The Future of Law and Economics

A seminar for PhD students of University Paris 2 (Panthéon-Assas) and University Paris X (Ouest), Maastricht University, Erasmus School of Law and the European Doctorate in Law & Economics (EDLE).

On Thursday 23 and Friday 24 March 2017, the 9th seminar will be organized, this time at Maastricht University. The title of the seminar is 'The Future of Law and Economics', symbolizing the fact that the PhD candidates constitute the future of law and economics and realizing that much of the research they undertake is in fact path-breaking and innovative.

Location: StayOkay, Maasboulevard 101, Maastricht

For directions see: www.stayokay.com/maastricht

Registration is required. The number of participants is limited. If you have not yet registered, please contact: rile-sec@law.eur.nl

List of presenters

University of Maastricht
Gian Marco Solas
Yu Yan

University of Paris Ouest
Maxime Charreire

Erasmus University Rotterdam/Bologna University/Hamburg University/Haifa University (EDLE)
Salvini Datta
Danny Blaustein
Thiago Fauvrelle
Damiano Giacometti
Chih-Ching Lan
Eka Lomtatidze
Bernold Nieuwesteeg
Cintia Nunes
Peng Peng
Orlin Yalnazov
Nan Yu

Discussants / Chairs (senior researchers)

Caroline Cauffman
Jef De Mot
Kristel De Smedt
Marco Fabbri
Michael Faure
Mitja Kovac (Ljubljana University)
Roy Partain (Aberdeen)
Niels Philipsen
Ann-Sophie Vandenberghe
Louis Visscher
Stefan Weishaar (Groningen)

Participants

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Steve Billion
Marianne Breijer
Maria De Campos
Gemelee Hirang
Renny Reyes

Programme Seminar "The Future of Law and Economics"

Thursday 23 March 2017

08.30 – 09.00	Registration
09.00 – 09.05	Opening by Michael Faure
	CHAIR: Marco Fabbri
09.05 – 09.45	**The Law and Economics of 'Opportunistic Valuations'** *Danny Blaustein* Discussant: Ann-Sophie Vandenberghe
09.45 – 10.25	**Pharmaceutical Regulation and Liability** *Salvini Datta* Discussant: Niels Philipsen
10.25 – 11.05	**Information, Precedent, and Statute** *Orlin Yalnazov* Discussant: Mitja Kovac
11.05 – 11.20	Coffee break
	CHAIR: Michael Faure
11.20 – 12.00	**Third Party Litigation Funding: some legal and economic considerations** *Gian Marco Solas* Discussant: Louis Visscher
12.00 – 12.40	**Economic Analysis of the Traffic Accident Prevention and Compensation System in China** *Yu Yan* Discussant: Louis Visscher

12.40 – 13.40	Lunch break
	CHAIR: Niels Philipsen
13.40 – 14.20	**Difficulties of Enforcement of Constitutional Social Rights** *Eka Lomtatidze* Discussant: Mitja Kovac
14.20 – 15.00	**The Choice of Contractual Structure for Hydrocarbons Extraction in Brazil** *Cintia Nunes* Discussant: Roy Partain
15.00 – 15.40	**The Law and Economics of Risk Pooling Arrangements in Cyber Security: the Case of Dutch Higher Education Institutions** *Bernold Nieuwesteeg* Discussant: Marco Fabbri
15.40 – 16.00	Coffee break
	CHAIR: Mitja Kovac
16.00 – 16.40	**Mandatory Dividend Regulations in Emerging Financial Markets: A Case of China** *Nan Yu* Discussant: Roy Partain
16.40 – 17.00	**Business Culture and Dishonesty Among Future Legal Professionals: An experiment** *Damiano Giacometti* Discussant: Marco Fabbri
19.00	dinner at Restaurant Au Petit Bonheur

