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Search Design Policy, Digital Disruption and Competition Law*

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ABSTRACT: It is debatable whether traditional competition law tools and remedies are able to deal with the digital disruption and whether it is desirable to adjust or even replace categories that have proven to be mainly suited to tackle anticompetitive conducts associated with stable innovations in markets where static competition prevails. From a bottom-up perspective, such *Grand Question* could well be addressed looking at the European Google Shopping case, just adopted at EU level, that will be analysed below with the aim of assessing whether and to which extent the positive antitrust toolbox is flexible enough to effectively cope with the data-driven era.

KEYWORDS: Innovation, digital disruption, Google Shopping, abuse of dominant position, discrimination

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Whereas the Article is the result of a joint research work, Valeria authored paragraphs 2, 3, 4, 5, 6, 7, 9 and Massimiliano Granieri authored paragraphs 1, 8.

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Uber: A New Challenge for Regulation and Competition Law?*

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ABSTRACT: The rise of new software platforms presents regulators and antitrust agencies all over the world with a challenge. Should regulations adapt to the new services of the digital economy? Should competition law change its paradigm in relation to the sharing economy? Despite the growing expansion of these services, in most countries there is still no regulatory framework addressing these problems. Uber is the most emblematic example of this phenomenon. Indeed, it is subject to a large number of ongoing lawsuits merging many issues, ranging from questions pertaining to labour law to problems connected with unfair competition laws. This article first analyses the particular business model adopted by Uber and the antitrust concerns that it could raise. In so doing, the article pays heed to the approach that antitrust authorities should take towards the complex rivalry between (regulated) incumbents and (unregulated) new entrants. The article then considers the legal nature of the services provided by Uber, i.e. whether they should be considered as transport services or as services of the information society. Either way, the chosen characterisation will affect the law applied to all digital platforms. The analysis, which adopts a comparative approach, focuses on the European context where national courts are in great turmoil and the CJEU will be issuing a preliminary ruling on the nature of Uber services.

KEYWORDS: sharing economy; taxi services; Uber; regulation; competition

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Merger Control and Online Platforms: The Relevance of Network Effects*

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ABSTRACT: Digital platforms operate in multisided markets providing services through the internet to two or more distinct groups of users, between which there are indirect network effects. Direct network effects are frequently present within each group. Therefore, online platforms usually present both direct network effects, between individual members of the same group, and indirect network effects, between members of distinct groups. Network effects may simultaneously reduce competition leading to a greater concentration and strengthening entry barriers, on the one hand, and put forward significant efficiencies on the other. This article examines some key aspects related to the impact of network effects on the assessment of mergers in two-sided markets, taking account of the recent practice of the Commission.

KEYWORDS: Online platforms, multi-sided markets, network effects, merger control, efficiency

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EU Law Restitution Revisited: In Search of Lost Criteria*

*Magnus Strand***

ABSTRACT: Since *Francovich* it seems the damages remedy has become The Remedy for individuals suffering economic loss by reason of EU law infringements by Member States. There is however an alternative to damages in private enforcement of EU law, in fact an antecedent to *Francovich*: Restitution by reason of a breach of EU law. Nonetheless, the criteria for restitution from a Member State, by reason of its breach of EU law, still remain neglected in comparison to the close attention and debate surrounding the criteria for the damages action against Member States. The purpose of this contribution is thus to identify and to discuss the distinctive elements of restitution as a remedy in the event of a breach of EU law by a Member State. Focus is on the very criteria that constitute legal basis for a claim of restitution from a Member State under EU law and the extent to which those criteria should be governed by EU law or by national law. Less attention is devoted to exceptions from liability to make restitution, although their existence in the case law is duly noted. The criteria identified in the case law are (1) the existence of a substantive right conferred on the claimant by EU law, (2) the existence of a payment from the claimant, collected by or on behalf of the Member State, (3) the incompatibility of the basis of that payment with EU law, and (4) that the payment follows as an inevitable consequence of the breach of EU law by the Member State. Case law hints on the more precise legal content of the criteria are examined in an attempt to shed light on their proper interpretation and application. It is noted that the second and third criteria cannot, on the basis of existing case law, be defined with precision. In that connection it is discussed whether the second criterion should be subdivided into two criteria: Impoverishment of the claimant and enrichment of the Member State. As regards to the fourth criterion it is noted that it is

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uncertain whether it applies at all. Finally it is submitted that some of the difficulties could be overcome if the Court of Justice were to distinguish clear cases of repayment of charges levied by a Member State institution or agency in breach of EU law from more difficult cases of possible liability by reason of the unjust enrichment of Member States.

