
Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Saturday, September 7th, 2024

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

Christian Bergqvist, Post Danmark: More than Just Another Serial Infringer

The Danish Postal incumbent's, Post Danmark, struggle to acclimatize to a market without special rights has yielded epic competition cases such as Post Danmark I and Post Danmark II. While it is tempting to label Post Danmark as a serial infringer, it is fundamentally a company that was slow in accepting that letter mail presented a dying business case and viewed other services as being merely and capable of being priced accordingly. The extreme fall in letter volumes has made this position untenable, explaining the company's financial collapse and persistent clashes with competition law. Studies of Post Danmark's 'troublesome' relationship with competition law offer insights into the treatment of multi-product companies under competition law the need to police their allocation of costs and the consequences of failing in this.

Aleksandra Wierzbicka, The GDPR-DMA Nexus: Is the GDPR an Achilles Heel for the DMA's Data-Related Obligations?

In the ever-expanding digital realm, a systematized and coherent legal framework regulating data-driven competition has emerged as a paramount concern in the European Union. At the heart of this intricate puzzle lie the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA) governing data protection and market contestability respectively. While the 'without prejudice' clause enshrined in the DMA seeks to harmonize their coexistence, the true extent of their compatibility and complementarity remains elusive. The juxtaposition of these two legislative pillars unveils nuanced conflicts and potential vulnerabilities at their intersection. If disregarded, these glaring blind spots might become an Achilles heel of the DMA and risk to weaken the DMA's data-related ambitions.

Kim Youngseok, Korean Competition Law Enforcement: Recent Developments

This article explains recent developments in Korean competition law enforcement from three perspectives. First, the Korea Fair Trade Commission ('KFTC') has recently improved its public enforcement procedures, focusing on preventing the collection of irrelevant materials during its on-site investigations, ensuring confidentiality in the KFTC's investigations against the legal departments of investigated companies, and enabling more active participation from respondents in expressing their opinions. Second, the most significant progress in the enforcement of Korea's Monopoly Regulation and Fair-Trade Act ('MRFTA') is evident in criminal enforcement. The KFTC and various other national institutions are actively employing criminal penalties, compelling companies to consider criminal procedures early in their response to investigations. Third, advancements have also been made in private enforcement, including (1) increased damage suits by parties injured by MRFTA violations, (2) derivative suits initiated by shareholders to recover company losses, and (3) recent legislative efforts to promote private enforcement through injunctions that prevent and prohibit violations and assist the injured parties in proving damage.

Chunxu Wu, Miao Chong v. SAIC-GM: The Dawn of the Private Enforcement of Chinese Anti-Monopoly Law?

Global antitrust experiences have demonstrated that plaintiffs are frequently faced with evidentiary difficulties in the private enforcement of competition law, and China is no exception. In *Miao Chong v. SAIC-GM*, the Supreme People's Court (SPC) of China, for the first time ever, affirmed the presumption of the truthfulness of the facts established in antitrust infringement decisions in the private enforcement of competition law, which is believed to relieve the plaintiff's burden of proof in establishing damages claims. However, the *Miao Chong* ruling should not be overstated because the application of this presumption must be combined with the judge's investigative power to collect evidence, which is also subject to certain strict conditions. In fact, the plaintiff's weak evidentiary position in the private enforcement of competition law lies in the de facto inequality of power and resources between parties. This is demonstrated by the fact that most plaintiffs are individuals who also lack effective evidentiary systems. To elevate the plaintiff's footing in the private enforcement of Chinese Anti-Monopoly Law (ALM), this article proposes changes to the existing presumptions of harm and substantive legal tests, with the aim of reducing the plaintiffs' evidentiary burden and better assisting them in defending their compensation claims.

Achu Ann Michael, Prevention and Detection of Bid Rigging in Public Procurement in India: Role of Artificial Intelligence

India's National Crime Record Bureau's report, 'Crime in India', stipulates that the conviction rate of economic crimes is only 29.4% which is way lesser than that of criminal conviction rate of 57%. Punitive measures under the Competition Act, 2002 are relatively less explored in the Indian context. This article is an attempt to examine the punitive measures in the Act, the evidence used for conviction and to see how the same deter the violators. An attempt is made to find out how the apex court in *Rajasthan Cylinders case* (*Rajasthan Cylinders and Containers Ltd v. UOI and Anr.* 2018 SCC Online SC 1718.) might have diluted the already weak conviction rate of India. Artificial intelligence is used in many jurisdictions for cartel identification. The evidentiary standards in Indian jurisdiction in regard to cartel identification are almost equivalent to 'beyond reasonable doubt' instead of 'preponderance of probability'. Need arises that the evidentiary

jurisprudence of ‘reverse onus or reverse burden’, whereby shifting the burden of proof on the accused, should be used liberally in instances of anticompetitive practices. Did the apex court fail? If digital algorithms are there to guide and highlight the red flags in clandestine cartelization, how will the jurisdictions use them to counter the anti-competitive practices?

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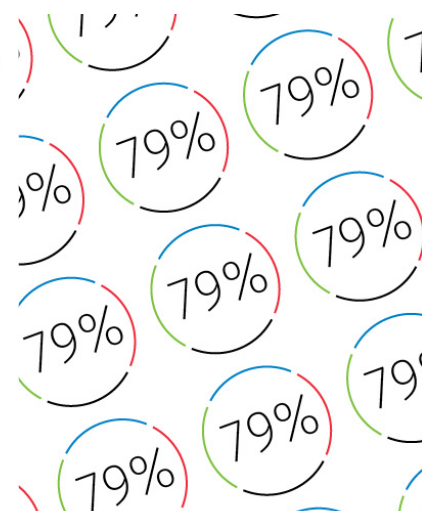
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