

LOOKING BACK AT THE *COMPETITION LAW CHALLENGES 2024* CONFERENCE

On Thursday 30 May 2024, a conference titled *Competition Law Challenges 2024* took place at the Law Faculty, Charles University in Prague. The event was organized by the newly established Association for Competition Law and Regulation (in Czech: Spolek soutěžního práva a regulace), which aims to create an open platform for all those who have an affiliation to competition law and public regulation and to stimulate discussion on current topics. The conference attracted a number of experts and enthusiasts who discussed key issues and current trends in competition law, offering a unique opportunity for sharing interesting insights and exchanging views. This article provides an overview of the conference’s highlights and topics that were presented.

OPENING REMARKS AND KEYNOTE CONTRIBUTIONS

The opening speech was delivered by none other than **Petr Mlsna**, Chairman of the Czech Office for the Protection of Competition (the “**Czech NCA**”). In his contribution, he expressed his delight at the growing activity of the competition law community and stressed the importance of similar conferences for public debate on competition-related issues. He also responded to the criticism of the Czech NCA in relation to high food prices and inflation, which he described as unfounded and politically motivated. The Czech NCA had conducted an extensive market investigation which confirmed that the Czech retail food market was competitive. Mr. Mlsna stressed the need for better communication and cooperation with the professional public in order to avoid misconceptions about the Authority’s activities. He also outlined the planned legislative changes to the Czech Competition Act (Act No. 143/2001 Sb.) to improve the effectiveness of the Czech NCA, such as the adoption of a “New Competition Tool”, “call-in” model for merger assessments and administrative penalties for individuals involved in cartel agreements. Mention was also made of the recent administrative courts’ case law on dawn raids, which the Czech NCA reflects but also considers unfortunate. He concluded by expressing the Czech NCA’s determination to continue to protect competition and wished success to the Association for Competition Law and Regulation.

The second speaker was **Kamil Nejezchleb**, Vice-Chairman of the Czech NCA, who followed up on his earlier reflections on the future of competition law enforcement and presented to the audience his reflection on the state of competition entitled “Quo vadis protection of competition 2 (3 years later, without covid, but with NCT, DMA, AI, etc.)”. In keeping with the theme of the conference, he identified five key challenges to competition law. The first challenge concerned the fact that, despite new thinking and

theories, competition law should not expand and try to solve all the world's problems. Protecting competition as a process to increase consumer welfare should remain a clear objective, along with the "more economic approach", which has lately been somewhat forgotten. The second challenge concerned the need for flexibility in competition law where regulation ends, with the example of the DMA, where this issue is currently being actively debated. The third challenge constituted a follow-up to Mr. Mlsna's remarks and responded to the recent case law of the administrative courts, pointing out that the law should not make excessive demands on the standard of proof. The fourth challenge related to advocating for specific changes to the Czech Competition Act that the Czech NCA proposes, arguing that the Czech NCA should have the tools to stir up competition in markets where competition has not worked for a long time. He pointed to the established capabilities of foreign competition authorities, particularly in the UK and Germany. The fifth and final challenge concerned the need for the Czech NCA to target more specific culprits, again recalling the planned changes to the Czech Competition Act. He concluded his contribution with two of his favourite quotes in relation to the last point: "*With great power comes great responsibility. It pays off not to restrict competition.*"

Milan Brouček, Chief Economist of the Hong Kong Competition Commission, joined the conference remotely from Hong Kong. In his contribution, he discussed the economic background of a relatively recent case handled by the Hong Kong Competition Commission concerning online food delivery platforms. The case depended heavily on economic evidence and therefore the work of the economics team was extremely crucial. In addition to describing the specific anticompetitive conduct of the platform operators, Mr. Brouček focused primarily on the positive consequences of the implemented commitments, which significantly helped to improve the situation in the relevant market. Prior to the imposition of the commitments, entry into the market was difficult, even leading to the exit of a capital-intensive competitor, while after the imposition of the commitments a successful entry of a new player occurred. This case proves that a good economic team should be a natural and unavoidable component of modern competition authorities' teams.

The afternoon session was opened with the last keynote speech by **Juraj Beňa**, the Chairman of the Antimonopoly Office of the Slovak Republic (the "**Slovak NCA**"), who chose a very topical theme. Territorial supply restrictions have come to the forefront of competition law after the European Commission imposed a staggering fine on Mondeléz just a week before the conference (Case AT.40632). Mr. Beňa not only provided his own comments on this decision, but also reminded that the Commission and other EU competition authorities plan to focus more on similar cases in the near future. In addition to the *Mondeléz* decision, he stressed that from a legal standpoint territorial supply restrictions go back to cases like *Consten/Grundig* and other key case law of the Court of Justice. He also pointed to the possibility that the real reason for the higher prices on the retail food market, which was examined by both the Slovak NCA as well as the Czech NCA, may be territorial supply restrictions and not collusive agreements between chains, as often appeared in the public debate.

