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JAN PETER VAN DER VEER

Entering uncharted territory: the Commission's thinking on territorial supply constraints 451

The recently published Green Paper on unfair trading practices takes issue with territorial supply constraints. The Commission suggests that the resulting cross-border price differentials adversely affect consumers. However, price discrimination is usually pro-competitive, and blanket rules aimed at reducing cross-border price differentials would have a number of unintended consequences.

BILL BATCHELOR AND FIONA
CARLIN

Turducken on the Menu: Initial Reflections on the Implications of the European Commission's Lundbeck Decision 454

Antitrust regulators have accused pharmaceutical companies of entering into illegal patent settlements where generic infringers agree not to market infringing products for (some of) the remaining patent term, in return for money or other commercial benefits. The issue has vexed regulators and courts on both sides of the Atlantic. If the pharmaceutical company's patent is valid, then how can agreeing a settlement no broader than the patent affect competition? A generic is excluded by operation of patent law, regardless of the benefits that flow under the settlement. Within days of each other, the European Commission and US Supreme Court issued two heavily conflicting views on when patent settlements can be a competition law violation. The former finds the arrangement presumptively illegal "by object". The latter concludes nuanced "rule of reason" analysis is called for. This article discusses the two approaches.

ANGELA ORTEGA GONZÁLEZ

Restrictions by object and the appreciability test: the Expedia case, a surprising judgment or a simple clarification? 457

During the last few years, the European Courts have frequently emphasised the special nature of object restrictions. This specific nature was recently once more highlighted in the *Expedia* case, in which the ECJ ruled that an agreement restrictive by object restricts competition in an appreciable manner, irrespective of any concrete effect. This article analyses the, for some controversial, relationship between object restrictions and the appreciability test.

MANUEL ALEIXO

An inaugural fine: Microsoft's failure to comply with commitments (case COMP/39530) 466

This article examines the grounds for imposing on Microsoft a €561 million fine under art.23(2)(c) of reg.1/2003. This was the first time such a fine was ever imposed. The European Commission had opened proceedings against Microsoft concerning a possible art.102 TFEU infringement: as Microsoft was tying Internet Explorer to Windows, the Commission was concerned that this foreclosed the market, preventing other browsers from competing on the merits with Internet Explorer. Microsoft eventually adopted commitments to address these concerns, which the Commission rendered binding by a decision under art.9 of reg.1/2003. Microsoft breached one of these commitments, which motivated the imposition of the fine. The author argues that the amount of the fine was disproportionate and that art.23(2)(c) of reg.1/2003 was indeed improperly applied.

DARRAGH KILLEEN

Following in "Uncle Sam's" Footsteps? The Evolution of Private Antitrust Enforcement in the European Union 480

The kernel of this article is a comparative analysis of EU private enforcement of competition with that of its United States counterpart. Doing so, it is submitted, will illustrate that the peculiarities of each jurisdiction have manifested themselves into two very distinct systems of competition law enforcement.

GRITH SKOVGAARD ØLYKKE AND
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Post Danmark, now concluded by the Danish Supreme Court: Clarification of the Selective Low Pricing Abuse and Perhaps the Embryo of a New Test under article 102 TFEU? 484

The Danish Supreme Court's judgment in the *Post Danmark* case is discussed in the light of recent rulings by the CJEU. It is concluded that the seemingly inconsistent CJEU's judgments in *Post Danmark* and *Tomra* can provide for a clarification of the case law on selective low pricing and exclusionary rebates. In fact the cases can be viewed as a step towards a new test under art.102 TFEU based on a dichotomy between "competition on the merits" and the "as efficient" competitor test. The Danish Supreme Court seems to have interpreted CJEU's ruling in this way when acquitting *Post Danmark*.

Case C-52/09, Konkurrentsverket v TeliaSonera Sverige AB, [2011] E.C.R. I-527 — Confirming an inappropriate assessment framework for margin squeeze 490

On February 17, 2011, the European Court of Justice clarified in the case *Konkurrentsverket v TeliaSonera Sverige AB* the assessment framework for margin squeeze, in particular arguing that requirements distinct from those that have to be fulfilled in (constructive) refusal to deal cases need to be fulfilled. This framework, however, is inappropriate since it does not treat economically-equivalent behaviours identically.

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