

Editor's Note

I am glad to present the March 2010 issue of *World Competition*. The first issue of this year has received many topical and high quality contributions related to different aspects of competition law and policy.

First, I would like to announce, that due to the success of our *Young Writer's Award* over the last four years, *World Competition* will continue to run this contest (the fifth edition) also in 2010. The winner of *4th Young Writer's Award* will be announced in our June issue.

The first article comes from Wouter Wils, member of the Advisory Board of this journal and our most regular contributor ('The Relationship between Public Antitrust Enforcement and Private Actions for Damages', *World Competition* 32 (2009): 1, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', *World Competition* 31 (2008): 3, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', *World Competition* 30 (2007): 2). In this contribution, Wouter addresses a highly topical issue of the level of EU antitrust fines. While some commentators have claimed that the criminal nature of fines make the current framework of antitrust sanctions incompatible with the European Convention on Human Rights (ECHR), Wouter disagrees with this view. He points out the distinction made in the case law of the European Court of Human Rights between 'hardcore' criminal cases and cases which are criminal only in the autonomous meaning of the ECHR. Since the EU antitrust cases belong to the latter category of criminal cases, the author concludes that the EU procedural and institutional framework for competition cases is compatible with the ECHR.

The second contribution comes from Süleyman Parlak, who analyses two interrelated questions of passing-on defence and indirect purchaser standing. The author analyses the differences in the position taken as regards these issues by the Courts in the US and the approach envisaged by the European Commission in its 'White Paper on Damages Actions for Breach of the EC Antitrust Rules'. The article discusses the policy considerations which determined the different choices on the both sides of the Atlantic. The author concludes that while the European Commission's choice to allow both indirect purchaser standing and passing-on defence seems justified from the policy perspective, the regulator did not provide convincing solutions for the problems which are likely to arise when implementing this choice in practice. Mr. Parlak has been nominated for the *5th Young Writer's Award*.

In the next contribution Karl Hofstetter and Melanie Ludescher analyse the current practice of the European Commission and the EU Courts regarding the liability

of parent companies for antitrust infringements committed by their subsidiaries. The authors maintain that the current practice of the Commission and the Courts in this respect ignores the fundamental corporate law concept of limited liability lacks a sound basis in EU competition law and weakens the deterrence of anticompetitive behaviour. The authors stress the importance of fault when sanctioning companies for antitrust infringements. The authors propose a new approach to fining corporations for antitrust infringements, which would be based on fault and increase the importance of 'Best Practice Compliance' in finding the liability and determining the level of fine for companies. Melanie Ludescher is a candidate for the *5th Young Writer's Award*.

The next article comes from Felix Mezzanotte, who has also previously contributed to *World Competition* ('Direct Versus Indirect Proof of the Airtours Criterion in Impala', *World Competition* 31 (2008): 4). The author discusses the possibilities for fighting tacit collusion afforded under Article 102 of the Treaty on the Functioning of the European Union (TFEU). He demonstrates that in order to punish tacit collusion under Article 102, the Commission needs to distinguish tacit collusion from other conducts, such as unconscious parallelism and undetected overt collusion. The article concludes that the detection hurdle and high probability of error the Commission faces in such cases, make Article 102 an unsuitable tool to fight tacit collusion.

The article by Frederic Depoortere and Stephane Lelart deals with the standstill obligation under the EC Merger Regulation and the problems raised by its practical implementation. The authors argue that despite the Commission's tough approach towards violations of the standstill obligation demonstrated in its recent decision against Electrabel, the interpretation of this obligation in real-world cases is extremely complex. The authors provide an excellent legal analysis of the concepts of de facto control, partial implementation and interrelated transactions and propose original solutions that could increase the level of legal certainty in the interpretation and application of the standstill obligation.

In the next contribution Alla Pozdnakova discusses the problems of application of Article 82 EC (Article 102 TFEU) to exploitative pricing abuses. The author analyses the case law of the Commission and the European Courts and discusses the various factors which need to be taken into account when assessing the pricing policies of dominant undertakings. She also suggests that excessive pricing may not only take place under single firm dominance but also under conditions of collective dominance. The author concludes that the legal test to identify exploitative pricing abuses needs further clarification and the Commission should be more active in initiating the debate on this issue. Ms. Pozdnakova has been nominated for the *5th Young Writer's Award*.

The article by Chantal Lavoie takes us away from Europe and discusses the South African Corporate Leniency Policy. The author maintains that it has been largely successful and has contributed to dismantling major cartels over the last years. Ms Lavoie analyses the main provisions of the policy, including the recent amendments introduced in 2008. Finally, she discusses the main challenges to the Corporate Leniency Policy brought about by introduction of criminal sanctions for individuals guilty of cartelizing.

The last contribution by Mark Furse ('Competition Law Choice in China', *World Competition* 30 (2007): 2)), takes us to Vietnam. The author discusses the main features of the Vietnamese competition law and points out the likely difficulties in the application of its certain provisions, which are sometimes overly complex or unclear. The author concludes that the competition law is largely under-enforced and lacks public recognition, but expresses a hope that the situation will change in the future.

I wish you a pleasant read.

José Rivas
Editor
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