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Jose Rivas (Bird and Bird, Belgium) · Wednesday, December 25th, 2024

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

Pablo Ibáñez Colomo, Resale Price Maintenance in EU Competition Law: Understanding the Significance of Super Bock

The Court of Justice (ECJ) ruling in Super Bock is a significant development in EU competition law. The judgment marked the end of the Court's sui generis approach to resale price maintenance. Whether or not this practice amounts to a restriction of competition by object is now evaluated in light of the same factors against which the legality of the rest of practices is assessed (namely the content of the agreement, its objective aims and the economic and legal context of which it is a part). Accordingly, it is conceivable that, at least in some scenarios, resale price maintenance does not have, as its object, the restriction of competition. It remains to be seen whether the potential for change will be reflected in subsequent developments.

Malte Frank & Emma Lewis, The European Commission's Challenge to Consent or Pay: Demystifying the Digital Markets Act?

The European Union's (EU's) Digital Markets Act (DMA) was hailed as a new era of digital regulation following a decade of debates on the flexibility of traditional competition law. Article 5(2) DMA requires gatekeepers to offer users a choice to opt-out of the data exchanges across a gatekeeper's services. Half a year after becoming applicable, its fitness for purpose and theoretical underpinnings are in the spotlight as the European Commission (EC) investigates Meta's consent or pay solution on the assumption that such a model is not compliant. This paper considers whether this assumption is supported by an interpretation of Article 5(2) DMA and assesses the risks posed by the EC's position to the integrity of the DMA and its aim to revolutionize competition law.

Thomas Weck, Gatekeeping With Privacy: The Facebook Case, Apple's ATT Framework and Google's Privacy Sandbox

Digital ecosystem operators can obtain an unmatchable information advantage with respect to the preferences of platform users by implementing privacy-related regulation and relying on the attractiveness of their core platform services. Implementing privacy-related regulation may violate competition law if it is done in an exclusionary or exploitative manner, but not simply because following the rules increases entry barriers and the dependency of other online service providers. Where dominant digital ecosystem operators reap advantages in competition from simply following privacy-related rules in line with the prevailing market standards (in contrast to either deviating from market standards or transgressing privacy rules), the competition issue is one of market structure, not one of anticompetitive behaviour.

Helena Drewes & Alexander Kirk, Extraterritorial Effects of the Digital Markets Act: The 'elusive long arm' of European digital regulation

The Digital Markets Act (DMA) will have significant extraterritorial effects: It applies directly – and with the exception of Booking.com currently exclusively – to non-European undertakings. It may shape markets beyond the EU single market: gatekeepers may decide to adhere to the EU standards on an international level and other jurisdictions may respond to the DMA with similar regulation. In this paper, we firstly assess the conditions under which digital regulation takes effect beyond the EU. We submit that the DMA meets these criteria in general as well as for specific obligations. Whilst it is difficult to establish which jurisdiction designed the blueprints of digital regulation and inspired others (concerning the de jure indirect extraterritorial effect), we found several strong reasons in favour of significant de facto extraterritorial effects of certain obligations. Secondly, we discuss whether it is legitimate that the EU imposes its understanding of how digital markets should work on other jurisdictions. We suggest to consider direct extraterritorial effects to be legitimate if there is a sufficient link to the jurisdiction and the regulatory competition is fair, i.e., if there is no (significant) asymmetry of power or the effects are proportionate to attaining digital sovereignty.

Yo Sop Choi & Kazuhiko Fuchikawa, Self-Preferencing in Korea and Japan

The growing influence of big technology companies in the markets has brought multiple competition law cases around the world. At the same time, new theories of harm involving the conduct of big techs have resulted in discussions of new digital regulations or digital competition rules. The competition cases of self-preferencing are the starting point of these discussions. There are numerous antitrust cases dealing with self-preferencing in the European Union (EU) and Asia, particular in Korea and Japan. We have seen notable similarities between the West and the East. However, there are some differences between the competition regimes in the implementation of competition rules. The competition regimes in Korea and Japan have unique provisions on unfair trade practices (UTPs) that can widely deal with unfair conduct, including self-preferencing of algorithmic changes or manipulations that can harm third parties and/or consumers. Given the importance of business models involving algorithms, it is timely to analyse the self-preferencing cases in Korea and Japan and discuss the similarities and differences in the dialogues on digital regulations.

Kolawole Afuwape, Analysing the Ex-ante Regulations in India's Digital Competition Bill and Its Effects on Indian Business Interests

The digitization of economic activity has important socio-economic development implications and at the same time creates challenges for antitrust analysis. These implications and challenges have been met differently in jurisdictions around the world. This paper makes a comparison of the exante regulations between India's Draft on Digital Competition Bill with that of the European Union's (EU's) Digital Markets Act (DMA). India, like many technologically conscious jurisdictions, is introducing more demanding ex-ante regulations for its digital economy. The draft Bill centred on the work of a Digital Markets Economy; India's proposals are defined by an explicit commitment to 'pro-competition' regulation. This article traces the evolution and emerging design of the forthcoming Indian digital markets regime in comparison with the EU. The article proposes to expand the competition enforcement by adopting a 'rule-making' approach to reduce the market-wide uncertainty, and cost of litigation and reduce unexpected outcomes. The latter is founded on a hybrid-mutual influence approach and intends to reduce the current inconsistencies existing between the regulatory and competition bodies in India.

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