

# Kluwer Competition Law Blog

## Questioning the Role of Competition Law in the 21st Century: Young Competition Law Scholars Conference 2024

Nils Imgarten (Deputy Editor) (University of Göttingen, Germany) · Sunday, September 8th, 2024

From 4th to 6th September 2024, 96 young competition law and economics scholars, from PhD students to post-docs and assistant professors, gathered in Vienna to discuss a wide array of topical issues of competition law. In its second edition, the young competition law scholars conference managed to attract attention not only from the DACH-region but also beyond. Participants came to Vienna from all around Europe and the world making this event truly international. Under the conference topic “THINK BIG – Questioning the Role of Competition Law in the 21st Century”, the organizers Ranjana Achleitner (University of Linz), Eva Fischer (LMU Munich), Lena Hornkohl (University of Vienna) and Bernadette Zelger (University of Innsbruck) convened 13 researchers presenting their work in six different panels. This was accompanied by two keynote speeches and one panel discussion featuring academics, enforcers and practitioners of competition law.

### **Keynote by Natalie Harsdorf (Bundeswettbewerbsbehörde)**

The opening keynote by Natalie Harsdorf (Director General of the Austrian Competition Authority/Bundeswettbewerbsbehörde) highlighted the evolving landscape of competition enforcement, with a particular emphasis on the challenges posed by digitalization. Due to the high complexity of digital markets the director general expressed some doubts about whether the Digital Markets Act (DMA) with its self-enforcing nature will successfully tackle pertaining issues. She underlined that also national authorities will have a role to play in competition enforcement in digital markets. She held that to effectively address these challenges, it is essential to strengthen the institutional framework. One step forward for the Bundeswettbewerbsbehörde was the recent establishment of a dedicated department for digital matters, the recruitment of specialized experts such as data analysts, and the general expansion of staff. Furthermore, cooperation with other national competition authorities (NCAs) is crucial for swift and effective action, as is the leveraging of technology to enhance enforcement capabilities.

The speech also touched on various other topics, including the role of public interests and sustainability in competition law. While these factors are not traditionally considered competition law parameters, they can serve as guiding principles for enforcement decisions. The importance of clarity and focus on objectives for competition authorities was emphasized. This might mean that for some issues, other agencies are better placed to address them, according to the Director General. Nonetheless, non-economic aspects can also be relevant for the work of competition authorities. One example provided by Harsdorf was the potential relevance of gender considerations in competition law, particularly applying a gender lens to market definition and priority setting for agencies, which was much discussed recently, including in OECD working

groups. Additionally, some interesting points on cartel enforcement were made. The Director General emphasized that both the authority's own investigations as well as leniency and whistleblowing programs provide a steady number of new antitrust cases to enquire. Looking ahead, the authority aims to increase its focus on abuse cases, which, although more complex, are necessary to address perceived underenforcement issues, according to Harsdorf.

### **Panel 1: Goals of Competition Law**

Silvia Retamales (Chilean Competition Tribunal/Universidad de Chile) challenged the traditional view of competition law as solely focused on promoting consumer welfare and economic efficiency as being too narrow and argued that competition law should also consider non-economic public interest values. She reviews the historical context of competition law in the US and EU, showing that these laws were initially designed to address social and economic issues, such as reducing concentration and promoting competition. She then focuses on the South African example, where competition law explicitly includes public interest values, and proposes a model for incorporating these values into competition law. However, in the following discussion, there was agreement that further ex-post analysis of competition law regimes which already implemented public interests would be beneficial to assess the potential of such policy proposals.

Christiane Wakonig (Bundeswettbewerbbehörde) explores the concept of fairness in European competition law, particularly in the context of Austrian competition law. She observes that despite the increasing importance of fairness in competition law discourse, its meaning and scope remain unclear. She argues that fairness is a multifaceted concept that can be understood in different ways, including as a procedural aspect (ensuring fair treatment in competition proceedings) and a substantive aspect (ensuring fair competition outcomes). Furthermore, she presumed, the concept of fairness might also be more open to policy considerations. While the concept of fairness remains vague, it is an underlying factor that may influence competition policy as a guiding principle, according to Wakonig.

### **Panel 2: Tools of Competition Law**

Selçukhan Ünekbaz (European University Institute) argued in his presentation that antitrust law today aims to foster competitive markets by protecting efficiency, but its focus should shift more explicitly toward dynamic efficiency. He proposes parameters such as innovation, cost reduction, and market entry since these factors drive long-term welfare. He critiques EU law's current mainstream static efficiency approach, which evaluates firms based on short-term cost/price structures, and suggests incorporating a "capabilities" framework instead. This would enable a better understanding of firms' potential to innovate and adapt, ultimately supporting dynamic competition more effectively, according to Ünekbaz.

