

Articles

TIM VAN HELFTEREN

Excessive pricing in pharmaceutical markets: A review of the legal test for competition authorities 427

The intervention against excessive pricing of dominant undertakings has generated significant competition policy debates. The last few years have nevertheless seen a sudden increase in enforcement against high prices of pharmaceuticals by competition authorities of the EU Member States and the Commission. The basis for assessing whether excessive prices constitute an abuse of a dominant position remains the ECJ judgment in *United Brands*. Despite being an authoritative starting point, the legal test developed in this judgment leads to various questions concerning its application in practice. Some of the major complications have become explicit in the *Phenytoin* litigation concerning sodium capsule prices in the UK. This article seeks to assess the extent to which the *United Brands* test is sufficiently capable of forming the basis of legally justified findings of abusively high prices, in particular from the perspective of pharmaceuticals in light of the two *Phenytoin* judgments. The three main themes of the *United Brands* test that have been under debate concern the appropriate methodology to find excessiveness, the extent to which the unfair limb elements are alternatives, and the role of economic value in the competition analysis. This article will assess the implications of the *Phenytoin* litigation on these three issues and will argue that the *United Brands* test is sufficiently flexible to remain the authoritative precedent for enforcement against excessive pricing.

ANDRÁS TÓTH

Competition law-regulated European energy markets 439

In the energy sector, regulation and the regulatory style application of competition law has proved to be an effective combination. Regulation and competition law enforcement together have not only contributed to the development of the internal energy market and promoted infrastructure-based competition through network divestitures and capacity releases, but also have freed customers from long-term contracts and made them available to competitors. Therefore, EU competition law has shown what an important supporting role it has in the liberalisation of European energy markets. The European Commission mainly used commitment decisions to influence the market. This article gives an insight to this regulatory style application of competition law in the field of the European energy market.

SVEN GALLASCH

Protecting competition in times of crisis—The balancing act looked at from a land Down Under 445

This article puts the spotlight on the ACCC's response to the COVID-19 pandemic. Instead of having to implement ad-hoc measures, offer comfort letters, or resort to "political" exclusion orders, the authorisation procedure provides the ACCC with the tool kit to safeguard the state of competition post-crisis while providing necessary short-term legal certainty.

FOLAKUNMI PINHEIRO

Revisiting the "Code": building privacy competition into the architecture of the internet 453

Online platforms increasingly threaten consumer privacy. As such, privacy protection is transforming into an important domain of competition among online platforms. However, this privacy competition is ineffective because of the privacy paradox, among other reasons. By combining the literature on regulating through competition law and the "pathetic dot theory", this article proposes a potential solution to regulate online platforms.

REBECCA WALKER

Procedural divergences as a barrier to effective EU competition law enforcement in digital commerce 468

This article examines the effectiveness of procedural autonomy under the decentralised enforcement model which faces substantive fragmentation of EU competition law. When confronted with the changing market dynamics of digital commerce, Member States such as the UK and Germany apply their own conflicting policies that lead inevitably to regulatory arbitrage and discretionary decisions.

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SWATI SHARMA

US Congress's hearing on big tech: a colossal step towards controlling competition in technology markets 478

This article seeks to traverse through the series of arguments raised by the US Congress in the hearing concerning the anti-competitive conduct of big-tech companies shedding light upon the clandestine manner of their operation. The article discusses the implication of the hearing and the discussion around it, across the globe and closer to home in India.

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