
THE COMPETITION LAW REVIEW

Volume 8 Issue 3 pp 217-221

December 2012

Editorial – Both Sides Now

*Stephen Calkins & Marek Martyniszyn**

Competition law is fun. As a noted expert consultant told one of us: ‘Don’t tell my spouse, but I’d work on these cases for the sheer joy of it’. The facts, the issues, the window into economies and legal systems - it does not get much better than this.

Not surprisingly, then, competition law academic seminars are also fun. At their best, they present opportunities for energized students to engage with scholars and wrestle with cutting edge issues in this particularly interesting field.

Each of the two authors of this Editorial recently had the opportunity to participate in such seminars on the less familiar side of the Atlantic. One of us is an American academic who has been teaching classes and participating in seminars in Ireland; one of us is an early career European academic who is currently researching and teaching in the United States.

The striking point, for both of us, is how different the experiences are. With all the talk about convergence of competition approaches, one might expect that the educational experiences would have harmonized. But they have not. This Editorial reflects on the differences we observed, implications from those differences for competition systems more generally, and the contributions of the four papers in this Special Issue.

This Issue itself is the principal written output of the Sixth Annual Postgraduate Workshop organized by the PhD community in the University College Dublin (UCD) School of Law. The Workshop was held on 22 March 2012 and it focused on competition law enforcement.¹ It brought together doctoral students from nine countries. No country accounted for more than two students. The discussants and chair persons came from or represented seven countries.²

* Member of the Irish Competition Authority; Professor of Law (on leave), Wayne State University, Detroit; and Senior Research Fellow, Institute for Consumer Antitrust Studies, Loyola University Chicago; previously PhD Candidate and Ad Astra Scholar, University College Dublin School of Law. The views expressed herein are individual views and are not the views of the Competition Authority.

¹ The Workshop was organised by Jocelyn Delatre, Anna-Louise Hinds, Marek Martyniszyn, and Yichen Yang. It benefited from the help of Alan Greene, Joanne O’Toole Byrne, and Kamil Piszczek, and the support of UCD School of Law Faculty. The event was generously funded by the European Commission Representation in Dublin, UCD Newman Fund, and UCD School of Law. The agenda is available at <http://www.ucd.ie/law/phdworkshop/thesixthannualpostgraduateworkshop/>. The participants had an opportunity to submit their revised papers for consideration of publication in this Special Issue. The Workshop organisers are grateful to the Editors of the Competition Law Review and the anonymous referees for their constructive collaboration and support.

² Workshop organizers would like to thank Anca D. Chirita (University of Durham), Fiona De Londras (then UCD, currently University of Durham), Kanstantsin Dzehtsiarou (University of Surrey), Jonathan Galloway (Newcastle University), Imelda Maher (UCD), Lorenzo F. Pace (Università Europea di Roma), Sebastian

Almost inevitably, papers examined and drew lessons from the legal systems of multiple countries - the papers printed here, for instance, include detailed discussion of the law and procedure of Poland and of Serbia, but other papers looked at other countries' systems. This is not at all unusual given the routine way that students study in 'foreign' countries in Europe. But it means that comparative law is a given rather than the exception. Not so in the US, where most antitrust courses and seminars are taught by and for Americans.

Another contrast is that in European seminars so much more is new. Ironically, it is the 'new world' that is old. The Sherman Act dates from 1890, the Clayton and FTC Acts from 1914. European Union competition law dates from 1957, and the basic structure of enforcement was substantially changed by the Modernization Regulation, EU Council Regulation 1/2003, which called for decentralized enforcement by the national competition authorities and national courts. Even as we write, major changes are being made with respect to private enforcement. Students grapple with big issues and exciting questions. So much is undecided - whether policy decisions, or procedural questions, or philosophical questions about what most to value and what trade-offs to make. Students can confront one big question after another. In the US, well, not everything is settled, but there is no long list of big questions calling for attention. As an academic friend told one of us, the profit-maximizing American academic interested in earning tenure³ is well advised to emphasize fields other than competition law.

Two things appear to be missing, so to speak, from European seminars. First, it is striking the extent to which law and economics - whether 'Chicago law and economics' or 'post-Chicago law and economics' - is deemphasized. Economics is central to US antitrust analysis;⁴ in Europe it matters, but less so.⁵ Although the situation is changing,

Peyer (Centre for Competition Policy, University of East Anglia), Oana Stefan (HEC), as well as Colin Scott (UCD Dean of Law). Stephen Calkins - the lead author of this Editorial - took part in the entire event and delivered the keynote.