Annika Stöhr (TU Ilmenau) focused her presentation on Section 19a of the German Act Against Restraints of Competition (ARC) which targets large digital companies with "paramount significance for competition across markets." Stöhr discussed the two-stage process of designating such firms and prohibiting certain harmful behaviours, focusing on early cases involving companies like Alphabet, Meta, Amazon, and Apple. Overall, she sees certain first successes in curbing anti-competitive behaviour but notes challenges in enforcement and the need for further refinement. She emphasized the nature of Section 19a ARC as a competition law instrument other than the DMA being mainly a regulatory instrument, thereby pointing to complementary function and goals of both tools. Nonetheless, Stöhr generally favoured the more flexible and more economics-driven approach of Section 19a ARC compared to the DMA, arguing that such a rule might achieve better results than the DMA if it was applied at the EU level.

### **Panel 3: Future of Competition Remedies**

Elaine Dunne (DLA Piper, Dublin) critiqued the current approach to remedy design in EU competition law enforcement, arguing for a more proactive and flexible framework. She outlined limitations of existing remedial practices, particularly the reliance on cease-and-desist orders, which often fail to restore competitive conditions effectively, as seen i.a. in the Google Shopping case. She proposes an iterative or staggered approach to remedy design, including the introduction of ex-post review mechanisms to monitor and adjust remedies based on their effectiveness over time. Dunne further advocates for the creation of a specific independent monitoring unit within DG COMP to ensure compliance and enhance enforcement on the EU level through better and more comprehensive ex-post review.

Linus Hoffmann (University of Strathclyde) focused on the traditional distinction between structural and behavioural remedies in competition law. According to him, this formerly clear distinction is becoming blurred in the digital economy, where value is extracted from information resources such as data and web traffic. Hoffmann contends that corporate control or ownership does not necessarily guarantee control over these resources, and that remedy design should focus on increasing or decreasing corporate control over information resources, rather than distinguishing between structural and behavioural remedies.

#### **Panel 4: Competition Law and the Twin Transition**

Luca Graf and Giulia Aurélie Sonderegger (both Universität Zürich) addressed the application of Article 102 TFEU to abuses in agricultural labour markets. They propose that the concept of dominance can be adapted to labour markets, where a single employer can be considered a dominant market player, and that the assessment of dominance should take into account the special features of labour markets, such as the vulnerability of migrant workers. Graf and Sonderegger also argue that worker welfare can be considered a relevant factor in the assessment of abuse, similar to consumer welfare in product markets, and propose a labour theory of harm that extends the reasoning of the CJEU in its famous Meta-case on data protection law to labour law.

#### **Panel 5: Competition Law, Crisis and Geoeconomics**

Nicole Deneka (Doctoral School of the University of the National Education Commission of Krakow) examined the European Commission's approach to state aid during international crises, such as the 2007-2009 financial crisis, the COVID-19 pandemic, and Russia's aggression against Ukraine. She argues that the Commission's temporary crisis frameworks aim to balance the need to provide support to affected businesses and sectors with the need to maintain the integrity of the EU's internal market. Deneka highlights the importance of monitoring and reporting obligations to ensure that state aid is granted in a way that is aligned with EU competition goals. She concludes that the Commission's approach to state aid during crises has consistently and successfully emphasized the balance between addressing immediate needs and preserving the integrity of the internal market.

Sophie Bohnert (Wirtschaftsuniversität Wien) suggested in her presentation that the separation between trade and competition policy is artificial and problematic, and that a more integrated approach is needed to address the challenges of the current global economic order. She contends that the "more economic approach" in competition law, which prioritizes consumer welfare and allocative efficiency, is too narrow and ignores other important considerations such as fairness, distributional issues, and public interest. Bohnert suggests that a more holistic approach to policymaking and enforcement is necessary, taking into account the interactions between trade, competition, and industrial policy, and that this requires greater coordination and cooperation between authorities. She also argues that the EU's competition policy should be more responsive to public interest considerations and that the EU's geopolitical ambitions should be taken into account in the enforcement of competition law.

Pierfrancesco Mattiolo (Universiteit Antwerpen) analysed the Foreign Subsidies Regulation (FSR) and its implications for EU competition law, particularly in the context of mergers and acquisitions. He argues that the FSR introduces a new regime that complements traditional EU competition law tools, allowing the Commission to screen operations orchestrated by foreign entities and integrate economic and geopolitical considerations. Mattiolo questions whether the FSR has become a “continuation of policy with other means”, citing its potential to be used as a tool for foreign investment screening at the EU level, which could lead to “over-securitisation” and reduce the openness of the EU economy. He also highlights the differences and overlaps between the FSR and the EU Merger Regulation, and notes that the Commission’s enforcement of the FSR may involve a balancing test that considers both economic and policy objectives, potentially blurring the lines between legal and political considerations.

