

# New Challenges for 21<sup>st</sup> Century Competition Authorities ... including Challenges for New Authorities



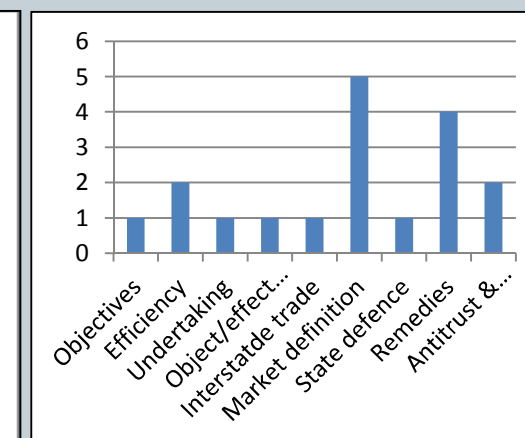
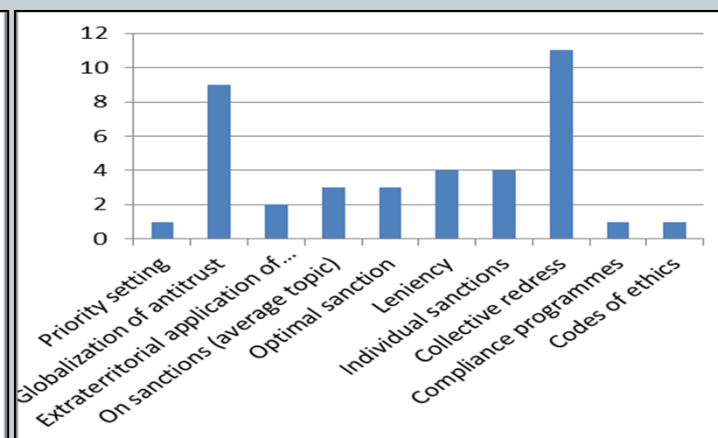
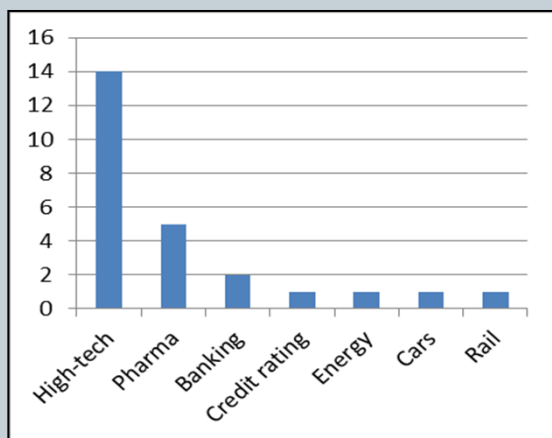
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19 OCTOBER 2012

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# What antitrust journals talk about

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# Outline

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## New Enforcement Challenges (I)

- Providing guidance
- Avoiding the “*Settle ’Em All*” Approach
- Enforcing Competition Law on Fast Moving, Technology-Enabled Markets
- Ensuring Optimal Detection and Compensation in Cartel Cases
- Finding the Right Stance on Compliance Programmes

## New Substantive Challenges (II)

- Eliciting the Goal(s) of Competition Statutes
- Keeping Economics alive and kicking in Competition Enforcement
- Opening Competition Law to New Interdisciplinary Insights
- Other Substantive Challenges
  - Making a choice on market definition
  - Moving beyond words on efficiencies

# I. New Enforcement Challenges

# Challenge n°1: Providing Guidance

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- Prevalence of “*negative enforcement*” techniques
- Marginal “*positive enforcement*”
- Microsoft compliance case (EU)
- Merits of positive enforcement
- Advocacy is no surrogate! + Settlements provide no guidance
- Risk of “*guidance desert*”?



