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Jose Rivas (Bird and Bird, Belgium) · Saturday, January 16th, 2021

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

Jacques Buhart & David Henry, COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?

On 8 April 2020 the European Commission issued its first comfort letter for a competitor collaboration in the context of its Temporary Framework in response to Covid-19. The issuance of this comfort letter is remarkable, particularly given the paradigm shift from the system of comfort letters before 2003 under Regulation 17 towards a system of self-assessment under Regulation 1/2003. While the EC has since ushered in comprehensive guidance – via block exemptions and guidelines – to assist businesses with the task of self-assessing their compliance with the EU competition rules, such guidance still leaves too much room for error und uncertainty. This is notably the case with respect to non-full function joint ventures, and in particular those that are long-term, complex and high in value. A corollary of this is that, rather than enter into pro-competitive collaboration for fear of antitrust repercussions, companies may prefer to desist. With a view to achieving enhanced legal certainty for such joint ventures, and capitalizing on the good work it is currently doing under the Temporary Framework, the EC may wish, therefore, to give meaningful thought to the introduction of a more generalized system of comfort letters – at least for non-full function joint ventures.

Patrick Actis Perinetto, A Formalistic Approach to Competition Law and Its Risks: The Curious Case of Roche/Novartis

The Roche/Novartis case raised an issue of European competition law so complex that it called upon the intervention of the most important and authoritative judicial body of the European Union, i.e. the Grand Chamber of the Court of Justice. Some of the outcomes of this case are, however, particularly worth analysing because they show to the highest degree the potential logical shortcomings that can be created by combining a too rigid and sterile application of competition law principles with

complex factual circumstances. More specifically, in this case the legal questions of the definition of the relevant product market, of the competitive relationship between the parties and of the implications of a licensing agreement between them needed to be adjudicated with reference to the unlawfulness of the creation and marketing of the relevant product, of the marketing of such product by third-parties (and not by one of the infringers) and of the weight of regulatory issues within the competition law assessment. Despite the arguably unique set of facts of the case, the problematic – even contradictory – nature of its findings cautions us against a formalistic application of competition law and shows instead the preference of adopting a substantive approach within the competition law assessment.

Dr. Andreas Ruster & Sebastian Von Massow, Disclosure in European Competition Litigation Through the Lens of US Discovery

The disclosure regime introduced by the EU Damages Directive is largely unprecedented in many EU Member States. Its implementation raises a number of thorny questions for both legal scholarship and practice. This contribution proposes a comparative analysis of Germany's implementation through the lens of US discovery as a means of exposing issues, testing weaknesses, and exploring potential solutions. While the US certainly does not get everything right, it has grappled with questions of disclosure for decades. This wealth of experience and case law provides a rich vein for European (civil law) legislators and practitioners alike to mine. To this end, we analyse the key uncertainties that persist in Germany's implementation: from the conditions and costs of disclosure, to the protections against disclosure, and the consequences of a breach. Each step of the way the US model serves as a preface to the German approach, providing context for a critical comparative analysis. We conclude with practical recommendations for the future.

