

European Competition Law Review

2019 Volume 40 Issue 4

ISSN: 0144-3054

Table of Contents

Articles

TRINE OSEN BERGQVIST

The winner does not take it all. Swedish Court of Appeal says co-operation between competing bidders is not restrictive by object 141

In two recent cases, the Swedish Patent and Market Court of Appeal has assessed the lawfulness of co-operation and information exchange between competing bidders and somewhat surprisingly concluded that the arrangements were not restrictive by object. This article presents the court's object analysis and explains why the outcome is questionable from an EU competition law perspective.

KONSTANTINA SIDERI

The impact of Brexit on corporate mobility and regulatory competition 147

This article discusses the impact of Brexit as from the withdrawal date, if no agreement is reached. It argues that UK incorporated companies will become third-country companies and therefore will not automatically be recognised by Member States. As a consequence, the cross-border mobility between the UK and the EU, as well as the regulatory competition, will be severely affected.

ALAN MCCARTHY

Ireland—An analysis of the 2018 competition law highlights in Ireland 150

2018 was an active year for competition law and policy in Ireland. There was a jump in the number of merger notifications with some complex deals leading to commitments. There was also enforcement activity with some notable competition cases in the Irish Courts. The changes to the Irish merger thresholds and proposed change to the merger control process, a likely renewed focus on enforcement by the Competition and Consumer Protection Commission, the impact of Brexit and implementation of the ECN Plus Directive suggest that the competition law landscape in Ireland will continue to change in 2019.

RICCARDO FADIGA

Horizontal shareholding within the European competition law framework: assessment and a way forward 157

Horizontal shareholding engenders significant anti-competitive effects which current economic trends are exacerbating. Literature and institutions in Europe have yet to establish whether a suitable instrument within European competition law exists which may be applied to horizontal shareholding in order to curtail its intrinsic anti-competitive effects. This article evaluates the state of the debate, analyses European competition law instruments, and shows that no adequate instrument is available. Ultimately, it proposes a novel approach to the notion of collective dominance suitable to support enforcement against horizontal shareholding on the basis of art.102 TFEU.

SAMSON Y. ESAYAS

Data privacy in European merger control: critical analysis of commission decisions regarding privacy as a non-price competition 166

In recent years, privacy has started to attract considerable attention in competition discussions, particularly in mergers involving data-rich industries. Prime examples of such mergers include *Google/DoubleClick*, *Facebook/WhatsApp* and the recent acquisition of LinkedIn by Microsoft. Given the central role that personal data plays in these mergers and associated privacy concerns for users, competition authorities have started to experiment with ways to incorporate privacy into merger assessment. One emerging approach is to factor in privacy as a non-price competition parameter. In its merger decisions involving *Facebook/WhatsApp* and subsequently *Microsoft/LinkedIn*, the European Commission held that data privacy constitutes a key parameter of non-price competition in the market for consumer communications and for professional social networks. This article provides a critical analysis of these decisions regarding the competition in privacy and Privacy Enhancing Technologies (PETs). The analysis is conducted from two angles: one looking at the Commission's approach in defining the market, particularly on how competition in privacy and PETs is manifested and when two firms are considered competitors based on these parameters and thereby of interest to competition law. The second angle takes aim at competitive assessment and theories of harm, particularly when a merger is considered to lead to reduction in privacy as a non-price competition parameter. The article maintains that the Commission's decision in *Microsoft/LinkedIn* represents a step forward in the discussion of privacy as a non-price (quality) competition parameter and the use of market power to harm such competition.

JUAN QI

Application of essential facilities doctrine to “Big Data”: US and EU perspectives 182

There is a possibility to apply the essential facilities doctrine to big data either in the US and EU. However, the application shall be limited in extreme scenarios and shall be examined cautiously and thoroughly by considering the dynamic and fast development of the digital economy.

National Reports

Canada

ANTI-COMPETITIVE AGREEMENTS

Pharmaceutical sector N-31

Denmark

ANTI-COMPETITIVE AGREEMENT

Demolition industry N-31

Portugal

GENERAL

Enforcement Activity N-32

Slovenia

GENERAL

Motor vehicle sector N-33

Turkey

ANTI-COMPETITIVE AGREEMENTS

Pharmaceutical sector N-34

US

ANTI-COMPETITIVE AGREEMENTS

Fuel supply contracts N-36

US

GENERAL

Department of Justice N-37