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EDITORIAL

Editorial: The EU's Competition Policy Agenda

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The EU's competition policy agenda is of paramount importance to the European Union on a number of grounds. First, the public enforcement of EU competition rules buttresses the Single European Market (SEM). By establishing an integrationist regulatory level playing field across the Union and having the necessary competition instruments in place to enforce it, EU competition policy increases competition intensity within markets, thereby driving the competiveness of EU firms. Secondly, and this is relatively new, EU competition policy increasingly provides a vehicle whereby private individuals can claim damages that result from the anti-competitive behaviour of firms, thereby reinforcing the deterrent effect of this policy. Thirdly, the international dimension of the competition policy agenda is important in not only securing access to overseas markets for EU firms by the removal of beyond-the-border competition distortions in these markets; but also in ensuring that the anti-competitive behaviour of non-EU based companies outside the EU, which distorts competition within the SEM, comes under EU competition law, thereby conferring extra-territorial reach upon the law.

The EU's competition policy agenda is not static but dynamic and evolving. This Special Issue of the Liverpool Law review discusses each of these three themes in turn. More specifically, the first theme of enhancing the integrationist level playing field is covered by the papers of Ulrich von Koppenfels and Leigh Davison. The former discusses proposed changes to the scope and operation of public enforcement of EU merger or concentration control, specifically those put forward

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in the 2014 EU White Paper, *Towards more effective EU merger control*[1] whereas the latter discusses the failure of the current merger control architecture to deal with the misallocation problem and puts forward proposals to address this issue. The second theme is dealt with by the paper of Christopher Bovis and Charles Clarke which discusses attempts by the European Commission, including the recent 2014 EU Directive on actions for damages under national law for infringements of competition law,[2] to improve the compensatory justice in EU Member States for breaches of EU competition rules. The third and final theme is an exploration by Leigh Davison and Debra Johnson of the evolution of the EU's twin-track approach to the achievement of its aforementioned international competition goals.

Ulrich von Koppenfels's opening paper explains and evaluates the European Commission's key proposals contained in the 2014 EU White Paper *Towards more effective EU merger control*. The White Paper considers that there are two main areas in which EU merger control can be made more effective. First, what the Commission terms an 'enforcement gap' in EU merger law can be plugged. That is, the situation in which acquisitions of non-controlling minority shares in another undertaking, be they horizontal, upstream or downstream to the acquirer, may in certain circumstances—illustrated using real world examples in the paper—cause harm to competition and consumers but are neither caught by EU merger law or EU rules prohibiting anti-competitive conduct (Articles 101 and 102 TFEU). The paper goes on to explore the European Commission's choice of a 'targeted transparency system' as the effective way of putting the proposed extension of EU merger law to acquisitions of a non-controlling minority into practice.

The second area where the White paper believes that EU merger control can be made more effective is in respect of certain elements of the referral system. The thresholds tests—or community dimension tests—are the key jurisdictional tests determining whether the concentration comes under EU or Member State law. However, these tests are flawed in that some cases with a likely Community competition concern are wrongly allocated to Member State law and vice versa. Hence the need for referral mechanisms that prevent or reallocate such cases in line with the principle of subsidiarity. The available referral mechanisms operate either before or after the notification of the proposed concentration, with the referral request, which is not mandatory, coming from the merging parties in the former and the involved competition authorities in the latter. Koppenfels explains how the White Paper aims to improve the operational effectiveness of both the working of the pre- and post-notification centralisation referral routes. With respect to the former, the White Paper seeks to make the referrals procedure simpler and faster, thereby increasing the likelihood of merging parties using it, and hence improving its effectiveness of dealing with the major form of misallocation—cases with a potential Community competition concern being vetted under Member State law. In regard to the latter, currently the European Commission has only the legal right to

[1] European Commission's White Paper COM(2014) 449 final.

[2] The Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union, 24 October 2014, 2013/0185 (COD), PE-CONS 80/14.

vet a referred case in respect of the territories of the Member States that sought referral or joined the referral request. The proposed change is that if a Member State seeks to refer such a case to the Commission—and assuming no other Member State competent to vet the merger disagrees (if they do, the referral does not happen) and if the Commission accepts the referral—then the Commission would vet the merger, on competition grounds for the whole European Economic Area, thereby preventing parallel reviews by national competition authorities (NCAs).

Koppenfels also briefly comments on the creation of something akin to a 'European Merger Area', adding that on this matter the White Paper explicitly invites the Commission and the NCAs to "consider moving towards a system where each applies the same substantive EU laws,…"[3] However, this is not taken forward by the White Paper which acknowledges that this would "require a more ambitious overhaul of the current system of merger control law within the European Union" (see Footnote 3).

