

ECONOMIC EVIDENCE
IN EU COMPETITION LAW

Mitja KOVAČ
Ann-Sophie VANDENBERGHE
(eds.)



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Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
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Economic Evidence in EU Competition Law

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*'What role does economics play in cases of competition law?
What role could it play? And what role should it play?
But do scholarly experts and judges agree on these viewpoints?
In this book an impressive variety of topics is covered and
surprising insights are gained. Thus it really covers recent and
partly controversial developments in the EU regarding the handling of
competition law cases on a national as well as an EU level –
something experts in the field must not miss.'*

Wolfgang Weigel, Chair, The Joseph von Sonnenfels Center for the Study of Public Law and Economics and Department of Economics, University of Vienna

*'Economics is the study of scarcity. Law is the study of rights.
Un-fortunately, law and economics scholarship that is practical and
focused on problems from the courtroom is scarce. This volume makes it right.
It combines the legal experience of experts and judges in several
European countries and the rigor of economics.
The result is an indispensable tool for anyone interested in EU competition law.'*

Shai Dothan, Associate Professor of International and Public Law, iCourts – the Centre of Excellence for International Courts, Faculty of Law, University of Copenhagen

PREFACE

Competition law has formed an important area of European law since the establishment of the European Union. However, the enforcement of EU competition law relies to a great extent on national courts and tribunals which are faced with ever increasing challenging responsibility given the dynamic nature of this area of law. Also the interplay of EC competition law and national law, especially national procedural law and employment of economic evidences, poses them with various challenges. In this light, the aim of this book is to identify practices for coping with these challenges to enable more efficient enforcement and application of EU competition law and also to stimulate transnational processes of mutual judicial-scholarly dialogue.

This book represents a direct outcome of a unique judicial-scholarly-expert research group in competition law and economics bringing together several European judges (from Belgium, Croatia, Czech Republic, Germany, Hungary, Lithuania, The Netherlands, Portugal, Rumania, Slovakia, Slovenia and United Kingdom), experts and selected outstanding scholars which identified the most triggering inefficiencies, problems of the economic evidence in EU competition law enforcement practice in different Member States. This book represents the outcome of this expert research group, providing a broad assessment of identified problems, inconsistencies, inefficiency, legal practice, cases, application of economic evidence and responding mitigating tools and interpretation techniques.

Contributions cover the most intriguing and challenging issues faced by practitioners and judges enforcing and litigating competition cases throughout the EU Member states (addressing current case law, enforcing practices, standards of proof and current developments in relation to economic evidence). The problem identification comes from judges, national experts and national enforcement authorities (bottom up approach) and reflects real obstacles in current EU competition law practices. Identified obstacles and issues are then addressed in chapters by several outstanding scholars and influential Supreme Court Judges.

This book could not have been made without the enthusiastic collaboration of our authors. They were all willing to contribute on a relatively short notice for which we are immensely grateful. We would like also to express our sincere gratitude to Anna Gerbrandy, Krijn de Veer and Ton van den Brink from Utrecht University, Faculty of Law, Europa Institute, to Oda Essens from the Competition

Authority of The Netherlands, to Jacques Steenbergen the Director of Competition Authority of Belgium, to Tomas Rymeikis from Lithuania and to Mitja Kocmut from KBL law firm (Ljubljana, Slovenia) for their substantive insights and suggestions.

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Kingdom); Lidija Smolar, Judge at the District Court of Ljubljana (Slovenia); Lucia Sousa, Judge at the Court of Appeal of Lisbon (Portugal); Ron Stam, Judge at the Supreme Court of The Netherlands (The Netherlands); Arunas Sutkevicius, Judge at Lietuvos vyriausiasis administracinis teismas (Lithuania); Iva Karin Šipek, Judge at the Commercial Court in Zagreb (Croatia); Pavel Trna, Judge at the Supreme Administrative Court of Czech Republic (Czech Republic) and Jaap de Wildt, Judge at the Court of Appeals Rotterdam (The Netherlands).

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Finally, thanks are due to the European Commission Directorate General for Competition that has generously supported our Faculty of Economics University of Ljubljana (Slovenia) and Utrecht University Faculty of Law, Europa Institute (The Netherlands) in pursuing a pan-European research project of identifying problems and overcoming obstacles in enforcing EU competition law. One of the related objectives of the research project was also the education of national judges in the context of the public and private enforcement of the European competition rules, including articles 101 and 102 of the Treaty with the emphasis on the economic analysis incumbent in these articles and the enforcement of state aid rules. The goal was to ensure the coherence and consistency in the enforcement of these rules by discussing the practical issues arising in the enforcement of EC competition law in the national courts of the selected Member States and encouraging a debate on these issues aimed at establishing solutions in the form of best practices of the Member States involved. Project also promotes a judicial-scholarly dialogue and creates coherence and consistency in the enforcement of European competition law.