- ³ Kingman Brewster - to whom we refer not as the eminent antitrust scholar who first proposed a jurisdictional rule of reason, but as a president of Yale University - encapsulated tenure's essence in the US system by stating that it is 'for all normal purposes a guarantee of appointment until retirement age.' Kingman Brewster, 'On Tenure', 58(4) *American Association of University Professors Bulletin* 381 (1972).
- ⁴ See, e.g., Douglas H. Ginsburg and Eric M. Fraser, *The Role of Economic Analysis in Competition Law*, in Ian McEwin (ed), *Getting the Balance Right: Intellectual Property, Competition Law and Economics in Asia* (Hart Publishing, forthcoming), available at <http://ssrn.com/abstract=1610189>.
- ⁵ Some time ago and before the modernization process Eleanor Fox observed that 'while economics has a role in EU analysis, it is much less center stage than in the United States', EM Fox, *US and EU Competition Law: A Comparison*, in Edward M. Graham and J. David Richardston (eds.), *Global Competition Policy* (Peterson Institute, 1997), at 340. Since then the role of economics in the EU competition regime has been growing. For example, in 2003 the office and the team of the Chief Competition Economist was created in the DG Competition and economics had become embedded in EU competition policy. William Kovacic more recently observed that 'to the extent that economists' perspectives become reflected more expansively in the work of DG Comp, as one predicts they will over time, the analytical approach that the Commission takes in deciding whether to bring cases probably will converge more closely upon the approach that the DOJ and the FTC take'. William E Kovacic, *Competition Policy in the European Union and the United State: Convergence or Divergence in the Future Treatment of Dominant Firms?*, *Competition Policy International* Oct 2008, at 14. For the view from the European Commission see Alexander Italianer, *The Interplay between Law and Economics*, Opening Address at the Charles River Associates Annual Conference (2010), available at http://ec.europa.eu/competition/speeches/text/sp2010_09_en.pdf.

fewer competition lawyers are trained in economics; economics is less important in the materials that are studied; more attention is given to matters not even implicitly economic. It is not that economics does not matter - it does - it just matters less and there is less cross-fertilization.⁶

Second, what European students miss is the real heart of US antitrust law: private litigation. It is only a slight exaggeration to say that US antitrust law *is* private litigation. Just look at recent Supreme Court decisions: *American Needle, Inc. v. NFL*,⁷ *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,⁸ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁹ *Credit Suisse Securities (USA) LLC v. Billing*,¹⁰ *Bell Atlantic Corp. v. Twombly*,¹¹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,¹² *Illinois Tool Works Inc. v. Independent Ink, Inc.*,¹³ *Texaco Inc. v. Dagher*,¹⁴ *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,¹⁵ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,¹⁶ *United States Postal Service v. Flamingo Industries (USA) Ltd.*,¹⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*,¹⁸ *California Dental Ass'n v. FTC.*¹⁹ That's right – one needs to go back to 1999 to find a Supreme Court antitrust case in which a government agency was a party. Four Justices - Roberts, Alito, Sotomayor, and Kagan - heard their first Supreme Court antitrust case in which the Government was a party only last November.²⁰ And yet the Supreme Court obviously continues to decide antitrust cases.

Private litigation provides continued grist for the antitrust academic mill. When do information exchanges become unlawful? See the learning from *Cason-Merendo v. Detroit Medical Center*.²¹ What practices fall within the *per se* ban on price fixing? See *In re: Sulfuric*

⁶ This seems to apply also to Academia. For example, Mathias Siems looked at journals in which UK academics (all academics, not just competition ones) publish, drawing data from the 2008 Research Assessment Exercise (RAE). He compared journal information for law with other disciplines to identify 'closeness' between law and other academic disciplines. Among eight categories Siems listed, economics was at the bottom, showing that in the UK legal scholars - in general - hardly ever publish in economics journals and economists rarely publish in legal journals. See Mathias Siems, 'How close is 'law' to other academic disciplines?', Siemslegal, 16 June 2012, available at <http://siemslegal.blogspot.com/2012/06/how-close-is-law-to-other-academic.html>.

⁷ 130 S. Ct. 2201 (2010)

⁸ 555 U.S. 438 (2009).

⁹ 551 U.S. 877 (2007) (5-4).

¹⁰ 551 U.S. 264 (2007).

¹¹ 550 U.S. 544 (2007).

¹² 549 U.S. 312 (2007).

¹³ 126 S.Ct. 1281 (2006).

¹⁴ 547 U.S. 1 (2006).

¹⁵ 126 S. Ct. 860 (2006).

¹⁶ 542 U.S. 155 (2004).

¹⁷ 540 U.S. 736 (2004).

¹⁸ 540 U.S. 398 (2004).

¹⁹ 526 U.S. 756 (1999).

²⁰ See *FTC v. Phoebe Putney Health System, Inc.*, Dkt. No. 11-1160 (argued Nov. 26, 2012).

