

## Editorial foreword

It is my great pleasure to present to you the newest issue of Yearbook of Antitrust and Regulatory Studies. We are proud that the YARS continues to attract original contributions discussing the developments in Central Europe and beyond. This is our eighteenth issue since the establishment of YARS in 2008 and the second one in 2018.

The issue covers diverse topics of direct relevance for competition law, competition economics and sector-specific regulation. However, the fact needs to be noted that 2018 has brought, or is about to bring significant changes into the broader legal framework affecting the functioning of legal areas that are of interest to YARS. Most notably, in Poland the judiciary was affected by far reaching reforms, undermining its independence, what led to the opening of infringement proceedings against Poland by the European Commission. It came without much notice that the changes affected directly the judicial review of decisions of the Polish competition authority and its sector-specific regulators.<sup>1</sup> Most notably, the new law on the Supreme Court moved appeal cases to a new chamber of the Supreme Court, a Chamber staffed with newly appointed judges. The recognition the Supreme Court enjoyed, as well as its expertise in the area of antitrust and sector-specific regulation, is likely to be lost. In a similar vein, at the end of 2018, the Hungarian Parliament passed a law establishing a new administrative court system in Hungary, which will be empowered to hear competition law cases. Again, there is a risk that the expertise of some of the judges of Kuria (Hungarian Supreme Court) will no longer be used.<sup>2</sup>

The issue opens with the obituary of Professor Irena Wiszniewska-Białecka, former judge of the General Court and the Polish Supreme Administrative Court, a leading Polish expert in competition and IP law. The obituary is co-authored by her colleagues from Polish academia and the judiciary.

The first article by Andrzej Nałęcz discusses how to empower consumers, the end-users of internet access services. The author reviews behavioural law and economics literature, and applies the resulting insights to interpret Article 4(1) of Regulation 2015/2120. Most interestingly, he proposes how to label internet access services so as to provide consumers with meaningful and understandable information. The issue continues with insightful analysis of the application of

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<sup>1</sup> See Bernatt, M. (2019). *Illiberal Populism: Competition Law at Risk?* Working Paper, available at <http://ssrn.com/author=1183912>.

<sup>2</sup> *Ibidem*.

fundamental right standards in Hungarian competition law. Tihamer Toth's original and well-balanced observations benefit from his practical experience in both the competition agency and private practice. The author underlines that the case-law clearly shows that the traditional administrative law enforcement regime is in conformity with fundamental rights requirements. What is crucial is for judicial checks to not be limited to narrowly construed legal issues. Still, there is place for improvement as to some specific procedural issues including, among others, the effectiveness of judicial review over inspections conducted by the competition authority and the immediate enforceability of administrative fines. Next, Paulina Korycińska-Rządca examines the Polish leniency model. She considers whether the leniency model was subject to spontaneous, legislative or judicial harmonization with EU law. According to the author, the lack of legislative harmonization leads to a situation where differences between national leniency programmes and the programme applied by the European Commission continue to exist. However, existing differences do not fully explain the lack of popularity of leniency in Poland. Maria Elisabete Ramos analyses opt-out collective redress scheme in the light of Portuguese experience. She discusses the advantages and the disadvantages of opt-out system and assesses the factors which can trigger abusive litigation. She considers what safeguards should be put in place to preserve positive characteristics of opt-out system. Dominik Wolski presents in his article the results of comparative research on judicial models, adopted in several European and non-European countries, in order to deal with private enforcement of competition law. The author concludes that it is difficult to find a clear link between the type of court – whether specialised or not – and the development of private enforcement in a particular State. Nevertheless, he argues that expert knowledge of judges can have positive effects when adjudicating private antitrust cases. Therefore, he is not against a judicial model where the same courts review the decisions of the competition authority and decide private antitrust damages cases; he favours the specialised judicial model. Zbigniew Jurczyk provides an overview of several economic theories relevant in the case of vertical restraints. By doing so, he analyses the economisation of competition law and the shift towards effect-based approach in the area of vertical restraints. By presenting different economic schools, he shows which of them affected and continues to affect the axiology of competition policy, as well as which of them offers specific evaluation criteria for vertical restraints. Kamil Dobosz addresses the incoherencies in the field of competition law and argues for greater unity both at EU and national level. A major role in this respect should be played by the CJEU. Another option is further-reaching legislative harmonization. Lastly, pro-EU interpretation of national competition law is necessary. In his article dedicated to state aid law, Marek Rzotkiewicz discusses whether the European

Commission abuses its powers when it chooses Article 108(2) TFEU instead of Article 258 TFEU as a basis of its infringement proceedings. The author does not reach a clear conclusion in this respect, but he cautions against such risk given the benefits the Commission gains when opening proceedings under Article 108(2) TFEU.

In addition to articles, the issue also contains an essay. Oles Andriychuk makes a case against hard-law based Net Neutrality rules. He argues that soft Net Neutrality rules are capable of meeting all positive objectives of regulation, without causing problems generated by hard Net Neutrality rules, such as those currently in place in the EU.

The next part of the issue is dedicated to legislation and case-law analysis; it opens with the study by Patrycja Szot and Ana Amza on the selective distribution agreements within EU competition law following the Coty Germany judgement. The authors provide a broad reading of the judgement and argue that Coty Germany effectively removed the limitation of sales via online platforms from the ‘by object box’, irrespective of the nature of the goods concerned. Moreover, in respect of luxury goods, such ban should be considered not to infringe competition law at all. Dragan Gajin describes the developments in the field of competition law in Western Balkans (Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia). The author shows that these countries differ from each other. In particular, the enforcement priorities are set differently. In addition, the peculiarities of each of the system are discussed. They include the existence of a notification system with respect to individual exemptions of restrictive agreements in three out of the four analysed jurisdictions. In addition, the issue contains case-comments to two important recent judgements. Marta Michalek-Gervais discusses the limitations imposed on electronic searches conducted by the Polish competition authority by means of a decision of the Polish competition court. Alexandr Svetlicinii analyses a judgement of the Croatian Constitutional Court which imposes additional burdens on the competition authority in terms of showing anti-competitive effects of price-fixing agreements.

The issue concludes with three conference reports and a book review.

I would like to thank all who contributed to this issue of YARS. My special gratitude goes to all peer-reviewers.

Enjoy reading!

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