Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Monday, December 11th, 2023

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

Wouter P.J. Wils, EU Antitrust Fines and Managerial Liability – A Legal and Economic Analysis

Should companies that have been fined for EU antitrust infringements be allowed to recover such fines from their (former) directors or employees? On the basis of an analysis of the EU Treaty provisions, legislation and case law on antitrust fines, as well as of the economic nature of antitrust infringements and the economic rationale of fines on undertakings/companies, this paper argues that it would appear contrary to EU law to allow undertakings/companies that have been fined by the European Commission or by a national competition authority(NCA) for infringements of Articles 101 and/or 102 TFEU to recover such fines from the companies' (former) directors or employees, as such recovery would significantly impair the full effectiveness of those fines.

Pablo Ibáñez Colomo, Form and Substance in EU Competition Law

Discussions around formalism have made a comeback in the competition law community. This paper seeks to clarify, first, what term means – and does not mean. It is, in essence, an approach to the identification and the evaluation of the lawfulness of practices that relies on their formal features – and their formal features alone. Formalism should not be conflated with, inter alia, the 'by object' treatment of conduct and with the use of legal categories (which are a necessity). Second, the paper shows that the Court has consistently placed substance above form in its case law – as cases like Super Bock and Slovak Telekom show. On the other hand, competition authorities appear to favour formalism. The tension between the Court's and authorities' favoured approaches might be a source of legal uncertainty and might result in the fragmentation of the legal system along several dimensions.

Alba Ribera Martínez, The DMA's Ithaca: Contestable and Fair Markets

The Digital Markets Act (DMA) obligations will start to apply to the designated gatekeepers starting in March 2024. Its main objectives are set out in Article 1(1) as those of ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of both business and end-users. However, the definition and the interpretation the Commission will provide for both objectives are far from clear. In turn, this makes future-proofing the DMA a more difficult task for gatekeepers, regulators and third parties, insofar as its obligations are construed upon one of the two stated goals depending on the provision or on both of them more generally.

The paper addresses this problem by narrowing the gap between those concepts in their relationship with their underlying economic theorems. Later on, it observes the manifestations of contestability and fairness throughout the text and the regulation's legislative process accounting for their four distinct expressions: objectives, indicators, and the legal bases for triggering the supplementary and precautionary measures of the instrument.

Richard Murgatroyd, Simon Lee & Theon Van Dijk, One Size Fits All? Competition Rules for Digital Markets Outside Europe

Stricter competition regulation in digital markets is a growing trend in the Global North, with the Digital Markets Act in Europe being the poster child of a more interventionist approach. In this article we do not focus on the debate surrounding these European efforts (which has meritorious arguments on both sides in our view), but instead examine similar developments elsewhere in the world, namely in South Africa, India, China, and Brazil. With reference to recent enforcement activities in these countries (such as industry investigations, greater scrutiny of mergers and of individual firm conduct, and in some cases ex ante regulations targeted at specific categories of firms), we provide our views on the potential adverse consequences of seeking to replicate the European approach in instances where digital markets may be less mature. In particular, while it is generally understood that heavy-handed regulation can stifle innovation and chill competition, we argue that such risks are more acute in countries outside of Europe (and North America), which thus warrants more cautious regulation methods. This is especially the case where the policy objectives deviate from the traditional one of protecting competition rather than competitors, since such an approach runs the risk of promoting short term gains at the expense of long-term benefits, which may ultimately harm the very stakeholders that such regulation is designed to advantage.

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