

Articles

DR MATTHEW COLE

No data, no abuse: The lesson from Intel’s “more economic approach” 419

This article investigates the law on conditional rebates in the context of the European Union (EU) *Intel* case saga. It explains that the law is now heavily data dependent and requires the Commission to make numerous calculations using data that it does not necessarily have. It is argued that specifying what evidence is required from the dominant undertaking would alleviate this problem.

ALEXANDROS LYMPEROPOULOS
AND MARIA ELENI POULIASI

Beyond Cuno: EU State aid vs US subsidies regulation from a quantitative perspective 429

When it comes to subsidies regulation, the United States favoured a laissez faire approach, while the European Union has opted for a prima facie prohibition, which is moderated by various exceptions. Quantitative data surprisingly suggest that the EU state aid expenditure is comparable to or higher than that of the US and has been constantly growing from 2015 onwards.

HÉCTOR PÉREZ

Sham litigation as abuse of dominance in relation to intellectual property rights and antitrust: Cross-jurisdictional historical analysis, recent case law, and critique 439

On 21 October 2022, the Spanish Competition Authority imposed a fine just short of €40 million on Merck Sharp & Dohme after proving that the pharma giant had pursued meritless legal action aimed at harassing a competitor. This breach of both antitrust and competition law (historically known as “sham litigation”) has its origin in different decisions by the United States Supreme Court that shaped the *Noer-Pennington* “immunity”, *California Motor*’s “sham exception”, and *Professional Real Estate*’s two-tiered definition on sham litigation. This early American judicial doctrine laid the foundation for the legal consolidation of this very limit to the legitimate use of patents and copyrights, whose core reasoning was further used in the European Union jurisdiction to decide on similar cases such as landmark 1996 decision and 1998 judgment in *ITT Promedia*. Such cross-jurisdictional approach to sham litigation will eventually help us to understand the logic behind the two main analysis steps followed by the Spanish Competition Authority in its sanction decision. Academic discussion as to the inadequateness of the concept’s legal construction as well as fundamental rights concerns related to it also arose.

VIKTORIA H.S.E. ROBERTSON

The future of digital mergers in a post-DMA world 447

The Digital Markets Act (DMA) wants to ensure contestable and fair digital markets. In addition to its principal obligations, the DMA requires digital gatekeepers to inform the European Commission of any prospective merger (art.14 DMA). Together with the Dutch clause contained in the European Union (EU) Merger Regulation, this obligation will impact the future of digital merger control.

ZIA AKHTAR

Algorithms, digital markets, collusion and antitrust frameworks in Latin America 451

Competition law globally is increasing its dependence on software technology, and artificial intelligence is being used as a tool to implement more efficiently explicit agreements in fixing pricing mechanisms. This article evaluates the developments in Latin America to determine the digital use of algorithms in price fixing to eliminate the possibility of collusion and ensure compliance in the competition law framework.

Comment

RICCARDO TREMOLADA AND
MAURITS DOLMANS

The European Commission proposal for a regulation on standard essential patents 461

This article summarizes the proposed new regulation on the licensing of standard essential patents in detail and provides a preliminary assessment of its main provisions.

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