

6th Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan - 'Challenges to the Enforcement of Competition Rules in Central and Eastern Europe' & 'Competition Policy Enfor ...

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C O N F E R E N C E R E P O R T S

**6th Competition Law and Policy Conference
in Memory of Dr. Vedran Šoljan
– ‘Challenges to the Enforcement of Competition Rules
in Central and Eastern Europe’
& ‘Competition Policy Enforcement in Digital Economy:
Recent Developments’,
University of Zagreb, 12–13 December 2019, Zagreb, Croatia**

The 6th Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan, co-organised by the University of Zagreb – Faculty of Economics and Business (EFZG), the Croatian Competition Agency (AZTN), the Croatian Competition Law and Policy Association (HDPPTN) and the European Documentation Centre EFZG, was held in Zagreb on 12–13 December 2019. A conference devoted to competition law and policy developments in Croatia, the wider CEE region and the EU as a whole, started off in 2009 as a small scale event aimed at presenting the results of an EU merger control reform project, led initially by Professor Vedran Šoljan (University of Zagreb), and continued on by Professor Jasminka Pecotić Kaufman (University of Zagreb) after his untimely death in 2008. Eventually, the Conference evolved into a large-scale event, and a tribute to the late Professor Šoljan, gathering around 150 participants from Croatia and abroad.

The 2019 conference was supported by ASCOLA (Academic Society for Competition Law) and sponsored by three leading Zagreb law firms that deal with competition issues (Bradvice Marić Wahl Cesarec; Divjak Topić & Bahtijarević; Liszt & Partners) as well as the biggest bank in Croatia (Zagrebačka banka d.d.).

The two-day conference was devoted to two major topics. The first day focused on competition law developments in post-socialist economies in Central and Eastern Europe, while the second day looked at challenges to competition law enforcement posed by the digital economy from the policy perspective.

The conference was opened by the main organizer, Professor Pecotić Kaufman, who emphasised the importance of reflection and discussion, especially for countries where the freedom of speech and critical thinking was limited and discouraged just a few decades ago. This conference, she said, provided a forum for a much-needed reflection on various competition law issues, especially in the context of post-socialist economies, where competition rules still do not feel interwoven with the fabric of the society.

The participants were also greeted by Professor Siniša Petrović, Vice-Dean of the University of Zagreb, Faculty of Law and President of the HDPPTN; Ms Mirta Kapural, Member of the Croatian Competition Council, and Professor Oliver Kesar, Vice-Dean of the University of Zagreb, Faculty of Economics and Business. Finally, opening speeches were given by H.E. W. Robert Kohorst, the US Ambassador to Croatia and by Ms Nataša Mikuš Žigman, State Secretary in the Ministry of Economy, Entrepreneurship and Crafts of the Republic of Croatia, who spoke on behalf of the Prime Minister of the Republic of Croatia. Ambassador Kohorst placed antitrust rules in the context of preserving economic liberty, but also noted that lobbying government for protection was sometimes easier for firms than innovating. Ms Mikuš Žigman placed the conference in the context of the then current Croatian EU Presidency with its four priorities (a Europe that is developing, a Europe that connects, a Europe that protects, and an influential Europe) and emphasised that opportunities for consumers must be protected, and that this is possible only if competition works well.

An inspiring introductory lecture, contextualizing the topics to come in day one, was given by the first keynote speaker, Professor William Kovacic (George Washington University, USA). Noting that it takes 20 to 30 years to be able to take a look behind you, Professor Kovacic gave a historical overview of the development of competition systems in Central and Eastern Europe during the 30 years following the fall of the Berlin wall, which marked the beginning of the transition process from a socialist to a market economy in this part of Europe. Major milestones of the competition law systems were presented, and the developed systems were evaluated against identified determinants of: good performance such as human capital, expenditures, project selection methodology, political stability, rate of learning and other. In this regard, Professor Kovacic noted that a strong academic hub was an extremely important component of an adaptable and resilient competition system. He also said that the question was not whether institutions will be affected by political turmoil, but rather, the question was if it will be able to persevere. He noted that the Central and Eastern Europe experiment did not fail but that it was incomplete. He mentioned Poland as a great success in terms of transitioning to a market economy, with the government's role in the economy changing from being a player to being a referee. When talking about institutional capacity and resilience, Professor Kovacic emphasised the importance of leadership and human capital, in particular of assessing the quality of the team with an annual staff evaluation. As regards challenges for less experienced competition authorities, Professor Kovacic noted that "you have to play the right matches". Remembering his role as the FTC head, when "politicians called me all the time", he emphasised "autonomy, accountability and effectiveness" as three cornerstones and a combination of "ambition and realism" as a good mix; "Moon, not Mars".

