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Jose Rivas (Bird and Bird, Belgium) · Tuesday, December 31st, 2019

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

Hedvig Schmidt, ***Competition Law and IP Rights: Not So Complementary: Time for Re-alignment of the Goals?***

This article argues through a US/EU comparative assessment of the intellectual property (IP) law goals and competition law goals that whilst the overarching goals of competition law and IP rights to enhance overall economic welfare are still complementary, internal conflicts within the two legal spheres are jeopardizing the achievement of these goals.

Within the IP laws the private/public reward/incentive to innovate equilibrium is now being tilted in favour of private interests due to recent developments in terms of rapid innovation in digital economy markets and technologies coupled with an expansion of IP rights and increase in patents grants and their width.

This has a knock-on effect on the application of the competition rules as a second-tier regulator of IP rights. However, the competition rules also face its own battle in keeping up with the fast-developing digital economy, the concerns regarding Big Data and online platforms raising questions about the sustainability of the 'consumer welfare' framework as an optimal standard to ensure effective competition in these markets.

Consequently, there is a danger that the competition rules and the IP rights will be out of quilter, risking stifling of innovation and harm to consumer welfare, unless adjustment is made within the two legal spheres.

Jan Blockx, ***The Limits of the 'More Economic' Approach to Antitrust***

The 'more economic' approach to antitrust recites two mantras: first of all, that antitrust analysis should only consider the effects of a practice, and secondly, that only the economic effects of a practice are relevant. The first mantra is impossible to satisfy in practice, thus the 'more economic'

approach to antitrust has relapsed into formalism. Other tools than effects analysis are needed in antitrust enforcement, such as per se rules and an examination of the intentions of the undertakings concerned. The second mantra implies usurping legislation enacted for other purposes and is based on a naturalistic fallacy. Other objectives than economic efficiency should count in antitrust enforcement as well.

Eyad Maher M. Dabbah, ***Brexit and Competition Law: The Future Place of the UK Competition Law Regime Internationally***

Arguably, the most famous line ever uttered on the decision by British voters of 23 June 2016 to exit from the European Union (EU), is, and always will remain, 'Brexit means Brexit'. These were the words of the serving British Prime Minister at the time. The triggering of Article 50 of the Treaty on European Union (TEU) – marking the start of the two-year negotiations/detachment process – eventually occurred on 29 March 2017. That process drew to its end on 29 March 2019. The UK however continues to be an EU Member State. At the time of writing, the UK's exit from the EU was expected on 31 October 2019, though it is highly uncertain whether this indeed will happen.

This article addresses the competition law related challenges, opportunities and implications of the UK becoming a non-EU Member State from an international perspective. The article analyses in particular the future place and role of the UK competition law regime internationally. The article considers the future international agenda of the UK Competition and Markets Authority (CMA) and the international orientation and standing of the UK competition law regime as a fully independent regime, which is both completely UK and European in orientation.

Camila C. Pires-Alves, Marcos Puccioni de Oliveira Lyra & Marina Maria Gutierrez Bonfatti, ***Quantitative Methods and Mergers Effects in Competition Policy: The Brazilian Case***

The article aims to discuss the use of quantitative methods in quantifying merger effects as evidence, taking the particularities of the Brazilian experience and considering both technical, institutional and policy issues. Therefore, the article investigates evolution and patterns in the Brazilian institutional framework and jurisprudence in terms of technical aspects and adequacy of implementation, policy issues regarding the acceptance within the administrative tribunal and the main challenges imposed. The information collected considered all the merger cases, as far as we know, in which quantitative methods were applied by Administrative Council of Economic Defense (CADE) in order to measure, estimate or imply the merger's potential anticompetitive effect on prices. Among the conclusions we find that the models are employed in few complex cases and mostly to sustain some restriction by the authority. We also note that the authority seems concerned about sensibility analysis, in some cases revealed by the combination of the use of different methods and/or competitive models.

Roman Inderst & Stefan Thomas, ***Common Ownership and Mergers Between Portfolio Companies***

The current debate on the competitive risks of common ownership has focused on whether passive index investments soften competition among portfolio companies. However, even if one concedes, in arguendo, that this is the case, it remains unclear in what way this bears on the analysis of horizontal mergers between portfolio companies. The EU Commission in Dow/DuPont and Bayer/Monsanto has alleged that common ownership is 'an element of context in the appreciation of any significant impediment to effective competition'. In that respect we hypothesize that it should not be presumed that common ownership in itself increases anticompetitive effects of a merger between portfolio companies. Instead we posit that this depends on the facts of the case. The existence of common ownership might even mitigate post-merger unilateral effects if compared to the pre-merger counterfactual. We test our hypothesis on price competition as well as on innovation competition. Eventually, we map our conclusions onto the legal principles governing the burden of proof in merger cases.

Ploykaew Porananond & Po Ma Ma Aung, ***Emerging Trend in Competition Law in Southeast Asia: Perspectives from Myanmar and Thailand***

Establishing a new competition law regime is never an easy task, especially for developing countries. The current literature of competition law is rich with suggestions on the best political economy preconditions conducive to an effective competition law regime. It is generally believed that countries with a democratic political regime and a stable rule of law are more inclined to enact national competition law. Moreover, countries that embrace the principle of trade liberalization, privatization, and market economy are a fertile ground to the growth of competition law.

Yet, the enactments of Myanmar competition law in 2015 and Thailand new competition law in 2017 deviate from this general understanding. Naturally, it is assumed that competition laws adopted in these countries would be starkly different from pre-existing competition laws. It hints towards an emerging trend of competition law, one which manages to enact and enforce competition law regardless of the reality of the local political economy. This article explains the cause and consequence of this deviation, without immaturely evaluating the effectiveness of such young regimes. It concludes with investigating the likely source behind it, specifically whether the ASEAN, in which both Myanmar and Thailand are Member States, is behind such phenomenon.

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