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Institutions and Incentives in Antitrust Enforcement*

*Spencer Weber Waller***

ABSTRACT: The United States Supreme Court has decided in a number of cases how Section One 1 of the Sherman Act should apply to agreements that potentially harm competition. In recent key cases, the Court stated that the rule of reason is the default rule in antitrust. Second, *per se* condemnation (or some rebuttable presumption) is reserved for a limited group of practices that economics and experience show that the type of agreement under consideration is inevitably destructive of competition with little or no redeeming features. Third, reasonable people can disagree about the likely competitive effects of a particular type of agreement. Therefore, lower courts going forward should apply the rule of reason on a case by case basis to determine whether there is any likelihood of competitive harm and any likelihood of significant procompetitive benefits. However, lower courts should structure and streamline their analysis by applying one or more rules of thumb.

The Supreme Court followed this basic approach in *Leegin*, applying the rule of reason to resale price maintenance agreements (vertical price fixing), and in *Actavis*, applying the rule of reason to pay-for-delay agreements involving branded and generic pharmaceutical manufacturers. This essay explores where this strategy has been successful (*Actavis*) and where it has not (*Leegin*). I focus not on the substantive law but instead on the institutions and incentives in antitrust enforcement that ensure that the

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pronouncements of the law on the books by the Supreme Court gets translated into the law in action in the lower courts and the real world.

KEYWORDS: Antitrust, Competition, Institutions, Incentives, Enforcement.

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All Happy Families Are Alike: The EDPS' Bridges between Competition and Privacy*

*Simonetta Vezzoso***

ABSTRACT: Long before techlash became popular, the European Data Protection Supervisor (EDPS) was holding up a mirror to the EU competition authority. Not only the effectiveness of competition rules' enforcement in the age of big data was questioned, but the suggestion was made to substantially improve the interaction, i.e. strengthen the family ties between competition, data protection and consumer protection. The importance of this suggestion was recently acknowledged by the EU Commissioner and Executive Vice-President of the European Commission Margrethe Vestager at a lecture delivered in memorial of the former EDPS Giovanni Buttarelli: "[i]n this time of fast and radical change, all of us have a lot to learn from each other. And if we work together in the spirit that Giovanni Buttarelli showed us, we can achieve his cherished aim – a digital future that works for human beings".
The article's main purpose is to take stock of the current state of the interplay between data protection and competition law against the background of the roadmap presciently put forth by the EDPS since 2014. Moreover, in the spirit that Giovanni Buttarelli showed us, it is suggested that new forms of collaborative enforcement should be explored, the workings of the Digital Clearinghouse progressively institutionalised, also at national level, and, most importantly, that a pro-competitive data governance framework should be developed in a cooperative manner.

KEYWORDS: big data, data market, data protection, abuse of dominance, merger control.

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Private Enforcement and Legal Privilege Versus Convergency*

*Valeria Falce***

ABSTRACT: Directive 2014/104/EU has also been implemented in Italy, thus reinforcing the effectiveness of competition law at national level, too. Through a "two point" system, public and private enforcement qualify today for complementary means towards the same end.
Within such binary system, different issues and topics have been addressed by the academic community: from the binding nature of competition authorities' decisions to the introduction of the powerful system of assumptions, to the alleviation of the burden of allegation, to the "passing on" rules, to the new role given to competition authorities in general, etc. Yet, the provision devoted to the legal privilege covering the attorney-client communications has been almost neglected. In this article, the legal privilege will be analysed in depth, since, thanks to the implementing provision, it will be able to acquire a renewed relevance in Italy in terms of both legal framework and scope of application.

KEYWORDS: Directive 2014/104/EU, Legislative Decree 3/2017, Private enforcement, Legal Privilege, Attorney-client communications.

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Market Definition and Conditions to Ensure Competition in the European Market for Air Transport Services: An Analysis of Past and Upcoming Merger Cases*

*Eugenio Olmedo-Peralta***

ABSTRACT: The Single European Sky and the Open Skies Agreements introduced a fierce competition both in the European and in the International Market for air transport. Former flag carriers found out that they did not just have to compete with other carriers, but also with new business models such as low-cost carriers and the use of the new information technologies to manage their business (for example, the use of Big Data and algorithms to determine the optimal prices and capacities of their flights).

