



Fourth ACELG Annual Conference on

## **Ten Years of Decentralized EU Competition Law Enforcement**

**Success or Failure?**

**14 November 2014**

9.30 – 17.00, followed by reception

University of Amsterdam, Library  
Doelenzaal, Singel 425, 1012 WP Amsterdam

[Amsterdam Centre for European Law and Governance](#)

Organizing committee:

Prof. Rein Wesseling

Prof. René Smits

Prof. Annette Schrauwen

Dr Katalin Cseres



## Background

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On 1<sup>st</sup> May 2004, Regulation 1/2003 entered into force, introducing a fundamental change in the enforcement of Articles 101 and 102 TFEU. This date also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. Regulation 1/2003 was evaluated 5 years after it took effect, but no such legislative evaluation has been envisaged ten years after. There are, however, good reasons to look back and reflect on the last ten years.

The role of competition law and enforcement in both the EU's and its Member States' constitutional legal orders and economic policies have significantly changed. In the enlarged EU, the Lisbon Treaty introduced a new Article 3(3) TEU; competition disappeared as an objective of the EU, but at the same time it did become a core constitutional value in many of the new Member States' legal systems. Since then many new market sectors have been opened up to competition and the enforcement of competition laws has become crucial. Moreover, the economic crisis of the last couple of years has significantly challenged this newly anchored role of competition law enforcement in the EU and its Member States.

On the institutional level, the transformation of EU competition law enforcement from a supranational EU policy into a transnational governance subjected this field to similar problems of multi-level governance as other substantive parts of EU law. Delegating enforcement powers to national competition authorities and national courts created a multiple-layered system of parallel competences and simultaneous application of EU and national competition law. In the compound procedural mechanism of Regulation 1/2003, the administrative capacity of the national actors became crucial. While Regulation 1/2003 merely contained some rudimentary rules (Articles 5 and 35) on administrative capacity, criteria for well-functioning competition authorities are developing on the basis of national constitutional principles such as independence and accountability, but also legal competences and practical aspects such as resources. The institutional embedding and the accountability mechanisms of the NCAs greatly vary across the Member States, creating a potential obstacle to the effective enforcement of EU competition law.

The role and the work of national courts under Regulation 1/2003 is much less visible. As enforcers of competition law in private law litigations and in judicial review of the administrative decisions of NCAs the courts, however, play a significant role in the overall competition law enforcement, which merits a closer look.

The goal of this ACELG conference is to take stock of the various constitutional (legal and institutional) developments that followed the entering into force of Regulation 1/2003. The conference will discuss the constitutional implications of these developments in the EU's and the Member States' legal orders and evaluate its first ten years of functioning.

# Programme

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- 9.30 – 9.50      Arrival and Registration
- Entry poll: Has decentralization of competition law failed?*
- 9.50 – 10.00    ***Welcome and short introduction***  
*Prof. Deirdre Curtin, ACELG*
- 10.00 – 11.00   ***Keynote speech***  
*Prof. Giorgio Monti, European University Institute*  
***A Plea for ‘Extraterritorial’ Antitrust Enforcement by National Competition Authorities***
- Chair: Prof. Rein Wesseling, ACELG  
Discussant: Dr Pieter van Cleynenbreugel, Leiden University
- General discussion
- 11.00 – 11.20    Coffee break
- 11.20 – 13.00   ***Roundtable: View from the EU Commission and from the Member States***
- Chair: Prof. René Smits, ACELG
- Roundtable discussants:
- Jeroen Capiau, EU Commission, DG Comp
- Šarūnas Keserauskas, Chairman of the Competition Council of Lithuania
- Prof. Jacques Steenbergen, President Belgian Competition Authority
- Mariana Tavares, Head of Cabinet of the President, Portuguese Competition Authority
- 13.00 – 14.00    Lunch



- 14.00 – 15.30 ***Decentralized enforcement of EU economic regulation by Member State Authorities in other areas***
- Chair: Prof. Annette Schrauwen, ACELG
- Decentralised enforcement of EU competition law by sector regulators – the UK model*  
Prof. Cosmo Graham, University of Leicester
- The role of the highest administrative court and the protection of the interests of the energy consumers in the Netherlands*  
Prof. Saskia Lavrijssen, University of Amsterdam / Tilburg University
- The potential conflict between judgments of national courts and Commission recommendations to modify draft remedies under the regulatory framework. Observations from a Dutch perspective*  
Winfred Knibbeler, Freshfields Bruckhaus Deringer LLP Amsterdam
- Additional contribution* by Dr Mary Catherine Lucey, University College Dublin
- General discussion

