[Book review of:] Mens Rea in EU Antitrust Law: When Intentions Matter by Jan Blockx

Sauter, Wolf

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Jan Blockx, *Mens Rea in EU Antitrust Law: When Intentions Matter*. Alphen aan den Rijn: Wolters Kluwer, 2020. xii + 251 pages. ISBN: 9789403523538. USD 135.

Jan Blockx is an experienced former practitioner at several international law firms who appears to have retooled to become an academic at the University of Antwerp. The title of his new book is derived from the Latin adage *actus non facit reum nisi mens sit rea*, which is to say "an act is not culpable in a criminal sense unless the mind is guilty". Accordingly, it deals with the role played by intentions (objective and subjective intent, and negligence) in EU competition law. This is a timely subject, insofar as it is an attempt to look beyond economic effects and efficiency, which is a more recent trend now EU competition law has begun shedding the economic dogmatism borrowed from the Chicago School. (Although the latter observation may be more my own view that that of the author.) The book illustrates the extent to which non-economic elements and concepts, in this case intent and negligence, borrowed largely from criminal law, already play a role today.

The structure of the book is somewhat unusual, given that after an introductory chapter it starts by discussing at length the case law of the European courts and European Commission decisional practice in a series of detailed vignettes, and concludes on the view in the literature. One would have expected taking things the other way around and concluding after testing the case law against the theory and the literature. Perhaps the reason for the current structure is that the pre-existing literature on the subject does not delve deeply into the theory? If so, it is not evident from the book itself.

The author shows himself a gifted legal miniaturist as he threads together his exhaustive but never excessively dry series of case summaries, while at the same time keeping careful track of the overall flow of his argument. In my view his discussion of the literature is less fortuitous in that it is approached in the same manner, salami-sliced, which perhaps does not do full justice to the opinions cited as they are not placed in context or discussed in depth, and instead seem to have been covered almost as an afterthought. Interestingly however at several instances in the book US views on intent are covered and integrated, which is helpful given the abovementioned Chicago context as well.

Blockx's ultimate findings are in themselves not surprising: intent plays an important role in determining the sanctions for infringements, and therefore deterrence, and a lesser role for establishing the infringements themselves, except in the case of predatory pricing and to some extent exclusionary price discrimination. As *inter alia* the relatively recent pay for delay cases regarding pharmaceuticals show, this does not mean that intent is not relevant to other abuses or anticompetitive agreements, and indeed its use may well be on the increase. This is because what Blockx calls subjective intentions, those that can be derived from documentary evidence such as internal documents, may shed light on the anticompetitive nature of certain behaviour. That is relevant because whatever view is taken of the merits of economic analysis, by itself it is often inconclusive and evidence of different sorts must be combined to reach balanced conclusions in competition law enforcement and adjudication.

The book reads well and as a whole is a solid product which delivers exactly what it sets out to do – describe the state of the law on *mens rea* in antitrust – with scarcely a superfluous sentence in 250-plus pages. The author's conclusion that strong arguments exist that militate for taking *mens rea* evidence into account in antitrust investigations is convincing, especially so regarding subjective intent. As the author states, this is largely because "Undertakings, whose entire existence is focused on running their business, must indeed be in the best position to

assess the probable effects of their practices" (para. 729). I was personally somewhat less convinced by the discussion of concept of objective intent as derived from the actions of the undertakings involved, which remains somewhat underdeveloped, or perhaps I have just failed to grasp the concept fully. Likewise some of Blockx's criticism of the ECJ, which focuses instead on whether undertakings are aware of the anticompetitive nature of their actions, regardless of intentions to infringe specific legal provisions or not, appears too strong: it is presented as erroneous, instead of simply as representing a different approach that is in my view equally sensible even if conceptually a bit of a short-cut.

It is always somewhat unfair to judge a book based on what it did not set out do, so a few pointers may suffice. First, the discussion of the concept of negligence could have been linked more to the duty of care and comparable notions from civil law, in contrast with the current criminal law focus of the book. Second, it would have been interesting to have seen a more in-depth discussion of the attribution of intent to corporate entities, perhaps taking into account behavioural insights, which are cited only once. A further examination of negligence and personal responsibility of corporate officers is one example where such an approach might also have been fruitful. Third, I would have been interested in *mens rea* in relation to the special responsibility of dominant undertakings, which is becoming an increasingly important dimension in the analysis of abuse. Perhaps these concepts and problems are at present removed one step too far from the case law on which the author focuses predominantly. Yet hopefully Blockx, who appears well-placed to do so, will consider such aspects in future.

For now I would like to congratulate Blockx on a successful attempt at writing what is likely to be a standard work in this field for some time to come. I would recommend its use to anyone seeking to understand intent in EU competition law, to follow the development of the relevant case law, or who is looking to identify starting points for new avenues in this field beyond the economic approach. Finally, the work has been well produced by Kluwer with serviceable tables, a compact index, and numbered paragraphs to facilitate pinpointing references. It deserves a place in any up-to date EU antitrust library.

Wolf Sauter
Amsterdam

Book notices

Leonhard Christoph, *Menschenrechts- und Demokratieklauseln in den Außenbeziehungen der Europäischen Union zu den AKP-Staaten*. Baden-Baden: Nomos, 2020. 252 pages. ISBN: 9783848761593. EUR 66.

This book discusses the EU's use of human rights and democracy clauses in its relations with third States, particularly the so-called African, Caribbean, and Pacific (ACP) States. The author first sets out the EU's use of these instruments in general, including some historical perspectives, before exploring their application to the ACP States in the Yaoundé I and II, Lomé I, II, III and IV, and Cotonou Agreements. The use of these clauses in agreements with other States (e.g. South Korea and Peru) is also briefly addressed. The book includes some conclusions and suggestions for improvement.

Aleksandra Drożdż, *Protection of Natural Persons with Regard to Automated Individual Decision-Making in the GDPR*. Alphen aan den Rijn: Wolters Kluwer, 2020. xviii + 162 pages. ISBN: 9789403520452. EUR 94.

In this laudable volume, based on her 2019 PhD thesis, the author systematically and thoroughly explores the application of the General Data Protection Regulation (GDPR) to individual decision-making. The book gives a concise but detailed overview. It is regrettable that the case law discussed almost entirely predates the entry into force of the GDPR.

Damien Gerard and Assimakis Komninos (Eds.), *Remedies in EU Competition Law: Substance, Process and Policy*. Alphen aan den Rijn: Wolters Kluwer, 2020. xxxiv + 334 pages. ISBN: 9789403522418. USD 142.

This book presents the contributions to the 14th Annual Conference of the Global Competition Law Centre at the Collège d'Europe, held in early 2019. The several chapters discuss all the most important aspects of remedies in EU competition law, including the relation between "negotiated enforcement" and due process, digital markets, the application of remedies in merger control and in State aid, and settlements. It is particularly useful for practitioners.