Editor's Note December 2012

Dear Reader,
I am pleased to present the December 2012 issue of World Competition.

We are very happy to start this issue with a contribution from Marc van der Woude and Rein Wesseling on the lawfulness and acceptability of the enforcement of European cartel law. The article deals with the concern that has arisen over the past few years relating to the administrative enforcement system of European competition law which deals with bringing charges and metes out punishment. This system is said to conflict with fundamental legal principles. Whilst several rulings by the European Court of Human Rights have partially rejected this view, the authors are of the opinion that this concern is still valid as one should look at how the system acts in practice rather then at the 'external characteristics' of such a system. The authors are of the opinion that there is a tendency to apply abstract legal principles in a formalistic way and that such application can conflict with the requirements of Article 6 ECHR.

Our second article is by András Tóth and deals with the EU competition aspects of minority shareholdings. This contribution considers whether there is a gap under European competition law regarding the treatment of minority shareholdings. The article starts with the basic economic aspects of minority shareholdings, then continues with the merger control regimes under which the acquisition of minority shares fall within some jurisdictions and goes on to examine the treatment of minority shareholdings under EU competition law. The article concludes that only a limited number of transactions would raise competition concerns which could not be satisfactorily addressed under Articles 101 and 102 TFEU and that over regulation and excessive burdens placed on companies should be avoided.

Ralf Boscheck's contribution focuses on intellectual property rights and compulsory licensing in the case of pharmaceuticals in emerging markets. In 1994 the agreement of trade-related aspects of intellectual property rights (TRIPS) was included in WTO rules and committed member countries to honour patent rights and to apply common compulsory licensing standards when seeking market relief. The article explains the way Thailand has converted compulsory licensing into an effectively unconstrained method of pure-cost containment in the case of non-emergency, non-infectious diseases. According to the author, the use of such a

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model would require the developed world to shoulder a disproportionate share of the necessary R&D expenditure while simultaneously presenting it with an attractive option to shed that burden. The decision taken by India's Controller General of Patents, Designs and Trademarks on 9 March 2012 in the case of Nexavar, may present a first step into that direction.

Our fourth contribution is by Tobias Schäfers and Joost Houdijk and discusses a recent trend relating to market authorities. Whereas over the last two decades Member States have set up specialized authorities with rather limited competences and powers, EU Member States now seem to prefer authorities with broader scopes of competence or even combining existing authorities into super-authorities. The contribution discusses the example of the Netherlands which has chosen to set up a super authority, the new Authority for Consumers and markets (ACM) by 1 January 2013. The article places the ACM into the general European trend, and has a closer look at the ACM itself, by evaluating the strengths and weaknesses of the new authority. To conclude, the authors make some remarks on what EU Member States can learn from the Dutch example.

Our next contribution is by Mika Oinonen on the 'small market problem' and illustrates that from a theoretical-economic point of view, small market mergers are still subject to many open questions with no clear-cut answer. Mergers between small market companies and mergers between large market companies are treated unequally in EU-merger control. The article discusses the discrimination in the light of economic theory and explains the theoretical economic foundations lying behind the findings regarding the recently presented diagnostic system by the author in 2010.

Sayyeda Fatima's article on the leniency programme of the Competition Commission in Pakistan highlights noteworthy characteristics of the leniency programme of Pakistan. The article focuses on Pakistan's leniency policy but draws comparisons to the leniency programme of the European Union where appropriate. Furthermore the article assesses the transparency and predictability of the leniency programme and the heavy fines imposed under the 2010 Competition Act.

Our fifth contribution by Saurabh Bindal deals with the Indian Patent Act of 1970 and the Indian Competition Act of 2002. Both provide measures to curb anti-competitive practices. The article discusses a facet of the clash between the Patent Act and Competition Law in the search for the appropriate forum having jurisdiction to address issues pertaining to both domains. The author concludes by providing possible solutions to this conflict. This is done by the comparison of the

two statutes and in particular, by interpreting three different provisions of the Competition Act of 2002.

I hope you enjoy these diverse and insightful articles,

José Rivas
Editor
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