15.30 – 15.50 Coffee break

- 15.50 – 17.00 ***Plenary discussion: Has decentralization of competition law failed?***
- Prof. Rein Wesseling and Prof. René Smits, ACELG
- Presentation and discussion of the entry poll results*

All participants are cordially invited to a reception after the conference



## Abstracts – afternoon session

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### *Decentralised enforcement of EU competition law by sector regulators – the UK model*

This paper examines the record of UK sector regulators in enforcing competition law over the past ten years. The UK is unusual in that it decided to adopt a system of concurrent competition enforcement which gives sector regulators the same powers to enforce competition law as the generalist regulator, now called the Competition and Markets Authority (previously the Office of Fair Trading). This paper starts by examining the initial debates over concurrency and what were the initial expectations. The second part of the paper sets out the legal arrangements that were put into place and describes the enforcement record of the sector regulators or, more accurately, the lack of enforcement activity. It goes on to discuss possible reasons for this and sets the record in the context of the enforcement activities of the Office of Fair Trading, the record of the Office of Communications (Ofcom) in relation to communications matter and the role of the Competition Appeal Tribunal. The third part of the paper looks at the recent reforms introduced by the Enterprise and Regulatory Reform Act 2013 which, among other objectives, seeks to rejuvenate the enforcement of competition law by sector regulators. It also looks at how concurrent competition powers have been extended to sectors such as health. The final part of the paper attempts an overall assessment of the UK experience and looks at the possible impact of future developments on the current arrangements, such as the possibility of greater devolved powers to Scotland.

### *The role of the highest administrative court and the protection of the interests of the energy consumers in the Netherlands*

This article examines how the highest administrative court for energy cases in the Netherlands - the Trade and Industry Appeals Tribunal (hereafter: CBB)- has lived up to the EU law principle of effective legal protection in practice in the energy sector. A normative framework has been developed for assessing the judgements of the CBB by elaborating in a detailed way the requirements that follow from the EU law principle of effective legal protection. The analysis concludes that the CBB has not fully and consistently complied with the requirements of effective legal protection when reviewing administrative decisions in the energy sector. The analysis of key cases in the energy sector shows a mixed picture. It is recommended that the CBB enhances the legal protection of the energy consumers by reviewing the facts and the legal and economic reasoning that form the basis of the ACM's decision in a more thorough way. Furthermore, more clear explanations should be provided for the weighing of short and long term consumers' interests and the final judgement in the light of the goals and provisions of EU law.

*The potential conflict between judgments of national courts and Commission recommendations to modify draft remedies under the regulatory framework. Observations from a Dutch perspective*

As a result of the 2009 reforms to the electronic communications regulatory framework the Commission may notify a National Regulatory Authority (NRA) if it considers that the proposed measure is incompatible with EU law. At that point BEREC (the body of European regulators for electronic communications) has a significant role to play in the remedies review process. BEREC and the NRA must cooperate closely to solve the situation and BEREC must publish a reasoned opinion. Recently it has become clear that in particular the issue of mobile termination rates is highly controversial. Three of the four opinions of BEREC in 2014 relate to voice call termination cases and a significant number of opinions in 2012 and 2013 relate to this issue. In this article an analysis is made of the regulatory discussion in relation to mobile voice termination and the potential conflict which may exist with judgments of national courts on this subject taking the Dutch case of the Tribunal for Trade and Industry as an example. A further review is provided of the methods on the basis of which the Tribunal for Trade and Industry takes the decision practice of the Commission in its judgments into account.

## Speakers and Chairpersons

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**Jeroen Capiou** joined the Directorate General for Competition of the European Commission in 2009. He is a policy advisor in the Unit responsible for the European Competition Network. Previously, he worked for the Belgian Competition Authority, first as a case handler in the investigation branch and later as a member of the decision-making branch. Before working in the area of competition enforcement, he was a teaching assistant at the European Law Institute of the University of Ghent.

