Editors Note

Dear Reader,

I am pleased to present the March 2012 issue of World Competition.

We begin this issue with an article from one of our most regular contributors, Hearing Officer Wouter Wils.[1] Wouter's article clarifies the concept of recidivism, analyses the treatment of recidivism as an aggravating circumstance in setting the amount of fines, the interplay between recidivism and leniency, and the difficulty of drawing conclusions as to the overall effectiveness of EU antitrust enforcement from the observed incidence of recidivism. The article concludes that, while recidivism does not appear to be on the rise, even if the level of enforcement was insufficient to deter recidivists, it is far from clear that the best solution would be to further increase the level of fines.

Our next article is by Nicoletta Tuominen, who presents a critical view of the use and abuse of defensive patenting strategies in the pharmaceutical industry. The article examines in detail the often complex relationship between the patent system and competition policy in this area, with a particular focus on so-called evergreening and the creation of patent 'thickets' or 'clusters'. The author contends that a general demonization of the pharmaceutical industry is not constructive, as

[1] Wouter P.J. Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 26 (2003): 131–148; *id.*, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', *World Competition* 26 (2003): 473–488**;** *id.*, 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 26 (2003): 567–588; *id.*, 'The Combination of the Investigative and Prosectorial Function and the Adjucative Function in EU Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 27 (2004): 201–224; *id.*, 'Is Criminalization of EU Competition Law the Answer?', *World Competition* 28 (2005): 117–159; *id.*, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-Law', *World Competition* 29 (2006): 3–24; *id.*, 'Optimal Antitrust Fines: Theory and Practice', *World Competition* 29 (2006): 183–208; *id.*, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003', *World Competition* 29 (2006): 345–366; *id.*, 'Leniency in Antitrust Enforcement: Theory and Practice', *World Competition* 30 (2007): 25–63; *id.*, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', *World Competition* 30 (2007): 197–229; *id.*, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', *World Competition* 31 (2008): 335–352; *id.*, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', *World Competition* 32 (2009): 3–26; *id.*, 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', *World Competition* 33 (2010): 5–29; *id.*, 'EU Antitrust Enforcement Powers and the Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', *World Competition* 34 (2011): 189–213; *id.*, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particuliar EU Antitrust Enforcement', *World Competition* 34 (2011): 353–382.

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it diminishes the confidence of this industry; since patents and competition law are vital for the well-being of consumers and society at large, a balance needs to be struck between the interests of all parties involved.

The contribution by Tjarda van der Vijver considers the 'objective justification' defence available to dominant companies accused of abuse of dominance under Article 102 Treaty on the Functioning of the European Union (TFEU). Where a dominant company succeeds if demonstrating an 'objective justification', Article 102 TFEU will not apply. Van der Vijver examines three types of objective justification, including (1) legitimate business behaviour, (2) public interest considerations, and (3) efficiency. He further analyses the factors considered by the European Court of Justice and the General Court in assessing a claim of objective justification, which include proportionality, necessity, the intent of the dominant firm, and the effect of the conduct in question. The article concludes that further clarity is required as to the objective justifications available to dominant undertakings and the conditions that must be met in order to invoke them.

Our fourth contribution is by Aaron Kahn, the winner of the GLCL Prize in Competition Law & Policy.[2] The article joins in the ongoing debate on how to reform the EU's system of antitrust sanctions, arguing for the introduction of UK-style director disqualification orders. Based on his analysis of corporate governance theory, Kahn concludes that individual sanctions are appropriate since directors often instigate, or could prevent, infringements. He further contends that for various political, cultural, and legal reasons, criminalization of competition law is not appropriate at this stage. Instead, he proposes a system of disqualification intended to combat the underlying causes of competition law. Finally, he suggests that a decentralized implementation model could alleviate many Member State's concerns over national procedural autonomy.

Our fifth contribution, by Alberto Heimler and Kirtikumar Mehta's, seeks to provide guidance on how deterrence could be achieved for specific categories of cartels and abuse of dominance violations. Heimler and Mehta conclude that the general principles of determining fines should be applied differently to cartel and abuse of dominance violations, taking into account the probability of detecting these violations. In both cases, they conclude that the interplay between fines, leniency, and private litigation should be taken into account. Having concluded that increased compliance and *ex ante* deterrence require greater predictability in the setting of fines, the paper proposed a simulation approach to provide

[2] The Global Competition Law Centre of the College of Europe awards a prize for the best thesis in competition law and policy.

competition authorities with ranges of percentages of fines that may become useful in practical applications.

Kai Huschelrath's article deals with the costs and benefits of antitrust enforcement. The article first considers why competition is worth protecting before analysing empirical evidence demonstrating that competition actually needs protection. Huschelrath then conducts a cost-benefit analysis of antitrust enforcement using two different approaches: first, an intervention-based approach and, second, a deterrence-based approach. Applying these approaches, Huschelrath conducts an empirical cost-benefit analysis of public antitrust enforcement for the United States and the Netherlands. Finally, Huschelrath concludes that if antitrust enforcement is linked to consumer welfare rather than total welfare, its benefits dwarf any measure of the costs.

Our final contribution, from Ching-yi Fung, focuses on Hong Kong, which is in the process of adopting a competition law. The article examines how the new bill will impact the government's current sector-specific approach to competition regulation. It goes on to analyse the new law in detail, raising some controversial questions regarding the bill's somewhat ambiguous objectives, the fragility of its substantive provisions, the deficiencies of its judicial enforcement model, the appropriateness of the bill's broad exceptions and exemptions, and the scope for jurisdictional conflicts. Putting these issues in perspective, Fung concludes that that the bill is unlikely to bring the much-anticipated progress towards a cross-sector competition law regime. This will only be possible once the government overcomes its current ambivalence to promoting economic efficiency.

I wish you a pleasant read.

José Rivas
Editor
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