FOREWORD

The notion of restriction of competition – also referred to as "harm to" or "distortion of" competition – is central to antitrust enforcement. It embodies what makes a particular conduct anti-competitive, in breach of Articles 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU"). As a result, the notion of restriction of competition necessarily encapsulates (a) particular standard(s) against which the legality of practices is/are tested. The aim of the 2015 Annual Conference of the Global Competition Law Center ("GCLC") was to capture how the process of "modernisation" of EU competition law enforcement has affected the interpretation of that/these standard(s) and, as a result, whether and how modernisation has affected substantive enforcement outcomes.

The previous edition of the GCLC Annual Conference had attempted to take stock of the institutional and procedural changes brought about by the process of modernisation over the previous ten years, following the entry into force of Regulation 1/2003. This time, the need was felt to revisit the core principles defining the antitrust discipline. That need was fuelled by the perception that the boundaries of what constitutes an anticompetitive practice in Europe have broadened to capture practices that had not (or only rarely) been considered anticompetitive in the past. It was further fuelled by the growing unease at the apparent tension between the standard(s) applied by the European Commission, on the one hand, and by the EU courts, on the other hand, as illustrated by the *Intel* case, and the instability of such standard(s), as illustrated by the *Post Danmark I and II* and *Cartes Bancaires* cases. Thus, the main intuition behind the programme of the 2015 GCLC Annual Conference was that the standard(s) applicable to antitrust infringements had become somewhat blurred in the aftermath of modernisation and therefore had to be revisited and, if possible, clarified.

To achieve that objective, the 2015 GCLC Annual conference was structured in four parts. The first part was historical and methodological in nature:

where do we come from and what has changed with modernisation in relation to transversal issues such as the bifurcated structure of the applicable Treaty provisions, the object-effect dichotomy, market definition and market power, but also as a result of the move towards a network enforcement system with the establishment of the ECN. The second and third parts were then designed to delve into the application of Articles 101 and 102 TFEU, respectively, while following the same sequence: two general contributions taking stock of what makes a coordinated and unilateral practice anticompetitive, respectively from a legal and economic perspective, followed by a series of three case studies reflecting the perceived broadening / blurring of the contours of the notion of restriction of competition. These case studies included information exchanges and price signalling strategies, MFN and price parity clauses and "hub-n-spoke" arrangements, in relation to Article 101 TFEU. With respect to Article 102 TFEU, the focus was put on pay-for-delay arrangements, standard-essential patents and "unequal treatment" of competing services by online platforms. The fourth part of the conference eventually aimed to draw lessons from earlier presentations and elicit prospective thoughts. In addition, the conference provided an opportunity for an exchange on the contribution of merger control to the definition of harm to competition in Europe.

This rich volume reflects the depth and intensity of the various contributions to the 2015 GCLC Annual Conference, and all the credit should go to the speakers who elaborated their oral presentation in written form, including by means of thorough scholarly pieces. The end product is very much a "coat of many colours", composed of contributions that do attempt to articulate consistent frameworks of analysis but sometimes equally mirror the apparent tensions in the interpretation of the basic standard(s) – or "baseline(s)" – defining what makes a commercial practice harmful to competition. Interestingly, though, a number of contributions also point to the convergence that can result from the observable and somewhat disconcerting "contest of ideas" currently guiding antitrust enforcement in Europe.

The opening address that **Commissioner Vestager** allowed us to reproduce in this volume focuses on priority setting as an important variable of competition policy, yet it also offers a concentrate of modernisation inasmuch as it emphasises deterrence, effectiveness, leniency (beyond cartels!) and the role of the ECN. From a substantive point of view, then, the contribution also echoes some of the main questions underlying the overall theme of the conference, such as whether and to what extent competition principles can or should be relied upon to "mak[e] key sectors work better" and whether rules established in the past are still applicable to remarkably

different market environments, such as e-commerce, or whether they need to be adapted.

Our journey through the notion of restriction of competition and its evolution then starts with a retrospective contribution by **Sir Christopher Bellamy**, which highlights the incremental nature of the shaping of that notion – over "the best part of 50 years" and throughout the "early law" and the "great confusion" that lasted from 1966 to 2004 – to arrive at the current understanding rooted in "a more realistic and balanced approach… based on economic analysis". In an attempt to inform the application of antitrust principles in the post-modernisation context, **Damien Neven** then articulates a framework of sequential acquisition of information designed to identify harms to competition and to operationalise the distinction between object and effect restrictions.