Jeroen Capiou holds a degree in Law (1998) and in Advanced Studies in European Law (1999) from the University of Ghent. He has published several articles on EU competition law and the law of the internal market.

**Pieter Van Cleynenbreugel** is Assistant Professor of European and Competition Law at the Europa Instituut, Leiden Law School, the Netherlands. He obtained law degrees at the KU Leuven-University of Leuven (PhD; LL.M.; LL.B.) and at Harvard Law School (LL.M.). His research and teaching focus on (the enforcement of) EU competition law and EU administrative law. Recent publications include 'Market supervision in the European Union. Integrated administration in constitutional context' (*Nijhoff Studies in European Union Law*, Brill Publishing, 2014); 'Article 101 TFEU and the EU Courts: adapting legal form to the realities of modernization?' (*Common Market Law Review*, 2014) and 'Institutional assimilation in the wake of EU competition law decentralisation' (*Competition Law Review*, 2012).

**Cosmo Graham** is Professor of Law at the University of Leicester and Director of the Centre for Consumers

and Essential Services (CCES). He is a competition lawyer and a public lawyer who specialises in the law relating to the regulation of public utilities. From 1999 to 2008, he was a member of the Competition Commission. He was a member of the European Commission's working group on vulnerable consumers in the energy sector. Cosmo Graham has written widely on the regulation of public utilities and consumer representation. His latest publication is *EU and UK Competition Law* (2nd ed, London, Longmans, 2013).

**Šarūnas Keserauskas** was appointed as the Chairman of the Competition Council of the Republic of Lithuania for the tenure of six years on 4 April 2011. Prior to moving to his current position Mr Keserauskas spent two years as a Senior Legal Adviser at the UK Office of Fair Trading.

Having graduated with a Master of Laws degree from Vilnius University, Faculty of Law in 1998, Mr Keserauskas continued his studies at King's College London, where he obtained a LL.M in European Law in 2003 and a PhD in Law in 2010.

In 1998 Mr Keserauskas started lecturing at Vilnius University, Faculty of Law, where since 2005 he has been giving lectures on Competition Law. Mr Keserauskas was a visiting Competition Law lecturer at Riga Graduate School of Law (Latvia) from 2000 to 2005. From 1998 to 2009 in addition to his work as a lecturer at Vilnius University, Mr Keserauskas was an associate and then a Competition Law adviser with the law firm LAWIN Lideika, Petrauskas, Valiūnas ir partneriai. Mr Keserauskas is a frequent guest speaker at local and international competition events.

**Winfred Knibbeler** (1967) is a partner in the Antitrust, Competition and Trade group and currently the managing partner of the Amsterdam office of Freshfields Bruckhaus Deringer LLP. He has been practising competition law and European law since 1991. He has a significant experience in representing clients in European and Dutch antitrust cases and has a substantial litigation practice, both at national courts and the European Court of Justice.

He is mentioned as one of the leaders in the area of competition practice in the relevant legal guides such as *Chambers Guide to the Legal Profession*. He is a former Chairman of the *Vereniging van Mededingingsrecht*, the Dutch association of competition lawyers. Winfred Knibbeler frequently lectures and publishes on competition law developments.

He graduated from the University of Leiden with a degree in civil and European law and was educated in London and Paris.

**Saskia Lavrijssen** is (part-time) Professor of Consumer and Energy Law at the University of Amsterdam. She is also (part-time) Associate professor of Law at Tilburg University. Before these positions she was associate professor of Public Economic Law at Utrecht University and assistant professor of European Law at Tilburg University.

Saskia Lavrijssen specialises in European law, competition law, energy law, economic regulation and administrative law. She has authored many national and international publications on the supervision and regulation of markets. Among the issues she explores in her research are the protection of non-competition interests by national competition authorities and economic regulators, in which consumer interests play a major role. Another area of focus is the importance of safeguarding regulator

independence in the protection of those interests. Insights regarding consumer decision-making in the regulated markets, drawn from behavioural economics, are another key theme of Lavrijssen's work. In 2010 her article 'What role for National Competition Authorities in protecting non-competition interests after Lisbon?' (*European Law Review*) was acclaimed with the Dutch competition law association's (*Vereniging voor Mededingingsrecht*) award for the best multi-disciplinary paper dealing with public interests and competition law. She delivered her inaugural lecture "The many faces of the energy consumer" on 22 September 2012. The Dutch version of this lecture was published by Wolf legal Publishers in 2012 and was reworked into an English paper. This paper has been published by the *Journal of Competition Law and Economics* (Oxford University Press) in 2014.