Friday 24 March 2017

	CHAIR: Ann-Sophie Vandenberghe
09.00 – 09.40	**Implications of Big Data for Competition Policy** *Peng Peng* Discussant: Caroline Cauffman
09.40 – 10.20	**To sue or not to sue? Evidence regarding the influence of personal and institutional factors on the decision to take legal action** *Thiago Fauvrelle* Discussant: Jef De Mot
10.20 – 11.15	Coffee break
	CHAIR: Michael Faure
11.15 – 11.55	**Policy Mix for Reducing Deforestation from Palm Oil Production** *Chih-Ching Lan* Discussant: Kristel De Smedt
12.00 – 12.40	**Compensation of third party victims, and liability sharing rules in oligopolistic markets** *Maxime Charreire* Discussant: Stefan Weishaar
12.40 –	Closing remarks followed by lunch

Abstracts (in alphabetical order)

Danny Blaustein

The Law and Economics of 'Opportunistic Valuations'

Abstract

Venture-capital contracting practices include the practice of 'staging', whereby the capital necessary for the implementation of the startup's business plan is not provided by the VC investors at once but in consecutive rounds of financing. The literature has noted that the practice is responsible for the phenomenon of 'opportunistic valuations' in start-ups, whereby VC investors are able to use their bargaining power or corporate power to undervalue the start-up at the expense of the entrepreneur. The paper provides a comprehensive analysis of the problem and delineates between its three facets: (1) abuse of corporate power; (2) appropriation of a 'signaling premium'; and (3) 'window dressing'. After discussing the potential adverse economic consequences of each facet, the reputational limitations on opportunistic behavior and the potential governance responses to the problem, the paper suggests that courts can play an important role in the mitigation of the problem.

Maxime Charreire

(co-author Eric Langlais)

Compensation of third party victims, and liability sharing rules in oligopolistic markets

Abstract

Accidents causing environmental damages and/or harm to several (third party) victims may result from the joint action of competing firms, in such a way that it may be too costly or impossible for Courts to disentangle the specific contribution of each firm (cf noise pollution by Orly airport 1988, Cass. 2e civ, No 86-12.543; asbestos litigation in USA 1994, Becker v. Baron Bros). Courts in many jurisdictions have the opportunity in such contexts to conclude for firms

liability in solidum, and to allocate the burden of damages between o˙enders thanks to alternative apportionment rules. In this paper, we analyze the impacts of such liability sharing arrangements (per capita vs market share rule) on output and care decisions in an oligopoly. We find that compared to the per capita rule, the market share rule leads to a lower output level but also to lower care expenditures at equilibrium. However as the net e˙ect on the expected harm to victims is ambiguous, it is not clear that the market share rule is dominating the per capita rule. Moreover, we also show that no sharing arrangement induce the optimal levels of output and care expenditures.

Salvini Datta

Pharmaceutical Regulation and Liability

Abstract

Optimizing the interplay between ex ante regulation and ex post liability is at the root of many Law and Economics studies and a challenge to tackle, yet such a pertinent issue for the pharmaceutical industry. Product safety is a major policy concern and pharmaceuticals are for this reason regulated by national agencies as well as international agencies such as the Food and Drug Administration (in the USA) and European Medicine Agency (in the EU). Moreover, markets hold the ability to penalise manufacturers and sellers of hazardous products by reducing the demand. To further promote product safety, product sellers are also subjected to product liability, which imposes legal obligations to compensate harmed parties, giving sellers an additional financial incentive to reduce product hazards.

It is thought by several scholars that pharmaceutical product liability can lead to potentially socially undesirable outcomes on economic outcomes. This paper takes a descriptive approach into answering whether the benefits of pharmaceutical product liability justify the apparent social costs of lost therapies or research that is forgone. Many product liability proponents and policymakers point to compensation of injured product users. Critics would however argue that compensation of injuries through product liability is socially undesirable.

