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Jose Rivas (Bird and Bird, Belgium) · Saturday, March 20th, 2021

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

Marco Botta The Challenge of Sanctioning Unfair Royalty Rate by the SEP Holder: 'When', 'How' and 'What'

The holder of a Standard Essential Patent (SEP) is usually required to license its patent to any licensee on the basis of Fair and Reasonable and Non-Discriminatory (FRAND) terms. In their recent judgements in Unwired Planet and Sisvel v. Haier, the UK Supreme Court and the German Bundesgerichtshof ruled that a 'range', rather than a 'single' royalty rate, may be considered compatible with the FRAND commitment. On the other hand, a royalty rate 'beyond the outer boundary of the range' would not be FRAND. In addition, an 'unfair'royalty rate might also be regarded as an abuse of dominant position by the SEP holder, in breach of Article 102(a) Treaty of the Functioning of the European Union (TFEU).

The paper analyses whether and under what circumstances Article 102(a) TFEU could be relied on by a competition authority in Europe to sanction a case of 'unfair' royalty rate requested by the SEP holder to its licensees. In particular, the paper assesses 'when' competition policy should sanction an unfair royalty rate requested by the SEP holder, 'how' a competition agency should analyse the case in accordance with the case law of the EU Court of Justice concerning Article 102(a) TFEU and, eventually, 'what' remedies the competition authority could adopt.

Roger Van den Bergh & Franziska Weber, The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?

This article provides a critical analysis of the German Facebook case and stresses the limits of competition law. Facebook's terms and conditions regarding the use of Off-Facebook data were qualified as an exploitative abuse at various stages of the German Facebook proceedings. However, it is far from certain that Facebook would have written its terms any different if it was operating on a competitive market. From an economic viewpoint the market failure at hand is a pervasive information asymmetry rather than market power. Therefore, it is doubtful that the

correct response lies within competition law. If competition rules must be rewritten in order to cope with market failures in digital markets, there is a serious risk that the abuse found is not an abuse of market power but an abuse of the market power provisions in competition law. Alternative routes that can be found in consumer contract, unfair competition or data protection laws might be viable options. The latter rules can be applied without a complicated finding of causality between market dominance and the use of 'unfair' contract terms. Admittedly, also the information paradigm can be called into question but amending rules of contract law avoids Herculean interpretations of competition law that go against a broadly supported 'more economic approach'.Abusing competition law or enhancing contract law to improve the efficiency of digital markets,that is the question.

Stefan Thomas, Horizontal Restraints on Platforms: How Digital Ecosystems Nudge into Rethinking the Construal of the Cartel Prohibition

This paper deals with collusive risks that can result from the ecosystems created by digital platforms. Recent case reports reflect that the potential for harm and benefit can be tightly interwoven here. It is not entirely clear, however, in what way the creation of a platform can, in itself, amount to a breach of the cartel prohibition, and how the potential for harm can be balanced against efficiencies in those cases. I argue in favour of an integrated construal of conduct and effect in order to close regulatory gaps whilst preventing false positives.

Jasminka Pecoti? Kaufman & Ružica Šimi? Banovi?, The Role of (In)formal Governance and Culture in a National Competition System: A Case of a Post-Socialist Economy

Research increasingly suggests that the effectiveness of competition laws and policies could be enhanced if their implementation is linked with a better understanding of the cultural influences on competitionrelated decisions.Moreover, the lack of competition culture has been considered one of the main barriers to the enforcement of competition rules. But the studies examining this interplay of competition policy and national culture appear to be rather limited. Based on interviews with key actors of the Croatian competition system, this study examines the interaction of the competition system and the national culture through the governance perspective of a European (post)transitional society. Our findings indicate three key features that are unlikely to support the competition system development: first, collectivism and high power distance in the society; second, a strong influence of planned economy legacy; and third, a clash between the process of Europeanization and inherited collusion-friendly (in)formal governance mechanisms. Based on a unique set of empirical evidence, the contribution of this article lies in the analysis of the relations between modes of governance, national culture, and competition system development in a postsocialist society. This study is expected to have broader resonance for other post-transitional countries and for other developing countries with similar cultural features.

Akanshha Agrawal, Predatory Pricing and Platform Competition in India

Predatory pricing has been a concern since the inception of competition policy. Scholars from different schools have large disagreements about it, with some arguing that predation does not exist

to others considering it a legitimate threat to competition. As predatory pricing theory is largely concerned with price cost test, the issue is further complicated while looking at two sided platforms. Due to network effects, the value of the platform for the users changes with the number of users on the network. Therefore, the price of services is influenced by multiplicity of factors rather than just the cost of the service.The aim of the paper is to note such economic theory and apply this in the Indian jurisprudence on predatory pricing. Part I of the paper provides a non-technical introduction to the economics of two-sided platforms. It explains the rationale behind below cost pricing and critiques the usage of a price cost test for determining predation in case of two-sided platforms. Part II touches on the international regulation of predatory pricing and establishes the context for the Indian jurisprudence. Part III discusses the Indian jurisprudence surrounding predatory pricing. This elaborates on the legislative history and the judicial decisions concerning predatory pricing and platform competition in India. This part argues that the Indian jurisprudence has completely disregarded the economic theory of predation in case of two-sided platforms and the adjudications are merely based on a price cost test.

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