Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

Rebates under EU Competition Law after the 2017 *Intel* Judgment: The Good, the Bad and the Ugly*

*Viktoria H.S.E. Robertson***

ABSTRACT: On 6 September 2017, the Court of Justice of the European Union delivered its long-awaited *Intel* judgment. The European Commission had accused Intel of inducing customer loyalty and thus foreclosing the relevant market for its competitors through (i) a rebate scheme and (ii) direct payments, both of which the Commission qualified as abuses of dominance under Article 102 TFEU. The General Court upheld the Commission decision in its entirety in June 2014. Before the Grand Chamber of the Court of Justice, however, the General Court's *Intel* judgment was set aside and the case was referred back to that Court. The Court of Justice held that where the Commission, as in its *Intel* decision of 2009, also relies on an as-efficient-competitor (AEC) test in order to assess the capability of a rebate scheme to restrict competition contrary to Article 102 TFEU, the General Court must review a party's counter-arguments pertaining to this economic analysis. The General Court was instructed to further examine the factual and economic evidence in this respect.

With a view to illuminating the legal questions that posed themselves in *Intel*, the present contribution reviews the leading European case law on rebate schemes – *Hoffmann-La Roche*, *Michelin I* and *II*, *British Airways*, *Tomra* and *Post Danmark II* – as well as the Commission's approach to conditional rebates in its 2009 Guidance Paper. After briefly recalling the different stages of the *Intel* case, the contribution then offers a commentary on and an analysis of the Court of Justice's *Intel* judgment and the way in which the Court attempted to reconcile its formalistic case law on rebate schemes with the effects-based economic tests carried out by the Commission.

---

* Date of Reception: 05 January 2018. Date of Acceptance: 13 January 2018.

** Assistant Professor, Institute of Corporate and International Commercial Law, University of Graz, 8010 Graz, Austria; viktoria.robertson@uni-graz.at. I am grateful for insightful comments received from two anonymous reviewers and from participants in my talks at Universidade Católica do Porto in December 2017, in particular Professor Sofia Oliveira Pais, and at Rutgers Law School Camden in January 2018. The usual disclaimer applies.

KEYWORDS: abuse of dominance, AEC test, as-efficient-competitor test, conditional rebates, exclusivity rebates, Guidance Paper, Intel, loyalty rebates, rebate scheme, rebates

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

Consumer Inertia, the New Economy and EU Competition Law*

*Vladimir Bastidas Venegas***

ABSTRACT: Services and goods in the new economy, such as social media platforms and applications, are often offered to end-consumers for "free". This may cause problems for the application of traditional antitrust doctrines, such as tying or other forms of leveraging, which normally have been applied to products and services offered at a price. As illustrated by the Microsoft I decision (Windows Media Player), it is not self-evident that the bundling of an application with an operating system results in coercion, the pressure to consume the "tied" product, if consumers have a *de facto* possibility to download competing products for free. Moreover, the availability of competing products for free may also affect the long-term effects in the market, as both the existing customer base and new customers may easily shift their consumption, which decreases potential "lock-in" effects. This propensity and capability of customers to choose products or services other than the predefined "default" option, e.g. by being included in a bundle, was also relevant in the recent Google decision (Shopping), which concerned the company's preferential placement of its own advertising messages in internet searches. In both Microsoft I and the Google decision, it was found that consumers were unable to choose products and services other than the default option, so-called *consumer inertia*. Consumer inertia has been explained both by the traditional law and economics literature and behavioural economics with switching costs, information costs and the status quo bias. Accordingly, this article explores the concept of consumer inertia in the light of the law and economics literature, in particular behavioural economics, to determine the factors which are relevant for establishing the presence of consumer inertia in individual antitrust cases concerning the new economy. Moreover, the article evaluates to what extent the use of consumer inertia in cases from the Union courts and the Commission is consistent with economic theory.

---

* Date of Reception: 22 January 2018. Date of Acceptance: 30 January 2018.