The main arguments for this in the Law and Economics literature is that legal disputing uses up many scarce resources per dollar transferred than other compensation mechanisms and that company responses to incentives from product liability have unintended and socially undesirable effects on economic outcomes. These may include a decrease in safety and effectiveness of the drugs, discourage innovation, increase in product prices as well as drive good products off the market. This means it is necessary to find optimal methods to improve economic efficiency, this paper delves into three possible routes: increasing population-level health benefits of pharmaceuticals, decreasing the social costs of drug-related injuries and decreasing transaction costs of legal disputing. It is therefore necessary to understand what the effects are of liability exposure on company decisions and economic outcomes.

Thiago Fauvrelle

To sue or not to sue? Evidence regarding the influence of personal and institutional factors on the decision to take legal action

Abstract

This paper aims to provide empirical evidence related to personal and institutional characteristics that might influence the individual decision to take legal action. Using a database composed of more than 19,000 Brazilians, the effects of personal and courts features on the decision to file a lawsuit are estimated for different kind of conflicts (labour, family, housing, basic services, social security and banking). The results confirm that personal (especially education, gender, age and the presence of a legal professional at home) and institutional attributes influence the litigation decision, however not always in the expected direction, this paper aims to provide empirical evidence related to personal and institutional characteristics that might influence the individual decision to take legal action. Using a database composed of more than 19,000 Brazilians, the effects of personal and courts features on the decision to file a lawsuit are estimated for different kind of conflicts (labour, family, housing, basic services, social security and banking). The results confirm that personal (especially education, gender, age and

the presence of a legal professional at home) and institutional attributes influence the litigation decision, however not always in the expected direction.

Damiano Giacometti

Business Culture and Dishonesty Among Future Legal Professionals: An experiment

Abstract

Taking a novel approach inspired by the economic theory of identity, which affirms that individuals are affected by their identity when making choices, the article presents the results of an experiment conceived to test if the professional identity has an impact on Law students' dishonesty. In markets for credence goods, such as the legal profession, expert sellers are induced to defraud customers because of the market structure and the informational asymmetry. Experimental and empirical evidence has recorded significant overtreatment and overcharging by experts of other credence good markets (mechanics, physicians and taxi drivers). Nonetheless, recent experimental findings report that professional identity, rendered salient thanks to a priming technique, may affect the level of dishonesty of expert sellers as it was with a similar case in the banking industry (another credence good market). Using the priming technique, the legal professional identity was rendered salient to the treated group. The main hypothesis conceives no significant effect on the treated sample provided the fact that participants did not experience yet the prevalent business culture of the legal profession. A further experiment with Lawyer will be performed, in a following study, in order to assess the professional identity effect on legal professionals.

Chih-Ching Lan

Policy Mix for Reducing Deforestation from Palm Oil Production

Abstract

This paper deals with the policy instruments targeting at one of the leading global drivers of tropical deforestation - the production and trade of palm oil. It uses a law and economics perspective and a policy instruments analysis approach. Palm oil as one of the most inexpensive vegetable oil ingredients used ubiquitously worldwide, has caused severe depletion of tropical natural forests, secondary forests or carbon-rich peatlands. This paper first summarizes the policy measures taken at both international and national levels by private and public institutions, including the roundtable certification schemes, the zero deforestation objective, the mechanism of Reducing Emissions from Deforestation and Forest Degradation under the international climate change regime, public procurement policies, moratorium and national land use planning coordination, etc. Then it further addresses their current gaps. Subsequently, based on the law and economics theories and literature, it discusses potential instruments that could be introduced or strengthened and suggests a policy mix of private enforcement, conditional payments and public land strategy. Finally, it concludes with possible synergies brought by the proposed instruments combination.

Keywords: oil palm plantation, tropical deforestation, policy mix

Eka Lomtatidze

Difficulties of Enforcement of Constitutional Social Rights

Abstract

Majority of the world's extant constitutions, including the constitutions of the poorest countries contain generous list of social rights. While the legal discourse focuses on whether social rights

should be enforceable by judiciary or not, the case studies of different jurisdictions demonstrate that, even when social rights have strong remedy and are enforced by judiciary, they fail to deliver the promised benefits to the most poor and marginalized groups of the society: social rights enforced by constitutional courts function as middle-class entitlements (Sajo & Landau). Case study of social rights jurisprudence of the Constitutional Court of Georgia, a Post-Communist country, reinforces the above-mentioned theory that constitutional social rights function as middle-class entitlements, but it challenges another, related hypothesis of Landau that generalized remedies can ameliorate that "middle-class effect". The findings of the paper also help to analyze which routes of constitutionalization of social rights and which remedies for their enforcements are more promising to deliver the improved social and economic conditions and to protect the dignity of the most vulnerable segments of the society.

