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Jose Rivas (Bird and Bird, Belgium) · Tuesday, March 19th, 2019

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

Ariel Ezrachi & Viktoria H.S.E. Robertson, ***Competition, Market Power and Third-Party Tracking***

The prevalence of third-party tracking in our modern ecosystem cannot be ignored. Trackers, on our websites and apps, enable multi-sourced data gathering, at distinct volume, variety, velocity and veracity. While numerous operators engage in tracking, the majority of these trackers are controlled by a small number of data giants. In this article we consider the rise and growth of this industry, the power it has bestowed on a handful of platforms, and the possible implications for consumer welfare and competition.

Wouter P.J. Wils, ***Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure***

This article discusses the law, policy and procedure of legal professional privilege in EU antitrust enforcement. It focuses primarily on the enforcement of Articles 101 and 102 TFEU [Treaty on the Functioning of the European Union] by the European Commission, but also touches briefly on the enforcement of EU antitrust law by the competition authorities of the EU Member States (addressing in particular the question whether those EU Member States that extend legal professional privilege to in-house lawyers are in breach of EU law), as well as on private enforcement.

Paolo Iannuccelli, ***Interim Judicial Protection Against Publication of Confidential Information in Commission Antitrust Decisions***

The publication, in the name of transparency, of Commission decisions finding infringements of EU competition law is a powerful tool for enhancing the private enforcement of Articles 101 and

102 of the Treaty on the Functioning of the European Union ('TFEU'). Before publishing those decisions, the Commission must nonetheless be careful to afford 'very special protection' to the legitimate interest of the undertakings concerned in the protection of their business secrets and other confidential information. When preparing the non-confidential version of the decision to be published, the Commission involves those undertakings, which have the right to object and, where they consider it appropriate, to refer the matter to the Hearing Officer, whose decisions may in turn be challenged before the EU Courts. In such cases, interim relief is essential to safeguard the undertakings' right to the protection of confidential information, as well as their right to effective judicial protection. The recent case law of both EU Courts on interim protection in this context is marked by a high degree of technicality and struggles to adapt the ordinary interpretation of the conditions required for the granting of interim measures to the specificities of this kind of case. This article examines several rather complex interlocutory orders in an attempt to extract the logic behind them.

Marc Veenbrink, ***Bringing Back Unity: Modernizing the Application of the Non Bis In Idem Principle***

This article describes the approach which the Union Courts have taken in relation to the non bis in idem principle when it concerns dual proceedings by the Commission and National Competition Authorities (NCAs) or by different NCAs. The unity of the legal interest is used by the CJEU as a jurisdictional safeguard for the Commission. Conversely, the identity of the facts determined whether the accounting principle is applicable in dual proceedings. This principle is in dual proceedings by the Commission and an NCA the only applicable expression of the non bis in idem principle. This approach is different from that in other areas of law where Article 50 of the Charter or Article 54 CISA are applied. The application of the non bis in idem principle in the Union's legal order can therefore be criticized on the basis of lack of unity. It will be argued that these diverging approaches can be aligned without losing the current outcome in competition law cases.

Nicole Rosenboom & Daan in ?t Veld, ***The Interaction of Public and Private Cartel Enforcement***

The prohibition of cartels is enforced by both public and private legislation, which may interact in a way that reduces their effectiveness. This article investigates these interaction effects specifically for the leniency programme and civil damages claims, by means of a conjoint analysis. Dutch companies and competition lawyers were faced with different enforcement situations containing a mix of public and private enforcement elements and were asked in which case they were most likely to apply for leniency. Their answers are analysed with a nested logit model, allowing for the possibility that respondents would continue the cartel in either of the presented enforcement situation. For firms, the corporate and personal fine and the fine reduction mattered in deciding to apply for leniency. Competition lawyers took the fine reduction, disclosure of leniency and burden of proof into account when advising on selfreporting the agreement. Both groups of respondents answered that in 16–19% of the situations they would continue the agreement and not apply for leniency/advice to so do (The authors thank the participating economists of the Dutch Competition Authority for their input and suggestions. Special thanks to Dr Ron Kemp, the competition lawyers who were willing to discuss the research results with the authors, prof. Dr Barbara Baarsma and

prof. Dr Bas ter Weel.).

Cento Veljanovski, ***Collective Certification in UK Competition Law: Commonality, Costs and Funding***

The UK introduced a new regime for opt-out ‘class’ or collective actions in 2015. These require certification before they proceed to trial to establish whether the members of the class have sufficient ‘common interest’. The certification of the first two collective actions – Gibson v. Pride Mobility Products and Merricks v. Mastercard – were dismissed by the Competition Appeal Tribunal (CAT). Here a critical assessment of the UK’s emerging collective certification process is undertaken focusing on the determination of common issues, pass on, distribution of damages, costs and funding. It is argued that the CAT has applied the test for certification too strictly and not in accordance with the case law surrounding the ‘Canadian model’ on which the UK certification procedure is based; and incorrectly treated the award of aggregate damages as the summation of individual damages. The way the CAT has handled these two factors threatens to undermine the purpose and effectiveness of the UK’s new collective action regime.

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