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NEWS SECTION

EUROPEAN COMPETITION LAW REVIEW - ISSUE 10 2017



EUROPEAN COMPETITION LAW REVIEW

Volume 38: Issue 10 2017

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BERRIDGE

Brexit, merger control and potential reforms 435

In this article on the implications of Brexit for merger control, we ask whether a new relationship with Europe might prompt the amendment to merger control rules in the UK. We speculate whether there may be consequences for the jurisdictional thresholds, the voluntary regime and/or grounds for intervention.

STEFAN TSAKANAKIS

Significant restrictions of competition: lessons from the Swiss Federal Supreme Court's decision in Gaba 437

With the *Gaba* judgment, the Swiss Federal Supreme Court finally shed some light on what is considered a significant restriction of competition under Swiss competition law. Most notably, the Court held that certain agreements already constitute significant restrictions of competition because of their object. Moreover, the decision clarifies certain questions concerning the geographic scope of the Swiss Cartel Act and the conditions for direct sanctions.

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The article analyses the effectiveness of the Competition Commission of India's merger control regime by juxtaposing it with the inadequacies prevalent in pre-merger negotiations that may trigger the notification scheme. It seeks to resolve the unanswered questions surrounding gun jumping, and advocates for the evolution of definite regulations. Towards this objective, the article provides a comparative analysis of gun jumping laws in major jurisdictions like the US and the EU.

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European and American analytical standards of assessment of legality of RPS were compared in the article. The author also researched whether US legal procedures may be effectively used to claim damages for harm caused by RPS in Europe.

DR CHRISPAS NYOMBI AND MOSES
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Tactical litigation in the post-Recast Brussels Regulation era 457

The goal of this article is to critically assess the motivations behind the Recast Brussels Regulation and carry out an analysis on whether the reform has helped to reduce the scope for tactical litigation, torpedoes and parallel proceedings. In order to achieve the goal of this article, a number of legal research methods are relied upon. First, doctrinal research methodology is used through a comprehensive analysis of Brussels Regulation in the pre- and post- Recast Brussels era. The relevant articles are examined to determine whether there have been material changes following the reforms. Secondly, theoretical conceptualisation is relied upon in this article as it offers scope to critically review concepts and doctrines in order to find relationships and build theory. The findings from this research will inform academics and practitioners, especially in the field of international law, about the implications of Recast Brussels reform on tactical litigation within the EU.

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In March 2017 the EU Commission published a draft Directive on NCAs' enforcement powers. The article analyses the objectives, legal basis and novelty of the Directive in comparison to the existing EU acquis. The Council and the Parliament will debate the legislative proposal in the coming months.

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The internet is a worldwide channel of trade with risks and opportunities for businesses, and new challenges for competition law. This contribution addresses vertical restraints on internet sales under competition law, in particular how far the distributor can limit its freedom to conduct business online.

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Editor

Julian Maitland-Walker
Solicitor
22 The Parks
Minehead
Somerset TA24 8BT
Telephone: 44 1643 707777
Fax: 44 1643 700020

News Section Editor

Professor Mark Furse
University of Glasgow
Glasgow G12 8QQ
(m.furse@law.gla.ac.uk)

Editorial Board

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Assistant News Editor
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EU Merger News

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Linklaters
<http://www.linklaters.com>

Greece

D.N.Tzouganatos & Partners
info@tzouganatoslaw.gr

Hungary

Dr Szilágyi Pál
Competition Law Research Centre
<http://www.versenyjog.com>

Ireland

Dr Vincent Power
A&L Goodbody
<http://www.algoodbody.ie/eu>

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Federica Togo
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Poland

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Correia
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Christopher Brown
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Associate Professor Julie Clarke
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Deakin University
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Dr Sandra Marco Colino
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gblanke@alumni.lse.ac.uk.

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price. For that reason, all traders appearing on these lists allegedly participated in a single continuous infringement, with a common objective to keep the auction prices artificially low.

Whereas the Rotterdam District Court followed this reasoning, the appeal court ruled that the authority failed to provide sufficient evidence for its conclusions that the arrangements in the various stages of the house auctions had this same anti-competitive objective. Only about 10% of the allegedly cartelised auctions, a secretive subsequent auction took place, whereas all auctions were part of the infringement findings. For the other 90% of the auctions, there were alternative reasons for the traders to subscribe on the lists. Reasons which the ACM failed to investigate, the appeal court ruled. Appearing on the list therefore did not in all cases form a prelude to alignment in the bidding phases and therefore, the ACM failed to provide convincing evidence for the existence of an “overall plan”, overarching all the arrangements. Since the existence of an overall plan is a prerequisite for the existence of a single continuous infringement, ACM failed to provide conclusive evidence of all alleged infringements.