²¹ ED Mi March 22, 2012.

*Acid Antitrust Litig.*²² What more than conscious parallelism is needed for a plaintiff to withstand a motion for summary judgment? See *Superior Offshore Int'l v. Bristow Group*.²³ And so on. It is a fundamentally different enterprise to write about government agencies (and, to some extent, court review of same) than about a mix of government action, court review, and, to a predominant extent, court decisions flowing from private litigation.

This is not just a question of the source of the 'law' that is being studied. The US legal system is compelled to craft legal standards suitable for being applied by generalist judges (and sometimes juries) in cases brought by self-interested private participants.²⁴ Thus, the Supreme Court's critically-important standards for granting motions to dismiss and motions for summary judgment are crafted in the shadow - nay, the spectre - of perceptions of discovery abuses and fears that litigation risks and expenses will force defendants to settle rather than resist frivolous cases. See, e.g., *Bell Atlantic Corp. v. Twombly* ('the threat of discovery expense will push cost-conscious defendants to settle even anemic cases').²⁵

The papers in this Special Issue epitomize some of the strengths of European seminars. And, not surprisingly, they illustrate some of the differences between US and European offerings.

Valerie Demedts offers an appealing overview of the key issues raised by international cooperation: multilateral vs. bilateral; convergence vs. cooperation; hard vs. soft law; formal vs. informal cooperation. She also provides a nice survey of the various means of bilateral cooperation, and then ends with the important point that 'EU competition policy does not constitute a goal in itself, but serves a wide range of goals in order to strengthen and optimize the internal market'. Her paper is especially timely, since the ICN and OECD have only recently been surveying international enforcement cooperation.²⁶

Ironically, Demedts fails to discuss one of the principal tools for international cooperation: seminars such as the one in which she participated. Cooperation is particularly likely when cross-border friendships, based on mutual understanding and respect, facilitate quick emails and telephone calls. One is much more likely to bounce ideas off, or seek research leads from, someone one knows. So also, reaching out is more likely when there are shared understandings of legal systems. One of the special contributions of the OECD and the ICN is the bringing of people from different countries together, but that role can be performed perhaps even more effectively through education.

²² Nos. 12-1109, 12-1224 (7th Cir. Dec. 27, 2012) (Posner, J.).

²³ 3d Cir. July 27, 2012.

²⁴ Stephen Calkins, 'The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever', 62 *Antitrust L.J.* 327 (1994).

²⁵ 550 U.S. 544, 559 (2007).

²⁶ See <http://www.oecd.org/competition/globalforum/programmeanddocuments.htm#S3>.

Maciej Bernatt makes the important observation that nominal substantive convergence may conceal the very substantial differences that flow from procedural differences. Bernatt points out - using especially the example of Poland - that sharp differences in procedure can exist notwithstanding the close cooperation made possible and encouraged by the European Competition Network. One of the important developments in recent years has been the application, and concerns about the possible application, of the EU Charter of Fundamental Rights, and Bernatt does a nice job of illustrating how this development offers the promise that procedural harmonization may follow substantive. There is no question but that seeming substantive harmony can mask sharp difference based on different procedures.

Pieter Van Cleynenbreugel's paper makes a good pairing with Bernatt's, since it too looks at procedure as well as substance. Although it might seem surprising that decentralization of enforcement of EU competition law would be a powerful tool for harmonization, Van Cleynenbreugel explains why that result was almost inevitable. Now, he argues, 'competition law enforcement should no longer be assessed solely from the vantage points of efficiency and justice, it should also reflect an inherent set of engineering principles that shape and reshape the institutional architecture as an end in itself'. This is because '[a]rchitecture is a kind of law: it determines what people can and cannot do'. Van Cleynenbreugel closes by focusing on the courts' important role in conferring legitimacy.

Courts are seen not only as conferring legitimacy, but as the essential engine of change, by Velimir Zivkovic. The Serbian Commission for the Protection of Competition ('CPC') has, he says, 'failed to produce any tangible results in practice, let alone promote the idea of competition'. Zivkovic observes that 'the culture of competition, is unfortunately not something that can be created merely by enacting laws'. The solution, he says, lies in private enforcement: 'It is the author's first-hand experience that, as in many other professions, the economic situation of Serbian attorneys is generally far from prosperous and additional avenues to gain income would surely be welcomed'. Not easy, he concedes, but with the active amicus support of the CPC, the courts offer what is seen as perhaps the best hope of progress.

Thus we end this tour of European scholarship with an invocation of one of the central features of US antitrust - and one of the key differences between EU and US educational offerings. Ironically, it is because of another of the differences - that so much of EU competition law is new - that it is easy to imagine evolutionary changes that could lead to still greater harmonization.