KEYWORDS: EU law, Restitution, Member State liability, criteria, recovery of unlawful charges

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A Different Path to the Same Old Question: Why Should Cartels be Criminalised?*

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ABSTRACT: Regardless of the extreme negative qualifications usually attributed to cartels and bid rigging, EU and Portuguese competition laws do not set them apart from other anticompetitive practices regarding the possible applicable sanctions. EU and Portuguese competition laws establish the same potential sanctions for all competition infringements. Despite that, there are clear indications that EU and Portuguese legislators intend to treat cartels differently from all other competition infringements, but those differences have essentially to do with rules or procedures designed to facilitate their detection, production of evidence and decision-making.

Notwithstanding the relevance of the "traditional" arguments regarding cartel criminalisation, we consider that the discussion is still incomplete and would benefit from the inclusion of an additional "filter". As it is a discussion about a criminalisation process, the use of common instruments in criminology can shed more light into the question, and one of those instruments – or the most important one – is the analysis of the legal interests protected by the norm. We deem it essential to think about what legal interests are harmed in each of the different types of competition infringements, so as to conclude if indeed and to what extent cartels and bid rigging are capable of impairing more or different legal interests, or in a different intensity, than those potentially violated by other types of competition infringements.

The conclusion is that cartel and bid rigging conducts always infringe the entire set of legal interests that is or may be defended by competition laws and always do so with high intensity.

KEYWORDS: cartels, competition law, objectives of competition law, legal interests

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Policy Considerations on the Interplay between State Aid Control and Competition Law

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ABSTRACT: Under the broad topic of the interplay between state aid and competition law, this article addresses the following related lines of discussion: (i) the goals and some of the political rationales of state aid control; (ii) a brief illustration of some of the harm caused by state aid, including a distinction between its anticompetitive and distortive effects; (iii) a description of the Portuguese legal and institutional framework on domestic state aid, including the underlying rationale for this institutional design; (iv) an assessment of the policy concerns that a scenario whereby the AdC would hold full-fledged enforcement powers against state aid might raise, and, finally (v) the competition advocacy role played by the AdC in relation to state-induced competition distortions, such as state aid or subsidies. The article concludes by putting into context the references included in recent EU policy statements on the importance of "fair competition" or "equitable markets" and recalls the need to avoid that similar standards contaminate antitrust enforcement or merger control, given the risks that "mixed" policy objectives in those domains might entail. It signals, in any event, the virtues of this new found rhetoric: the fact that it helps to engage the common citizen on the importance of competition. Such popular, less technocratic approach can be instrumental in bringing competition enforcement "down to earth".

KEY WORDS: state aid control, policy goals, public interest, fairness, consumer welfare

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Commitment Decisions: Is the Sky the Limit? Commentary to Judgment of the General Court (Eighth Chamber) of 15 September 2016, T-76/14, Morningstar, Inc. v European Commission

*Rita Leandro Vasconcelos**

ABSTRACT: In its judgment of 15 September 2016,[1] the General Court ruled on whether the commitments offered by Thompson Reuters to the European Commission during an investigation of a possible abuse of dominant position were sufficient to address the competition concerns identified by the Commission.
This is only the second time the Court of Justice of the European Union[2] ruled on Commission decisions rendering binding the commitments offered by an undertaking under Article 9 of Regulation 1/2003.[3] With regard to standing, the General Court ruled the appeal lodged by a competitor admissible. As for substance, the General Court generally confirmed the previous case law. It ruled on the wide discretion of the Commission when adopting commitment decisions as long as the commitments meet the competition concerns identified by the institution, the different proportionality standard in Article 9 decisions as compared to Article 7 Regulation 1/2003 decisions (formal decision finding an infringement), and the limited scope of judicial review of the Court of Justice of the European Union in these appeals.

KEYWORDS: Commitment decisions; judicial review; proportionality.

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[1] Judgment of 15 September 2016, *Morningstar, Inc. v European Commission*, T-76/14, EU:T:2016:481.

[2] Comprising the Court of Justice, the General Court and specialized courts.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 4 January 2003, 1-25).

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The Internal Market as a Legal Concept
Stephen Weatherill

Reviewed by Ana Teresa Ribeiro[*]

1. Introduction

The internal market is an essential foundation of the EU. However, and despite this evidence, it is surrounded by numerous uncertainties regarding its contents, reach, and limits. This is the premise of *The internal market as a legal concept*, by Stephen Weatherill, in which the Author offers an approach to the internal market as an ambiguous legal concept.

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