PANEL 1: INNOVATIVE APPROACHES IN COMPETITION LAW AND ECONOMICS

The first panel of the conference, which took place during the morning session, offered contributions from young faces in competition law and competition economics dealing with innovative issues in these areas. Two competition economists, Jan Málek and Jakub Chini, were complemented in the panel by competition lawyers, René Milich and Kryštof Žáček. The panel was moderated by Professor **Josef Bejček** of the Commercial Law Department, Law Faculty, Masaryk University in Brno, who belongs among the founders of modern competition law thinking in the Czech Republic.

The panel's kick-off was offered by **Jan Málek** of E.CA Economics in Brussels and Catholic University in Leuven (KU Leuven) with his contribution titled "*Mergers and innovation: An old-new debate that has no universal answer*". His contribution shed light on the complex relationship between mergers, market power and innovation. He pointed out that decisions of competition authorities, as in the case of the *Dow/DuPont* merger, often suggest that mergers can constrain firms' innovation efforts. However, current economic theory shows that the relationship between competition and innovation is much more complicated. Mr. Málek recalled that historically innovation has been little considered in competition-related analyses, but its importance is growing, especially in the pharmaceutical, chemical and digital industries. Acquisitions, he said, often take place in the early stages of development with a high risk of failure. To assess the impact of mergers on innovation, it is necessary to consider not only the market position but also the technological capabilities and stage of development of the firms involved, which can lead to different outcomes for consumers.

The relationship between innovation and mergers was also addressed presentation by **Jakub Chini** of Cornerstone Research in Brussels and Faculty of Economics and Administration, Masaryk University in Brno, who focused on new theories of harm for mergers in digital markets, especially for large technology platforms. According to Mr. Chini, new approaches such as ecosystem empowerment, stifling innovation, privacy degradation and data hoarding effects are emerging in the digital context alongside traditional theories. Like the previous speaker, he paid particular attention to "killer acquisitions" where large firms acquire smaller innovative businesses to stop competitors from developing their products. These acquisitions can limit innovation and eliminate potential competition, with various consequences for consumers. Mr. Chini concluded by stressing that assessing these impacts requires a detailed analysis of market and technological factors and that judicial review of these theories will play an important role going forward.

After two contributions by economists, **René Milich** of the Czech NCA spoke on the currently discussed issue of the approach of competition authorities to competition in labour markets. Mr. Milich outlined the evolution of the competition authorities' approach to this matter and presented different types of anti-competitive agreements, such as non-solicitation and wage fixing agreements, which are now more the authorities' focus. He also mentioned that mergers between competitors and abuse of dominance in

the context of labour markets are starting to be considered, which may lead to significant changes in the future.

Kryštof Žáček of Geradin Partners law firm in Brussels then offered the audience an interesting analysis of the current case law of the Court of Justice concerning the ability to produce anticompetitive effects as a condition for declaring that a certain conduct constitutes abuse of dominance. According to the Court of Justice, the ability of a practice to produce anticompetitive effects is crucial, but it is not entirely clear what specific forms these effects must take or whether they must actually manifest themselves on the market. The effects must be causally related to the conduct and not hypothetical. Mr. Žáček drew attention to the debate among experts, with some supporting the need for a high likelihood of effects and a comparative analysis, while others, including the European Commission, reject this requirement in order not to undermine effective competition law enforcement. According to Mr. Žáček, the overall uncertainty is exacerbated by the unfortunate terminology chosen by the EU courts, which conflates substantive conditions with the degree of evidentiary certainty. This issue is key to the forthcoming Article 102 TFEU guidelines and ongoing court proceedings, particularly in the Google Shopping case.

PANEL 2: NEW SECTORS, SECTORAL REGULATION

The first of the two afternoon panels focused on the topic of sectoral regulation in dynamically evolving technology sectors. The panel consisted of three speakers, Václav Šmejkal, Robert Květon and Natálie Tůmová, and was moderated by **Jiří Mňuk** of ROWAN LEGAL law firm in Prague.

After a brief introduction by the moderator, the floor was taken by **Václav Šmejkal** of European Law Department, Law Faculty, Charles University in Prague, who in his presentation examined the importance of access to data from smart cars and their impact on competition. Modern cars equipped with advanced IT systems produce data that is crucial for service provision and for new services and features. This data is valued by both car manufacturers and independent service providers, raising concerns that manufacturers may gain a monopoly position by controlling this data. Mr. Šmejkal focused on the debate between the possibility of sectoral *ex-ante* regulation (along the lines of the DMA) and the use of Article 102 TFEU to prevent abuse of manufacturers' dominant positions. For further reflection, the final consideration is that the current competition law standards may not adequately reflect the new possibilities of eliminating competition through automotive data, which may require doctrinal development or a recognition that competition law may not be the most appropriate tool to ensure access to such data.

