ECONOMIC EVIDENCE IN EU COMPETITION LAW

Mitja Kovač Ann-Sophie Vandenberghe (eds.)



CONTENTS

Pre	face	vi
List	of Co	ntributors xx
Ger		ntroduction a Kovač and Ann-Sophie Vandenberghe
	,	•
PAI	RT I.	
EC	ONO	MIC METHODS IN COMPETITION LAW
Cha	ipter l	
		Economic Approach in European Competition Law: Is More or Not Enough?
100		
	Roge	r van den Bergh
1.	Intro	oduction
2.	The	Goals of Competition Law: An Unresolved Puzzle
	2.1.	Total Welfare Versus Consumer Welfare 16
	2.2.	Further Complications: A Broader Consumer Welfare Concept
		and Non-economic Goals
3.	EU (Competition Law Assessed from a Total Welfare Perspective 20
	3.1.	The Inconsistent Treatment of Vertical Restraints
	3.2.	Cartel Damages: Under-deterrence and Lack of Compensation 24
4.	The I	Missing Economics in the more Economic Approach 26
	4.1.	Ordoliberalism
	4.2.	Dynamic Approaches
5.	Obst	acles to an Economic Approach
	5.1.	The Chicago School's Bad Reputation in Europe
	5.2.	The Counter-intuitive Results of Economic Analysis
	5.3.	Unrealistic Models
	5.4.	The Demands of the Legal System
		5.4.1. Administrative Costs and the Need for 'Simple' Rules 34
		5.4.2. A Telling Example: Definition of the Relevant Market 35
6.	Cone	clusions
Bib		phy

Intersentia

	Property 2. Value of Training in Quantitative Methods for Judges Jonethan Klick	43
	Jonathan Klick	1.
1. 2. 3. 4. Bibl	Introduction. Reference Manual on Scientific Evidence. The Effect of Training in Antitrust Law Conclusion.	45 48 50
	apter 3.	
Reli		Action 1
	Rok Spruk	51
1.	Introduction	51
2.	A Brief Crash Course in Linear Regression	
	2.2. Goodness of Fit Criteria in Regression Analysis	
	2.3. Omitted Variable Bias	
	2.4. Homoscedasticity and Residual Variance Distribution	6(
	2.5. Inference and Hypothesis Testing from Regression Analysis	
	2.7. Interpreting Regression Coefficients and Functional Forms	67
	2.8. A Note on Non-Linearity	68
	2.9. Adjusting the Regression Model for Heteroscedasticity	73
3.	Essentials of Panel Data Econometrics	74
4.	Empirical Analysis of Policy Changes: Difference-in-Difference	
	Estimation	
	Summary	
5.		
Bibl	iography	83
DA I	RT II.	
	DNOMIC EVIDENCES IN COMPETITION LAW	
Cha	upter 4.	
	nomic Evidence in Competition Law: The Experience from a National	
	ninistrative Court	
	Hendrik Kerkmeester 8	37
1.	Introduction	87
2.	The Institutional Context.	
	1.1. Administrative Court	
		00