Bernold Nieuwesteeg

The Law and Economics of Risk Pooling Arrangements in Cyber Security: the Case of Dutch Higher Education Institutions

Abstract

In this paper, we use literature on cyber risk pooling arrangements to empirically analyze an actual pooling arrangement in the making among Dutch higher education institutions. We aim to synthesize from the available literature to what extent and under which conditions a cyber risk pooling arrangement can contribute to social welfare. We start with a discussion of the theoretical potential of a cyber risk pooling arrangement (hereafter: pooling) in comparison with two traditional branches of risk management strategies, individual management and cyber insurance. The theory of cyber risk pooling arrangements has had some attention in the literature, but the practical side of it, the actual set up of a pooling arrangement in a concrete situation, has not been studied in the literature so far. We engage in an opportunity to study a preferences and prerequisites regarding setting up a pooling arrangement through the Surfnet platform. We perform a case study in Dutch higher education to analyze the practical potential

and drawbacks of setting up a risk pool between higher education institutions. We use semi-structured interviews, panel conversations and surveys to identify the need for pooling its potential contribution to social welfare.

Cintia Nunes

The Choice of Contractual Structure for Hydrocarbons Extraction in Brazil

Abstract

This paper draws a parallel between Brazilian oil and gas exploration and production contracts (onerous cession, production sharing arrangements, and concessions) and agriculture contracts (wage, sharecropping, and fixed rent). The relative efficiencies in of those contract structures are ranked considering the nature of the property rights involved, the transaction costs, and the risk allocation between the parties, as well as the incentives for efficient extraction. Until 2015, the Brazilian government had awarded around 800 contracts for hydrocarbons exploration and production to 96 firms (47 from Brazil and 49 from other countries) which have earned those contracts in specific tenders. Those contracts transfer to oil firms the rights to search for oil and gas in a given area for a given period of time. If circumstances are profitable, the firms may extract the resource for a number of years and retain a portion of the rents – which portion exactly depends on the terms of the contract. Until 2010, all hydrocarbon contracts were structured as concessions. However, in that year new laws introduced two new contractual structures: the production sharing agreement and the onerous cession. Nowadays the Brazilian government can choose which of the three contract structures to employ when offering leases to firms in tenders. Preliminary findings are that production sharing agreements allocates risks between the parties in a more efficient way but might offer less incentives for efficient extraction than concession contracts, while onerous cessions provide the weakest incentives for efficient resource extraction.

Peng Peng

Implications of Big Data for Competition Policy

Abstract

Big Data has become a strategic and valuable asset in modern knowledge-based economy. The new business model based of the collection and processing of data is currently shaping the economy on the Internet. On one hand, Internet users enjoy high-quality, constantly updated, and customized services at low, if not zero, prices; on the other hand, considering the facts that data collection of today is ubiquitous, and that Internet giants, such as Google, Facebook, Apple, are able to control most of the data, one may have the doubt: are there competition concerns regarding Big Data?

So far there have been no cases, either in the United States or in Europe, that have found Big Data itself to be a basis for a theory of harm on antitrust grounds for conduct cases. Neither Big Data has been carried as an issue in any merger or decided conduct case. However it might be reckless to include that there is no role of competition policy.

With a positive approach, the paper first summarizes the arguments that against the role of competition policy in the Big Data realm. Besides the argument from legal perspective, from economic perspective there is no need to worry about "monopolizing water in tsunami", therefore even if the Internet giants possess a certain degree of market power, monopolization of data is not possible. Furthermore, other policy tools might be more suitable than competition law in Big Data. In the second part, I discuss whether the features of the market facilitate market concentration, and whether there exist entry barriers by analyzing the value chain and cost structure.

