Editorial foreword

Dear Readers,

It is my great pleasure to introduce to you the 23rd issue of the Yearbook of Antitrust and Regulatory Studies (YARS 2021, Vol. 14(23)), with the focus on the currently highly debated topic of the interplay between competition law and sustainability.

Climate change is the crisis of our time affecting Europe and the world. The European Green Deal, which is an integral part of the Commission's strategy to implement the United Nations' 2030 Agenda, aims to make Europe the first climate-neutral mainland by 2050,[1] to achieve sustainable economic growth considering pivotal environmental and social policy priorities. There are many effective ways to tackle the climate emergency which can be pursued by regulatory tools, taxation, and investment. However, regulations are often inefficient and therefore, competition law has a role to play for the green future. In light of the Green Deal, the European Commission has instigated debates on how competition policy can best support the Green Deal objectives. The November 2020 consultation has attracted significant attention, gathering 200 contributions from businesses and governments, NGOs, national competition authorities, practitioners, academics, and other competition experts across the EU, and beyond. Those that took part in this consultation, followed by the participants of the EU competition law and sustainability conference held virtually on 4 February 2021, agreed that competition policy has an important role to play in delivering the Green Deal objectives, especially, by 'driving green innovation and bringing about the technological revolution required to have sustainable jobs and growth, in line with EU rules and values'.[2] The constructive feedback collected has framed three main on-going reform work-streams, embracing examples in each of the three competition instruments. These are: i) state aid directed at the funding of non-fossil fuels; clarifying and simplifying the rulebook; enhancing possibilities to support innovation; ii) antitrust, where further

[1] See https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/european-green-deal-sets-out-how-make-europe-first-climate-neutral-continent-2050_en, (last visited 8 Feb. 2021).

[2] Competition policy brief, Competition Policy in Support of Europe's Green Ambition, 2021-01 | September 2021 ISBN: 978-92-76-41099-7, ISSN: 2315-3113

clarification is required whether and how to assess sustainability benefits; improving guidance and an open-door policy; and finally, iii) mergers with strengthening enforcement regarding possible harm to innovation (that is, green 'killer acquisitions'); reflecting sustainability aspects/features prevailing in the market and consumer preferences for these. This is only the start of the debates directed at these pressing concerns. While not all these challenges are addressed in this YARS issue, most evidently, the four main articles provide a valuable contribution to this debate with some references to the Central and Eastern European context.

The articles' section begins with the fascinating article entitled 'The Concept of Sustainability in EU Competition Law: a Legal Realist Perspective' written by Dr Oles Andriychuk, which provides a perfect foundation for this issue. In this paper, the author scrutinises the role of sustainability in EU competition law from the theory of legal realism perspective by conceptualising the discussion. There are three underlying themes raised in this paper. First of all, it summarises the main normative and methodological arguments of the protagonists and the antagonists of a more sustainability-minded approach in interpreting competition rules. The second theme of the paper is built on the perspective from the theory of legal realism, most notably, to shape a theoretical avenue with the purpose of expanding the apparatus of the discussion, instead of using legal realism in support of a specific vision towards a more sustainability-embraced competition policy. The final theme projects legal realism to an applied dimension, raising the issue of balancing incommensurable values. The article did not intend to make a normative argument in support of a more-sustainability friendly approach nor to argue against such approach. Instead, the article demonstrates successfully in my view how the main normative ideas of both sides could be incorporated into the conceptual framework of legal realism.

Further discussion on sustainability in the competition law context is developed by Michael Konrad Derdak in his paper entitled 'Square peg in a round hole? Sustainability as an aim of antitrust law'. First of all, the paper employs both subjective and objective approaches in construing the aims of competition law, namely, under the Polish and EU competition laws. While concluding that the main objective of competition law from an objective perspective is economic, and from a subjective approach – opportunistic and political, the paper further explores whether sustainability currently is, or may be in the future, an appropriate aim of competition law. The paper concludes that sustainability and the core economic aim of competition law (that is, protection of competition, promotion of economic efficiencies and ultimately, protection of consumer welfare) conflict with each other and so introducing a new objective, such as sustainability that is contrary to or at

least incompatible with the primary economic objective of protecting the competition process, must be avoided.

