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# Kluwer Competition Law Blog

## World Competition Law and Economics Review, volume 41, issue 4, 2018

Jose Rivas (Bird and Bird, Belgium) · Tuesday, February 26th, 2019

We are happy to inform you that the latest issue of the journal includes the following contributions:

### **Michael Albers, *Achieving Competitive Neutrality Step-By-Step***

States are not only rule makers, they also are purchasers and often also suppliers of goods and services. However, the state is not a purchaser or supplier like any other. It may enjoy competitive advantages other market participants do not have. The concept of competitive neutrality addresses the problem of distortions of competition caused by state activity on markets. This article lists thirteen consecutive steps, which are clustered in three distinct groups, to improve the conditions of competition on markets where private enterprises are active as purchasers or suppliers next to the state. They reach from creating more awareness of competition-distorting state measures and the prevention of new distortions to the removal of distortions.

### **Miroslava Marinova, *What Can We Learn About the Application of the as Efficient Competitor Test in Fidelity Rebate Cases from the Recent US Case Law?***

It is accepted that the treatment of fidelity rebates is one of the most controversial topics in European Union competition law. It remains an outstanding issue despite the clear position of the Court of Justice in both the Intel and Post Danmark II judgments to depart from the strict form-based approach and to endorse an approach based on an evaluation of the possible anticompetitive effects of fidelity rebates. In particular, it remains unclear whether a price-cost test should be deployed. The conditions when a price-cost test should be applied to fidelity rebates as opposed to alternative approaches is a central issue in recent US case law of fidelity rebates and associated scholarly debate. This article examines the academic debate in US and compares the treatment of fidelity rebates on both sides of the Atlantic in an attempt to clarify under which circumstances a price-cost test should be used as a tool to determine anticompetitive effects of fidelity rebates and how this clarification can be translated into concrete lessons for European caselaw. It reveals that the economic theory of raising rival's cost explains that the assessment of a strategy to exclude an as efficient competitor does not require a price-cost test.

### **Laureen De Barys, *Do Pay-for-Delay Agreements Promote Innovation?***

Since the first EU case in 2013, pay-for-delay agreements have been considered a restriction of competition by object under Article 101 TFEU. However, according to parties to these agreements, the harm caused to consumers can be balanced out by efficiencies in terms of increased incentives to innovate. The aim of this thesis is to assess this efficiency argument by studying the effect of pay for delay agreements on innovation. It appears from the analysis that this effect partly depends on the innovation cycle it relates to: either first-generation innovation or subsequent innovation.

The impact on first-generation innovation is studied sequentially, by reference to the literature, for three dimensions of innovation: returns on innovation, R&D investments and the innovative output. We conclude that first-generation innovation is either promoted or non-affected.

Subsequent innovation is then studied from both a theoretical and an empirical point of view. The theoretical analysis focuses on two distinct issues: the incentives for first-generation innovators to invest in an improved version of their patented invention, and the ability of follow-on innovators to use existing knowledge. Based on this theoretical analysis, we put forward the revocation of a patent as a proxy for pay-for-delay agreements. We further use this assumption to design an empirical model whose objective is to estimate these agreements' effect on innovation. We conclude that second-generation innovation is either unaffected or hindered.

### **Chiara Muraca, *Cultural and Political Forces in the Criminalization of Cartels: A Case Study on the Chilean Experience***

Despite the increasing number of countries opting for a criminal antitrust enforcement, outside the US, the implementation of criminal penalties has been quite deficient. Among the main arguments provided by the relevant literature to explain such deficiency, in addition to the procedural obstacles, there is a belief that the criminalization of cartels is often the product of a top-down process led by transnational enforcement interests rather than domestic bottom up pressures. And, as such, it bears the original sin of missing the required enforcement culture and support of the decisive stakeholders. Against this background, the present article provides an empirical investigation exploring the law making processes that led to the criminalization of cartels in Chile. We observe that, when the policy decision is highly politicized, i.e. the consensus building motive is predominant, even if the decision making is not driven by transnational interests but by purely domestic pressures, a regulatory populism might still overcome important balancing policy considerations, with the risk of jeopardizing the results' effectiveness.

### **Svetlana Avdasheva, Dina Korneeva & Tatiana Radchenko, *Antitrust Price Remedies May Facilitate Collusion in Global Commodity Markets***

Difficulties of competition policy at the global level are widely debated by academics and policy-makers. However, recent discussions do not pay enough attention to those instruments of antitrust enforcement that target local companies in domestic markets. This type of antitrust price remedies becomes popular in Russian competition law enforcement towards large exporters that dominate in home markets. In this article we explain the circumstances under which antitrust price remedies imposed by national competition authorities on one exporter in a determined country may limit

competition in global commodity markets. In particular, antitrust price remedies, which impose the cap on domestic prices using export or global prices of the commodity as a benchmark, increase the sustainability of collusion, either explicit or tacit. Being primarily designed to support domestic buyers, antitrust price remedies may also increase domestic welfare by facilitating collusion abroad and creating additional profits for large national producers.

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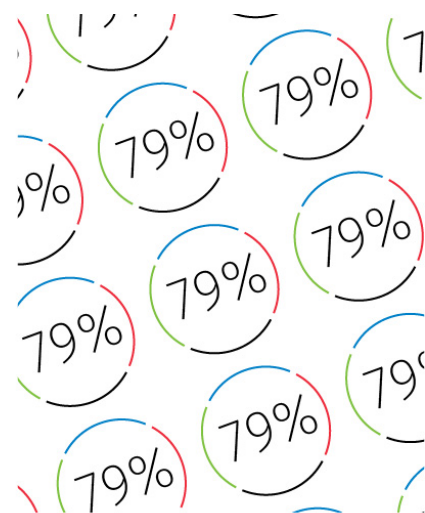
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