The session of the policy implications first illustrates challenges to the current instruments of competition analysis, such as zero-pricing and multi-sidedness of the market. Then discuss a merger case Facebook/Whatsapp, and demonstrate the potential role of competition policy in merger control, by bringing a privacy dimension to merger assessment.

Admittedly, this paper does not draw clear-cut conclusion in whether competition policy should play a role in Big Data. However the constant achievements of Big Data do not come without a cost: consumer privacy concerns, market concentration etc. How much will be the gains from Big Data, and meanwhile its costs for the society, will partly depends on relevant regulatory and jurisdiction regimes.

Gian Marco Solas

Third Party Litigation Funding: some legal and economic considerations

Abstract

Third Party Litigation Funding (TPLF) is the practice of some investment funds or similar entities to finance the costs of litigation in change for a share of the recovery, only in case of victory, sometimes even purchasing the claim. TPLF has steadily grown in the recent years and is striking for its capability to change the equilibriums of dispute resolution at a global level: it has initially started being used in some common law jurisdictions, and now it is expanding in the civil law ones, too. Some courts and commentators have already highlighted how TPLF would be enhance access to justice and equality of arms in single disputes, and prevent some negative externalities on a more general level. Others have instead raised some concerns regarding the potential abuses that may derive from it, both to parties to a dispute and more generally to the legal systems. Considering the controversial nature of TPLF, and at the same time its great potential in terms of affecting dispute resolution, providing some legal and economic (L&E) analysis on it proves to be very important not only to shape the future of this practice in a virtuous way, but probably of all of the dispute resolution arena.

In light of the above, this article aims at assessing TPLF from a L&E perspective. The positive L&E approach would first of all help in defining why and how has TPLF emerged in the last years, and what has been the impact that the current legal framework has had on this process. On another side, the L&E instruments would also be applied to see whether it would be desirable that the use of TPLF would increase, from both a micro and macro economic perspective. Should the

answer to this question be positive, the normative L&E approach would then be applied to assess some measures that may eventually foster its use, and potentially prevent that abuses would be perpetrated through it. The article attempts to do so also by taking into account the current legislation and other regulatory framework(s) potentially impacting on TPLF in the European legal context. More specifically, the potential of TPLF would be measured by considering some European Union legal fields where there are concerns related to access to justice and equality of arms, and see what could be the incentives for the various parties to make use of it so to address them.

Akiva Weiss

The Role of the Guardian in Refugee Integration

Abstract

Successful integration of refugees into the labor market and political community is critical for the social cohesion and long-term economic stability of EU Member States. Yet whose role is it to ensure integration is effective? EU primary law clearly bestows competency upon individual Member States. Yet spillovers from ineffective integration may impact the socio-economic well-being of neighboring States, and, on a macro level, the Union as a whole.

This paper proposes a centralized EU-wide mentoring system to address determinants shown in the literature to impact integration of third-party nationals. Centralized coordination will help ensure consistent funding, measurable outcomes, oversight, as well as the ability to tie integration into a more equitable Union-wide refugee allocation. Centralization, however, does not preclude local ownership: interactions between State and refugees must be embedded within local institutions and meso-level stakeholders.

Through case studies and empirical analysis, a well-designed mentoring program reveals the potential to impact stratification factors and institutional inequalities shown in the labour market and educational literature to stifle effective integration. In turn, this two-way, multi-tiered interactive process may allay the uncertainty for hosting communities surrounding

absorbing refugees, as well as weld a sense of permanence for refugees, thereby increasing incentives to invest in the human capital of their designated host country.

