

Editorial

JAMES HARVEY

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Post-Patent Expiry Royalties and EU Competition Law: An Old Issue in Need of a Refresher Following the CJEU Genentech Judgment 481

The 2016 CJEU Genentech judgment cannot be read as questioning the consistency with Article 101 (1) TFEU of post-patent expiry royalty payment obligations even where the licensee is not given a right of free termination. The analysis draws on the long history of that old issue under EU competition law as discussed especially by Valentine Korah to whom this article is meant as a tribute.

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The incentive effect means that receiving State aid must compel the beneficiary to undertake activities it would not have taken in the absence of government support. No State aid is allowed for activities that would have been undertaken anyway. The long-recognized conceptual problem with the incentive effect is determining whether the beneficiary has indeed been compelled to change their behaviour as a result of the aid, since alternative “what if” scenarios are not testable. This article seeks to analyse the existing *acquis* on the incentive effect and its newest developments on locational competition between Member States—the subsidy arms race to incentivize businesses to relocate to particular areas. It will seek to determine whether the interpretive approach to the incentive effect allows for arms race-inducing abuses whereby undertakings may force the State’s hand in granting aid by showing that no relocation would take place in the absence of support.

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Excessive pricing is one of the most controversial categories of abuse under art.102(a) TFEU and is rarely enforced in the energy sector, even though high prices have been identified as a major challenge. The question of whether and how to apply excessive pricing under art.102(a) TFEU must be answered taking into account the general conceptual and practical challenges of this form of exploitative abuse and the specificities of the sector, in particular the scope of action left by regulation. It is argued that despite conceptual and practical challenges, excessive pricing should be applied under certain conditions, also in parallel to regulatory law.

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In this opinion piece, we identify the signs of greater judicial scrutiny in Portugal, highlighting recent leniency and gun jumping judgments. We also describe AG Medina’s opinion in the warrants preliminary reference case, which would have been music to the Portuguese Competition Authority’s ears as it seeks to preserve a decade of enforcement decisions and fines.

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This Article examines the question whether Apple and Google are collectively dominant in the app store market. Over 90% of EU smartphones run on either Apple’s iOS or android systems using the Google app store. Both companies levy up to 30% commission on app developers as the price of admission to their app stores and on in-app purchases. It is arguable that the test for collective dominance is met by the major online platforms, yet the EU Commission has not sought to argue that they are collectively dominant and the DMA does not provide a collective dominance test. Therefore, the question arises why is the Commission not attempting to exert the collective dominance test long recognised by the EU’s courts against the two dominant players in order to bring competition into the app store market?

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