The second keynote speech was given by Kati Cseres (University of Amsterdam), who addressed the most important common denominator of competition law systems in Central and Eastern Europe, their journey from Europeisation to Harmonisation, with a view on institutions, their powers and priorities. Most of those countries' legal frameworks related to competition were the result of their accession process to

the EU. Institution building is the major part of this process, and Professor Cseres analysed the institutional capacity and efficiency in the pre- and post- accession stage, identifying common challenges and possible solutions for further development in the era of decentralisation. Noting that 2004 was an exercise in ‘copy pasting’, with implementation being neglected as a conditionality criterion, Professor Cseres called for more ‘centralisation’, for example, more involvement by the Commission in the new countries. Her message was that ‘institutions do matter’. She warned that Regulation 1/2003, which gave more power to local enforcers and created the challenge of ‘multilevel governance’, did not fulfil its aim for a more effective system when it comes to CEECs, and that a much more complex approach is required. Also, she emphasised that vertical legal transplants (‘if it worked for the Commission, it will work for us’) are not working (for instance, almost no leniency applications or private enforcement cases despite the 10% overcharge presumption). In fact, she called for a more centralised approach, criticizing the Commission’s hands-off approach.

Panel 1, moderated by Professor Siniša Petrović (University of Zagreb), was dedicated to the development of competition law systems from the perspective of different jurisdictions. Marek Martyniszyn (Queen’s University Belfast), presented the results of the empirical study performed in Poland on the development of its competition law system, which he found to be deeply influenced and related to the political, legal and economic development of the country. A similar empirical study was performed in Croatia by Jasminka Pecotić Kaufman (University of Zagreb), who presented her results showing the immaturity of the Croatian competition system and an insufficient competition culture. Opposite results came from Chile in relation to competition culture and cartel enforcement; they were presented by Umut Aydin (Pontificia Universidad Catholica de Chile).

Panel 2 was moderated by Marco Botta (Max Planck Institute for Competition and Innovation, Munich). The first presentation in this panel was devoted to the topic of antitrust enforcement against SOEs in the CEE Member States, prepared by Alexandr Svetlicinii (University of Macau). Dubravka Akšamović (University of Osijek) followed, with the results of a study related to judicial review in competition cases. Her research focused on winning and losing arguments before the High Administrative Court of the Republic of Croatia, compared to winning and losing arguments before the CJEU, showing a remarkable similarity of results. Vlatka Butorac Malnar and Ivana Kunda (both University of Rijeka) analysed the timely issue of damages claims for infringements of Article 101 TFEU that occurred prior to the Croatian accession to the EU, with a view of bypassing the limitations imposed by EU law with tools originating in private international law rules.

The first conference day was finalised with a sequence of short presentations of selected papers moderated by Tea Jagić (DG CONNECT/HAKOM). The first to introduce his topic was Ondrej Blažo (Comenius University Bratislava). He addressed the issue of the prioritization policy of national competition authorities and its impact on the overall enforcement of competition law, particularly with a view on the new ECN+ Directive and the overall EU impact in creating a proper, transparent and just competition policy and enforcement. Ákos Réger (Allegro Consulting) and András

Horváth (Hegymegi-Barakonyi and Partner Baker & McKenzie) discussed the abuse of dominance in the case Law of the Hungarian Competition Authority from the historical perspective. Dijana Marković-Bajalović (University of East Sarajevo), on the other hand, gave a competition law perspective of candidate countries to EU accession, the choice of the most suitable EU competition enforcement model to follow and lesson to learn. Avdylkader Mucaj (PhD candidate at University of Ljubljana) presented an overview of the competition law framework and institutional design in Kosovo. Veljko Smiljanić (Karanović & Partners, Belgrade) and Kevin Rihtar (Karanović & Nikolić, Ljubljana) gave a comparative analysis of the institutional design in Slovenia and Serbia, addressing the key problem of effectiveness vs. procedural fairness. The first conference day ended with the presentation of Dino Gliha (PhD candidate at University of Zagreb), who analysed the development of the refusal to license copyright under Article 102 TFEU. He focused his presentation on the methods of evaluation and enforcement in the Croatian legal system.

A short book presentation was held on the first conference day, with Professor Cseres introducing the book *Competition Law in Croatia* by Kluwer Law International, published in 2019, and written by Jasminka Pecotić Kaufman, Vlatka Butorac Malnar and Dubravka Akšamović. By providing a comprehensive review of most important competition cases dealt with by Croatian authorities, detailed information on the normative framework and the enforcement system including private enforcement, the book will hopefully be valuable for business and legal professionals alike, as well as for academics and researchers studying international and comparative competition law.