However, this research-training project had also an unintended but highly beneficial, fruitful and rewarding side-effect. Namely, the issue of the proper and effective employment and assessment (understanding) of economic evidences in daily decision-making in competition cases across European Union appeared as one of the most triggering problems that European judiciary is facing while enforcing common EU competition rules and deciding daily competition cases.

This book hence represents a real positive, beneficial externality and reflects the collective wisdom and ideas of European judges, experts and scholars developed in this project over the past four years. We all hope that you will enjoy it.

Ljubljana – Rotterdam, September 2015
Mitja Kovač and Ann-Sophie Vandenberghe

This book could not have been made without extensive financial and organisational support from the European Commission Directorate General for Competition.



What we do need is more dialogue. Like English river Thames that flows in both directions, out to the sea and in to the England with an incoming tide we need dialogue between judges and scholars, judges of national courts and judges of two European supranational courts. We need to pursue many forms of dialogue and judges across Europe shall adopt an international perspective on their work and to be alive to legal and academic issues in other jurisdictions.

Lady Justice Mary Arden, at 106th annual SLS conference,
University of York, 2015

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Roger van den Bergh, Professor of Law and Economics at the Erasmus University of Rotterdam, Faculty of Law, Rotterdam Institute of Law and Economics (The Netherlands).

Rosamaria Bitetti, Associate professor at LUISS Guido Carli University, Istituto Bruno Leoni (Italy).

Jaka Cepec, Assistance professor at the University of Ljubljana, Faculty of Economics, Department of economic theory and policy (Slovenia).

Miodrag Dordevic, Judge at the Supreme Court of Slovenia (Slovenia).

Michael Faure, Professor of International and Comparative Environmental Law at Maastricht University Faculty of Law and Professor of Comparative Private Law and Economics at the Erasmus University of Rotterdam, Faculty of Law, Rotterdam Institute of Law and Economics (The Netherlands).

Jasminka Pecotic Kaufman, Associate professor at the University of Zagreb Faculty of Economics (Croatia).

Hendrik Kerkmeester, Judge at the Commercial Chamber at the Court of Appeals Amsterdam (The Netherlands) and Associate professor at the University of Antwerp Faculty of Law (Belgium).

Jonathan Klick, Professor of law at the University of Pennsylvania, Faculty of law, Professor of empirical legal studies at Erasmus University of Rotterdam, Faculty of Law and a Maurice R. Greenberg Visiting Professor of Law at Yale University, Yale Law School (USA).

Ayşe Gül Kökkılınç, Professor at the Dokuz Eylül University Izmir, Faculty of Law (Turkey).

Mitja Kovač, Associate professor at the University of Ljubljana Faculty of Economics, Department for economic theory and policy (Slovenia).

Claire Leger, Post-doctoral researcher at the Université Paris Ouest Nanterre la Défense (France).

Vlatka Butorac Malnar, Assistance professor at the University of Rijeka, Faculty of Law (Croatia).

Francisco Marcos, Professor of law at the IE Business School, Instituto de Empresa, Madrid (Spain).

Arjen Meij, Judge and Chamber President at the General Court of the European Union from 1998 until 2010, current Judge at the Court of Appeal of The Hague, The Netherlands and Professors of International and European Law at the University of Luxemburg and Utrecht University, Faculty of Law (The Netherlands).

Danilo Sama, Professor of competition law at LUISS Guido Carli University of Rome (Italy).

Anastasia Shastitko, Assistance professor at the Lomonosov Moscow State University (Russia).

Marcus Smith, Q.C., Judge and Chairman of the U.K. Competition Appeal Tribunal Court of Appeals (CAT), London (United Kingdom).

Rok Spruk, Researcher at the Utrecht University, Faculty of Humanities, Department of economic and social history (The Netherlands).

Ann-Sophie Vandenberghe, Associate professor at the Erasmus University of Rotterdam, Faculty of Law, Rotterdam Institute of Law and Economics (The Netherlands).

Ana Vlahek, Associate professor at the University of Ljubljana Faculty of Law (Slovenia).

Katarina Zajc, Professor of law and economics, University of Ljubljana Faculty of Law (Slovenia).

Sabina Zgaga, Assistance professor at the University of Maribor, Faculty of criminal justice and security (Slovenia).

REVIEWERS

Prof. Dr. Michael G. Faure (Erasmus University Rotterdam),

Prof. Dr. Luigi A. Franzoni (University of Bologna) and

Prof. Dr. Stefan Voigt (University of Hamburg).