

Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Sunday, June 25th, 2023

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

Beatriz Kira, Is iFood Starving the Market? Antitrust Enforcement in the Market for Online Food Delivery in Brazil

This article examines the decisions taken by the Brazilian Competition Authority, the Administrative Council for Economic Defence (CADE) in two antitrust cases related to the dominant food delivery platform iFood, one merger review and one investigation into exclusive dealing agreements. Through an in-depth examination of the case documents, this article uncovers the evolution in CADE's comprehension of the competition dynamics in multi-sided digital markets, while also revealing gaps and inadequacies in the authority's substantive and procedural antitrust enforcement. Based on the findings, the article draws lessons that can help strengthen the authority's approach to digital platform cases in the future. Firstly, CADE must adapt its steps of analysis and develop new theories of harms that are better tailored to the characteristics of multi-sided platforms. Secondly, CADE should conduct more rigorous merger reviews that take into account the wider impact of dominant platforms' business strategies on the ecosystem of players orbiting them. Thirdly, the article highlights the importance of the authority building its capacities and expertise to detect competition problems from an early stage, design effective remedies, and ensure these remedies are enforced effectively. These recommendations underscore the significance of continuously updating the enforcement framework and enhancing the capabilities of the competition authority to keep pace with the rapidly evolving digital economy.

Paul Friederiszick, Moderating Globalization: Is There a Role for Antitrust Law? A Comparison of the Relevance of Entry, Expansion and Imports in US and EU Merger Proceedings

This paper attempts to locate the issue of innovation and foreign entry, in particular new entrants from China, in recent US and EU merger decisions. In the first part, the paper examines to what extent US and EU authorities considered foreign entry in recent major merger decisions such as Bayer/Monsanto, Dow/DuPont and ChemChina/Syngenta. The outcome of this short analysis shows that the EU Commission has in recent years begun to accept the argument of foreign entry, in particular from China, as long as the market shares of the merging parties are not too high. The US has not explicitly discussed the question of foreign entry in the above-named decisions.

However, in the case Whirlpool/Maytag the US authorities accepted, despite high market shares of the parties, the argument of foreign entry and approved the merger. With regards to innovation, entry into future product markets is not considered favourable to the merging parties by the EU Commission. ‘Innovation competition’ or early ‘pipeline products’ is rather used as an argument to demonstrate that the merging parties hold market power in product markets in the future. Based on the selected case law, the US authorities, by contrast, did recognize entry into future product markets as an argument in favour of the merging parties.

In its second part, the paper looks at the pros and cons of forming ‘national champions’ and discusses competition law enforcement in light of the numerous and politically powerful Chinese state-owned enterprises (SOEs).

Paolo Siciliani, Anticompetitive Financial Leverage: In Search of a Theory of Harm

The corporate capital structure of firms has come under scrutiny by competition authorities lately, especially with respect to the role of financial investors such as private equity firms. The main concern seems to be that highly indebted firms are not only less resilient, but also, perhaps wilfully, less able to compete. However, a clear theory of anticompetitive harm underpinning competition law enforcement seems to be lacking. This article tries to fill this gap by first reviewing the extant theoretical and empirical literature on how debt affect firms’ strategies and, thus, market outcomes. The general consensus is that a high level of debt induces a weakening of the competitive stance of the borrowing firm, which can be exploited by financially-unconstrained rivals. Therefore, the unilateral adoption of a high level of financial leverage is irrational unless it is reciprocated by rival firms. Ultimately, though, this theory of harm does not provide a robust basis for enforcement – on either an ex-ante basis under merger control, or ex-post basis under competition law – due to the existence of legitimate alternative explanations for the use of financial leverage.

Stavros Makris, Responsive Competition Law Enforcement: Lessons from the Greek Competition Authority

According to the conventional view competition law differs from regulation in that it is applied ex post, through proscriptions, and in a ‘crime-tort’ fashion. From this angle, when competition enforcers intervene ex ante, in a prophylactic manner, and employ prescriptive tools, they inappropriately transform competition law into ‘regulatory antitrust’. The present study challenges this view arguing that modern competition law intervention has moved beyond the crimetort enforcement model and aspires to be ‘responsive’. This means that modern enforcers intervene ex ante and ex post, use prescriptive and proscriptive tools, and impose restorative and prophylactic remedies to ensure that the law is applied effectively. The works of the Greek Competition Authority offer a case study to illustrate this point. This authority has been utilizing a plurality of tools and enforcement strategies to enhance compliance and deterrence, and apply the law responsively. However, enforcement that aspires to be responsive may create problems of over-enforcement or under-enforcement, be vulnerable to regulatory failures or undermine Rule-of-Law principles. For this reason, this study draws on responsive regulation theory to make fourteen recommendations on how to address these challenges and ensure truly responsive enforcement.

Minakshi Ghosh & Souvik Chatterji, A Paradigm Shift in Indian Competition Regime Vis-A-Vis Restructured Adjudicatory Institution

In the recent past Indian government policy relating to the reform of the tribunals has raised debate amongst researchers, policy makers, judiciary and stake holders. However, this reform was never called for in respect of Indian competition law, despite many instances of discord between the relevant adjudicatory and regulatory bodies. Significant time and effort is required to develop an appropriate jurisdiction specific antitrust regime, which is distinct from that required in respect of other sectoral tribunals. Any structural reform pertaining to a developing competition jurisdiction can have a serious impact on its performance and the disposal rate of competition cases.

In this paper a substantial performance analysis has been carried out from the perspective of the pre and post restructured adjudicatory institution of competition regulatory body. Ultimately, it is concluded that the reform has resulted in a steady reduction in the performance of the Indian competition enforcement system, thus calling for reconsideration of the reestablishment of a dedicated competition law adjudicatory institution.

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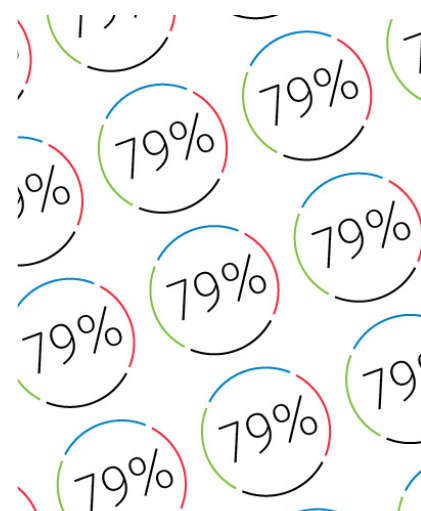
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