# Challenge n°2: Avoiding the “Settle ’Em All” Temptation

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- Rise of settlements (commitments in EU and consent decrees in US)
- Not a panacea
- Settlements exist because of alternative threat of prohibition
- Need for restraining principles
  - Exclusion #1: Protracted anticompetitive conduct
  - Exclusion #2: New legal and economic issues



# *Settle 'Em All* – Overview of the past 5 years (EU)

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## **Commitments decisions**

- *IBM - Maintenance services*
- *Standard and Poor's*
- *ENI*
- *E.On gas foreclosure*
- *Swedish Interconnectors*
- *Long term electricity contracts in France*
- *Microsoft (Tying)*
- *Rambus*
- *GDF foreclosure*
- *Ship Classification*
- *RWE gas foreclosure*
- *German electricity balancing market*
- *German electricity wholesale market*

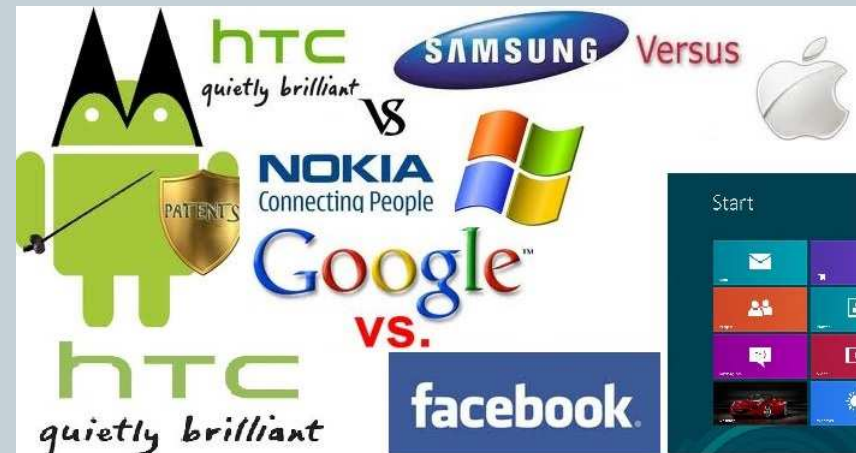
## **Infringement decisions**

- *Telekomunikacja Polska*
- *Intel*

# Challenge n°3: Enforcing Competition Law on Fast Moving, Technology-Enabled Markets

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- Conventional antitrust enforcement is slow
- New idea pushed by Commissioner Almunia (links [here](#) and [here](#)):
  - *Ex ante* approach
  - Alternative procedural routes => Interim measures and Article 9 settlements
- Quasi regulatory approach, reminiscent of utility regulation





Sector Specific Regulation	Proposed Approach	Classic Antitrust Approach
<i>Ex ante</i>	<i>Ex ante</i>	<i>Ex post</i>
No proof of antitrust offense	No proof of antitrust offense (serious concerns, and even before SO)	Proof of antitrust offense
Remedies	Remedies	Fines
Minimal due process requirements	Minimal due process requirements	Heavy due process requirements
No fault	No fault	Fault
Ongoing monitoring	Ongoing monitoring	One shot
Injunctive	Hybrid (settlement, but commitments are mandatory)	Injunctive or collaborative

# An unworkable analogy

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- Underlying assumptions for utility regulation are absent in high tech markets
  - Inability to predict risks of future anticompetitive foreclosure
  - Low barriers to entry in the market (no “barriers to periphery”)
- And cost of errors even more severe than in the real economy
  - Combinatorial innovation
  - Dearth of precedents

# Challenge n°4: Ensuring Optimal Detection *and* Compensation in Cartel Cases

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- Courts request agencies to disclose of leniency-related documents (rules on administrative transparency)
- Trade-off => Detection *v.* Compensation
- Extreme position of EU Commission and NCAs
- Many possible solutions
- Impact on international cooperation?

# Challenge n°5: Finding the Right Stance on Compliance Programmes

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- The legal issue: Should compliance programme count as mitigating circumstances when agencies compute fines?
- The policy issue => Should agencies encourage firms to adopt compliance programmes through fines reductions?
- Variety of approaches
- My take: **NO (4 reasons)**

## II. New Substantive Challenges

# Challenge n°1: Uncovering the Goal(S) of Competition Statutes

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- Renewed interest for the unstated goals of competition law



# Overview of the literature

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- **Proposed goal(s):**
  - Achieve *welfare outcomes*, yet disagreement on content (consumer welfare, total welfare, efficiency) => US scholars, US authorities, DG COMP
  - Protect the *process of rivalry*, and in turn market structures with many firms (ordo-liberal theorists) => EU legal service
  - Ensure *consumer choice* => Lande, Averitt, Weber Waller, Nihoul
  - Promote a wealth of other *public policy* goals, in addition to ensuring competition => Townley, Van Rompuy, etc.

