

First ‘Gaetano Filangieri’ Conference on Freedom of Commerce ‘Recent developments in EU Competition Law’ Naples, 8–9 May 2018

On 8–9 May 2018 the University of Naples ‘Federico II’ (*Università degli Studi di Napoli ‘Federico II’*) hosted the international conference ‘Recent developments in EU Competition Law’. The event, which gathered eleven speakers from eight different European universities and over fifty participants, marked the beginning of the ‘Gaetano Filangieri’ conference series, devoted to the late 18th Century Neapolitan jurist who, in his treatise *The Science of Legislation (1780–1791)*, developed some pioneering ideas on monopolies, regulated professions, competition on the merits, and freedom of commerce.

The conference was opened by three representatives of the University of Naples ‘Federico II’: Professor Amedeo Arena, the convenor of the conference, Professor Roberto Mastroianni, Director of the Postgraduate Diploma in EU Law, and Riccardo Guarino, editor-in-chief of the legal periodical ‘Ius in Itinere’.

The introductory part was followed by a keynote speech delivered by Dr Arianna Andreangeli (University of Edinburgh), which focused on the possible impact of Brexit on competition law enforcement. The speaker recalled that competition policy is an exclusive competence of the European Union; hence, *prima facie*, the transfer of competences back to the national level appears to be significant. The scholar then moved to discuss the foreseeable implications both from a substantive and from a procedural point of view. With respect to the former, the impact of Brexit was not expected to be dramatic, as the substantive interpretation of national competition rules has become largely synchronized with their European counterparts over the past decades. At the same time, the fact that the Court of Justice would no longer be competent to provide interpretative guidance on the application of competition rules in the United Kingdom might have an impact on their further evolution. The UK’s exit from the EU was seen as an even greater challenge when it comes to procedural issues such as mutual recognition of judgments. The speech concluded with a discussion of the different forms of administrative cooperation that could compensate for the Competition and Markets Authority’s withdrawal from the European Competition Network (ECN).

After a brief discussion, Professor Arena opened the next session and invited Professor Maciej Bernatt (University of Warsaw) to present his paper on the independence of national competition authorities (hereinafter: NCAs), due process and judicial review. The speaker began with an observation that NCAs already play

a role in enforcing EU competition law, yet the scale of their active involvement in doing so differs widely. Attention was then drawn to a proposal for a directive, which was recently submitted by the European Commission with the aim of ‘empowering the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market’.¹ According to Professor Bernatt, while the focus of the proposal remains on the effectiveness of enforcement, it could also affect the independence of NCAs as well as the procedural standing of the parties to the proceedings. In his assessment, the proposed rules on undue dismissals and the resources available to NCAs go in the right direction, but to improve their actual independence further measures are necessary. The speaker then moved to a broader discussion of the guarantees of due process in competition law proceedings, presented the findings of his comparative research devoted to this topic, once again referred to the legislative proposal which is currently on the table in the EU and expressed his views on the role the EU could take in setting standards for this domain.

The analysis of some of the issues that emerged during the first two talks of the day was further advanced by Professor Erzsébet Csatlós (University of Szeged) who assessed the different networks of cooperation between public authorities and enquired whether the ECN could serve as a model for other areas of administrative cooperation. The speaker noted that the EU currently lacks a coherent procedural framework for administrative enforcement, which has traditionally remained a domestic matter. At the same time, due to the importance of public administration in the application of EU law, multiple networks of cooperation have come to exist over time between particular authorities. The networks share several common features, such as their reliance on soft law instruments; however, they also vary substantially as to their functions and level of development. According to the speaker, the European Competition Network is currently the most developed cooperation model and can generally be assessed positively, even though some room for improvement remains. Most notably, to ensure compliance with the principle of the rule of law, networking structures should be based on a basic legal act of a binding nature. More attention should also be devoted to the impact of the instruments adopted within such networks on the individuals concerned.

In the subsequent speech Professor Monika Namysłowska (University of Łódź) presented a paper entitled ‘Unfair competition in the supply chain: the need for EU rules’. The speaker indicated that unfair trading practices in B2B relations are regulated by various legal acts, which use different notions, measures and have diverse application scopes. This raises a question whether there should be a more uniform approach towards regulating business-to-business unfair practices at the EU level. With this in mind, the speaker moved to an analysis of the two legal acts which were recently proposed by the Commission, namely, the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain² and a Directive on promoting fairness and transparency for business users of online

¹ COM(2017) 142 final.

² COM(2018) 173 final.

intermediation services³. Professor Namysłowska argued that the provisions on unfair practices in B2B relations are not extensive and the EU lacks comprehensive rules. The proposed Directives may be a step towards filling this gap, however not in the shape of the presented drafts.

Professor Anna Piszcz (University of Białystok) presented the issue of the derogation for small and medium-sized enterprises (hereinafter: SME) from the principle of joint and several liability under the Damages Directive⁴, mainly from the perspective of CEE Member States. The speaker discussed the legal basis and background for both this principle and derogation. Professor Piszcz indicated that EU Member States approach the SME derogation differently, since the Directive does not provide extensive definitions and provisions. Hence, some requirements for the derogation are ambiguous, for instance, at what time must an undertaking have a SME status to use the defence provided for by the Directive. The scholar also pointed out that the implementing provisions on the extent of liability proved to be a challenge for national legislators. Professor Piszcz noted possible problems related to the enforcement of the Directive, such as the implication of the assessment of how long an undertaking is enjoying the SME status or whether the SME derogation may clash with the protection of a larger undertaking which received immunity.

