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The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications 403

The Draft Horizontal Guidelines promote a broad notion of "sustainability", extending beyond environmental sustainability to encompass "activities that support economic, environmental and social (including labour and human rights) development". Whilst the European Commission acknowledges that certain sustainability agreements may fall outside the scope of art.101(1) TFEU, for example under the ancillary restraints doctrine, it is not prepared to apply the *Wouters* case law more generally to sustainability agreements. The sustainability chapter of the Draft Guidelines appears as residual category. If a collaboration between rivals falls within a different chapter of the Draft Guidelines—e.g., agreements relating to R&D or production—that chapter will apply first and in full. Business can, however, still use the principles and reasoning underpinning the sustainability chapter as an interpretative aid, to understand how the Commission may balance efficiencies of a collaboration with any adverse effects on competition. The Commission creates a "soft safe harbour" presumption, which saves sustainability agreements that fulfil seven cumulative criteria from further assessment of effects. These agreements will be deemed as having no effects on competition but the actual consequences of such presumption remain unclear. The chapter maintains, overall, an orthodox framework for analysing potential restrictions on sustainability agreements. The main innovation in the assessment that the Commission suggests is the recognition of collective benefits inside and outside the market(s) on which the collaboration takes place. Rather than constituting a major legal innovation, the draft guidelines provide incremental steps towards facilitation of sustainability agreements.

NISSIM MASSARANO

The virtue of a proportional response—an assessment of the CMA's new penalty guidance 411

The Competition and Markets Authority's updated penalty guidance provides the CMA with new levers to increase the level of penalties it imposes for breaches of competition law. This article argues that this new guidance inappropriately demotes considerations of culpability and the seriousness of the offence and, instead, focuses on deterrence. Accordingly, the new regime will likely impose disproportionate penalties.

DR MARIA DREHER AND TIM-ERIK HELD

ESG & supply chains: a practical outlook on opportunities and challenges under antitrust law 417

As global supply chains are disrupted and governments impose new due diligence requirements, it proves increasingly important for companies to be able to engage in joint initiatives in order to implement ESG-standards efficiently and at large scale. In this context, the recently published (draft) revised Horizontal Guidelines of the European Commission are intended to provide guidance to companies in relation to co-operation between competitors. This article provides a practical overview of regulatory developments and the impact of the current policy debate around the role of ESG in antitrust on supply chain management, including opportunities and challenges for companies engaging in industry co-operation.

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Antitrust consequences of the Digital Single Market Initiative in the European Union 425

The DSM strategy sought to create an internal market allowing pan-EU digital access while addressing obstacles to copyrighted content. With increased access, such content is accessible online, and the EC's approach includes new legislations for DSM objectives. This article explores the ramifications of unintended consequences of constrained scope and antitrust issues, along with legislative interplay and friction between copyright territoriality and DSM's cross-border nature.

MAREK KRZYSZTOF KOLASIŃSKI

Self-preferencing in European Union Competition Law after the Google Shopping judgment 435

The actual legal standard relevant for examining self-preferencing by dominant companies is introduced in this article, as well as the economics of this business strategy. The judgment of the General Court in *Google Shopping* is examined in detail. The author emphasises that the court did not recognise a strict duty of no self-preferencing, but applied a complex, sophisticated test of "normality" of the dominant undertaker's behaviour.

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The fork in the road of the single continuous infringement: the 12 angry banks (Turkey) 441

In 2013, the Turkish Competition Authority (TCA) imposed the largest penalty in its history on 12 banks due to their concerted actions in determining interest rates and fees for deposit, loan, and credit card services. In October 2021, the high judiciary reversed the TCA's decision because a single framework agreement could not be established. The final decision in the long-running conflict between the TCA and the high judiciary suggests that there is no room for the application of the single continuous infringement principle in Turkish competition law.

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