** Associate Professor, Uppsala University, 752 36 Uppsala, Sweden, vladimir.bastidas@jur.uu.se.

KEYWORDS: consumer inertia, behavioural economics, new economy, tying

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

Unresolved Questions Regarding Lawyers' Fees and the Restriction of Competition*

*Fabio Ferraro***

ABSTRACT: This paper explores the most salient aspects of the case-law of the Court of Justice of the European Union on legal services in order to highlight a lack of clarity in defining the terms of compatibility between European Union law and national rules on lawyers' fees. This is a complex issue and one that has not yet been finally resolved, especially in a difficult context such as that of the Italian market, which is characterised by an extremely large number of lawyers, which in itself entails the risk of deterioration in the quality of services provided, with services being offered at a discount. In Italy, following the *Cipolla* judgment of the ECJ and the resulting abolition of the system of fixed remuneration (minimum and maximum fees), new measures were introduced by the State and professional organisations to protect members of the legal profession (particularly to safeguard lawyers in a weaker position in dealings with powerful clients such as banks and insurance companies) and to ensure fair remuneration. In accordance with the *Wouters* exemption and the increasing role of economic analysis in competition rules, these measures require a reflective analytical approach in order to evaluate their compatibility with European Union law.

KEYWORDS: lawyers' fees, fair remuneration, professional organisation, *Wouters* exemption, Italian market.

* Date of Reception: 08 January 2018. Date of Acceptance: 24 January 2018.

** Professor of European Union Law, Department of Law, University of Naples, Federico II, 80138 Napoli NA, Italy.

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach*

*Alexandr Svetlicinii***

ABSTRACT: With the rapidly unfolding China's Belt and Road Initiative (BRI) and the ongoing reform of the State-owned enterprises (SOEs), the number of overseas acquisitions by the Chinese SOEs in various industrial and services sectors is gradually on the rise. These transactions have raised a number of questions in terms of the assessment of the economic concentrations' potential impact on competition and challenged the traditional assessment tools employed by the merger control regimes. The paper examines the evolving experience of Chinese SOEs' acquisitions in the European Union (EU), which are subject to *ex ante* assessment under both EU and national merger control regimes. The analysis of the merger assessment practice of the EU Commission culminating in the recent conditional approval of the *ChemChina/Syngenta* merger indicates that the traditional assessment tools, when applied to the acquisitions by Chinese SOEs, may no longer be adequate to grasp the essence of their corporate governance and decision-making. The review of the merger control practice of the national competition authorities (NCAs) also demonstrates the absence of a coherent assessment approach to the cases involving Chinese SOEs, which may lead to the inconsistent enforcement and strengthening of the foreign investment screening on grounds other than market competition.

KEYWORDS: State-owned enterprise, Belt and Road Initiative, merger control, national competition authority, competition law

---

* Date of Reception: 29 December 2017. Date of Acceptance: 30 January 2018.

** LL.M (CEU), MRes (EUI), PhD (EUI); Assistant Professor at the University of Macau, Faculty of Law; 999078 Macao SAR (China); alexandrs@umac.mo. The author presented working drafts of the paper at the European Union Academic Programme Macao Biannual Conference "60 Years after the Treaties of Rome: What is the Future for the European Union?" in Macao on 27 November 2017, and at the Asian Competition Forum 13th Annual Conference "Asian Regional Competition Issues: Corruption, Communications, Nationalism: Globalisation in Reverse?" in Hong Kong on 11 December 2017.

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

Challenges and Constraints to Recognition in the Field of Freedom of Circulation: The Relevance of the *Fraus Legis* Institute in European Union Law*

*Dulce Lopes***

ABSTRACT: The relevance of *fraus legis* – a falsely presented state of affairs – both in internal and private international law, and particularly within recognition procedures, has not been undisputed throughout the years. And in the midst of integration or close cooperation arrangements it might seem that the institute of *fraus legis* would definitively lose its interest due to an "unshaken" mutual confidence in the activity of other public authorities.

This is however not the case, as demonstrated by European Union law where both legislative and case law examples show the renewed importance of such truthfulness or veracity requirement.

Bearing this is mind, the present article has a dual purpose: the first aims to describe the legal concept of recognition in its diversity and richness. As an aggregating factor we will subsequently turn our attention to the "internal structure" of that concept and to the conditions or requisites it is dependent upon. One of such conditions is precisely the control of veracity of the act or situation that aims to be recognised by the receiving State.

