Editorial

Changing Times for JECLAP, Changing Times for Competition Law

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In less than 10 years, JECLAP has established itself as one of the (if not the) leading competition law journals in Europe. Thus, I felt honoured (and, why not say it, also somewhat overwhelmed) when I was asked to replace Paul Nihoul as one of the general editors— together with Gianni De Stefano. Needless to say, I gladly accepted. Inevitably, doing so made me think about changes in the enforcement of EU competition law since JECLAP’s creation, and about the role that the journal can play in these changing times.

This editorial is prepared at a time when EU competition law is undergoing a noticeable evolution. When JECLAP was founded in 2010, it looked like we were close to reaching the ‘end of history’ in the field. A landmark moment was the adoption of the Commission Guidance Paper on Article 102 TFEU enforcement—which was in fact the subject of an article by Giorgio Monti in the first issue. It looked like efficiency and consumer welfare were just about to become the keystones around which the interpretation and application of EU competition law would revolve.

Things look very different 7 years later. We have witnessed the emergence of new analytical frameworks and new ideas. Concepts like choice and, more recently, fairness, have found their way in academic and policy discussions. Paul Nihoul himself has in fact been one of the most vocal proponents of choice as a guiding principle in EU competition law (see for instance ‘Choice vs Efficiency’, JECLAP (2012) 3(4): 315–316). What these developments show is that the efficiency-based framework has failed to win the hearts and minds of many lawyers. The consensus around consumer welfare that exists on the other side of the Atlantic has not materialised in Europe, and perhaps never will.

In addition, new developments in the field are pushing the boundaries of EU competition law. Looking back at the past decade, it looks like authorities in Europe have become less reluctant to interfere with the exploitation of intellectual property rights, to mention one example. Pay-for-delay settlements in the pharmaceutical sector, and the use of injunctions in the context of standard-essential patents (both abundantly discussed in the pages of JECLAP) are clear milestones in this sense. Similarly, discussions relating to the use of big data and the impact of algorithms on firms’ ability and incentive to engage in collusive and/or discriminatory conduct have moved to the centre stage.

What is, and can be, the role of JECLAP in reaction of these developments? Allow me to share a few thoughts with you.

Place the law at the centre of the analysis: If EU competition law is fascinating, this is in part because it is at the intersection of many disciplines. The downside is that, for that very reason, we run the risk of ignoring that enforcement and policy-making is achieved through the law. It is my hope that JECLAP will contribute to ensuring that the law remains at the centre of discussions. This can be achieved in many ways. One way is to keep up to date with legal developments and putting them in their economic, regulatory and technological context—whether through current intelligence pieces or through the excellent surveys that have greatly contributed to the journal’s name.

I also hope JECLAP will engage critically with new approaches to the interpretation and enforcement of EU competition law. As has been recently argued in these same pages, there is no reason to rule out fairness as a guiding principle for enforcement. At the same time, it is necessary to bear in mind that high-level objectives need to be made operational. If a principle is not, or cannot, be broken down into a set of practicable legal tests (that is, if it lacks a concrete content that can be anticipated in advance by stakeholders), it may open the door to arbitrary decision-making—and arbitrary decision-making is inherently unfair.

Economics? More of it! This said…: Economic tools are widely used in EU competition law. In fact, never in the history of the discipline has its use been more frequent and pervasive. On the other hand, it is impossible to ignore that the rise of economics has been received with scepticism, if not overt resistance, by some lawyers.

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Several factors can explain this reaction. The perceived ‘imperialistic’ inclinations of economics—that is, the tendency of economists to apply their approaches and techniques to phenomena that are studied by the other social sciences—is one of them. In this sense, it is hoped that JECLAP will continue to bridge the divide by encouraging the dialogue between lawyers and economists.

It is also hoped that JECLAP will help understand that economic analysis makes some fundamental contributions to the discipline that are often ignored. Economics in competition law is not just about defining overarching benchmarks (namely efficiency and consumer welfare) and about econometric forecasting. It is also valuable as—if not primarily—a means to define boundaries on administrative action and, by the same token, as a tool that contributes to the clarity and predictability of the law.

A platform to deal with new (and old) ideas: It is exciting to see there is no shortage of new ideas in competition law, and JECLAP editors would like the journal to contribute to their production and dissemination. On the other hand, we would like to encourage discussions that do not miss the forest for the trees and that address transversal issues that are of the utmost relevant in practice. These are the sort of questions that require the combined skills of practitioners—who have a nose for relevant issues—and academically minded lawyers—who have developed the ability to see the big picture. JECLAP has been and should continue to be the preeminent forum for these exchanges.

In this sense, and as I write this editorial, I can think of some questions of fundamental importance that have not yet been clarified. For instance, there is still uncertainty as to what is exactly meant by an ‘anticompetitive effect’ in the case law. The same is true of other fundamental concepts, including that of counterfactual—which is central to ongoing cases relating to the exploitation of intellectual property rights (just think of Lundbeck and Servier). Readers are hereby invited to contribute to these.

JECLAP is a success story. I have no choice but to work hard, together with the rest of the team, to ensure the success lasts many more years!

doi:10.1093/jeclap/lpx058
Advance Access Publication 9 August 2017