State Aid plays a vital role in achieving the Green Deal objectives. Therefore, the third paper entitled 'The Implementation of the European Green Deal – tensions between a market-based approach and State aid for renewables', jointly written by Aleksandra Granat and Dr Malgorzata Kozak, explores a market-based approach towards renewable energy support schemes and whether this approach is directed at achieving the European Green Deal goals. Most importantly, the paper also evaluates the recent draft Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 (CEEAG). The paper concludes that the current market-based approach may not be sufficient to achieve the goals of the European Green Deal. Yet, some positive notes can be found in the context of the draft CEEAG where the authors acknowledge that the Commission is not only focusing on a market-based approach, but also on the phasing-out of fossil fuels as well as aims to introduce new requirements ensuring that aid is efficient, well calibrated and also in line with the European Green Deal objectives.

The final paper of this section 'Energy Transition enhanced by the European Green Deal – how national competition authorities should tackle this challenge in Central and Eastern Europe', written by Marcin Kaminski, continues the discussion on the European Green Deal with a specific focus on the role of national competition authorities (NCAs) in Central and Eastern European (CEE) countries to deal with the clean energy transition. The author overviews the CEE countries' energy markets and their reliance on fossil fuels. While noting some positive initiatives employed by other countries, such as the Dutch NCA, the paper criticises the lack of action by the NCAs in CEE countries to address energy transition and decarbonisation. The paper also proposes for the NCAs in the CEE region to take certain institutional actions, such as: i) defining environmental agreements; ii) issuing guidelines on competition law and the European Green Deal; and iii) creating new ways for consultation.

Given that the YARS volume is also open to other issues related to competition law and policy as well as sector-specific regulations, this issue also features a review article analysing the postal sector. Specifically, the paper entitled 'Competition Law in the Quasi-Liberalized Postal Service Market: An Overview', written by Dr Fatih Buğra Erdem, analyses postal services in the EU, especially after the implementation of three postal directives (i.e. Directives 97/67/EC, 2002/39/EC and 2008/6/EC) aimed at the liberalisation of postal services for the development of the single market and the promotion of socio-economic development. The paper argues that despite the removal of barriers for new entrants championed by these directives,

formerly monopolised national postal operators have, to a large extent, retained their dominant positions and attempted to abuse their market power. This paper draws its arguments from the experiences of selected jurisdictions, such as the UK and some EU Member States (namely France, Germany and the Netherlands). These examples are contrasted with the US postal service model and its publicly governed postal service. This paper concludes that the level of competition in the postal market has not yet sufficiently increased in Europe.

YARS's case-law reviews section contains expansive commentaries of two recent cases. The first case comment is on the judgment of the CJEU of 11 June 2020 *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa* (Joined cases C-262/18P and C-271/18P), written by Elena Aldescu and Inês Neves. This case concerns a grey area of competition law – the definition of an 'undertaking' in the health sector, specifically regarding social security systems and their hybrid nature in terms of economic and non-economic activities. While the authors acknowledge that this ruling reached an important conclusion in relation to the nature of the activities and the qualification of entities operating within a social security sector, it, nevertheless, missed an opportunity to clarify how much competition (especially in terms of quality) will be needed to allow a certain activity to be qualified as 'economic'. The authors conclude that while quality is a self-standing parameter of competition, the intensity of its role in social security schemes was left unanswered.

The second commentary, written by Professor Cezary Banasiński, is on the recent CJEU judgment *Airhelp* (C-28/20), concerning the protection of consumers in the sphere of the air carrier's responsibility in the event of a flight cancellation due to a strike by the employees of the carrier, where the court interpreted the definition of 'extraordinary circumstances' (both 'internal' and 'external') as the premise for obliging or freeing the carrier from its liability. The author supports the CJEU's standpoint in this case – a strict interpretation of the definition of 'extraordinary circumstances', which is limited to events not inherent to normal activities of the air carrier either due to their character or source and which are impossible to control by the air carrier. Therefore, in line with the court, the author concludes that a strike irrespective of whether it is a 'wildcat' or falls within the conditions defined by national legislation (especially, respecting the necessary timeframe) is not included in the definition of 'extraordinary circumstance'.

This issue concludes with a conference report on a Panel 'Career Challenges: How to make and maintain an academic career (not just as a woman)' held on 3rd July 2021 at the virtual 16th ASCOLA conference, which was moderated by Professors Rupprecht Podszun and Kati Cseres with the panellists consisting of Professors Anna Gerbrandy, Juan David Gutiérrez, Jasminka Pecotić

Kaufman, and Wendy Ng, sharing their stories and experiences. The panel focused on the current challenges in pursuing an academic career starting from a young/inexperienced scholar to an established academic and formed a platform for open, honest discussions with the audience.

Finally, I would like to thank the YARS Editor-in-Chief Professor Maciej Bernatt for all his support in the preparation of this issue. I hope that you will find this issue both informative and enjoyable.

London,

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