**Annette Schrauwen** holds a chair in European Integration and citizenship law at the University of Amsterdam. Her research is embedded in the Amsterdam Centre for European Law and Governance. Together with Kati Cseres, she recently published "Empowering consumer-citizens: changing rights or merely discourse" in D. Schiek (Ed.), *The EU social and economic model after the global crisis: interdisciplinary perspectives* (Ashgate, 2013).

**René Smits** is a consultant on EMU law, EU banking regulation and financial sector legislation and competition law, as well as part-time professor of the law of the Economic and Monetary Union at the University of Amsterdam (Jean Monnet Chair) and a Visiting Professorial Fellow at Queen Mary, University of London. In September 2013, Professor Smits was appointed as an assessor in the Competition College of the Belgian Competition Authority. In September

2014, the ECB's Governing Council appointed him as an alternate member of the Administrative Board of Review, a review panel for the ECB's supervisory decisions.

**Jacques Steenbergen** has been President of the Belgian Competition Authority since its establishment as an independent authority in 2013. From 2007 to 2013 he was Director General of the directorate general for competition in the Belgian Ministry of Economic Affairs. He has been teaching competition law at the University of Leuven since 1980. Before joining the competition authority, he was partner in the Brussels office of Allen & Overy, and legal secretary to the President of the Court of Justice under the presidency of Prof. J. Mertens de Wilmars.

Jacques Steenbergen is member of the Bureau of the OECD Competition Committee, member of the board of editors and former editor-in-chief of the Dutch-Belgian European law review *SEW*, member of the scientific committee of the law review *Concurrences*, member and former president of the Board of the Stichting van het Koninklijk Conservatorium of Brussels (the foundation of the royal academy for music of Brussels), and honorary member of the Bar of Brussels. He is a former member of the Brussels and Flemish Bar Councils. He publishes regularly on EU and competition law.

**Mariana Tavares** has been the Chief of Cabinet of the President of the Portuguese Competition Authority (PCA), since November 2013. She joined the PCA in September 2004. Before her current position, she served as Director for the International Relations Bureau (October 2008 to March 2013), as a Legal Advisor to the Board (December 2007 and October 2008). Her earlier experience within the Portuguese Competition Authority includes case handling in the

Restrictive Practices Department. From April to October 2013 she was a United Nations Consultant for the UN Conference on Trade and Development, working in the headquarters of the Brazilian Competition Authority (Administrative Council for Economic Defense - CADE), in Brasilia, Brazil.

Mariana Tavares integrated the Working Group for the Revision of the Portuguese Competition Act created in September 2011 by the Ministry of the Economy. The working group, composed of 8 people among which representatives from Government, Bar Association, the International Chamber of Commerce and the PCA, was responsible for the preparatory work of the revision of the Portuguese Competition Act and the bill that was subject to public consultation.

She is a part-time PhD Student at King's College, London and holds a Law Degree from the Catholic University, Oporto, a LL.M from Duke University and a D.E.S. from Universtié Libre de Bruxelles. The Global Competition Review named her in its list of "100 women in Antitrust".

**Rein Wesseling** is Professor of Competition and Regulation at the Law Faculty of the University of Amsterdam and partner at Stibbe law firm Amsterdam. He teaches and publishes in the area of EU and competition law and regulation. In his capacity as a practicing lawyer, he successfully assisted clients in all areas of EU and competition law, including cartels, distribution, joint ventures, abuse of dominance, unfair competition, merger control and state aid law. His experience covers numerous business sectors including Industry, Fast Moving Consumer Goods, Pharmaceuticals, Transport and (Financial) Services. He regularly assists companies in their dealings with the EU Commission, National Competition Authorities and European courts.

