Editor's Note June 2013

Dear Reader,

As Editor of World Competition, I am very pleased to begin the June 2013 issue by announcing the winner of the Young Writers Award 2012: Ramin Silvan Gohari.

His article entitled *Margin Squeeze in the Telecommunications Sector: A More Economics-based Approach* was published in the June 2012 issue. It was felt that the article was very comprehensive and brought clarity to what is a complex area. The author examines the different approaches used in the European Union, where the Court of Justice of the European Union has endorsed an economics-based approach, and the United States, which has traditionally seen margin squeeze as exclusively the domain of regulation.

On behalf of World Competition, I would like to congratulate the author.

In our first contribution, Florence Thépot discusses market power in two-sided markets, namely online search and social networking industries, by use of two prominent examples, that of *Google* and *Facebook*. The author outlines the particular characteristics of two-sided markets, such as the existence of indirect network externalities whereby users on one side of the platform tend to realise more value when there are more users on the other side. This has very real practical implications in terms of both market definition and market power. The market has to be defined in relation to the other side of the market, and this article outlines the difficulties this has caused in the past for competition authorities. Interestingly, this article also discusses a number of erroneous conclusions that are used in one-sided markets but are not appropriate to be used in two-sided markets. The article goes on to provide a framework for assessing market power in the markets for online search and social networking, which encompasses an assessment of the relevant European Commission decisions.

Next, Liza Lovdahl Gormsen poses the question *Are anti-competitive effects necessary for an analysis under Article 102 TFEU?* The author deals with exclusionary conduct and begins by outlining the two distinct ways that the effects on economic evaluation can be assessed: the orthodox approach, where there is a presumption of harmful effects, and the analytical approach, where actual effects at the point of application are found, through a case-by-case analysis. The Guidance Paper on the Enforcement Priorities in Applying Article 82 TEC does not completely adopt either approach but rather an 'equally efficient competitor' test.

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The first section of the article discusses the different application of Articles 101 and 102. Next, the author explains the orthodox approach to Article 102, its application in the case law and the criticism of this approach. While the 'equally efficient competitor' test could be used as a more precise tool to consider whether the effective structure of competition is capable of being harmed, the author remarks that this test is absent in most case law prior to the Guidance Paper. The third section describes the approach adopted by the Commission in its Guidance Paper and examines whether the courts support this approach. While the courts support the principle of the 'equally efficient competitor' test, the question remains as to how the test is turned into operational rules and how to manage the often multi-dimensional trade-offs involved in designing optimal rules.

Our third article, by Maurits ter Haar, deals with issues and developments in the European Commission's approach to the obstruction of investigation in EU competition law. While in the past, the Commission fined such procedural infringements by qualifying them as an aggravating circumstance in the decision in the substantive decision, in recent years the Commission has started fining them as autonomous infringements in standalone decisions, under Article 23(1) of Regulation 1/2003. The author first outlines the four categories of obstructive behaviour which have been found by the Commission during the lifetime of the 1998 and 2006 Fining Guidelines. The Commission imposed procedural fines in several instances under the former Regulation 17 but only three decisions have been taken under the currently in force Regulation 1/2003. These three decisions are discussed, with particular attention being paid to the Commission's reasoning of the factors taken into account in the calculation of the fine. While the move from circumstantial to standalone fines is commendable in itself, the author argues that the Commission has too much discretionary leeway. This raises issues of arbitrariness, proportionality and legal certainty, which could be, at the very least, reduced by the adoption of guidelines for fines imposed under Regulation 1/2003.

Bruno Nascimbene's article examines the interaction between leniency programmes and damages actions in antitrust law. Due to the lack of harmonization in the area, the author assesses if so, and to what extent, the EU is effectively developing a coherent approach for the purposes of private antitrust enforcement. While the Commission working document of April 2011 envisages the adoption of a directive in order to compensate for the differences present at the national level in terms of standing and redress, this was subsequently rejected by the Commission, at least for the time being. The author goes through numerous cases dealing with redress for damages and any possible limitations to the Commission's leniency programme thereunder. Focus is put on the importance of striking a balance between the effectiveness of competition law and rights of

defence. The impact on the national courts of the solutions proposed by EU courts is also discussed.

The article by Mark Furse looks at the developments in the Chinese merger control regime, with particular emphasis on enforcement, since its entry into force until January 2013. The merger regime framework is outlined, including the timeframe from notification until the final decision, along with many other useful procedural requirements for practitioners such as the requirement to submit public and confidential versions at the stage of notification. While their decisions have tended to be short, evidence suggests a strong willingness on the part of Antimonopoly Bureau of the Chinese Ministry of Commerce (MOFCOM) to impose behavioural remedies. The author discusses numerous decisions and flags various matters of concern such as evidence of the use of remedies to protect Chinese competitors rather that the process of competition; the lack of transparency in the decisions; and the extensive jurisdiction of MOFCOM following the imposition of remedies.

Our final article is by Félix Mezzanotte and compares the presumptions of market dominance under Article 19 of China's Antimonopoly Law with the law of collective dominance in Article 102 TFEU. The author outlines the concept of 'collective entity' in EU competition law and compares it with the provisions in the Chinese Laws, which only came into effect on 1 August 2008. The article shows that the two rules in China and Europe function very differently, with a major distinction coming from the requirement of collective entity in Article 102 TFEU. In the context of Article 19(2) and 19(3) of the Chinese Laws, an individual firm holding as little as 10 % market share can be presumed to occupy a position of market dominance, where proof showing that this firm concertedly acted with other firms being irrelevant. There have, however, been a number of criticisms of the China's Antimonopoly Law for lacking economic rationale and for having a pernicious rather than a beneficial effect on competition. Due to the recent nature of the law, only time will tell how the law is interpreted and used.

I hope you enjoy these diverse and insightful articles.

José Rivas,
Editor
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