Part One of this volume focusing on the "mapping" of the notion of restriction of competition then moves on to discuss transversal issues, common to Articles 101 and 102 TFEU. **Ben Smulders** first revisits the "bifurcated approach" governing the nature of the competitive analysis, the practical consequences thereof, including with respect to the treatment of efficiencies, and the allocation of the burden of proof, as well as the converging pattern in the application of both Articles 101 and 102 TFEU. The essential topic of the object-effect dichotomy is then analysed in details by **Bernard Amory, Geoffroy van de Walle and Nathalie Smuha**, who consider both the pre- and post-*Cartes Bancaires* judgments. In their view, in spite of a trend towards a stricter and more structured grid of analysis, ample scope remains for clarifying both the appropriate standard of harm and the level of scrutiny to be used when assessing a potential restriction of competition by object. In a carefully researched piece, **Imelda Maher** closes this first part by discussing the challenge of ECN convergence in the definition of harm to competition. By means of selected examples starting with the notion of object restriction applied to MFN practices and pay-for-delay arrangements, she maps the scope for divergences before assessing the ability of the institutional tools built into the modernised EU enforcement system to induce convergence which, as she observes, may emerge but at the cost of considerable uncertainty.

As noted, Part Two of the volume discusses the notion of harm to competition in relation to concerted practices under Article 101 TFEU. It starts with a paper by **Luc Gyselen** drawing lessons from the past, including from his personal experience at DG COMP, to then suggest formalising a shift in the enforcement of Article 101 TFEU by rewriting it. Gyselen proposes indeed to move beyond the bifurcated approach towards a

monist approach allowing for a more even-handed balancing of the anti- and pro-competitive effects of concerted practices. A rare discussion of the legislative history of then Article 85 EEC and of selected ECJ judgments supports Gyselen's proposal designed to acknowledge transformations brought about by the modernization process. Moving to case studies, **Raphaël De Coninck** and **Yves Botteman** each articulate a coherent framework to successively assess the anti-competitive character of information exchanges and price signaling practices, on the one hand, and hub-n-spoke arrangements, on the other hand. Tacking stock of the Commission's practice-from *Wood Pulp* to the recent liner-shipping conference case, De Coninck proposes an economic framework to determine whether and in what circumstances price signaling is likely to have anticompetitive effects, from which he derives recommendations as to the standard applicable to such cases. Botteman digs into the practice of national competition authorities to unveil the different qualifications of hub-n-spoke infringements and discuss the various factors affecting such qualifications. He concludes that standards set at national level can well serve as precedents for the EU as a whole, which is an important evolution brought about by the modernisation process.

Defining the notion of harm to competition in the context of unilateral practices under Article 102 TFEU is probably the most contested enforcement issue of this decade. It is addressed in Part Three of this volume by authors at the forefront of that still ongoing discussion in both their practice and their publications. The contribution of **Robert O'Donoghue** to the rationalisation of the analytical framework applicable to abuses of dominance cannot be overstated. In that endeavor, O'Donoghue is preceded in his endeavour by **John Temple Lang**, whose pioneering scholarship has paved the way for many of the recent debates. Their respective contributions to this volume are very complementary: while O'Donoghue provides a comprehensive grid of analysis for the assessment of unilateral practices, Temple Lang offers a "solution" to the everlasting question of the definition of exclusionary abuses, which he roots in the wording of Article 102(b) TFEU and the interpretation of that provision in various ECJ judgments as prohibiting limitations to the production, markets or technical development of competitors. Temple Lang's incisive piece boldly supports the overall endeavor pursued by this volume and the conference on which it reflects for, in his view, no progress can be made in enforcing Article 102 TFEU until a common understanding is reached as to the defining features of what makes an exclusionary practice abusive. As is well known, Temple Lang's contribution to that endeavor has been

very significant over time and will continue to stimulate discussions for many years to come. In a different but equally unconcessional piece, **Adam Cellan-Jones** and **Andrea Lofaro** reject attractive shortcuts to distinguish harmful from benign unilateral practices and plead for systematic effects-based assessments factoring the specific features of the markets in question while applying a robust economic analysis of the likely effects of the dominant firm's actions. The distinction between harm to competitors and harm to competition is central to their argument, which they support by means of concrete examples drawn from cases involving high-technology industries.