The second paper in this Special Issue is by Leigh Davison and articulates such an overhaul as one possible way forward for merger control within the European Union. It is not intended to be definitive: rather its purpose is to contribute and, in so doing stimulate, to promote further debate on this important subject.

The primary motivation behind Davison's proposals to overhaul or amend the current architecture of separate jurisdictional zones is the virtual elimination of the aforementioned misallocation problem which, despite attempts at remedy, such as the employment of referral mechanisms, still is a major issue. Moreover, the paper demonstrates that the near elimination of the misallocation problem will lead to other significant benefits. These include: the strengthening of the application subsidiarity principle; the ending of the problem of mergers with a potential Community competition concern having to face the burden and uncertainty of multiple investigations under two or more national laws; and the achievement of a more effective operation of the one-stop shop approach. Davison, in explaining the proposed amendments to the architecture of separate jurisdictional zones, demonstrates how they inter-link to bring about the said benefits.

The proposed amendments also have the goal of streamlining the working of the merger architecture, specially removing the need for the cumbersome and time-consuming pre- and post-notification referral mechanisms. This could represent a major efficiency gain. However, for this and the other stated benefits to be achieved, the Commission would lose its exclusive right to apply EU merger law. In other words, the NCAs, in certain circumstances only, would be the authorities legally tasked to vet merger cases using this law, over and above applying their own national law in cases that fell under this jurisdiction. Davison recognises that for this to work effectively in practice, there would need to be mandatory cooperation between involved regulators with the Commission at its centre (in fact, this type of co-operation is already established in anti-competitive complaints under 101 and 102 TFEU). If this first step toward a more cooperative architecture proved successful, then it may signal that the aforementioned European Merger Area is not only feasible but rational in respect to improving effective merger control.

[3] *Supra* n. 1 White Paper COM(2014) 449, final, paragraph 22.

Of course the EU competition agenda is not just concerned with public enforcement but increasingly recognises the importance of private actions. Indeed, since 2003 private individuals have been able to claim damages arising from the anti-competitive behaviour of companies. Bovis and Clarke demonstrate how the European Commission has attempted to improve compensatory justice for breaches of competition rules by recognising the consumer as a stakeholder with a right to redress from companies which cause them harm through breaches of competition regulation. The authors note that since decentralisation and the entrusting of much of the application of competition law to NCAs, the number of private claims for damages has increased.

It is not helpful, however, that private actions under EU law are dealt with by national courts under national procedures which leads to a lack of regulatory uniformity and creates uncertainty. Private enforcement also encounters other difficulties that can inhibit private parties from bringing actions. Bovis and Clarke discuss these obstacles and some of the measures proposed to overcome them, including difficulties in proving a causal link for a loss and providing appropriate evidence. Quantification of these losses is also problematic: damages for breaches of competition law are intended to put claimants in the position they would have been in if the infringement had not occurred—a process which can require the construction of complex econometric models. Throughout the Commission's attempts to address some of the issues arising from decentralisation and private enforcement, Bovis and Clarke note it is trying to negotiate a difficult balance between ensuring suitable redress for injured parties whilst avoiding encouragement of a litigation culture and discouraging the cooperation of companies in investigations under the 'leniency process'.

The final contemporary theme covered in this Special Issue is that of the international dimension of competition policy. Davison and Johnson address the key question in their article: namely, how does the European Union deal with the challenges posed to competition policy by the growing economic interdependence resulting from globalisation? The EU has two main goals in relation to regulating competition matters with an extraterritorial dimension: the first is to secure access to overseas markets for EU firms by removing beyond-the-border competition distortions in these markets and the second is to ensure that competition in the Single European Market is not distorted by restrictive practices, such as international cartels, of non-EU companies. The authors note that the EU has adopted both cooperative and non-cooperative approaches: the former is predominant at both a multilateral and bilateral level and has been used in pursuit of both goals whereas the non-cooperative approach is used unilaterally, primarily, but not only, to achieve the second goal.

Davison and Johnson analyse the efforts made by the EU to deal with these extraterritorial issues, concluding that, although the EU has an avowed preference for multilateral over bilateral action in relation to the cooperative approach, the difficulty of reaching agreement multilaterally, or indeed persuading sufficient countries that such matters are an important subject for negotiation, is such that the bilateral approach has become the EU main policy approach in recent years. Even here, though, progress has been relatively slow. Moreover, matters have become

unnecessarily complicated in relation to the EU's efforts to secure extra-territorial jurisdiction enabling it to take unilateral action against non-EU companies in the non-cooperative approach. This complexity has arisen from the range of jurisdictional tests—the effects doctrine, the single economic entity test and the implementation criterion—which suggests overkill.