Xii Intersentia

	1.3. The Specific Competence of the Court of Appeal for Trade and	
	Industry	0
2.	Common Misperceptions of Economic Experts 90	0
	2.1. The Court Will Solve our Scientific Dispute	0
	2.2. The Court Will Look for the Right Answer	1
	2.3. The Issue at Hand is an Economic Issue	3
	2.4. We Know What is Important to Decide a Case	3
3.	Issues You Find in the Courts, not in the (Economic) Books 94	4
	3.1. Judicial Cold Feet and the Flight to Procedural Issues 94	4
	3.2. Judges Can Digest Lasagne but not Spaghetti 95	5
	3.3. The Requirements of the Textbooks, May Be too Costly	
	in Practice	5
4.	How, Nevertheless, Economic Evidence is Able to Creep in	5
	4.1. The Unavoidability of Economics	7
	4.2. Why Economic Experts Tend to be Helpful 98	3
5.	What Judges Are Able to Do)
	5.1. Using Common Procedural Rules to Furnish Facts)
	5.2. Using Previous Cases as Precedents)
	5.3. Finding Inconsistencies)
	5.4. Contradicting the Principal 101	l
6.	Conclusion - What is Needed to Remove Obstacles 102	2
Ch	pter 5.	
Co	npetition Law and Behavioural Evidence in a Courtroom?	
	Mitja Kovač	3
1.	Introduction	3
2.	On the Nature of Economic Reasoning 104	
3.	What is Behavioural Law and Economics?	5
4.	General Implications and Evidences of Non-rational Behaviour 109)
5.	Competition Law and Behavioural Law and Economics: Implications,	
	Cases and Insights	3
6.	Behavioural Competition Law and Economics in a Courtroom:	
	Not Ready for the Main Stage?)
7.	Conclusion	l
Bib	iography	2
Cha	pter 6.	
	ges, Ex Ante Decisions, Evidence and Proof	
	Marcus Sмітн, Q.C	7
1.	The Evidential Difference between <i>ex ante</i> and <i>ex post</i> Regulation 127	,
	The Britainian Difference between ex with and ex post regulation 127	

Intersentia xiii

3.	The Common Regulatory Framework and Dispute Resolution 1	29
4.	The Approach of Ofcom and Ofcom's Findings 1	30
5.	Dealing with "Known Unknowns" 1	.32
	pter 7.	
Law	and Economics' Evidence in Competition Law: Jurisprudence	
in S	lovenia	
	Katarina ZAJC 1	.35
1.	Introduction1	35
2.	Economic Analysis of Law in the Antitrust 1	36
3.	Economic Tools and Competition Law	
	3.1. General 1	
	3.2. Economic Methods of Determining the Relevant Market 1	
	3.3. The Definition of the Relevant Market and the SSNIP Test 1	
	3.4. An Empirical Analysis	
	3.4.1. Direct SSNIP Test – Critical Loss and Critical Elasticity 1	
	3.4.2. Price Correlation	
	3.4.3. Granger Causality	
	3.4.4. Co-integration Analysis	
	3.4.5. Single Root Test	
4.	Review of practices in Slovenia	
	4.1. The Competition Protection Office	
	4.2. The Administrative Court	
	4.3. The Supreme Court	
5.	Conclusions	
	iography	
DIUI	graphy	13
PAR	RT III.	
INS	IDER TRADING, CARTELS AND CRIMINALISATION	
Cha		
	pter 8.	
An A	Analysis of the Criminalisation of Insider Trading at EU Level	40
	Michael G. Faure and Claire Leger	.49
1.	Introduction	49
2.	Legal and Policy Background: Context of the Directive on Criminal	
	Sanctions for Market Abuse	151
	2.1. Harmonisation of Criminal Law in the EU	51
	2.1.1. Criminal Law, a Traditional State Sovereignty Matter 1	
	2.1.2. The Lisbon Treaty	
	2.2. Harmonisation of EU Insider Trading Law	
	2.3. Directive on Criminal Sanctions for Market Abuse	

