

Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Saturday, March 9th, 2024

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

Giorgio Monti, EU Merger Control After the Grand Chamber's Judgment in Commission v. CK Telecoms Investments

The Grand Chamber set aside the judgment of the General Court in CK Telecoms having found eight errors in law. This paper dissects the judgment of the Grand Chamber to illustrate and explain the differences between the two judgments as well as the significance of these differences. The Grand Chamber clarifies the standard of proof and confirms that the analysis of unilateral effects in oligopoly markets requires a holistic analysis of a number of factors none of which is decisive. While it ratifies the analytical stance of the Commission this does not necessarily indicate that the Commission will prevail as the appeal is heard again at the General Court. Furthermore, the judgment as well as the new techniques used by the Commission suggest that a review of the Horizontal Merger Guidelines is much needed. More generally, the clash between the two courts reveals a fundamental difference between judges in the two courts about the role of EU competition law.

Ignacio Fornaris Valls, Exclusion of Bidders in Spain: Analysing Challenges Posed by National Competition Law

This paper examines the Spanish Competition Authority's (CNMC) most ground-breaking implementation of the bidder exclusion for competition infringement since March 2019. Through an analysis of key case-law and regulations, we explore the CNMC's traditional approach to debarment decisions and its subsequent reconsideration following influential judgments from the High Court of Justice of Catalonia. This study sheds light on the evolving landscape of the bidder exclusion, and provides valuable insights into its legal nature, application procedure, and potential effects on fostering fair and transparent competition in Spain.

Ana Vlahek, The Great Saga of Collective Redress in EU Competition Law: All Cry and No Wool?

The paper presents the evolution of attempts at regulating antitrust collective redress in Europe, and the omission of listing competition law infringements in the annex to Directive 2020/1828 on

consumer collective actions and thus from its scope of application. It attempts to understand why the non-availability of antitrust collective actions is the result of the long-lasting drafting processes on the EU level that typically covered competition law, taking into account that the collective redress mechanism is the only real option for consumer private enforcement of antitrust. It calls for the European Commission, the European legislator and the Member States to finally regulate collective actions in the field of competition law as otherwise access to justice for victims of antitrust breaches is not guaranteed.

Vlatka Butorac Malnar, Assignment and Bundling of Antitrust Claims as an Alternative to Collective Consumer Compensatory Redress in Croatia

Over the last decade, there has been a proliferation of mass antitrust damages cases before national courts of Member States. The procedural landscape varies very much, however, a number of MS have some form of compensatory and/or injunctive collective tool for consumers and other categories of victims from antitrust violations. Croatia has no such system in place, so the purpose of this article is to analyse the potential and limits of assignment and bundling of claims as an alternative to a full-fledged collective compensatory redress mechanism. The paper identifies advantages and possible disadvantages and limitations of this tool. The author argues, that while the general rules of contract law offer wide discretion and possibilities to organize a ‘collective’ action for damages through mass assignment, it falls short of consumer protection measures.

Lena Hornkohl, Public Compensation for Private Harm: Fair Funds for Consumer Competition Law Redress

This paper discusses the use of the concept of Fair Funds for consumer competition law enforcement from an EU perspective. With such Fair Funds, the US Securities and Exchange Commission distributes collected fines and disgorged profits to compensate victims of securities law violations. The paper explains the use of Fair Funds in US law, highlights similarities, and adapts the concept for use in European competition law enforcement. It places an emphasis on the usefulness of such a concept against the role of consumers, but the conclusions can equally be drawn for small and medium enterprises’ private enforcement or private enforcement of competition law in general. It shows the advantages and disadvantages of including a system of Fair Funds. The paper argues that Fair Funds can serve as an alternative form of compensation, particularly for large groups of individual victims harmed in a small amount, such as consumers, with that overcome the lack of a harmonized collective redress system on EU level, and improve the coordination between public and private enforcement.

Mariya Serafimova, Quantification of Harm in EU Consumer Antitrust Actions for Damages

This paper analyses the development of private actions for damages as a significant pillar of private enforcement of EU competition law and discusses the quantification and estimation of harm. Since the adoption of the EU Directive 2014/104/EU on Antitrust Damages Actions, private enforcement in Europe has undergone crucial clarifications in the case law of EU courts, yet the critical issue of quantifying damages in private actions has only recently been addressed by the Court of Justice of the European Union (CJEU). This paper takes a closer look at the recent ruling in the *Tráficos Manuel Ferrer* case (C-312/21) and assesses the implications of that case law for private enforcement proceedings. Concerning the allocation of procedural costs, this judgment has established that injured parties may be required to bear a cost risk, even if they are partially successful. This finding needs further reflection in the context of consumer claims for damages, as

it is susceptible to add an additional cost burden on plaintiffs. The second intricate finding concerns the relation between the ability of national courts to estimate damages and the exhaustion of evidence disclosure. Taking the example of Spain, the paper advocates for the specific inclusion of the principle of proportionality when determining harm in private actions for damages and especially in cases involving consumers or smaller harmed parties.

Zoltán Marosi & Barnabás Gergely, The Issue of Consumer Compensation Before Antitrust Authorities: Commitments, Cooperation and Competence: The Hungarian Experience

The compensation of consumers for damages stemming from a breach of EU competition law rules has been in the forefront of discussions in the last years. A recent important aspect of the debate is whether a mixing of public and private enforcement efforts could enhance the effectiveness of consumer compensation. In Hungary, consumer compensation for breach of another field of EU law (unfair commercial practices) has been championed by a public authority, the Hungarian Competition Authority, which has achieved significant results to the direct benefit of consumers in this respect. This paper reviews the authority's recent practices, key decisions and main achievements in this area (including some earlier cases concerning antitrust) and then provides a detailed assessment of the corresponding advantages and disadvantages. The authors argue that some key achievements in Hungary in this respect are very well suited for further use in the development of consumer compensation in the field of antitrust law on both an EU and national level.

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