2020 Volume 41 Issue 5
ISSN: 0144-3054

European Competition Law Review

Table of Contents

Editorial
ALEXANDER M. WAKSMAN

Editorial: Issue 5 215

Articles
BILL BATCHELOR & CAROLINE JANSSENS

Big data: understanding and analysing its competitive effects 217
The article considers the competitive effects of data, reviewing regulators' approach to intervention in dynamic digital markets. Analysis reveals regulators attuned to big data, applying traditional merger controls, setting a high bar for abuse of dominance, separating privacy issues—calling for cautious considerations of the merits of more regulation.

ANTJE KREUTZMANN-GALLASCH

Universal ultrafast broadband after Brexit—a distinct possibility or rather wishful thinking? 225
The UK Government agrees with the EU that ultra-fast broadband is vital to facilitate economic growth yet proposed a very different approach. In times of Brexit, they want to take back control over broadband investment, arguably avoiding EU state aid constraints as well as introducing an industry-funded Universal Service Obligation. This article questions the feasibility of this approach as well as its likelihood of success.

MAREK KRZYSZTOF KOLASIŃSKI

Google Shopping decision against the background of the EU and US case law 234
The *Google Shopping* decision and the reasoning of the European Commission behind it are examined in the article against the background of the EU and US case laws. The author concludes that the possibility is on the table that the decision will be considered a reasonable development of the CJEU case law. He is also of the opinion that the theoretical gap between the positions of the US Supreme Court and the European Commission is not as huge as it seems to be prima facie.

PHILIPP KIRST

Skanska, Cogeco and Otis: harmonisation through the back door? 245
There exist discrepancies in relation to the temporal applicability of the new rules of the Damages Directive (104/2014/EU) across Europe. This article analyses whether national courts are nevertheless under a duty to guarantee a minimum harmonised standard in antitrust damages disputes between private parties. It is argued that—in line with the most recent case law in *Smith*, *Skanska*, *Cogeco* and *Otis*—the Directive only has limited direct effect but parties in antitrust damages actions may be able to rely directly on primary EU law.

DR HAB. JAKUB KOCIUBIŃSKI

A toxic relationship? Competition law scrutiny of airport-airline agreements –possibilities and challenges 251
It is generally recognised in the air transport industry that agreements concluded between airlines and regional airports can carry the risk of anti-competitive effects by deterring potential market entry by competitors, thereby ultimately limiting consumer choice. This issue has gained much attention in State aid law, but the question of the applicability of substantive competition rules, when the conduct cannot be attributed to a State, remains underexplored. In the above context, this article attempts to assess whether arts 101 and 102 TFEU could provide a viable alternative to counter anti-competitive effects arising from these agreements. This article will conclude with recommendations *de lege ferenda* based on the foregoing considerations.

GIULIA SONDEREGGER

A critical analysis of Leniency Programmes: an efficient tool to detect cartels? 260

Leniency Programmes play a major role in the fight against cartels. By granting a fine reduction or immunity in exchange for reporting a cartel, they provide incentives for undertakings to co-operate with the responsible authority. In recent years, the European Commission's Leniency Programme has proven to be a valuable tool to efficiently detect cartels. However, it would probably be even more efficient if the Commission could, similarly to the US, not only punish firms with high fines but also impose individual prison sentences. Like this, the Commission could presumably increase the fear of being detected, thus raising the probability of cartel members to come forward. Moreover, due to Leniency Programmes' general passive nature, it is of paramount importance that the European Commission applies this cartel detection tool in parallel with other, more proactive tools. To maximise cartel detection, the Commission therefore needs to signal to the outside that it is not solely relying on its Leniency Programme but also using its investigatory power to actively pursue anti-competitive behaviour. In the light of recent technological developments, such an active pursuit seems crucial, especially when considering that sophisticated algorithms increasingly facilitate collusive behaviour and thus potentially jeopardise the effectiveness of Leniency Programmes as they may lower the participants' incentives to report anti-competitive conduct.

National Reports

CJEU

ABUSE OF A DOMINANT POSITION
Generics v CMA N-39

Portugal

GENERAL
Portuguese Competition Authority N-40