Kluwer Competition Law Blog

World Competition Law and Economics Review, Volume 45, Issue 3, 2022

Jose Rivas (Bird and Bird, Belgium) · Saturday, September 24th, 2022

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

Pablo Ibáñez Colomo, Competition Law and Sports Governance: Disentangling a Complex Relationship

Cases like International Skating Union and Super League show that the application of EU competition law to rules adopted by sports governing bodies is complex and occasionally controversial. This article discusses the peculiarities of sports as an activity and addresses the implications for Articles 101 and 102 TFEU. It shows, first, that the relationship between individual participants in a tournament is best described as co-opetitive, in the sense that their viability and success depend on sustained cooperation. Second, the emergence of a regulatory structure is inevitable. Third, tensions – of a horizontal and a vertical nature – are bound to emerge within an association. These tensions are explained, inter alia, by the opportunistic behaviour of individual participants (which may seek to benefit from the joint venture while simultaneously undermining it).

The case law accounts for the peculiarities of sports. Measures aimed at addressing opportunistic conduct within a cooperative structure (such as the non-compete obligations imposed by governing bodies) do not have, as their object, the restriction of competition and do not invariably have anticompetitive effects, which are to be established case-by-case. Absent exclusive or special rights, moreover, governing bodies are not subject to a general duty of non-discrimination vis-à-vis competing organizations.

Roman Inderst & Stefan Thomas, The Scope and Limitations of Incorporating Externalities in Competition Analysis Within a Consumer Welfare Approach

The failure to fully internalize externalities from production and consumption, including on future generations, is supposed to be at the core of the perceived failure to ensure (ecological) sustainability within the realm of antitrust enforcement. While some argue that sustainability should constitute a goal in itself that must be balanced against economic efficiency in antitrust

analysis, we instead want to explore whether and how sustainability can be incorporated into a consumer welfare approach. We make a key distinction between what we term an individualistic and a collective consumer welfare analysis. Within an individualistic consumer welfare analysis, consumers' willingness-to-pay is measured ceteris paribus, holding other consumers' choices fixed. In a collective consumer welfare analysis, consumers may express their willingness-to-pay also for the choices of others and, thereby, also for the reduction of externalities on themselves. Borrowing from environmental and resource economics, we also discuss more indirect ways of incorporating such externalities. And we critically assess the possibility of 'laundering' consumers' sustainability preferences in the light of supposed biases and cognitive limitations. Finally, we relate our analysis to the Draft Horizontal Guidelines of the European Commission, published in March 2022.

Florin Dascalescu & Marc Houtman, Practical Considerations on the Notion of 'Advantage' and the Application of Market Economy Operator Test in the Context of Financial Instruments

This article focuses on the notion of 'advantage', as an element necessary for a national measure to be qualified as state aid. Behaving like a private economic operator implies that the state remains profitoriented and does not grant an advantage to a recipient undertaking (i.e., no aid). In order to determine that economic transactions carried out by public bodies do not confer an advantage on the recipient, the European courts have developed, as of the mid-1980s, a test which implies the comparison between the state and a private economic operator. This article focuses on a number of key issues arising when applying the 'market economy operator test' (MEOT) to Member States' (MSs') investments, especially in the area of financial instruments, e.g., equity or quasi-equity investments, loans or guarantees. The recent EU soft law indicates the forms that the MEOT may take and clarifies the state's role in co-investments in financial instruments, together with private investors. The existing EU case-law may be useful for subtracting some principles to assist practitioners with designing financial products in line with the MEOT and avoid the negative effects of illegal aid recovery. We conclude that more proxies may be provided via soft law by the European Commission for designing financial products under the MEOT, in an effort to increase access to finance to European companies.

Liyang Hou & Jian Li, Compulsory v. Voluntary Merger Notification Mechanism: Implications of China's Enforcement for Young Competition Jurisdictions

The internationally dominant compulsory notification mechanism under merger control aims to remedy anti-competitive harm by blocking or conditionally approving mergers ex ante. However, such a mechanism is not free from disadvantages. As an alternative, the voluntary notification mechanism, though superficially producing fewer deterrence effects, is in effect no worse than the compulsory mechanism (CM), given its significantly less implementation costs. In order to examine which mechanism suits a given jurisdiction, it is necessary to evaluate the costs and benefits for the implementation of such a mechanism. The enforcement of the CM in China can be argued to present insufficient benefits and high costs, due to the extreme low proportion of blocked and conditional approved cases, as well as the unsatisfactory deterrence effect, and the significant constraints by implementing resources, in particular human capital. Such a particular situation in

China implies that the voluntary mechanism (VM) might be advisable to be a more feasible option for young competition jurisdictions.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Saturday, September 24th, 2022 at 11:59 am and is filed under World Competition Law and Economics Review
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.