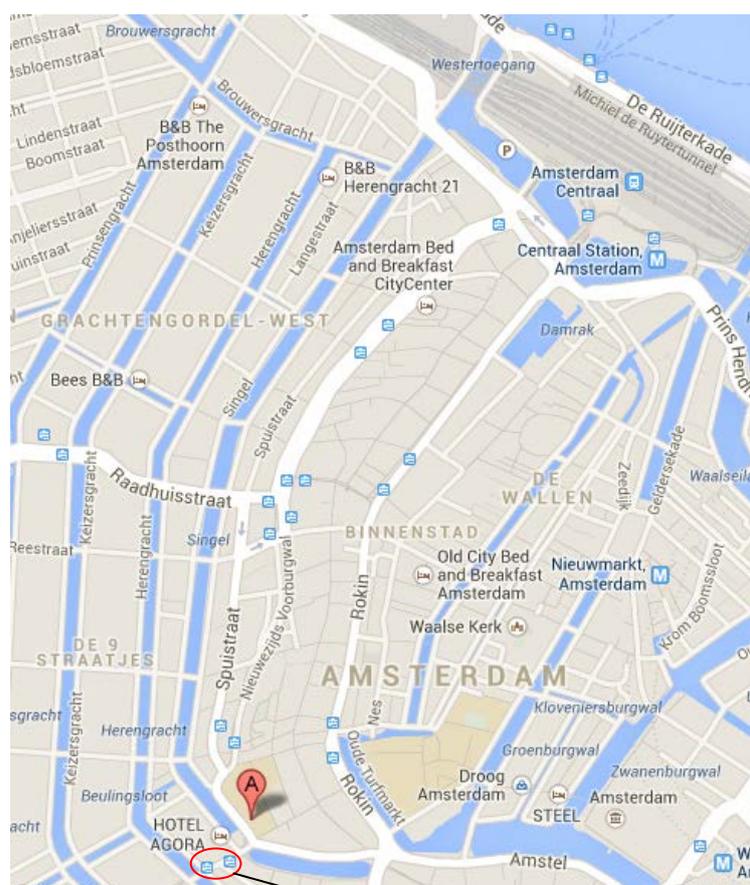
## Practical information

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### Venue

Library of the University of Amsterdam  
Room: Doelenzaal  
Singel 425  
1012 WP Amsterdam

### Directions within Amsterdam



Tram stop Koningsplein

### By public transport

From Central Station take tram 1, 2 or 5 and disembark at stop Koningsplein. From there it is a short walk to the conference venue (A on the map).

### By car

Parking space near the University  
Library is very scarce. Closest parkings are:

Parking Bijenkorf  
Beursplein 15  
1012 JW Amsterdam

Parking Stopera  
Valkenburgerstraat 238 - 1011 ND Amsterdam

## Public transport

- **Arrival at Schiphol Airport**

From Schiphol airport, trains leave every few minutes to Amsterdam Central Station – see [railway journey planner](#). The journey takes about 20 minutes. Chipcards are sold in the airport's central hall, either at the counter of the NS (Dutch Railways) or at vending machines. See below for instructions on the use of the machines.

- **Public transport within Amsterdam**

Disposable chipcards valid for 1 hour (EUR 2.70), 24 hours (EUR 7.50) or 48 hours (EUR 12.00) after check-in are sold at the GVB Tickets & Info office in front of Central Station or at (few) GVB vending machines in Central Station (look for the blue GVB logo). The 1-hour card can also be bought on board of trams and busses (not in the Metro).

- **Buying single-use chipcards for use in trains**

Single-use chipcards for immediate use between Schiphol and Amsterdam can be used to or from any train station in Amsterdam – but not on Amsterdam trams, busses or the metro. Tickets can be bought at the NS Tickets & Service counter in Schiphol airport or Amsterdam Central station or from an NS ticket machine (with a blue sign and white NS logo on top).



Ticket machine with NS logo

### How to buy a single-use chipcard at the ticket machine?

- Change the language to English from the bottom left corner of the screen
- Then press “Buy single ticket or OV-chipcard”
- Select “Single ticket”
- Press “Single ticket” and follow the instructions on the screen
- You can choose to pay with a VISA, MasterCard, Maestro and V Pay card or cash (coins only)
- Pick up your single-use chipcard from the box below the left bottom corner of the screen
- On your ticket you can see whether you need to check-in and check-out
- Check in at the check-in points
- Do not forget to check out when you get off the train



Check-in point

## Contact

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