded' and exacting appraisal of the arguments for and against resale price maintenance and places this assessment against the wider background of the rules adopted by a number of jurisdictions to respond to the possible competition objections arising from these arrangements. She argues that condemning RPM clauses is the outcome of a 'wrongly founded and premised' argument which seeks purportedly to protect intra-brand competition in the belief that it will serve consumer welfare. Her analysis, instead, shows that these arrangements can be, and often are, welfare-enhancing, in as much as they 'motivate retailers to provide sector specific services' that can be financed via relatively higher prices and also encourage suppliers to keep investing in research and innovation. Gulati convincingly suggests that for competition law to deliver, ultimately, on its purported objectives of economic efficiency and of consumer welfare, rivalry should not be reduced to a 'price war'. She expresses the view that 'if consumer welfare requires a deviation from price competition, the competition law and policy should not hesitate to allow for such a deviation'.

The paper by Marek Martyniszyn constitutes another example of this ongoing tension between 'old' and 'new'. The author tackles another 'classic' competition law topic, i.e. the concept and implications of the state compulsion defence to prima facie anti-competitive behaviour, in light of US antitrust law and the EU competition rules. He argues that in a fast-paced, globalised economy the predictability of the applicable standards in these cases would be highly desirable, to ensure greater legal certainty in the legal assessment of prima facie anti-competitive, yet 'defensible' practices. However, drawing from his assessment of recent decisions concerning the applicability of the defence to Chinese export cartels in the US, he expresses the view that the current rules are not entirely appropriate to deal with the still largely unknown legal consequences of foreign state compulsion on corporate actors.

In particular, Martyniszyn suggests that the requirement to prove compulsion is at present set too high to render this defence a 'reliable and workable tool' to respond to the challenges arising from the 'reactions' of individual states especially to the entry of foreign companies in their economies. He suggests that, unless a more flexible yet clearer set of principles is developed and more efficient international fora are established to deal with these cases, economic actors may be left relatively powerless against the action of public authorities, especially in the so-called BRIC states, designed to 'claw back' on their freedom to engage in commercial activities in emerging economies.

Andrea Gideon's contribution constitutes an insightful examination of an as yet relatively unexplored area, i.e. the implication of competition law and policy for higher education in the EU. As is well known, the ongoing trends in relation to the activities of academic research and of delivery of University education clearly lead in the direction of their increasing 'commodification', thus making this paper very topical and stimulating. Gideon reflects on the changing nature of University education from a 'public service'-type activity to an increasingly 'commercial' one, akin to the provision of services and argues that this progressive transformation is likely to make the rules on

free movement, state aid and competition more and more relevant for higher education providers. She also points out that while the 'public interest exception' contained in Article 106(2) TFEU is likely to provide a safe harbour for any prima facie 'restrictive practices' arising from these activities (such as joint research activities), its scope remains relatively undefined, thus raising questions as to whether 'all constellations' in the 'HEI galaxy' will be exempted from the applicability of the competition rules.

In the second part of her paper Gideon provides an exhaustive and engaging discussion of the possible challenges for higher education provision arising from the applicability the EU competition rules. Drawing from domestic decisions adopted, inter alia, in the Netherlands and Germany, she discusses the likely consequences of the application of Article 101 TFEU, albeit to a more limited degree, Article 102 TFEU, the merger rules, and of Article 107 TFEU (state aid principles) to a number of practices. Thus, with respect to the charging of uniform fees and cooperation in research among HEIs, she argues that although the legal exception could be applied either individually or via Block Exemption Regulations to avoid the nullity of these arrangements, it would depend on the individual circumstances of each case whether a justification may be available. As to the applicability of the state aid rules, Gideon also points out that any form of public financial assistance given to Universities to conduct research may remain unlawful, even if it entailed the exclusive use of public infrastructures, if the HEI concerned did not rely on full economic costing to account for the use of this finance. Overall, Gideon's paper deals proficiently with increasingly important issues to which to date not very many convincing answers have been given: her contribution is extremely important and likely to be a trailblazer for more work in the future.

'Old' and 'new' coexist also in Alina Kaczorowska's contribution, another article which promises to stimulate debate on the general objectives of competition policy in the context of the creation of novel multilateral enforcement and institutional structures, such as those envisaged by the Caribbean Community (CARICOM) Treaty's provisions on the Single Market and Economy. Starting from the premise that a discussion of what objectives these new frameworks should seek to achieve is fundamental for the framing of a 'coherent body of substantive competition law', the author starts with a brief examination of the CARICOM's rules and overarching objectives and focuses on the position of competition policy in this context. Thereafter, she discusses in more detail the goals that this policy should seek to achieve as part of the realisation of a common Caribbean Single Market: Kaczorowska forcefully argues that this question should be answered by bearing in mind the specificity of the Caribbean States' economies and their social and political make-up. Thus, having regard to the text of Article 169 of the CARICOM Treaty, which lists the priorities of the competition policy regime envisaged for the Caribbean area, she illustrates how these objectives are left intentionally 'open' and 'flexible' and are therefore capable of embodying different meanings, especially as a result of the influence of diverse economic and political theories.

Kaczorowska is conscious that this relatively 'fluid' reading of the Treaty's objectives may be in some way detrimental to the coherence of competition policy; however, she argues that a degree of 'balancing' between economic goals, such as those of market

efficiency, and 'other objectives', such as, inter alia, the implementation of effective 'social, employment, industrial and trade policies', is indispensable for the attainment of the CARICOM's overarching aims. How in practice these goals should be secured and, especially how this 'balance' must be struck are the questions addressed by the latter part of this article: drawing from the examples offered by the case law of the Court of Justice of the EU, Kaczorowska examines the structure and the provisions of the Treaty and argues that the 'intentionally imprecise' goals enshrined in it should be ranked in a way that best serves the features of the economies of the Caribbean states. In this context, the creation of a common market across the Caribbean area and the protection of consumers should be prioritised.

