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# Kluwer Competition Law Blog

## World Competition Law and Economics Review, volume 43, issue 1, 2020

Jose Rivas (Bird and Bird, Belgium) · Saturday, March 21st, 2020

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

### **Wouter P.J. Wils, Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network**

This article deals with the fundamental procedural rights of companies that are targeted in the enforcement of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU) by the European Commission or the competition authorities of the EU Member States. The paper first provides a (non-exhaustive) list of such rights as applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission, and explains the source of these fundamental rights in the EU legal order. The paper then examines the relationship between fundamental procedural rights and effective enforcement of Articles 101 and 102 TFEU. It argues that procedural rights often contribute to effective enforcement, but not always. The interplay between fundamental rights of legal persons and competition enforcement remains a balancing exercise, and this balancing exercise is not the same as in traditional criminal law. Finally, the paper examines the question whether or to what extent EU Member States can, for the enforcement of Articles 101 and 102 TFEU by their national competition authorities (NCAs), provide for a lower or a higher level of procedural rights than the level of fundamental procedural rights applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission.

### **Emmanuel Combe & Constance Monnier, Why Managers Engage in Price Fixing? An Analytical Framework**

This article analyses the incentives for a manager to engage in a cartel, by mobilizing the framework of the ‘economics of crime’. We apply a cost-benefit analysis, relating to the decision of starting and/or remaining in a cartel, at an individual level, including psychological and behavioural factors. It also examines the various solutions – both at company and public authority level – to limit individual incentives to engage in this type of practice, and the role of public policy, in the broad sense of the term, in preventing these behaviours.

### **Pieter J.F. Huizing, Proportionality of Fines in the Context of Global Cartel Enforcement**

This article assesses the fundamental elements of national and international cartel sanctioning practices from a proportionality perspective under both retributive and consequentialist theories on punishment. It finds that the current framework of setting fines for international cartels fails to ensure proportionate overall punishment. This is due to two types of shortcomings. First, the amplification at an international level of the failure of national sanctioning methodologies to fully observe retributive or consequentialist proportionality principles. Second, the absence at an international level of an appropriate maximum limit on the level of punishment or any consideration of the overall proportionality of the overall punishment. Overcoming these shortcomings calls for not only the coordination of sanctions between authorities pursuing the same cartel, but also a serious reconsideration of the fundamental elements of national cartel fining methodologies. At the least, achieving overall proportionate punishment requires authorities to start considering the retributive and consequentialist objectives already achieved by fines imposed elsewhere for the same overall cartel conduct.

### **Anna Nowak-Salles, The Optimal Assessment Rule for EU State Aid Procedure**

This article fills the gap in the State aid literature by discussing the optimal rule for State aid assessment, which shall increase the reliability and accuracy of State aid enforcement by the European Commission. Moreover, it contributes to decision theory more broadly, by putting emphasis on the error in application of law, which hampers an effective distinction between desirable and undesirable measures.

The argument developed in this article is that the informational asymmetries, which the Commission faces when assessing measures, may be overcome to a different extent at each procedural stage. Hence, and due to the interrelation between complexity of rules and the probability of error in their application, State aid assessment requires two assessment rules, one for the preliminary examination and one for the formal investigation. However, it seems that such optimal assessment rules have not been identified, and no concern about accuracy in application of complex rules is reflected in the literature or in the legal framework. Consequently, the Commission shall structure and make known the rules which guide its assessment, especially in the preliminary examination. This would benefit the quality and transparency of the decision-making and might be particularly valuable in the context of the on-going revision of State aid guidelines.

### **Eyad Maher M. Dabbah, Brexit and Competition Law: Future Directions of Domestic Enforcement**

Brexit – the UK’s exit from the European Union – brings unprecedented challenges and opportunities of historic magnitude across a raft of legal and policy fields. One of these fields is competition law. These challenges and opportunities deserve careful assessment – whatever shape the outcome of the detachment process might eventually take – in order to prepare for an increasingly uncertain future ahead.

This article considers and analyses the future directions for UK domestic competition law enforcement in light of Brexit. The article addresses a range of issues, including: the likelihood of significant post-Brexit reform; the government's commitment to competition in local markets; the relevance of industrial policy; the issue of regulation; and aspects of institutional structure of the UK competition law regime. The article will also consider changes to UK competition law which currently appear on the horizon.

### **Annika Stöhr, Victoriia Noskova, Philipp Kunz-Kaltenhäuser, Sophia Gaenssle & Oliver Budzinski, Happily Ever After?: Vertical and Horizontal Mergers in the US Media Industry**

This article provides an economic analysis of recent vertical and horizontal mergers in the US industry for audio-visual media content, including the AT&T–Time Warner and the Disney– Fox mergers. Using a theory-driven approach, we examine economic effects of these types of mergers on market competition, focusing on digital media content distribution.

In doing so, we address three research questions: (1) Is the current development of the industry with its recent merger activity concerning? (2) Would vertical or horizontal integration be more preferable for overall welfare and competition in this industry? (3) What are implications for antitrust policy?

We conclude from our analysis that in the already highly horizontally concentrated US market for audio-visual content the process of further vertical integration creates concerns from a competition policy perspective. Moreover, even though horizontal concentration on some of the market stages may be anticompetitive as well, vertical integration is likely to be more harmful. As a consequence, we recommend a stricter approach to vertical merger control in this industry, as well as a more active abuse control against already vertically integrated media companies.

### **Sven Gallasch & Naoko Mariyama, Should Pay for Delay Be a Cause for Concern in Japan?**

Yes, it should. Pay for delay settlements have raised concern across the globe and have led to significant competition law scrutiny in the US and Europe. Branded pharmaceutical companies use patent settlements to pay potential generic entrants in order to stay off the market, thereby reducing competition and harming consumers. This conduct has been found to be unlawful by the US Supreme Court and the EU General Court. In Japan, however, such anticompetitive settlements allegedly do not take place, despite offering similar economic incentives to pharmaceutical companies in the second largest pharmaceutical market in the world. This is intriguing and warrants close scrutiny. This article is the first to investigate, based on a comparative analysis with the US and EU whether or not the Japanese pharmaceutical sector is susceptible to pay for delay settlements. We come to the conclusion that the regulatory regime in Japan features the necessary prerequisites to make pay for delay settlements a feasible yet anticompetitive drug lifecycle management strategy.

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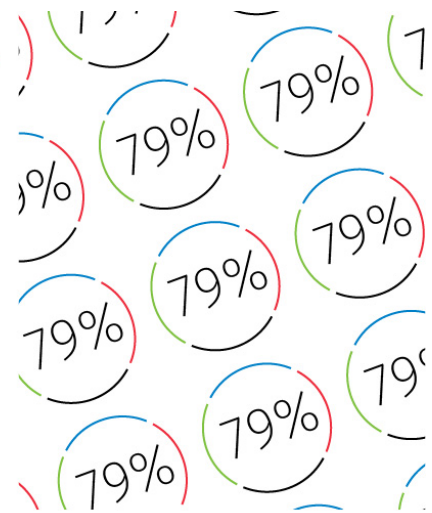
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