xiv Intersentia

3,	Crim	inalisation of Insider Trading at a EU Level? 16
	3.1.	Economics of Federalism
		3.1.1. Transboundary Externalities
		3.1.2. Race-to-the-Bottom
		3.1.3. Transaction Costs
		3.1.4. Benefits of Differentiation
	3.2.	Is the Directive Necessary?
		3.2.1. Curing the Implementation Deficit? 163
		3.2.2. Effectiveness Doubtful
		3.2.3. No Convincing Justification
		3.2.4. Inconsistency with European Policy 168
4.	Conf	licts with Principles of Criminal Law 169
	4.1.	The Principle of Proportionality
	4.2.	Principles of Subsidiarity and Coherence
5.	Conc	cluding Remarks 173
Bib	liograp	ohy
	ipter 9	
The		inalisation of EU Competition Law
	Sabir	na ZGAGA 177
1.	Intro	duction
2.		venia Obliged to Criminally Prosecute Restriction of
۷.		petition?
	2.1.	Supranational Reasons for Criminalisation of Restriction of
	2.1.	Competition
	2.2.	The Obligations arising from the Slovenian Constitution
3.		inal Policy as a Reason for Criminalisation of Competition Law 186
3. 4.		of the Art Criminalisation of Competition Law
4. 5.		
Э.		ent Issues regarding Slovenian Criminal Law Regulation 192
	5.1. 5.2.	Complicity
	5.2.	The Relationship between a Misdemeanour and Criminal
	F 2	Responsibility
_	5.3.	Leniency in Criminal Procedure
6.		lusions
BID	liograp	bhy
Cha	pter 1	n
	1	tection and Collusion Screening: an Empirical Analysis of the
		letal Exchange
2011		lo Sama
	Dam	W W.
1.	Libor	Scandal
2.	Benfo	ord's Law

Intersentia

3.	Literature Review	
4.	Empirical Analysis of the London Metal Exchange	207
5.	Policy Conclusions	211
Bib	liography	212
Cha	apter 11.	
Dar	mages Claims in the Spanish Sugar Cartel	
	Francisco Marcos	213
1.	Introduction	
2.	The Sugar Industries	214
3.	The Spanish Sugar Cartel (1995–1996)	219
4.	Damages Claims in the Spanish Sugar Cartel	
5.	Lessons for Future Private Claims	224
	5.1. Relevance for Private Enforcement of Prior Public Enforcement	
	Decisions	225
	5.2. Damages' Calculation	
	5.3. The Passing-on Defence	
6.	Conclusion	
Bibl	liography	
	RT IV.	
PRI	ELIMINARY RULINGS AND STATE AID CONTROL	
Cha	apter 12.	
Stat	te Aid Cases in National Courts and the European Commission	
	Arjen Mei	239
1.	Introduction	239
2.	Distinct but Complementary Roles Meet in the Notion of Aid	240
3.	Safeguarding Rights in National Courts	
4.	Liaison, Cooperation and Delimitation	
5.	Final Observations	247
Bibl	liography	
Cha	apter 13.	
	cue and Restructuring of the State Aid	
	Jaka Cepec	249
1.	Introduction	249
2.	State Aid for Rescuing and Restructuring Firms in Distress	
	2.1. Rescue and Restructuring Guidelines	
	2.2. The Balancing Test in R&R State Aid	

xvi

	2.2.1. Contribution to a Well-defined Objective of Common
	Interest
	2.2.2. The Need for State Intervention
	2.2.3. Appropriateness of the Aid Measure 260
	2.2.4. Incentive Effect
	2.2.5. Proportionality of the Aid
	2.2.6. Avoidance of Undue Negative Effects on Competition
	and Trade between Member States
	2.2.7. Transparency of Aid
3.	Special Rules for Aid Schemes for Smaller Aid Amounts and
	Beneficiaries (Aid for SME)
4.	Critical Law and Economics Overview
5.	Conclusion
Bibl	iography
Cha	pter 14.
EU.	Accession Process, Judicial Review and State Aid in Turkish
Cor	npetition Law
	Ayşe Gül Kökkilinç
1	Total direction 271
1.	Introduction
2.	Anti-Trust Rules
	2.1. Cartels and Other Agreements Limiting Competition
	2.2. Abuse of Dominant Position
•	2.3. Mergers and Acquisitions
3.	Competition Authority
4.	Fines
5.	Judicial Review of Decisions made by the Competition Board
6.	Conclusion
Bibl	iography
	RT V.
	DNOMIC EVIDENCE, ENFORCEMENT PROBLEMS AND NATIONAL
CO	URTS
~ 1	
	pter 15.
G00	ogle, Competition Policy and the Owl of Minerva
	Rosamaria BITETTI
1.	Can the Owl of Minerva Spread its Wings and Fly?
2.	The New Economy: Did the Dusk Begin to Fall?
3.	The Breeze of Behavioural Antitrust
4.	Google, a Tale of a Virtuous Monopolist?