The last paper in the senior speakers session was delivered by Professor Viktoria Robertson (University of Graz). It was dedicated to consumer welfare in the financial sector understood as banking, insurance and capital markets. The speaker discussed the special protection provided for consumers in those markets in the light of consumer protection law and EU competition law. Consumer welfare is a standard of EU competition law and can be characterized as the economic wellbeing of consumers defined broadly, that is, not on an individual, but on a structural level. Both competition law and financial consumer protection law put emphasis on external factors such as the structure of the market when assessing consumer welfare. However, they differ when it comes to approach; the former is reactive and applies when an alleged infringement already took place; the latter is proactive and includes many preventive measures to improve the market before the law is violated.

The second day of the conference offered junior speakers the possibility to present their on-going work and receive extensive feedback from discussants having expert knowledge in the field. It began with a presentation by Agnieszka Jabłowska (University of Łódź) who investigated one of the topical issues related to EU competition law in the e-economy, namely the use of the so-called most favoured nation clauses (hereinafter: MFNs) by the operators of online platforms. The speaker first presented this issue from a competition law perspective, drawing on the examples of enforcement actions taken on the basis of Article 101 and 102 TFEU. She then moved

³ COM(2018) 238 final.

⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter: the Damages Directive).

to assessing the attempts of addressing the issue of MFNs by regulatory measures, and discussed the provisions of the proposed regulation on promoting fairness and transparency for business users of online intermediation services devoted to this topic. The presentation was followed by advice and comments given by Professor Bernatt.

Magdalena Knapp (University of Białystok) presented subsequently a paper analysing the issue of the liability for anticompetitive conduct of a third party under EU antitrust law. She discussed the concepts of extended liability set forth in relevant judgements and competition law doctrine. She focused on situations where an undertaking's exposure to liability is a consequence of unlawful conduct of an independent third party which can be defined as a separate legal entity acting on its own behalf and bearing relevant financial and commercial risk in its own name. She noted that the CJEU introduced a test for the attribution of antitrust conduct of an independent service provider, which consists of rebuttable presumptions. The speaker underlined the possible actions that can be undertaken by an entrepreneur to distance himself from the competition law infringement, for instance, modification of compliance procedures. Finally, possible problems related to the discussed issue, such as the assessment of evidence or difficulties with rebutting the presumptions, were described. The presentation was commented on by Professor Victoria Robertson. The discussant pointed to issues that could be further developed.

The next paper was presented by Claudia Massa (University of Naples 'Federico II') and referred to punitive damages and the EU Damages Directive. She analysed the definition of punitive damages referring to relevant case law. The speaker emphasized that in most EU Member States punitive damages are considered incompatible with national rules on civil liability, since damages only have a compensatory function. Subsequently, she indicated the possible reasons for excluding punitive damages from the Damages Directive and provided arguments for their introduction into the European legal system. The speaker concluded with a proposal to modify the scope of relevant regulations, for example by allowing national courts to conduct a case-by-case assessment which could result in awarding more compensation to the victims than is possible according to current rules. Professor Piszcz made comments on the presentation and drew attention to other matters that are vital to this topic.

Gabriella Perotto (University of Turin) delivered a presentation on selectivity in fiscal aids. She indicated that fiscal benefits lie at the boundary of Member States and EU competences. The issue of selectivity is crucial since other requirements of Article 107 TFEU are usually fulfilled by Member States. The speaker defined the notion of geographical and material selectivity with a focus on the latter, more controversial type. Gabriella Perotto referred to recent developments in the case law of the Court of Justice [CJEU] and the derogation test developed therein. The test consists of three steps: identifying the correct tax reference framework, assessing the character of the measure, that is, whether it differentiates between undertakings in similar situations, and third, optional step used only if a measure was found selective. She highlighted that the CJEU and the Commission share a common approach to the notion of selectivity which is being extended. She indicated that national tax laws are getting more similar to each other, through backdoor harmonisation. The presentation was

reviewed by Professor Robertson who highlighted matters that need to be analysed in more detail.

Andrea Pezza (University of Naples 'Federico II') discussed the issue of the right of fair trial in EU antitrust proceedings. The speaker emphasised the importance of the principle of fair trial in the light of relevant case law and Commission proceedings as well as the binding effect of the principle. In his opinion, the current system adopted by the Commission needs a substantial enhancement. The speaker referred to two main models of proceedings – dualist and monist. It must be noted that Commission proceedings are structured as a monist model. The proposed changes referred to the system adopted in France. Many aspects from this model could be transposed, ensuring at the same time that principles of fair trial are respected. After the presentation, Professor Bernatt shared his thoughts on the issue and pointed to other important matters that the paper could include.

The conference successfully combined the presentations of senior and junior speakers and provided a platform for intense and thought-provoking discussions. At the same time, the diversity of the research topics addressed by particular scholars highlighted an enormous potential for future 'Gaetano Filangieri' events. Full versions of some of the papers presented at the 2018 conference are published in this volume of the YARS.

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