Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Friday, July 3rd, 2020

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Eva Van Der Zee, Quantifying Benefits of Sustainability Agreements Under Article 101 TFEU

Discussions at the European Commission, in academic journals as well as at conferences for academics and practitioners, indicate that there is a lack of clarity how to coincide anticompetitive sustainability agreements with the so-called economic approach of the European Commission. The current interpretation of the economic approach, most notably the European Commission guidelines issued in ss2004 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), has led to situations where agreements between undertakings to stop the sale of unsustainable products or production processes have been discouraged. In this article, it is examined how the current European Commission guidelines could be improved to allow undertakings to assess their agreements in a way that is quantifiable but that goes beyond an economic approach focusing solely on monetary well-being. This article gives a legal overview of Article 101 TFEU and the guidelines, followed by an exploration of different methods to quantify agreements under Article 101(3) TFEU.

Jens-Uwe Franck & Martin Peitz, Cartel Effects and Component Makers' Right to Damages

The focus of the law on competition damages is on the recovery of overcharges appropriated by the cartels. Parties other than purchasers are often neglected, not only as a matter of judicial practice but also due to legal restrictions. We argue that a narrow concept of standing – which excludes parties that supply either the cartels or the firms that purchase from them with complementary product components – falls short of the normative objectives associated with actions for competition damages:

effective deterrence of competition infringements and pursuit of corrective justice. We propose a simple economic framework with two complementary products and show that under neither competition nor cartelization do the allocation and distribution of surpluses depend on whether producers of complements purchase from a cartel or supply a cartel or its customers. This indicates that producers of complements should be treated alike, regardless of their position in the supply chain. Based on various factors that determine the enforcement effect of actions oncompetition damages and their role as an instrument to restore corrective justice, we conclude that a broad concept of standing is preferable.

Eyad Maher M. Dabbah, Brexit and Competition Law: The Future Relationship Between the UK and EU Competition Law Regimes

The United Kingdom's withdrawal from the European Union and its impending departure from the latter, place the UK and EU competition law regimes in a situation of great uncertainty. From a well-anchored position in which these two regimes have been intertwined and their key actors – the Competition and Markets Authority and the European Commission – enjoy a strong and close association (principally within the European Competition Network), the two regimes are now supposed to go separate ways. This transition could not be more powerful and its implications could not be more serious. Yet, hardly any proper attention has been given to assessing the future relationship between the two regimes especially from a policy perspective.

The present article engages in such assessment. In addressing a number of key issues – notably the relationship between UK and EU competition law and authorities – the article offers a vision and critical analysis of the kind of future relationship the two regimes should have.

Baskaran Balasingham, Hybrid Restraints and Hybrid Tests Under US Antitrust and EU Competition Law

The distinction between horizontal and vertical agreements is not always as obvious as suggested in case law. In particular, under US antitrust law, the current case law on section 1 of the Sherman Act sets out a dichotomy between horizontal and vertical restraints. Yet, the commercial reality, as seen for instance in the e-commerce sector, is that the line between those two types of restraints is sometimes blurred. As more recent cases have shown, the legal assessment of vertical restraints that have horizontal effect is more difficult compared to purely vertical or horizontal restraints. Under US antitrust and EU competition law the assessment of those 'hybrid restraints' is further obfuscated due to the emergence of intermediate approaches to the rule of reason/per se rule in section 1 of the Sherman Act and arguably the restriction by object/restriction by effect categories in Article 101 Treaty on the Functioning of the European Union (TFEU) respectively. This article explores whether those intermediate approaches are suitable for the legal assessment of vertical restraints with horizontal effect and how the analyses could be conducted in order to be more administrable.

Rhea Reddy Lokesh, The Anti-Competitive Effect of Price Controls: Study of the Indian Pharmaceutical Industry

The objective behind imposing price controls on essential medicines is to ensure that the masses have access to these essential goods and services without prejudice. However, the prices of these medicines have significantly increased under price controls, defeating the purpose of the ceilings' implementation. In this article, the author examines the reasons behind these price increases. In particular, the article examines whether price ceilings facilitate collusion in the pharmaceutical market of India. The scope of examination considers the effect of the ceiling on prices both before and after it was implemented. This is important because prices become significantly higher in a cartelized market, thereby preventing the masses from being able to access essential, life-saving medicines.

After examining studies of individual drugs and common market tendencies, the author concluded that price ceilings do facilitate anti-competitive practices. This is due to the marketbased price ceilings providing a focal point for tacit collusion. This is especially true in pharmaceutical markets with market-based price ceilings due to the presence of strong intermediary association and monitoring, evidence of communication, and underutilization of capacity. Similar collusive behaviour has been observed in markets across China, the United States, and the United Kingdom. At the end of the article, suggestions to mitigate the effects of price ceilings and prevent the consumers from being harmed further have been enumerated.

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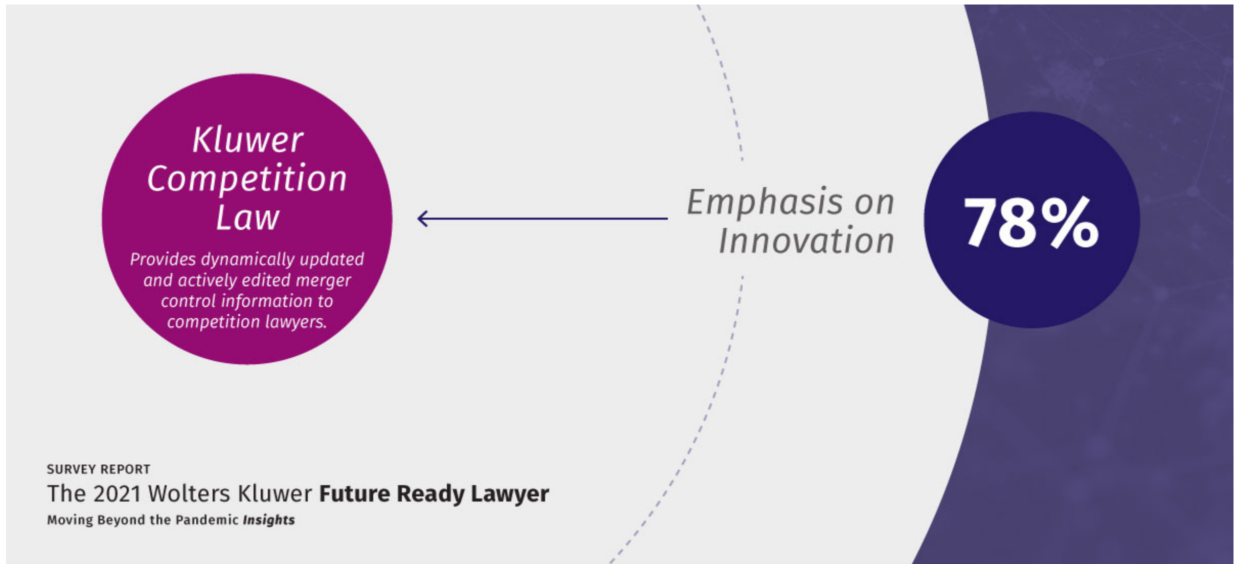

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