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Jose Rivas (Bird and Bird, Belgium) · Saturday, December 11th, 2021

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

José Rivas, Interview with Ms Cani Fernández, Chairwoman of the Spanish National Commission of Markets and Competition (CNMC)

Pablo Ibáñez Colomo, EU Merger Control Between Law and Discretion: When Is an Impediment to Effective Competition Significant?

This paper considers the interpretation of the substantive test laid down in Article 2 of Regulation 139/2004. It focuses on horizontal mergers in the so-called 'gap' cases, which would not result in the creation or the strengthening of a (single or collective) dominant position. In its practice and soft law instruments, the Commission has construed Article 2 in such a way that virtually any transaction involving actual or potential competitors could lead to a finding of a significant impediment to effective competition. Under this approach, the substantive test would be fulfilled, in principle, in every horizontal merger. In CK Telecoms, the General Court crafted an alternative framework that is capable of meaningfully constraining administrative action and ensures that judicial review in EU merger control remains effective.

Elias Deutscher, Brand Bidding Restraints Revisited: What Is the Appropriate Economic and Legal Framework for the Antitrust Analysis of Vertical Online Search Advertising Restraints?

This article explores the law and economics of brand bidding restraints which constitute the most novel type of vertical restraints imposed by brand owners on their distributors in digital markets. The article tests and critically reflects on the restrictive approach European competition watchdogs have recently adopted towards these brand bidding restraints. It contends that this harsh antitrust treatment of brand bidding restraints is not sufficiently grounded in the economic analysis of vertical restraints. In proposing a comprehensive framework for the legal and economic analysis of brand bidding restraints, the article makes three principal contributions. First, it asserts that brand bidding restraints can have a number of procompetitive effects by internalizing advertising-related

externalities, addressing free-riding on display and traditional advertising and facilitating fixed cost recovery through price discrimination. Second, the paper considers different ways through which brand bidding restraints may harm competition and consumer welfare when they disproportionately affect infra-marginal consumers, prevent meaningful intra- and inter-brand comparisons or result in price discrimination on the basis of search costs rather than brand preferences. Moreover, brand bidding restraints are of particular concern when adopted in the context of dual distribution systems where vertically integrated brand owners have an incentive to raise their retailers' costs to prevent them from cannibalizing on their own sales channel. Third, the article explore various filters that may inform an effects-based analysis of brand bidding restraints. In this respect, the article makes a number of policy recommendations for the future antitrust analysis of brand bidding restraints. These proposals could also inform the ongoing revision of the Vertical Block Exemption Regulation (VBER) and Vertical Guidelines in the EU and in the UK.

Patrick Massey & Moore Mcdowell, EU Competition Law: An Unaffordable Luxury in Times of Crisis?

The paper rejects arguments advanced in some quarters for a relaxation of EU competition policy to promote economic recovery. Economic theory and historical experience indicate that competition is likely to assist rather than impede recovery. While the Covid-19 induced recession necessitated increased State Aid, there is a serious risk that such aid will seriously distort competition within the internal market, given differences in the financial capacity of Member States to support businesses. The paper argues that policies designed to promote national champions and greater self-sufficiency are not justified and that action to secure reciprocal market access for EU exports is preferable to protectionist measures. An important lesson from the financial crisis is that actions based on immediate needs are a poor substitute for policy intervention based on sound economic analysis.

András Tóth, Creating More Public Value in the EU Competition Law by Reaching a Higher Level of Prevention in the Particular Context of the Digital Markets

The problem-solving mechanism developed by Sparrow in the field of social regulation could also be implemented in competition law in order to prevent the recurrence of competition problems in a given industry. The aim of competition authorities (as a protection-type agency) is to create public value. This is measured in terms of their ability to solve social problems by preventing or controlling harms. In the case of competition authorities, public value is achieved by ensuring a competitive market environment through the curtailment of market power and the removal of barriers to entry. The public value of prevention is especially important when markets have a tendency to become concentrated. In order to achieve the maximum preventive effect, all prevention tools must be operated effectively. This includes imposing structural remedies or switching to ex-ante prevention (regulation) when ex-post enforcement proves ineffective.

Rajan Dhanjee, International Co-operation on Competition Law Enforcement: A Breakthrough?

Section F of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ('UN Set') deals with international measures, including consultations and co-operation among competition authorities for enforcement against anti-competitive practices, particularly for developing countries' benefit. The 2020 Eighth Review Conference on the UN Set adopted Guiding Policies and Procedures under section F ('GPP'). While it contains few norms, this non-binding instrument provides principles and a pedagogical guide for enforcement co-operation, encourages positive responses to co-operation requests, and strengthens the consultations mechanism and the United Nations Conference on Trade and Development (UNCTAD) secretariat's supporting role. The GPP's siting within the UNCTAD and UN Set contexts provides legitimacy, inclusivity, mandates, resources, a secretariat – and thus the best available multilateral framework for developing and transition countries to mobilize publicity, dialogue, and persuasion to strengthen enforcement co-operation in this area for their benefit. The GPP therefore constitutes a breakthrough, while how far or when its potential will be fulfilled will depend upon the building-up of shared perceptions of common interest, mutual trust and mutual benefit among competition authorities- something which UNCTAD could promote through action at the national and international levels. Initial signs provide hope that good progress can be achieved.

Yusaf H. Akbar, President Biden's Antitrust Counterrevolution: Implications for Business

The proposed changes to the way the United States handle antitrust policy enshrined in the July 2021 Executive Order (EO) issued by President Biden implies significant financial and strategic implications for corporates and their executives not seen since the 1980s. Changes to merger control policy, actions against price agreements as well measures to raise wage growth are all part of the EO and will likely be a legacy of the Biden Presidency for years to come. Among the more than seventy policy changes initiated by the EO, this article evaluates the probability of policy implementation of these policy initiatives and provides a series of options as to how companies could respond.

Nora Memeti & Agata Jurkowska-Gomulka, SOEs, Foreign Investments & Competition: A View from the Gulf States

State-Owned Enterprises (SOEs) directly compete with private companies, including foreign investors. The scope of applicability of competition law towards SOEs constitutes one of the key features of national competition protection regimes. Two approaches (models) can be identified in this area: the equality approach (competition law applied in the same manner towards the public and the private sector; the model is based on the neutrality principle); and the differentiation approach (excluding fully the application of competition law on SOEs). The second model is usually justified by important social and economic goals, mainly by a necessity to provide highquality public services. However, the differentiation model may negatively affect both domestic competition and the investment atmosphere.

The Gulf Cooperation Council (GCC) countries adopted competition laws that generally put SOEs and the public sector in a broader sense out of scrutiny of competition law regime. The paper aims to check what reasons lie behind a rejection of the neutrality principle in GCC's competition laws,

specifically if competition protection regimes are patterned on antitrust laws from liberal economies. By identifying how the differentiation approach to addressees of competition laws is reflected at a legislative or practical level in most GCC's countries, the article tends to assess the impact of national competition laws on Foreign Direct Investments (FDI) in the Gulf region.

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