In order to survive in this competitive environment, air carriers need to adopt strategical and structural decisions to adapt their sizes and scopes to the new requirements of the market. Co-operation agreements, joint ventures and mergers play a significant role in this process. Carriers that are not able to adapt to the new market structure and requirements are compelled to disappear. The cases of Air Berlin or Germania are two good examples of this.

In the last years, the European Commission has analysed and cleared many concentrations and co-operation agreements in this sector, most of the times subject to conditions in order to ensure that the operation did not jeopardize competition neither raised entry barriers, especially in congested airports. These operations need to be considered not only taking into account the individual market players – the carriers –, but also considering the airline alliances in which they participate (mainly OneWorld, SkyTeam and Star Alliance).

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The problem has also to be addressed within the current debate about whether European competition rules should foster the creation of European champions, in this case, by facilitating the formation of big European carriers or alliances that may compete worldwide.

In the last month the Spanish former flag carrier Iberia announced the acquisition of AirEuropa, an operation that raises concerns about competition in many national and international routes (mainly from Europe to Latin America and the Caribbean) as it may hinder the access to slots in the airport of Madrid-Barajas, which would become the fifth biggest hub in Europe. It is relevant to consider if the doctrine set by the European Commission up to now is still appropriate to address this operation.

KEYWORDS: Air transport, mergers, conditions, barriers to entry, slots.

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Mutual Trust as a Backbone of EU Antitrust Law*

*Małgorzata Kozak***

"*Trust everyone and trust nobody – is wrong*"
Seneca

ABSTRACT: The article is an attempt to analyse to what extent a close cooperation between competition authorities belonging to the European Competition Network is based on the mutual trust principle. The fundamental importance of the principle of mutual trust was underscored in Opinion 2/13 on the Accession of the EU to the European Convention of Human Rights (ECHR), where the Court of Justice found that: "it should be noted that the principle of *mutual trust* between the Member States is of fundamental importance in EU law".

However, as it was emphasised by the CJEU, mutual trust does not amount to a blind trust, as it is illustrated in the case law of the CJEU in cases concerning the European Arrest Warrant. The CJEU imposes more and more obligations on executing Member States in verifying whether there are no irregularities issuing the European Arrest Warrant (EAW) in comparison to the early days of its functioning, leading towards a regulated or conditioned trust. This development *mutatis mutandis* is particularly interesting to analyse while referring to the functioning of cooperation of competition authorities within the EU. The research statement of this article is that based on the outcome of CJEU case law in cases concerning EAW such as e.g. *Aranyosi and Căldăraru* the trust in institutional cooperation such as provided by Regulation 1/2003 and Directive 2019/1 should not be blind so as not to allow the non-noticing of irregularities occurred in other Member States or before the European Commission.

We will begin by framing what the concept of trust englobes and showing how it is normatively framed in EU law. Then, the analysis concentrates on where there are boundaries to mutual trust in the decentralised application of art. 101 and 102 TFEU.

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Subsequently, the questions of how this trust works in practice and what the boundaries are that limit its application are addressed. As the concept of mutual trust is complex itself, this article does not aim to propose detailed solutions *de lege ferenda*. Its ultimate objective is rather to provide a conceptual framework of *de lege lata* analysis of mutual trust in the application of EU competition law.

KEYWORDS: Mutual trust, ECN, Directive 2019/1, Regulation 1/2003, Cooperation within the ECN.

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The *Bajratari* Case: Are All Resources Good Enough for EU Law?*

*Benedita Menezes Queiroz***

ABSTRACT: The *Bajratari* case is a significant contribution of the Court of Justice of the European Union to the clarification of the meaning of the condition of sufficient resources within the regime of the Citizens Directive 2004/38 (Article 7 (1) (b)). Moreover, it is also a step towards strengthening EU citizens' right to move and reside in another Member State. In this decision the Court held that income that results from the exercise of professional activities without a lawful residence and employment permit is not to be excluded from the condition of sufficient resources imposed by EU law to a Union citizen who is residing for more than three months in another Member State.

KEYWORDS: Sufficient resources; EU citizenship; derived right to reside; Citizens Directive 2004/38, public policy.

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