Two case studies on pay-for-delay and online platforms complete this inquiry into the notion of abuse of dominance. **James Killick** first discusses the *Perindopril* case in which he acted for Servier, and questions the standard applicable to the qualification of patent settlements and acquisitions of technologies as abuses of dominance. That case, in Killick's view, illustrates the lack of clarity with novel theories of harm that rely on the open-ended notion of "competition on the merits as a fallback option". **Renato Nazzini** then engages in a systematic discussion of Google's alleged foreclosure strategy arising from the different display of links, in its general search results, to the specialized results of its own comparison shopping services and to those of competing vertical comparison shopping services. Nazzini discusses various concepts that have pervaded the definition of abusive conduct such as the "concept" of abuse, "competition on the merits" or the "special responsibility" of dominant firms, before inquiring into the exclusionary test applicable to Google's search practices which, in his view, should be that of refusal to supply.

Part Four of this volume contains a unique exchange between **Carles Esteva-Mosso** and **Nicholas Levy** on the contribution of 25 years of merger control to the evolution of the notion of harm to competition in Europe. Esteva-Mosso's contribution inquires successively into the influence of antitrust on merger control, the reverse influence of merger control on antitrust enforcement and whether there is or should be a single analytical framework for assessing concerted practices and horizontal mergers. Levy then discusses the suggestion that a unifying framework should guide the analysis of collaborative arrangements under Article 101 TFEU and of horizontal concentrations under the Merger Regulation, thereby leading to "substantially the same level of intervention". While welcoming the principle of relying on similar methodologies across the antitrust and merger control fields, he questions the possibility to assume substantially similar intervention levels under the two regimes absent further guidance,

including a closer alignment of the Horitzontal Co-operation Guidelines with enforcement practice under the Merger Regulation.

Finally, Part Five contains reflective and forward – looking pieces on the notion of restriction of competition in the post-modernisation context. In their stimulating paper, **Pablo Ibáñez Colomo** and **Alfonso Lamadrid de Pablo** acknowledge the existence of a gap left by the substantive shift caused by modernisation, which has not been conclusively closed by other conceptual frameworks. Yet they equally consider that the scope of consensus around the notion of restriction of competition is broader than commonly understood. Adopting a bottom-up approach, they subsequently derive building blocks from the case law of the EU courts for a tentative definition of what is a restriction of competition, anchored in the impact of the practice in question on firms' ability and incentive to compete in the relevant market, as assessed against the counterfactual situation. Reflecting on recent cases such as *Intel* and *Lundbeck* from an economic perspective, **Avantika Chowdhury** then poses the question of whether authorities and courts are not going back to notions of competition based on market structure and behaviour rather than on outcomes and effects on consumers. Wary of that trend, she cautions against a tendency to stretch the category of by object restrictions while emphasising the centrality of counterfactuals and theories of harm reflecting actual long-term market outcomes for consumers/customers. The volume then closes with the transcript of **Cecilio Madero**'s closing statement to the 2015 GCLC Annual Conference, followed by remarks by **Andrew Renshaw** on the state of enforcement in relation to vertical restraints. Madero's address is particularly interesting insofar as it captures the analytical framework guiding antitrust enforcement at EU level and recognises as an important development the alignment of the framework applicable to findings of infringement under Article 101 and 102 TFEU. Eventually, Madero openly questions the sense of uncertainty created by the modernisation process as to the boundaries of restrictions of competition, referring to the ample guidance available in the case law of the EU courts and the Commission's enforcement practice while equally underlining the need for competition law to remain predictable for those subject to it and administrable for courts and competition authorities.

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The contributions assembled in this volume confirm the intuition underlying the overall theme of the 2015 GCLC Annual Conference regarding the materiality of a shift in the substantive standard(s) defining the notion of restriction of competition as a result of the modernisation process, as