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Table of Contents

Articles

EMILIANO MARCHISIO

Critical Remarks on Collective Dominant Position in EU and Italian Antitrust Law 559

The concept of “collective dominance” allows one to attribute dominance to a plurality of different enterprises as regards both abuses of dominant position and concentrations. This article examines the assumptions of fact necessary for the occurrence of collective dominance and, in particular, which “links” are sufficient to aggregate in a collective dominance the market position of two or more undertakings; contrasting the interpretation, developed since the *Gencor v Commission* case, under which the recurrence of a collective dominant position could be proven only through the economic assessment of market structure. The reasons are explored as to why such an idea contrasts with the economic theory of oligopoly and the principles of antitrust law—and, more generally, of EU and national constitutional laws. In fact, it will be noted that the relevant case law of the Competition Authority and of the Community Courts (and, consequently, the Italian Antitrust Authority and the national administrative courts) rejects, in practice, the theoretical statement summarised above. Nevertheless, this assertion continues to be theoretically recalled, particularly in law literature.

DR BETTINA LEUPOLD

Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability 570

The article reviews recent judgments of the EU courts in cases where parent companies challenged decisions holding them liable for the competition law infringements of their subsidiaries. The analysis reveals that the courts typically endorse or even strengthen the European Commission’s arguments, while making it practically impossible for parent companies to rebut the presumption of liability in cases of 100 per cent shareholdings.

DR LEELA CEJNAR AND ARLEN DUKE

Competition policy and the banking sector: the need for greater international co-operation 583

Although the historical tendency to lightly apply competition laws to banking markets has largely been overcome, competition policy still tends to be subordinated in times of financial crisis. Competition policy needs to be given more weight when the long-term efficiencies that competition laws promote are traded off against immediate stability concerns. For reasons explored in this article, the effective integration of competition policy into financial market regulation requires greater international co-operation.

DAREN SHIAU AND CHLOE CHENG

Compliance under the Singapore Competition Regime: Penalties, Leniency and Private Action 590

To balance the need to manage regulatory costs with securing the benefits of effective competition, the framers of the Singapore competition law regime have devised three main tools: financial penalties, a world-class leniency regime and the right to private action. This article examines these tools, and their effectiveness in contributing to cost-effective compliance.

PROF. CARLOS PADRÓS REIG

Spanish Competition Commission on Trial 597

Lawyers seldom use a quantitative research methodology to examine competition policy. Like any other administrative policy, the performance of competition authorities may be analysed using data, including the number of examined cases; the number of fines imposed; the amount of fines per file, etc. The first part of this article examines these data regarding Spain’s National Competition Commission (CNC) for a six-year period (2007–2012). Since competition legislation was significantly amended in 2007 with the passing of Act 15/2007, the results may help to measure the effectiveness of that major reform. Furthermore, competition cases are rather new according to the development of some Southern European national legal orders. The judicial review of cases is also investigated, in terms of how it impacts on competition policy; how many resolutions are challenged before the courts; what is the final result and what this implies in the dialogue between agencies and judges in enforcing Spanish competition law.

Book Reviews

ANDREAS STEPHAN

The Criminal Law of Competition in the UK and in the US: Failure and Success 607

National Reports

Australia

ANTI-COMPETITIVE AGREEMENTS

Mining consumables N-149

Czech Republic

MERGER CONTROL

Competition Office N-150

Estonia

GENERAL

Legislative amendments N-150

Slovenia

PROCEDURE

Slovenian Competition Protection Agency N-151

US

PROCEDURE

Ruling on venue N-152

US

ANTI-COMPETITIVE PRACTICES

E-book alleged price-fixing N-153