
Summaries

Privilege in competition investigations

Colin Passmore and Patrick Boylan

This article examines the English and EU rules on legal professional privilege as applied in competition investigations, highlighting a number of issues that arise both during a competition regulator's investigation and in related private enforcement action, in particular concerning materials that are likely to be created at the start of a regulatory investigation such as notes of witness interviews.

Interim remedies: is it in the public interest for the Competition Appeal Tribunal to dispense with cross-undertakings as to damages?

Jonathan Tickner, Jason Woodland and Emma Ruane

On 1 October 2015 the Competition Appeal Tribunal (CAT) obtained the power to grant injunctive relief (including interim injunctions) in competition cases, and to dispense with cross-undertakings as to damages when granting interim relief in claims subject to the new 'fast-track' procedure. This article considers the CAT's new powers, its guidance on the issue and the existing High Court case-law on cross-undertakings, and assesses the principles which should be applied by the CAT when determining whether to require a cross-undertaking in damages.

Interim measures versus commitment decisions in fast-developing markets

Lukas Solek

The practice of the European Commission to adopt commitment decisions in cases related to fast-developing markets appears to be somewhat ineffective considering the time delay and paucity of precedent. At first glance, interim measures seem to offer a solution for both issues. However, the law and practice of interim measures show that the limitation of protected interests as well as heavy procedural framework deter the European Commission from awarding interim measures in relation to competition cases. Thus, the Commission prefers to resolve urgent threats to competition by accepting commitments offered by the undertakings concerned. Against this backdrop, this article examines the shortcomings of the present regime of commitment decisions and interim measures in the context of fast-developing markets and presents possible solutions.

OECD Hearing on 'Across Platform Parity Agreements', Competition Committee (28 October 2015): written contribution from the Competition and Markets Authority

Simon Constantine

The growth in e-commerce and online markets in recent years has been striking. In the UK alone, e-commerce sales in 2013 accounted for 20% of business turnover. While the digital world has brought – and promises to continue to bring – benefits to many, it also raises potential risks and novel challenges. The rapid emergence of so-called 'digital giants' has generated a range of new products and services (in particular a multitude of new online platforms and marketplaces). But it has also led to concerns, including some around, among other things, the holding by those players of potential 'gatekeeper' positions. This article considers those dynamics in the specific context of the use of so-called retail Most Favoured Nation (retail-MFN) clauses in online distribution arrangements. It considers first the nature of those agreements, and the commercial rationale for their use, and then discusses both how – and thereafter when – those clauses are, in the Competition and Market Authority (CMA)'s experience, more likely to raise competition concerns. This article is the written contribution from the CMA to the OECD Competition Committee's Hearing on 'Across Platform Parity Agreements' held in October 2015.

***Post Danmark II*: the pendulum between form and effects**

Gunnar Niels

On 6 October 2015 the European Court of Justice (ECJ) issued its long-awaited ruling in the *Post Danmark II* abuse of dominance case. The judgment sheds light on how rebates offered by dominant companies should be assessed in terms of their form and effects. While ruling out the as-efficient competitor test as a necessary condition for finding an abuse, the ECJ leaves room for an analysis of effects on competition in the assessment of rebates.