# Bottom-lines

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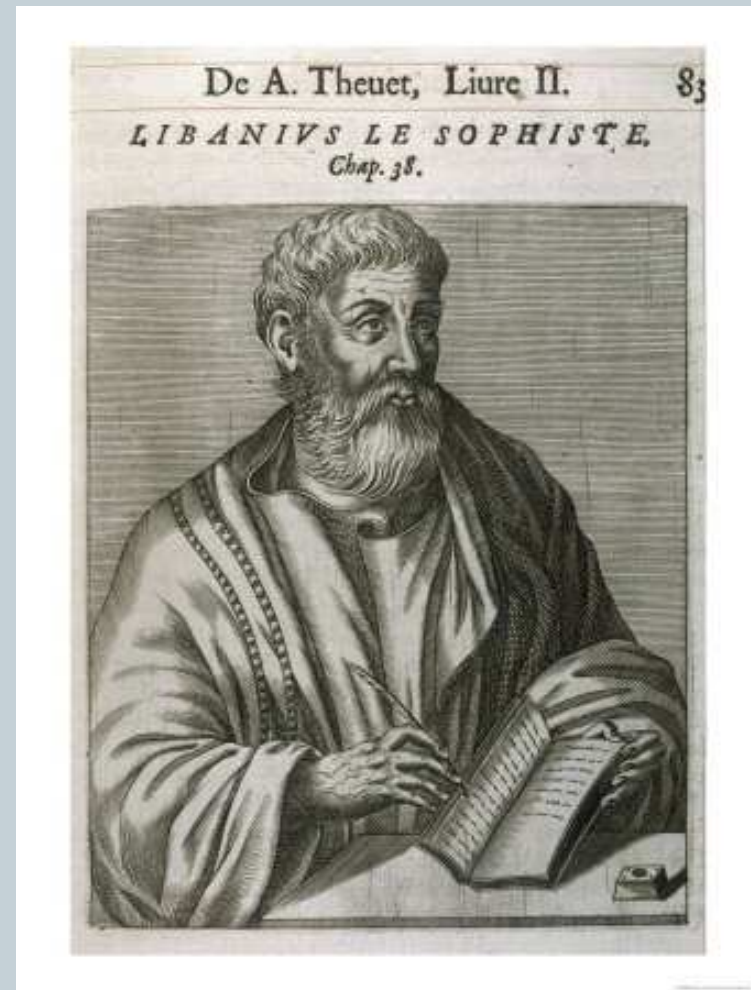
1. Price efficiency (allocative efficiency) is at the core of all antitrust statutes
2. Need for one (and one only) explicit purpose
  - Encroachment on individual freedoms
  - No democratic control, and marginal judicial review



# Challenge n°2: Keeping Economics “Alive and Kicking” in Competition Enforcement

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- The “*more economic*” approach in a nutshell
  - Focus on market facts, case-specific
  - Eradication of forms based standards, which infer anticompetitive effects from the conduct’s features (e.g., duration of a clause), regardless of market impact
- Critics and sophists => economics work at the expense of legal certainty



# Why the Sophists lie

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- The “*more economic*” approach channels analysis on anticompetitive and procompetitive effects, thus limiting risks of arbitrariness
- The “*more economic*” approach is fully compatible with, and supportive, of the adoption of *ex ante* legal standards => *Airtours plc v. Commission*
- The “*more economic*” approach is simply antinomic to forms’ based *ex post* assessments; and forms based *ex ante* standards

# Challenge n°3: Opening Competition Law to New Interdisciplinary Insights

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- Progresses in psychology, marketing, sociology
- “Behavioral economics”
- Firms are composed of individuals
- Individuals do not behave as profit maximizers
- Implications for antitrust law?
  - Predatory pricing cases
  - Refusal to deal cases



# Other Substantive Challenges

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- Making a choice on market definition
  - Controversy in the context of the US merger guidelines review
  - In practice useless on market with differentiated products (Farrell & Shapiro; Salop & Moresi)
  - Market definition is “*incoherent*” (Kaplow)
  - Dust has settled => a useful step, but not always a necessary evil
- Moving beyond words on efficiencies?
  - Can the efficiency defense play in mergers to monopoly (*Ryan Air/Aer Lingus, Deutsche Börse/NYSE*)?
  - Balancing between anticompetitive (price) and procompetitive (cost) effects => qualitative v. quantitative assessment?
  - Scope for innovation-related defenses?

# Thank you!

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