Overall, the author concludes that while 'starting with a blank canvas' has clear advantages for policy makers, since it allows them to identify and prioritise the objectives that are most appropriate to the CARICOM members' interests, the drawing of these priorities should never occur without making reference to strong and transparent economic theories. Kaczorowska's article is extremely current since it represents perhaps the first opportunity for a European audience to become familiar with a new multilateral instrument for the creation of a single market, this time in the Caribbean area. At the same time, however, her contribution demonstrates that in new regimes just as in established ones, debate as to 'what competition law is for' and to what role economic concepts should play in its application remains central since it provides the background against which to frame legal rules that are appropriate to a specific institutional, political and economic context. Due to the novelty of the topic and to the state of infancy of the CARICOM Treaty, as well as to the growing importance of the Caribbean states, Kaczorowska's contribution is sure to inspire more discussion in the future.

The much awaited preliminary ruling in the *Murphy* case[2] constitutes perhaps the single most influential decision of the Court of Justice of the EU in 2011, due to the significance of the interests involved as well as of the importance of the issues at stake in the case. Although it would be tempting to define it as just 'one more case' on territorial exclusivity, to be assessed in light of Article 101 TFEU and of the rules on the free movement of services, it is beyond doubt that the ruling tackles more general questions affecting the very way in which the Treaty competition rules should be interpreted today. Stuart Pibworth's case note presents the reader with an agile analysis of the Court's decision and seeks to place it against the wider background of the case law concerning the distinction between infringements of Article 101 'by object' and 'by effect'.

Pibworth analyses the challenges arising from the application of established legal principles to TV broadcasting licenses and seeks to provide answers to the important practical questions arising from the ruling and relevant especially for broadcasters. He argues that the prohibition of arrangements such as the one in issue is, on the one hand, entirely consistent with established EU competition law principles, according to which any arrangements partitioning the single market along national boundaries, either

[2] Cases C-403 & 429/08 *Football Association Premier League v QC Leisure* [2011] ECR I-0.

directly or indirectly, represents a 'by object' infringement of Article 101 TFEU. On the other hand, however, he points out that this outcome may have unexpected consequences for TV broadcasters and their licensors (in this case, the English Football Premier League Association), who may have to reconsider their licensing practices and consider moving to 'pan-European' licenses.

Using a comparative approach, which draws from the US experience as well as from European jurisdictions, Pibworth questions whether upholding the goal of market integration 'at the expense' of other important considerations, such as the economic integrity of the intellectual property rights held by the licensors (such as the Premier League) still constitutes the 'right approach' in this area. He points out that holding an exclusive right to broadcast and to license the broadcasting of 'valuable content' (such as the live images of a football match) is not incompatible, according to the *Coditel* decision,[3] with the EU competition rules. Against this background, he questions the approach adopted by the Court on the ground that the latter did not examine in any depth if the *Coditel* 'exception' could 'salvage' the FAPL license. In addition, he seems to take exception to the lack of any detailed consideration of the question of whether the legal exception of Article 101(3) TFEU could be applicable to the arrangement.

More generally, Pibworth poses the question of whether attaining the common market objective is still an acceptable justification for 'trumping' other reasons, such as pursuing economic efficiency or protecting the right to exploit 'valuable' content, including TV broadcasts. He argues that, although the CJEU's conclusions were consistent with the applicable legal rules, they could have a potentially adverse effect on future licenses: although Pibworth rightly acknowledges that it would be open to individual licensors to stipulate 'pan-European' arrangements and in general to adapt their practices to the legal requirements spelled out in the judgment, he also argues that this may result in sports broadcasts being available to fewer customers. Overall, he suggests that the decision seems to overlook the 'real reason' for Mrs Murphy's behaviour, namely the considerable price differential existing among Member States and the apparent unwillingness of licensors to adapt their arrangements to make licenses more 'worthwhile' and therefore more attractive for individual licensees.

Seeking to provide a 'snapshot' of the state of play of the 'current research' in any area of the law is never easy and is even more challenging in a fast-paced field, such as competition law. Add to the 'ever-changing' nature of the subject the equally evolving state of the global economy, which is characterised by the emergence of 'new' states as new economic powerhouses as well as by the apparent stagnation, if not decline, of hitherto established world leaders and the picture blurs even more.

However, these papers highlight one of the key guiding trends in this fluid landscape, namely the coexistence of 'old' and 'new' and, consequently the temptation to apply established legal rules to novel economic phenomena as well as the desire to uphold 'cherished' values, such as market integration in the EU or consumer protection in

[3] Case 262/81 *Coditel SA v Cine-Vog Films* [1982] ECR 3381.

emerging 'free trade areas', such as CARICOM, above other equally important albeit perhaps more 'politically challenging' values and approaches.

Although they seek to deal with issues that appear to have little in common with one another, all these contributions share a common theme, namely how the existing trends and the current legal and economic approaches characterising competition enforcement can be applied to new phenomena—in other words, how 'new wine' can be put in 'old skins' while making sure that the latter do not 'burst' at the seams - and thereby lead to change which is more akin to evolution and growth than to 'dismantling' and revolution. Relying on a more 'economics-based approach' to the assessment of prima facie anti-competitive practices, reflecting on new, more imaginative ways on the possible goals that competition law and policy should pursue, for instance by relying more often and maybe more 'courageously' on the legal exception of Article 101(3) TFEU, while at the same time upholding established achievements and using them as a blueprint for new structures, are tools that may assist in solving the tensions arising from the path to change.