KEYWORDS: *fraus legis*, migration, freedom of movement, recognition

* Date of Reception: 03 January 2018. Date of Acceptance: 05 January 2018.

** Professor at the University of Coimbra, Faculty of Law, 3004-528, Coimbra, Portugal, dulce.rdgr@gmail.com.

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

The Disclosure of Leniency Statements and Other Evidence under Directive 2014/104/EU: An Undue Prominence of Public Enforcement?

*Claudia Massa**

ABSTRACT: Directive 2014/104/EU contains detailed provisions related to the disclosure of evidence in actions for damages before national courts that seek to strike a balance between a claimant's right to access evidence in support of its private damages claim and the protection of leniency programmes, which are some of the main tools of public antitrust enforcement. Articles 5 to 8 of the Directive create a "microsystem" of the law of the evidences, which is highly specialised and based on the central role of the judge and on the principle that private enforcement must not compromise public enforcement.

The Directive tackles the information asymmetry that characterises competition law litigation by acknowledging the right for a claimant "to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence". However, the obtainment of the disclosure of evidence is circumscribed by a number of conditions and exceptions.

The Directive creates three lists of documents that are characterised by a different level of protection: the black list, the grey list and the white list.

After giving an overview of all these provisions, the article will focus on the disclosure of leniency statements and settlement submissions, by analysing the case law of the ECJ before and after the entry into force of the Directive. It will be found out that while the Court has always been cautious, by affirming that it is necessary to weigh up, on a case-by-case basis, the respective interests in favour of disclosure of such documents and those in favour of their protection, the European Legislator preferred to unconditionally protect the efficiency of leniency and settlement programmes to the detriment of parties that suffered a harm, which have to find any possible way to support their

* Claudia Massa, LLM in European Law at Panthéon Assas University (Paris II), currently PhD Candidate in Economic Law at University of Naples Federico II – Department of Law, 80129, Naples, Italy, claudia.massa@unina.it.

damage claim in a context in which the information asymmetry and the difficulty of the factual and economic analysis are evident.

It seems that, with Article 6(6), the European Legislator did not succeed in its goal of making it easier for victims of antitrust violations to claim compensation from the offender, which is the general aim of the Directive. In fact, not having the possibility to have access to leniency statements or settlement submissions in stand-alone actions, it is highly difficult to prove that they suffered harm. Therefore, victims can only wait until the competition authority adopts a final infringement decision in order to start a probably successful follow-on action.

Overall, all provisions on disclosure of documents contained in the Directive contribute to make a big step forward in the private enforcement sector, except for the provisions of Article 6(6), which could have probably been less rigid. In fact, while the rule on the right to obtain the disclosure of evidence, together with the provisions on disclosure of documents contained in the grey list and in the white list, strike a fair balance between public and private enforcement and facilitate victims of antitrust violations in bringing actions for damages, the same thing cannot be affirmed for provisions on disclosure of documents contained in the black list.

KEYWORDS: private enforcement, damages actions, disclosure of evidence, leniency statements, case law.

Market and Competition Law Review / VOLUME II / No. 1 / APRIL 2018

Support Schemes in Renewable Energy: Commentary to Judgment of the Court (Fifth Chamber) of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*

*Nevin Alija**

ABSTRACT: In its September 13th 2017 decision,[1] the Court of Justice of the European Union (CJEU) decided on a request for a preliminary ruling by the Supreme Court of Poland (Sąd Najwyższy) in proceedings between ENEA S.A. (ENEA) and the president of the Urzędu Regulacji Energetyki (Office for the regulation of energy, URE) on the imposition by the latter of a financial penalty on ENEA for breach of its obligation to supply electricity produced by cogeneration. The judgment of the Court of Justice follows many decisions of the European Commission and judgments of the EU courts assessing the involvement of State resources in support schemes in energy, particularly with the aim of switching towards more environmentally friendly sources. This case reaffirms that support schemes may, in certain circumstances, fall outside the scope of the EU State aid rules.

KEYWORDS: State resources, renewable energy, support schemes

* PhD Candidate, Católica Research Centre for the Future of Law, Católica Global School of Law, Universidade Católica Portuguesa, 1649-023, Lisbon, Portugal; Researcher, Foundation for Science and Technology (FCT), Portugal.

[1] Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671.