Intersentia xvii

5. 6. 7. 8. 9. 10. Bibl	The Trouble with Dominance. The Trouble with Abuses. Refusal to Supply. Tying or Bundling. The Trouble with Remedies. Conclusions	313 314 316 318 322
Cha	apter 16.	
	Interaction between EU Regulatory Implants and the Existing	
Cro	atian Legal Order in Competition Law	225
	Jasminka Pecotić Kaufman and Vlatka Butorac Malnar	34/
1.	Introduction	327
2.	Background	328
3.	Early Development of the Institutional Setting	332
4.	Competition Act 2003	335
	4.1. Article 266 of the General Administration Procedure Act	336
	4.2. Limitation of Sanctioning Powers of the Competition Agency	
	- Involvement of the Misdemeanour Courts	337
5.	New Institutional Setting and Open Issues	341
6.	Development of Substantive Competition Law Rules	344
7.	EU Competition Rules: A Source of Law or an Auxiliary Means of	
	Interpretation	349
	7.1. Case Pliva d.d./INFAI-NMR	
	7.2. Case P.Z. Auto	
8.	The Application of EU Competition Law: Competition Act 2009	
9.	Conclusions	356
Cha	upter 17.	
	piric Assessment of the Role of Economic Analysis in Russian	
-	npetition Law	
	Anastasia Shastitko	357
1.	Introduction	357
2.	Review of Problem	
3.	Database	
	3.1. Description	
	3.2. Comparison of the Sample and the General Sample	365
4.	Econometric Analysis	366
5.	Conclusion	370
	iography	
App	endix	371

xviii

Chapter 18.

Cha	allenges of Private Enforcement of Antitrust in Slovenia	
	Ana Vlahek	75
1.	Introduction	75
2.	Regulation of Private Enforcement of Antitrust in Slovenia	
	2.1. Jurisdiction in Antitrust Private Enforcement Cases	
	2.2. Legal Standing in Antitrust Private Enforcement Cases 37	
3.	Civil Law Sanctions for Antitrust Breaches	
	3.1. Damages for breaches of European and/or Slovenian antitrust 38	
	3.2. Full Compensation and Single Damages	
	3.3. Quantification of Harm	
	3.4. Scope of the Victims Seeking Damages	
	3.5. Passing-on	
	3.6. Fault	
	3.6. Joint and Several Liability of Infringers	91
	3.7. Effect of NCAs' Decisions	92
4.	Disclosure of Evidence	94
5.	Limitation	96
6.	Cooperation of National Courts with NCAs	98
7.	Consensual Dispute Resolution 40	00
8.	Nullity of Restrictive Agreements and Decisions	ე2
9.	Obstacles to Effective Private Enforcement of Antitrust in Slovenia 40	03
10.	Selected Case-law of Private Enforcement of Antitrust in Slovenia 40)7
	10.1. WWI v. Mobitel	98
	10.2. Si.mobil v. Telekom Slovenije, Tušmobil v. Telekom Slovenije 40	ე9
	10.3. T2 v. Telekom Slovenije	11
	10.4. Sinfonika v. Telekom Slovenije	13
	10.5. ABM v. Telekom Slovenije	
	10.6. Quantum v. Telekom Slovenije	
	10.7. Akton v. Telekom Slovenije	
	10.8. Amis v. Telekom Slovenije	
	10.9. Blitz v. Kolosej	
	10.10. Euromedia MB v. Pošta Slovenije	
	10.11. S5 vleka ladij v. Luka Koper	25
Bibl	liography 42	26

Intersentia XiX

Contents

###