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Jose Rivas (Bird and Bird, Belgium) · Friday, August 31st, 2018

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

Maciej Bernatt, Marco Botta & Alexandr Svetlicinii, The Right of Defence in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe

The article compares the application of the right of defence in competition law proceedings by seven National Competition Authorities (NCAs) of Central and Eastern Europe (CEE). In particular, the article focuses on four sub-rights that are part of the right of defence: right to be informed; right to access the file; privilege against self-incrimination (PASI) and legal professional privilege (LPP). The article shows that the NCAs selected as case studies generally provide lower procedural guarantees in comparison to DG Competition of the European Commission. The findings of the article are relevant in view of the Directive aiming at harmonizing the powers of NCAs ('ECN+ Directive'). The legislation aims at strengthening the investigatory tools of NCAs, while it pays limited attention to the procedural guarantees followed by NCAs. In view of the diverging application of the right of defence by the NCAs selected as case studies, the article challenges such policy choice, claiming that stronger investigative powers should be counterbalanced by a more homogenous application of the right of defence by NCAs of the EU Member States.

Javier García-Verdugo, Carlos Merino Troncoso & Lorena Gómez Cruz, An Economic Assessment of Antitrust Fines in Spain

Fines remain an essential mechanism of competition enforcement and should deter anticompetitive practices. This article quantifies the deterrent power of fines imposed by the Spanish competition authority from 2011 to 2015. First, we compare the evolution of fines over three sub-periods: From January 2011 to the creation of the CNMC on October 2013, since then until the Supreme Court's judgment on fines on January 2015, and for the rest of 2015. The average fine per firm is similar in the first two periods but significantly lower in the third period, and now fines are more concentrated around the mean than before. Second, we define three scenarios – according to low, average or high values of the relevant parameters – for which we compute deterrence ratios to

compare actual and optimal deterrent fines. The results show that most of the fines were under deterrent – a deterrence ratio lower than one – even when using the lower optimal fines of the lower scenario. More specifically, 80% of the actual fines are under deterrent in that scenario (close to 100% in the other two scenarios), and the average value of the fines imposed to these companies was on average 64% below the optimal deterrent fine, with slight changes across sub-periods. We conclude that the fining policy of the Spanish competition authority between 2011 and 2015 should be considered significantly under deterrent.

Roberto Grasso & Georgia Tzifa, The ECJ Ruling in Coty and the Future of Vertical Restrictions in the Internet Space

This article discusses the ECJ preliminary ruling in Coty and its impact on the law of vertical restraints. Although the legal test for selective distribution cases dates back to the 1970s ECJ judgment in Metro and has since been applied rather consistently, the rapid growth of ecommerce has created serious uncertainties as to the compatibility of certain selective distribution practices with competition law. National regulators and courts throughout Europe have been enforcing the law in different and sometimes conflicting ways. This article provides a rather extensive review of such national case law and emphasizes the important contribution of the Coty judgment in clarifying the law and allowing for a more consistent enforcement of competition law in the area of vertical distribution. Finally, this article discusses some of the questions left open by Coty, which are likely to give raise to inconsistencies in the enforcement of the law at national level, such as the concept of luxury good.

Giovanna Massarotto, From Standard Oil to Google: How the Role of Antitrust Law Has Changed

Google cases give us two lessons. First, despite the time that has passed since Standard Oil case,the big primary question remains the same, are markets better off with self-regulation? Second, antitrust law can be the appropriate relief to govern markets through the adoption of remedies enshrined in consent decrees. Tailored antitrust remedies can succeed where government’s regulation and self-regulation fail.

James Hotchkiss, Polar Opposites: Judgments and Counterfactuals in Sainsbury’s V. Mastercard and Asda V. Mastercard

This article explores the recent cases Sainsbury’s v. Mastercard and Asda v. Mastercard and uses them to demonstrate how the decentralization of Article 101 TFEU enforcement is creating legal uncertainty due to national courts being unequipped to apply complex Ex Post counterfactuals consistently. It considers the distinction between restriction of competition by object and restriction of competition by effect to show that EU and national courts now apply the latter. It then considers the requirements for effects-based analysis, focussing on the mandatory use of Ex Post counterfactuals, highlighting their emergence as a legal mechanism in Article 101 application. This article argues that Ex Post counterfactuals’ basis in vague economic theory creates significant difficulties for national courts attempting to enforce Article 101 consistently and evidences these

difficulties by considering the courts' composition, their overreliance on expert economic witnesses, the standard of proof, complex court interplay and referral for preliminary ruling. Ultimately, it argues that despite procedural tools being provided to national courts to ensure consistent application of Article 101 at national and EU levels, the courts are failing to utilize them, resulting in the creation of significant legal uncertainty as evidenced by the polar-opposite judgments reached in the Mastercard cases.

Daniel Mandrescu, Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)

Abuse of dominance cases under Article 102 TFEU concerning online platforms will require revisiting the process of the market definition in light of the complexities that are likely to arise due to the two- or multi-sided nature of such platforms. This distinctive nature will firstly require determining the number of relevant markets that need to be defined in each case before the scope of such markets can be accurately delineated. Unfortunately, however, the current approaches to this first, new step, of the market definition process are incompatible with business reality. Therefore this article provides an alternative approach to this complexity, which is better suited to guarantee the trueness of the market definition findings. Accordingly, this article indicates that the number of relevant markets in each case should be determined based on the typology of the interactions facilitated by the online platform and the degree of substitutability of such online platform with other non-platform undertakings from the perspective of its customers groups. This approach allows reaching findings of market power in a manner that adequately reflects the business reality of such platforms in the digital economy and the degree of competitive pressure they may experience in practice.

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