Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Friday, June 15th, 2018

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

Michael J. Frese*, Civil Liability for Single and Continuous Infringements*

Infringement decisions by one of the European competition authorities constitute either irrefutable evidence or prima facie evidence of an antitrust violation in cases brought before a national court. As a result, evidentiary rules applicable to investigations have a direct impact on the scope of potential damages exposure in civil litigation. The legal concept of the single and continuous infringement is an example of such an evidentiary rule. This construct has alleviated the burden for authorities to prove the existence of cartels whose membership and activities may have evolved over time. However, in order to ensure that defendants are not paying for harm they have not caused or could not have prevented, appropriate limiting principles are necessary.

Johan W. van de Gronden*, Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?*

The applicability of the competition rules has far-reaching consequences for the freedom of the State to organize the supply of public services. Could the specific features of particular public services justify the non-applicability of the competition rules? This contribution explores which limits to the broad concept of undertaking can be found in EU competition law. It will be argued that, apart from the two (well-known) limits related to official authority and social security schemes, a third limit emerges from the case law of the EU courts. Services provided in order to pursue specific public policy goals seem to fall outside European competition law. In contrast with economic activities, where companies supply goods or services to individual consumers, the main characteristic of the 'public policy goal activities' is the collective way of financing. It will be contended that the following three-prong test should be carried out for concluding that competition law does not apply to these activities: (1) the supply of the services concerned is predominately dependent on public funding (2) the objective of the public funding is to achieve a public interest goal (3) the activities concerned are closely related to this public interest goal.

Margherita Colangelo & Claudia Desogus, ***Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: A Comparative Study of the Italian and UK Experiences***

Excessive pricing has generally been seen as a problem to be addressed through sector-specific regulation rather than through antitrust intervention. Literature on the issue is divided between scholars calling for an interventionist approach and those supporting a non-interventionist approach on the basis of conflicting rationales. However, recent cases have called attention to the imposition of excessive prices in the pharmaceutical sector. The Aspen and the Flynn cases, in particular, constitute emblematic examples of such practice in the field of off-patent drugs. The analysis of the investigations conducted by national competition authorities in these cases provides some important insights into the controversial issues of ascertaining when antitrust intervention can be considered justified and of determining which methodology may be properly adopted in order to assess whether a drug price is unfairly high.

Diheng Xu, ***Rationale Behind State Aid Control over Tax Incentives***

EU State aid draws international attention recent years due to its application to fiscal measures granted by Member States to multinational enterprises. It has triggered discussions on the reasonableness of applying State aid law to tax measures. This article aims to explore the fundamental rationale behind EU State aid and its application to tax incentives. By going back to basics, this article contributes to a clearer picture on reasons for the State aid control over tax incentives. Governments tend to use fiscal State aid measures to achieve policy goals and tax incentives could realize the goals since they do bring beneficial effects. However, considering efficiency and equity in the internal market, tax incentives can cause harmful effects as well. It is necessary for State aid law to regulate the harmful effects of tax incentives, therefore guaranteeing the level playing field in the internal market.

Diego Hernández, ***Drawing the Boundaries Between Hub-and-Spoke Cartels and Vertical Agreements: Lessons from the United Kingdom and the United States to Chilean Competition Law***

Indirect contacts or exchanges of information between competitors through a common third party can sometimes lead to the existence of a cumulus of vertical agreements and, sometimes, can imply the configuration of a horizontal agreement. In competition law, vertical and horizontal agreements are treated in very different ways. Therefore, establishing whether a set of facts amounts to one or the other is critical. After analysing the situation in the United Kingdom and in the United States, this presentation will explain why the limit between the hub-and-spoke (horizontal) conspiracies and a mere aggregation of vertical agreements lies in the existence not only of vertical information exchanges (or, to phrase it differently, in an indirect horizontal exchange) but also in the established existence of an additional mental element. Towards the end, relevant conclusions will be reached in relation to the application of the Chilean Competition Act.

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