Editor's Note September 2013

Dear Reader,

In our first contribution for the September 2013 issue, the authors Ronny Gjendemsjø, Erling J. Hjelmeng, Lars Sørgard examine the application of Article 102 TFEU to abuse of collective dominance. Even though it is settled case law that Article 102 can be applied to an abuse of a collective dominant position, it has mainly been applied in the context of single firm dominance. Possible reasons behind this are mentioned and it is submitted that competition authorities in markets involving collective dominance should be more concerned with conduct liable to strengthen the potential for coordinated effects in the form of tacit collusion. The authors first present the traditional approach to collective dominance in Article 102 TFEU as a concept of coordinated effects. This is followed by the identification of conduct which may raise competition issues under the effects-based economic approach, namely the *meet-competition clause*; the *most-favoured-customer clause*; and acquisitions of *minority shareholdings*. The article goes on to outline a new approach in this area and explains how discussing the concept of abuse within the framework of abuse of unilateral market power, in situations involved in collective dominance, results in an excessively narrow conception of 'abuse'. The question is rather how a collective position may be 'strengthened' by means other than competition on the merits and how the line between lawful and unlawful conduct should be drawn in this regard.

In his article examining the New Zealand High Court air cargo cartel case, Gunnar Niels goes back to the first principles of market definition. At a time when competition authorities increasingly skip market definition and assess competitive effects directly, this case was very interesting in that it turned almost entirely on the delineation of the relevant market. In a prosecutorial system where the Commerce Commission must bring cases before the court and especially as a two-stage trial process was agreed, the importance of market definition was increased further as the jurisdiction of the Commission depended on it. As the case related to transport services – an odd feature of which is that by definition, the product itself has a geographic element to it – it was important to be clear about the distinction between the product and geographic dimensions, and how they related to each other. The author first takes an in-depth look into both the product dimension of the air cargo market and the geographic dimensions. 'Derived

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demand' and the consequences for the hypothetical monopolist test are discussed as well as possible refinements to existing guidelines in this respect. In this case, the Court's reasoning on the economic principles was strongly influenced by the expert economists. Whether and how courts can interpret complex economic evidence is an important theme in jurisdictions worldwide and this case is an example of how economic evidence can be dealt with effectively.

Our third article, by Natalia Fiedziuk, deals with the prospect of the decentralization of State aid control, a prospect which has traditionally been viewed with scepticism mostly due to the high potential of political influence at the national level. As the Commission's backlog of State aid cases has progressively increased, some legal scholars discerned the need for a more decentralized State aid enforcement system. Indeed, in the area of services of general economic interest (SGEI), there are signs that the decentralization process is already under way. In looking at this prospect, the author puts Article 106(2) TFEU under the magnifying glass and examines the concept of direct effect and the possibility that national courts might apply Article 106(2). In the aftermath of the *Altmark* judgment, the so-called SGEI package was introduced allowing for the block exemption in the area of SGEI which created a safe harbour for aid to undertakings below a particular amount as well as for particular economic sectors. This exempted a number of State aid to SGEI from the notification requirement under Article 106(2). Here the author provides extensive insights into the substantive discretion the Commission has and also the roles of both the national courts and the national competition authorities in the application of Article 106(2).

The article by Henrique Pacini, Maria Dolores Montoya Diaz, Valéria Guimarães and Iris Benohr examines the relationships between indicators of competition and environmental performances. Understanding the linkages between these is important for two reasons. Actions which favour specific green sectors can be seen as going against the premises of competition-promotion. On the other hand, both environmental policies (seeking the internalization of environmental damage in economic decisions) and competition policies (attempting to maximize consumer welfare and safeguard innovation) share the same objective of augmenting economic efficiency. The article is based on country-level data sourced from the International Energy Agency and the IMD's world competitiveness survey and looks to find any correlations between environmental and competitiveness indicators. While aggregated data shows little evidence of direct relationships between environmental and competition policies, the results call for deeper reflections on how to strengthen bridges between the two themes.

Our final article is by Cosmo Graham and it examines the application of competition law and policy in the UK retail banking sector from 2000 until the present day. This article focuses on competition law's approach to the question of market structure, rather than issues relating to breach of the prohibitions against anti-competitive agreements and abuse of dominance. In doing so, the author first briefly discusses the new form of competition law introduced in to the UK from around 2000. While this new system was introduced, the big question which was never answered was 'what role is there for a pro-active competition policy?' The article examines the historical background of the banking sector, starting in the 1960s. Next it looks at subsequent competition inquiries into the retail banking markets and examines the consumer focused remedies that were pursued and their effectiveness. The article then returns to more recent developments in relation to market structure arising out of the financial crisis and critically examines the recent merger activity and provides valuable insights into conflicting the views of the UK competition authorities and the government when faced with further consolidation in the retail banking market.

I hope you enjoy reading these diverse and insightful articles.

José Rivas,
Editor
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