Robert Květoň of Dentons law firm in Prague then followed with a presentation on the approach of competition authorities to the regulation of generative artificial intelligence, which he prepared together with his colleague Tomáš Pavelka. They paid particular attention to the potential of large language models (LLMs) to redefine market

structures and competitive dynamics. The central content of the contribution concerned a summary of existing reports from competition regulators such as the US FTC, the UK CMA and the Portuguese Autoridade da Concorrência. Mr. Květon also discussed other areas of interest such as relevant market definition, barriers to entry, data monopolization and network effects. He also highlighted unexplored areas such as potential AI collusion, concentration of market power among firms with significant data resources, interconnections between levels of the supply chain and the potential for anti-competitive behaviour. These areas pose significant challenges for regulators around the world and raise questions about the right level of regulation and the need to establish dedicated departments to address such challenges.

The panel on sectoral regulation was concluded by **Natálie Tůmová** of KROU-PALIDÉ law firm in Brno, who spoke about the role of data protection in the EU regulation of digital markets and its impact on competition. In addition to regulations such as the DMA and DSA, the GDPR, while not primarily focused on competition, has significant implications for the competitive landscape. Tech giants such as Apple and Google use data protection as an argument for restricting access to their platforms or favouring their own services. Ms. Tůmová cited as a key example the proceedings pending before the French competition authority in the Apple ATT case. She further suggested that more activity is needed by competition authorities against the self-declaration of these tech giants as data protection gatekeepers and stressed the need for an integrated approach between data protection and competition law. In addition, she stressed the need to open a debate on the possible abusive effects of the so-called “data protection shield” used by the tech giants.

PANEL 3: PROCEDURAL ISSUES

The final panel of the conference focused on procedural issues. As with the previous panel, three speakers introduced themselves to the guests: Josef Čabrádek, David Líněk and Martin Hadinec. The last panel was moderated by **Jan Kupčik** of Schoenherr law firm in Prague.

Josef Čabrádek of KŠ Legal law firm in Prague provided a contribution connecting competition law with criminal law. In particular, he focused on the application of a special provision of the Criminal Code on effective contrition, which allows offenders to actively cooperate in the detection of prohibited agreements in exchange for the termination of criminal liability. Mr. Čabrádek analysed the possibilities and limits of application of this provision to legal persons, although the Czech legal system does not provide for such criminal liability for legal persons. In addition to effective contrition, he also mentioned the link between criminal law and competition law, leniency programmes and settlement procedures and their impact on the investigation of competition law infringements. He concluded his contribution by discussing the cooperation between law enforcement authorities and the Czech NCA with regard to the *ne bis in idem* principle.

In his presentation, **David Líněk** of Bříza Trubač law firm in Prague and Law Faculty, Charles University in Prague, followed by offering an interesting mix of competition law and private international law. His topic concerned the determination of international jurisdiction in private enforcement of EU competition law. Mr. Líněk placed private enforcement in the broader context of the regulation of corporate conduct and presented possible methods of determining jurisdiction and related topical issues. He also stressed that the different conditions for private enforcement in different EU Member States lead to different chances of success of actions. He brought the audience up to date with the case law of the Court of Justice, in particular the judgments in *CDC*, *Apple*, *flyLaL*, *Tibor-Trans* and *Volvo*, and provided an analysis of the rules contained in the Brussels I *bis* Regulation. He also referred to criticisms of some of the decisions, for example by Advocate General Bobek, and stressed the need for a comprehensive view of the jurisdiction rules. He suggested that more consideration should be given to the complex rules in the Brussels I *bis* Regulation, which could lead to a better understanding of the possibilities for claimants to obtain jurisdiction more favourable to them, which has a major impact on the outcome of the dispute.

Martin Hadinec of Portos law firm in Prague acted as the conference's last speaker. He concluded the programme with a contribution on participation in the management of the process of state aid regulation. The crucial matter identified concerned the need to reform participation in this process. The new regulation on foreign subsidies allows the recipients of subsidies to participate directly in the procedure, which is not the case with state aid, where only the Member States remain participants. Mr. Hadinec suggested that the rights of a party should also be granted to beneficiaries of state aid and their competitors, which, in his view, would increase the transparency and quality of the decision-making process and strengthen the protection of interested parties' rights. He also criticised the current situation where the European Commission deals with evidence in a rather formal way and pointed to the need for legislative change or increased pressure on the Court of Justice. In his view, the adoption of new rules could lead to greater legal certainty and the prevention of court disputes, although at the same time it could increase administrative costs. Mr. Hadinec concluded by stressing that reform of participation is essential for a fairer and more sustainable regulation of public aid in the EU.

CONCLUSION

The meeting of the competition community in Prague at the Law Faculty, Charles University in Prague, not only enriched the participants with new knowledge, but also stimulated a number of fruitful debates on important issues that will undoubtedly resonate in the future, whether in practice, in the academic sector or in legislative process. The organisers from the Association for Competition Law and Regulation concluded the conference by expressing an ambition that the conference would become an annual tradition, bringing together all those interested in competition law in the years

to come. We believe that the Association for Competition Law and Regulation has successfully laid the foundation to fulfil that ambition and future editions of the conference will further contribute to the development and improvement of competition law in the Czech Republic.

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