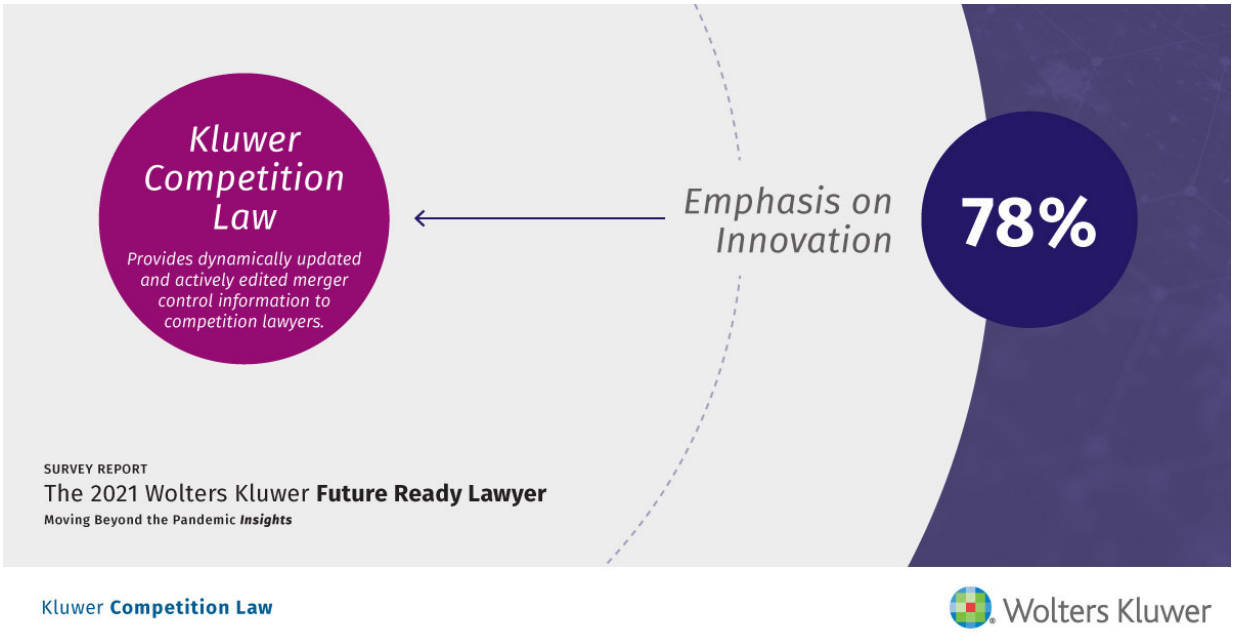
Lior Frank, Boundedly Rational Users and the Fable of Break-Ups: Why Breaking-Up Big Tech Companies Probably Will Not Promote Competition from Behavioural Economics Perspective

The aim of this short article is to show why breaking-up big tech companies, probably will not promote competition from 'behavioural economics' standpoint. In particular, this article shows that 'bounded rationality' theory casts heavy doubt on the ability of breaking-up large tech companies to effectively promote competition in digital markets. As recent behavioural evidence shows, users tend to use only one single platform, instead of using multiple platforms in such way that will promote competition between these platforms. It also shows that users do not always choose the best quality platforms available to them among others. In light of this evidence, it is not likely that competition will emerge in digital markets after the breakup, as it is expected that users, which can be regarded as 'boundedly rational users', will probably still behave in such a manner that deviates from strict patterns of rationality, and continue to use only one single platform. As a result, and after the breakup, digital markets will continue to be dominated by a single platform. Hence, this article

concludes that the notion of breaking-up big tech companies should be abandoned entirely, and other solutions for curbing big tech companies' economic power should be sought instead.

Mayank Udhwani, Remedying The Mischief Created By E-Commerce Entities In India

E-commerce entities like Flipkart and Amazon have been alleged to be in violation of the laws governing foreign direct investment ['FDI'] in India. Additionally, the business model adopted by them appears to be in contravention of the Competition Act, 2002. On 26 December 2018, the Department for Promotion of Industry and Internal Trade ['DPIIT'] had issued Press Note 2 (2018 Series) which introduced a series of changes in the FDI norms in the e-commerce sector. (These changes have been incorporated in the FDI Policy vide Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fifth Amendment) Regulations, 2019, dated 31 January 2019, Notification No.FEMA.20(R) (6)/2019-RB, available at, https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11496 [Last accessed on: 21 April 2020].) The Press Note was purportedly introduced to protect the interest of small and medium sized enterprises in India. In this article, the author argues that the changes which are introduced by the Press Note go against the very purpose of their introduction as it leaves every stakeholder in a worse off situation by allowing easy circumvention. After highlighting the issues arising from amendments introduced by the Press Note in Part I of this article, the author delineates the anti-competitive nature of the business model of the e-commerce entities in Part II of this article. The author proposes that the appropriate method to remedy the problem surrounding the e-commerce sector would have been to make the appropriate amendments under Competition Act, 2002 rather than to opt for the FDI route.



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