### **Panel 6: EU Competition Law Beyond the EU**

Richard Bunworth (University College Dublin) argued that the European Union should leverage its influence through the “Brussels Effect” to promote its social values in competition law, going beyond the traditional economic focus of the discipline. The EU’s social values, such as gender and racial equality, economic equality, and environmental sustainability, are reflected in its constitutional foundations and should be incorporated into competition law. The Brussels Effect, which refers to the EU’s ability to shape global markets through its regulatory powers, provides a unique opportunity for the EU to diffuse its social values through competition law, particularly in developing countries that are more receptive to the EU’s approach. By introducing social values into its competition law framework, the EU could shape global norms and promote a more balanced and socially conscious approach to competition policy, according to Bunworth.

Tamta Margvelashvili (Ivane Javakhishvili Tbilisi State University) discussed integrating competition enforcement trends for digital platforms into eastern partnership. She argues that the EU should incorporate digital market competition enforcement as a key pillar of accession talks with Eastern Partnership countries, specifically Georgia, Ukraine, and Moldova. Margvelashvili posits that the EaP countries’ traditional market dynamics-focused competition laws are inadequate for EU accession. The author suggests that the EU should provide targeted technical expertise and capacity-building programs to help these countries develop effective digital market regulation and enforcement mechanisms, and that adherence to the EU’s Digital Markets Act and Digital Services Act should be formalized as obligations rather than voluntary commitments.

### **Closing Keynote and Panel on EU-Competitiveness in a Globalized World**

In his keynote speech on “EU-Competitiveness in a Globalized World: Competition Law and Innovation vs. Regulation”, Chris Meyers (Amazon) addressed the disparities between Europe and the U.S. in terms of innovation, pointing out Europe’s lower investments in R&D, fewer unicorn firms, and significantly less scaled-up AI companies compared to the U.S. He further expressed fears of politicizing competition law, blurring fundamental legal notions, and creating a lack of uniform application among the EU and its member states. He also expressed uncertainty about the enforcement of the Digital Markets Act, raising doubts about whether the DMA’s vague and undefined legal concepts would allow it to be self-enforcing. From a business perspective, Meyers emphasized that regulation should incentivize innovation, support further integration of the single market, and ensure clarity, predictability, balance, non-discrimination, and verifiability in competition laws, especially with regard to national abuse provisions.

In a panel discussion Chris Meyers was joined by Tabea Bauermeister (Universität Regensburg), Martin Gassler (Wolf Theiss), Heike Lehner (freelance economist), and Florian Tursky (former State Secretary for Digitization in Austria) to further discuss the topic. The participants emphasized the ongoing challenges Europe faces in fostering innovation, particularly in light of complex

regulations such as the DMA, which may not always accurately reflect and achieve economic objectives. Furthermore, concerns were raised about the rigidity of competition law generally, with calls for more flexibility to accommodate dynamic market developments.

## Conclusion

After two intense conference days, an impressive width of current issues of global competition law have been covered and discussed. The panel discussions and keynotes were complemented by possibilities for a personal exchange and networking amongst the participants and speakers, not only during conference breaks but also at the two evening receptions. The success of the conference was made possible through the generous support of sponsors (Barnert Egermann Illigasch Rechtsanwälte, Binder Grösswang, Haslinger Nagele, Helmuth M Merlin Stiftung, Land Oberösterreich, Nomos, Schalast, Schönherr, Universität Wien, and Wolf Theiss), who contributed in various ways to ensure a productive and enjoyable event for all participants.

The 12 papers presented at the conference will now be prepared for publication in the conference volume. This will be published as second volume in the newly established series “Junges Kartellrecht” by Nomos. The first volume of this series, based on the presentations of papers at last years Young Competition Law Scholars Conference was published in the beginning of 2024 and is [available open access](#). Other than the first volume, this year’s conference volume will be published fully in English language.

Next year’s Young Competition Law Conference will take place the EUI in Florence hosted by the EUI Competition Law Working Group. If you want to be updated about this and further events of the EUI Competition Law Working Group, sign up [here](#).

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*\* All speakers at the conference spoke in a personal capacity. Thus, the views expressed at the conference and referenced in this report may not necessarily reflect the views of the respective institution or employer which the respective speaker is affiliated to.*

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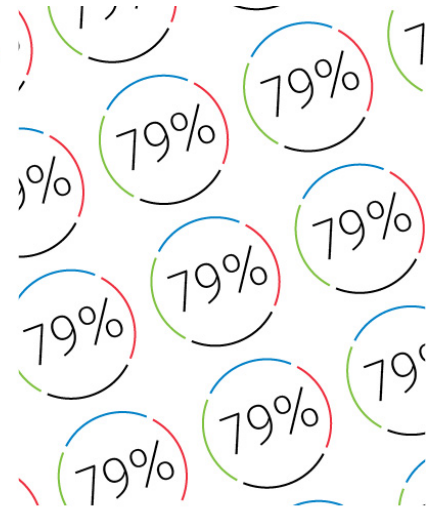
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