

The antitrust duck test: principled pragmatism in pharmaceutical antitrust 1

Pharmaceutical companies in Europe try to evade antitrust scrutiny for pay for delay settlements by asserting that they are not “potential competitors”, which is a uniquely European concept. Rejecting these calls is not only correct, but the “principled pragmatism” employed by the competition authorities should be applied to the entire pharmaceutical sector.

An innovative theory of innovation harm? An assessment of the European Commission’s approach to innovation competition in merger review 9

The European Commission recently articulated its current thinking on innovation competition in its decision in *Dow/DuPont*, conditioning its approval on the divestiture of DuPont’s entire global crop protection R&D organisation. The decision prompted an as-yet unresolved debate between the Commission (and its economists), on the one hand, and advisers to the merging parties and several commentators, on the other, about the novelty of the Commission’s approach to innovation competition. This article argues that the debate stems from the fact that “innovation” has been used—in merger reviews, policy statements, and academic literature—as a catch-all term subsuming distinct theories of economic harm. A framework is proposed which organises past merger reviews involving innovation competition into three categories based on the underlying theory of economic harm, noting that some mergers, such as *Dow/DuPont*, involve multiple types. These three categories are: (1) elimination of pipeline overlaps, (2) vertical foreclosure, and (3) reduction of industry-wide incentives to innovate. This article argues that while the first two categories are appropriately addressed using the traditional unilateral effects framework, and are therefore in line with the Merger Guidelines, the third category (which was invoked by the Commission in *Dow/DuPont* and one prior merger before it, *Deutsche Borse/NYSE*), is not. The article concludes that the ongoing discrepancy between soft law as it is interpreted by the Commission (which deems innovation to be a parameter of competition analogous to price or output) and Commission practice in certain merger reviews (which essentially treats innovation as a market in and of itself) matters because it imposes costs on merging parties. Accordingly, the Commission has a responsibility in the context of innovation competition falling into the third category to either amend, clarify or abide by its soft law obligations.

Why the Magill criteria should have been reviewed in IMS Health and the effectiveness of compulsory licence 24

In *IMS Health*, the Court of Justice and the European Commission (EC) should have reviewed the criteria set in *Magill* to apply them to subsequent similar cases. Thus, they would have issued consistent decisions about how to determine the antitrust infringement of refusing to grant Intellectual Property (IP) licences, which is effectively remedied with a compulsory licence and a periodic penalty payment.

Data protection law: An inhibition in enforcement and promotion of competition law 34

Data protection law has become an inhibitor in the enforcement and promotion of competition law. Some of these instances are in the form of: promoting exclusionary conduct; increasing entry barriers; inhibiting competition authorities’ investigations; and increasing compliance cost for the start-ups. The said conflict can be turned into co-operation by data portability, regulatory bodies co-operation, introducing value-based merger threshold, etc.

Spain—Recent developments in competition damages claims: What once was just a possibility, is now a reality 41

Recent judgments of courts in Madrid and Barcelona confirm what the most skeptical never thought possible. Despite everything, Spain could be an attractive forum for competition damage claims. In this article, we will analyse two different sets of judgments. On the one hand, in relation to the Spanish spin-off of the European envelopes cartel, where judgments of courts in Madrid and Barcelona differ. On the other hand, from the Civil Provincial Appeals Court of Barcelona, in which a claimant was awarded damages in relation to an abuse of dominance in the energy market after a sanction from the Catalan competition authority.

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