

PARCU, Pier Luigi, MONTI, Giorgio and BOTTA, Marco
(eds). *Abuse of Dominance in EU Competition Law.*
***Emerging Trends.* Cheltenham: Edward Elgar Publishing**
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Review by

Michal Petr

Palacký University, Olomouc, Czech Republic

michal.petr@upol.cz

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Over the last decade, re-thinking of the Article 102 TFEU and in particular, what conduct may be considered abusive and what evidence is needed in order to conclude so, belonged to the most discussed topics in EU competition law, despite the fact that the wording of that Article has not been changed since it was originally adopted in the Treaty of Rome. Much attention has been devoted to this topic and a significant number of publications has been published on it.

The publication under review still managed to approach this topic in an original way, summarised in the subtitle “*Emerging Trends*”. Its aim is therefore not to discuss the concept of abuse as such, but to concentrate only on a few selected issues, in particular the role of intent in assessing whether certain conduct is abusive and the interpretation of Article 102 TFEU on national level.

The relevance of intent belongs to fundamental but not frequently addressed issues; if it is being discussed at all, it is mostly in relation to fines, because the Commission is only allowed to impose sanctions for intentional or negligent conduct. The authors of the book under review thus managed to identify and discuss an issue that is sure to gain on importance in the future.

Concerning the role of NCAs and national courts, the vast majority of Article 101/102 cases is indeed handled on national level. Admittedly, the convergence among the Member States has mostly been stressed in legal research,¹ and iden-

1 See e.g. CHIRITOU, Bogdan. *Convergence Eithin the European Competition Network: Legislative Harmonization and Enforcement Priorities.* In: ALMASAN, Adriana, WHELAN, Peter (eds). *The Consistent Application of EU Competition Law. Substantive and Procedural Challenges.* Cham: Springer, 2017, pp. 3 *et seq.*

tification of diverging trends is therefore very topical. The authors of the book under review focus in particular on Germany, Italy and the United Kingdom; they convincingly explain why these jurisdictions were chosen, even though a more robust approach, covering at least some Central and Eastern European countries, where the tension between convergence and divergence is very strong, would be much appreciated.

The editors of the book under review, all connected to the European University Institute in Florence, belong to the best researchers in the area of EU competition law and need no further introduction. They managed to put together an impressive team of authors from both the academia and legal practice, much experienced in the topics they introduce. Despite the number of authors and diversity of their backgrounds, the editors managed to keep the book compact and coherent.

As has already been mentioned, the role of intent in the assessment of the undertakings' conduct under Article 102 TFEU constitutes an underdeveloped topic in EU competition law, and it is therefore understandable that the chapter on it was put to the front of the book under review. It is focused almost entirely on the EU-level, but at the end, after a thorough analysis of relevant materials, asks the EU institutions for official guidance. Even though complemented by a subsequent chapter on Italy (Chapter 7), where the national institutions presumably rely on the exclusionary intent while assessing the nature of certain new forms of abusive conduct, the situation in the Member States is not much discussed.

The other chapters focus on the second topic, the role and developments of Member States' jurisprudence. The role of national courts in incremental development of the EU case-law is stressed in Chapter 3, which illustrates *"how a good dose of deference to the CJEU, mixed with an appreciation of the need to improve the case law, can yield the small steps the small steps necessary for refining the law on abuse of dominance"* (p. 50).

Subsequent chapters concentrate on specific Member States. In Chapter 4, both private and public enforcement in the United Kingdom is discussed, with a surprising conclusion that stand-alone private enforcement actions may be more effective than complaints to competition authorities with respect to putative breaches of Article 102 TFEU.

The next two chapters focus on Germany. Chapter 5 deals with abusive conduct of standard-essential patent-holders; it analyses German jurisprudence predating the EU one, thus illustrating the "incremental development" approach advocated above. Conversely, Chapter 6 does not focus on an "emerging trend" but on specific provisions of German (and Austrian) competition law, which – unlike under the EU rules – provides for specific presumptions on dominant position, based on the undertakings' market share; while not overlooking the

advantages of such presumptions, a shift from this form-based approach to material assessment of actual market power is fittingly suggested.

Following two chapters are devoted to Italy. Chapter 7 analyses Italian approach to certain “new” forms of abusive conduct and compares it with pre-dating CJ EU case law; among others, it stresses that the Italian courts rely on subjective intent while assessing whether certain conduct is indeed abusive, which significantly differs from the EU approach, and warns against negative consequences of such a divergence. Similarly, in Chapter 8, the authors warn against the divergence between Italian and EU case-law concerning applicability of competition law in regulated industries.

The final Chapter 9 brings a broad comparison of decisions of NCAs from numerous Member States, not just the three of them indicated above, on excessive prices in the energy sector; it concludes that even though contrary to the Commission, the NCAs are indeed willing to prosecute such conduct of energy suppliers vis-à-vis final consumers as abusive, there is a rational in such approach and it should be encouraged.

Overall, the book under review puts a valuable stone into the mosaic of publications on abuse of dominance. It discusses topics and identifies trends that are often neglected by other authors. Even though limited in scope, its conclusions are valid and indispensable for any serious research.