

# MARKET AND COMPETITION LAW REVIEW

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VOLUME VII / No. 2  
October 2023



EDITORIAL

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## Editorial

*Laura Zoboli\**

Guest Editor

The contemporary arena of competition law is clearly intricate and multi-faceted. As the interplay between competition law and economic and societal dynamics continues to evolve, so too must the comprehension and application of competition law. Against this background, this issue of the *Market and Competition Law Review* gathers contributions that bring to the forefront challenging facets of European competition law, with a specific emphasis on the evolution of markets subject to antitrust enforcement.

The issue starts with an article by Jasper P. Sluijs that takes us on a journey through the concept of “undertaking” in EU competition law – a concept that aims to ensure consistent enforcement across all economic entities but faces challenges in cases involving mixed markets where public and private firms compete. In the Netherlands, public entities engaged in alleged anti-competitive behaviour have escaped competition law scrutiny by relying on the so-called ‘compass doctrine’ and the article highlights how such a doctrine may inadvertently weaken competition enforcement, leading to broader questions about its functional approach to business and its adaptability to changing market dynamics.

Shifting the focus to digital markets, the second article, by Mariateresa Maggiolino, guides us across the complex terrain of competition enforcement in the EU, and in particular it addresses the European Commission’s approach to assessing the conduct of dominant firms. Maggiolino persuasively argues that the Commission’s occasional deviations from its liability tests are not only legitimate, but also necessary in the age of digital

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DOI: <https://doi.org/10.34632/mclawreview.2023.15886>.

\* Assistant Professor of Commercial Law, University of Brescia; Scientific Coordinator, Centre for Antitrust and Regulatory Studies, University of Warsaw, ORCID: 0000-0001-5410-1489.

ecosystems. Moreover, the article shows how these deviations align with the effects-based concept of abuse and the teleological interpretation of treaty rules. It underscores that adhering to unalterable liability tests would elevate their individual components to essential elements of the abuse concept, directly contradicting the prevailing interpretation of this notion.

The third article, by Jeanne Mouton, delves into the power dynamics between online platforms and their complementors, with an emphasis on economic dependence and fear of retaliation. The article provides insights into how consumer empowerment and consumer-oriented enforcement can produce a positive externality for complementors and reshape the competitive landscape.

The fourth article, by Jan Polański, pivots on the premise that as the tech giants' perceived control over online information continues to grow, so do concerns regarding private censorship and constraints on free speech. Polański scrutinizes the boundaries of antitrust enforcement, pondering the potential classification of private censorship as an abuse of dominance. The article's conclusion posits that while it is feasible to maintain a perspective rooted in the consumer welfare standard, newer approaches are also conceivable. In particular, in the author's view, although free speech may appear as a purely political concern, it can be brought into the realm of antitrust as a means to alleviate some of the societal tensions stemming from the largely unchecked influence wielded by major enterprises.

Moving on to the data economy, the fifth article, by Selçukhan Ünekbaşı, assesses the data sharing provisions within the Digital Markets Act and the Data Act. The author's perspective suggests that the data sharing provisions in both Acts share a common goal of stimulating disruptive and complementary innovation. However, they suffer from legal uncertainties and may unintentionally result in adverse economic consequences, including limiting the ability of complementary firms to meet consumer demands while strengthening incumbent platform operators. These findings raise doubts about whether the vertical data sharing rules in the Acts can successfully achieve their primary objectives, namely, ensuring the competitiveness of digital markets and promoting innovation among smaller-scale firms.

The issue concludes with a review by Sílvia Bessa Venda, who examines Emanuela Arezzo's book, 'Patent Portfolios and Pharmaceuticals: A European Perspective'. The review underscores the significance of this

monographic endeavour, offering valuable insights into the intricate interplay between intellectual property and competition law within the pharmaceutical sector. In doing so, the book challenges established viewpoints regarding patent portfolios and their impact on competition, highlighting the necessity for a reevaluation in light of contemporary market dynamics.

To conclude, in this issue the contributors shed a light on the subtleties of competition law, reminding us of the need of a continuous reflection on the ever-changing economic landscape. We trust that these contributions will be as informative and stimulating for you as they have been for us, contributing to the ongoing dialogue on competition law and its evolving application.