On the second day of the Conference, a special policy event titled ‘Competition Policy Enforcement in the Digital Economy: Recent Developments’ took place, bringing together prominent academics with their cutting-edge research on various challenges and threats that digitalisation and related technological developments pose to competition policy enforcement. Here again, the topics were given an introductory context by keynote speakers, Professor Bill Kovacic and Mirta Kapural (AZTN). While Professor Kovacic problematised the general adequacy of competition law institutions to address digital economy issues, Ms Kapural addressed these issue from the perspective of the Croatian Competition Agency, particularly with a view on digital policy demands of the EU.

While the focus nowadays is on the digital revolution and its implications, Professor Kovacic noted that a revolution happened before – at the end of 19th century. Quoting the later Kodak case, he said that the consequences of competition can be drastic, with consumers loving it, but not necessarily the workers. As regards digital markets, he noted that intervention needs to be prompt but precise, suggesting that we will not get good results unless we use competition, privacy and data protection together. Professor Kovacic commented that the German Facebook case was ‘a stretch’, but that it was a result of other (privacy) regulators not being engaged. He noted that in some instances, past cases create space for new firms to emerge, and how as a consequence of Microsoft abuse cases Bing was not included in the bundle, which allowed Google to emerge as a strong competitor. Finally, he suggested that smaller, newer agencies

tackle the issue of digital markets by using the analysis made by larger institutions, by cooperating with other domestic agencies, foreign colleagues and by forming academic partnerships.

Ms Kapural presented the main conclusions from the Crèmer et al. Report, summarising them conveniently for the audience. As a local NCA *fonctionnaire*, she did not speak in favour of a lower standard of proof for digital markets, and noted that underenforcement was a problem both as regards traditional markets and digital markets. She noted that while smaller agencies have limited resources and, absent legislation on EU level, she sees at least a part of the solution in cooperating with a data protection regulator as well as designating a person at the NCA level to follow developments on digital markets.

Panel 1 of the event, moderated by Marijana Liszt (Liszt & Partners Law Firm, Zagreb), started with the presentation by Nikola Popović (HAKOM) on the topic of governance of digital ecosystems and the possible future developments influenced and driven by AI, internet of things and other digital breakthroughs. Pedro Gonzaga (OECD) discussed the main challenges for competition authorities and presented recent OECD findings related to competition policy in digital markets, while Álvaro García Delgado (DG COMP) analysed the interactions between competition and regulation in the digital field, by presenting the findings of the EU Report on competition policy for the digital era and possible future developments.

Mr Gonzaga said that while we should not be afraid of change, we should care about market power and abuse. Speaking in favour of a ‘careful approach’, he noted that competition law has its limits and cannot address all the problems. As regards merger control in digital markets, where we need to look at very complicated markets, Mr Gonzaga emphasised that the evolution of market shares over time was more important than static market shares because of the pronounced market dynamism. Also, he noted the importance of dynamic efficiencies in digital markets, as well as that dynamic markets require more flexible remedies.

Mr García Delgado noted that over the five years Commissioner Vestager and her team gathered a lot of expertise in assessing competition issues in digital markets, emphasising that competition law is flexible enough and that what was needed was not revolution, but evolution.

Panel 2 was moderated by Mario Krka (Divjak Topić & Bahtijarević Law Firm, Zagreb). The first speaker was Viktoria H.S.E. Robertson (University of Graz) who discussed the problems of defining relevant digital markets. She questioned the appropriateness of the existent legal framework and economic tools of relevant market definition, presented possible problems and proposed a roadmap for the challenges ahead. Ramsi Woodcock (University of Kentucky) addressed the intricate issue of driven pricing and, what he referred to as the second dimension of market power, differentiating between the effects of personalised and dynamic pricing and the threat to competition they both pose. Thibault Schrepel (University of Utrecht) focused on a special digital technology, blockchains, and possible dynamic collusion it may lead to with far-reaching implications and serious challenges to competition policy

response. Panel 2 was closed with the presentation of Stefan Thomas (Eberhard Karls University, Tübingen) who gave an engaging presentation on the application of oligopoly theory in the age of machine learning.

Panel 3, moderated by Mislav Bradvica (Bradvica Marić Wahl Cesarec Law Firm, Zagreb), gathered presentations of different national perspectives and responses to the existent digital economy challenges. Marko Brgić (AZTN) discussed the new role that the NCA's experts should take in response to digitalization, particularly by rethinking forensic IT and data analytics. Al. Stefan Ruech (Austrian Competition Authority) brought the Austrian perspective, questioning its dealing with the challenges in the digital economy. Marco Botta (Max Planck Institute for Competition and Innovation, Munich) analysed the German Facebook Case and the complex interaction between competition policy, consumer protection and data protection shaping the decision in question. The final presentation was given by Mario Denni (Italian Competition Authority) on the ICA's investigation against Amazon and its use of a mixture of old and new theories of harm.

More details on the conference, including presentations and videos, are available at <https://pptn.net.efzg.hr>.

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