Orlin Yalnazov

Information, Precedent, and Statute

Abstract

I compare precedent and statute in cost-effectiveness terms. To make laws, a lawmaker needs information. Information has a cost. That cost is sensitive to the choice of norm production technology. The orthodoxy is that the courts acquire information more cheaply. Litigants volunteer it in exchange for adjudication. I qualify that point in two ways. Firstly, if the information in question has to be produced purely for the purposes of norm production, then litigants will only bear its cost when their expected benefits from a favourable ruling are higher than the information's production cost. Law being a public good, we might expect that a litigant's private benefit from a favourable ruling will usually be lower than the social benefit of there being a norm applicable to all. When it is so, the legislature is superior. It has the budgetary powers to initiate the production of information; the courts do not. Secondly, it is very costly for judges to coordinate on ideological grounds. When a case is decided, the presiding judge does not normally know the ideological preferences of the appellate panel. Nor do the members of that panel know the ideological preferences of the cassatory court. If the cost of reversal to individual judges is positive, then in most cases they will have no incentive to try to change the law. The same is evidently not true of legislatures. The courts come out inferior. After developing these points, I introduce some refinements. Specifically, I argue that the legislature is better at handling uncertainty, that the time-value of norms is reflected in the rate of litigation, and that a system which combines statute and precedent is better than one which does not. I also consider the operation of interest groups under different institutional arrangements.

Lastly, I discuss the policy implications of my theory. I focus on proposals to curb the volume of litigation in society, sunset clauses, *amici curiae* and Attorney Generals, and the general debate about the relative merits of the common and the civil law.

Yu Yan

Economic Analysis of the Traffic Accident Prevention and Compensation System in China

Abstract

Since 2003, China has made intensive legislative efforts to combat the road traffic accidents. In 2006, a complicated system was finally established in China to prevent traffic accidents and to compensate victims. On the one hand, China has implemented tort liability together with regulation to achieve the goal of accident prevention. On the other hand, tort liability, compulsory liability insurance, optional insurance schemes, and social security systems are all employed simultaneously in China to compensate victims of traffic accidents. This article analyzes the traffic accident prevention and compensation system in China from a particularly perspective, being law and economics. Such analysis aims to address the following questions. First, to what extent can the law and economics theory pointing at the efficiency of road traffic liability rules and other legal instruments (in terms of both deterrence and compensation) be used in the context of China? Second, do these preventive and compensatory instruments function correctly from a law and economic perspective? If the answer is no, then what are the problems associated with each instrument? Following these research questions, this article is organized as follows. Section 1 provides a brief overview of the current legal framework on traffic accident prevention and compensation in China. Section 2 describes what legal instruments China uses to prevent road traffic accidents. Section 3 investigates the multi-layered system for compensating road traffic injuries in China. At the end of sections 2 and 3, a critical analysis of all these preventive and compensatory instruments is presented, using the economic implications outlined in the previous chapters. Some empirical evidence concerning the functioning of the traffic accident prevention and compensation system in China is presented in section 4. Section 5 concludes.

Nan Yu

Mandatory Dividend Regulations in Emerging Financial Markets: A Case of China

Abstract

The effective legal protection of minority investors of listed companies is an important guarantee for the healthy development of the securities market. However, the Chinese stock market lacks an effective long-term protection for minority investors. One serious problem with China's stock market is that the dividend yield level in most listed corporations is extremely low. As part of the China Securities Regulatory Commission's (CSRC) regulatory package, rules and regulations which require the listed corporations to pay dividends have been issued. Given the insufficient protection offered by the market discipline and China's judicial system, regulatory authorities have become the last resort on which those investors whose interests are damaged can rely. In addition, in the short-term, a rule-based system is preferable in China. After a general cost-effective analysis of the legal rules concerning dividend policy in this paper, I have ascertained that although China's dividend regulations increased the cash dividend payout level, the so-called semi-mandatory dividend regulation formulated by the CSRC is problematic which can be explained from the private interest perspective. In the long-term, China's stock market and judicial system still need more comprehensive reforms.

Keywords: Dividend Policy, Mandatory Dividend Regulation, Corporate Governance, Market Discipline, Enforcement, Cost-Effective.