Joost Fanoy
Barents Krans

Portugal

ABUSE OF DOMINANT POSITION

Pharmacies group—

Infringement decision—

Penalties—Reduced on appeal

☞ Abuse of dominant position;
Fines; Pharmaceutical services;
Portugal

The Lisbon Court of Appeal confirmed a Portuguese Competition Authority (PCA) decision imposing fines on several entities from the ANF (the Portuguese National Pharmacies Association) group for abuse of dominance, but reduced the amounts of the fines significantly.

The case dates back to 2015, when the PCA first imposed fines upon ANF, Farminveste – SGPS, SA, Farminveste – Investimentos, Participações e Gestão, SA, and HMR – HealthMarket Research, Lda. in the total amount of €10.4 million. The PCA found that the referred entities had engaged in an abuse of dominance through margin squeeze in the markets for pharmacies’ commercial data and for market studies based on such data.

When the decision was first challenged, the Competition, Regulation and Supervision Court upheld the PCA decision but reduced the fines to a total of €6,89 million based on the understanding that only the turnover related to the markets in which the abuse of dominance took place shall be considered for the purpose of setting a fine.

According to the information publicly available, the Lisbon Court of Appeal has now confirmed the existence of an abuse and the imposition of fines upon ANF, Farminveste IPG SA and HMR. It seems, however, that the Court dismissed the liability of the holding company of the group (Farminveste SGPS) for the abuse. Since such entity had the highest turnover, the fine initially imposed by the PCA was substantially reduced by 92%, from €10.4 million to €815,000.

Nuno Carrolo dos Santos
Vieira de Almeida

Diana Alfafar
Vieira de Almeida

Portugal

PROCEDURE

Complaints—Online portal introduced

☞ Anonymity; Anti-competitive practices; Complaints; Internet; National competition authorities; Portugal; Websites; Whistleblowing

On 5 June, PCA launched an online Complaint Portal to assist the public in reporting anti-competitive behaviour, such as cartels and abuses of dominance, and even infringement of mandatory notification obligations regarding merger control.

According to the PCA, this user-friendly tool intends to promote complaints in a simple and quick way while ensuring anonymity to complainants. In addition, the Portal provides information on the type of practices prohibited by the Portuguese competition law, as well as about the leniency programme in force. Detailed information on fighting bid-rigging in public procurement is also available.

In a praiseworthy approach, the Portal also covers subject matters that do not fall under PCA's competence (such as corruption, misleading advertising or other consumer-related topics), redirecting the users to the competent authorities.

This new platform was foreseen as a priority in the PCA's "Competition Policy Priorities for 2017", given that complaints constitute one of the main drivers of antitrust investigations.

Nuno Carrolo dos Santos
Vieira de Almeida

Diana Alfafar
Vieira de Almeida

Portugal

ANTI-COMPETITIVE PRACTICES

LPG—Storage facilities—Access—Public interest facility declaration

☞ Anti-competitive practices; Competition policy; Gas storage; Liquefied petroleum gas; National competition authorities; Portugal; Pricing

On 20 June, the Portuguese Government issued a declaration of public interest regarding the liquefied petroleum gas (LPG) storage facilities of Sigás (in Sines) and Pergás (in Perafita). This measure was adopted in light of the very high prices of bottled LPG (which is still used by a large percentage of the Portuguese population) and in the framework of a public policy aimed at stimulating competition in the sector and decreasing the prices of bottled LPG. This Government decision was heavily supported in a report from the PCA published back in March 2017, following a request by the Secretary of State of Energy (the *Report on the Industry of Bottled LPG in mainland Portugal*). In this report, the PCA identified barriers to entry and expansion in the distribution of bottled LPG, warning about the insufficient competition in the sector. Since access to LPG storage facilities was identified as one of the key factors to foster competition in the sector and given that the three main market players (Galp, Repsol and Rubis) jointly detained ownership of the share capital of Sigás and Pergás, the PCA recommended that the Portuguese Government should grant public interest status to the LPG storage facilities of Sigás and Pergás in order to guarantee access to said facilities.

Nuno Carrolo dos Santos
Vieira de Almeida

Diana Alfafar
Vieira de Almeida