Editor's Note December 2013

Dear Reader,

In our first article for the December 2013 issue, Viktoria Robertson examines the European Commission's 2011 Horizontal Guidelines, which contain a section exclusively dedicated to the application of competition law to 'pure' information exchange, and applies them to the four leading EU cases on information sharing: the *John Deere*, *Asnef-Equifax*, *T-Mobile Netherlands* and *Dole* cases. The author's aim is to assess whether – and if so, to what extent – the Guidelines introduce a new approach or whether in fact they rather codify the previous case law. In some cases, the author identifies that the analysis proposed by the Guidelines is very close to the Court's analysis. While in other cases the author identifies areas where the analysis under the Guidelines diverges significantly from the Court's reasoning, the end result is ultimately very similar. Having completed this counterfactual analysis, the author then identifies a number of issues and weaknesses in the case law of the Court of Justice, for example, the ambiguous distinction between pure and merely ancillary information exchanges and the special market characteristics present in many of the leading cases. While the Guidelines have not resolved all of these issues, they have certainly been a step in the right direction.

In his article about restraints on selective distribution agreements, Giorgio Monti reflects on how far law enforcement has gone in reshaping the rules on vertical restraints and specifically, the way in which selective distribution agreements are scrutinized both at national and European level. While the application of competition law to selective distribution agreements has become somewhat less restrictive since the Block Exemption for Vertical Restraints, according to the author, the *Pierre Fabre* saga reveals traces of the remains of the old regulatory approach which rests on poorly worked out theories of hard that allow the close monitoring of selective distribution contracts by competition authorities. The author goes on to provide answers to the question why those enforcing EU competition law remain eager to control the use of distribution agreements and more broadly speaking, discusses the following policy question: Is the role of antitrust law to remove anti-competitive effects which have been created by parties or to make markets more competitive? There is a fine line

'Editor's Note'. *World Competition* 36, no. 4 (2013): 455–458.
© 2013 Kluwer Law International BV, The Netherlands

between both of these roles and this provokes a very interesting discussion of policy by the author.

Our third article, by Pietro Merlino and Gianluca Faella, discusses strategic underinvestment as an abuse of dominance under EU competition rules. Under the controversial Essential Facility Doctrine (EFD), a dominant firm that holds an input indispensable to operate in a downstream market may be compelled to grant access to this input to rivals, unless its refusal is objectively justified. In *Bronner,* the Court of Justice set forth strict conditions for the application of Article 102 TFEU to refusals to deal but these, according to the authors, have been interpreted broadly and flexibly by the General Court in the *Microsoft* case, by the Commission in its Guidance on the Commission's enforcement priorities in applying Article 82, and some national competition authorities. This is a markedly different approach than in the US where, in the *Trinko* case, the Supreme Court held that 'no court should impose a duty to deal that it cannot explain or adequately and reasonably supervise'. The last frontier of the EFD under EU competition law is the use of antitrust rules to impose on dominant firms a duty to invest in infrastructure development, thereby facilitating competitors' entry and growth. The authors look at a number of important cases, both at EU and national level, which have questioned the dominant firms' freedom to decide whether, and to what extent and under what conditions to invest in infrastructure development and find that the application of dominance rules to strategic underinvestment seems to be at the very least questionable.

The article by Csonger Istán Nagy examines the distinction between anti-competitive object and effect after *Allianz* and asks the question, is this the end of coherence in competition analysis? The author first analyses the rationale and traditional notion of anti-competitive object and provides an outlook of the structure of antitrust analysis in US law, compared with EU competition law. The article then gives an overview and assessment of the *Allianz* ruling as to the reach of restriction by object agreements. The idea that a comprehensive assessment has to be completed to ascertain whether the agreement is classified as anti-competitive by object and that this elusive concept has to be applied on case-by-case basis is, according to the author, both conceptually flawed and dangerous.

In their article on the European Commission's roles as investigator, prosecutor, judge, and now plantiff, Nils Hauger and Christoph Palzer discuss the recent action for damages brought by the Commission following the *Elevator cartel* decision. While the Commission's success could provide the necessary boost to the private enforcement of competition law, this situation also raises questions of conformity with the defendants' right to a fair trial. Is the Commission entitled to brand an action as incompatible with European competition law and to reap the

rewards of this decision before a civil court? This question raises a number of other questions such as is the Commission competent to represent the EU before a national court in a civil action for damages? Even if the answer to the former question is yes, what about the principle of equality of arms whereby each party must be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent? These proceedings before the District Court in Brussels will constitute an acid test for the Commission's endeavours to promote private enforcement of competition, the importance of the results of which cannot be overestimated.

Following on from the previous article about private enforcement, our final article by Kai Hüschelrath and Sebastian Peyer investigates the relationship between public and private enforcers and introduces a more differentiated approach. While private enforcement is often treated as something new in Europe, it has been the driving force of US antitrust enforcement since the middle of the twentieth century. In a situation – as in Europe – in which private enforcement activities are added to an existing public enforcement system, an assessment of the incremental costs and benefits of such a system become crucial for the design of an optimal competition law enforcement system. In this article, the authors refine some of the determinants of an optimal enforcement mix such as the possession of information or the quality and capacity of the antitrust authority. In addition, the authors also match the determinants of an optimal enforcement mix to different types of anti-competitive conduct in order to show that the costs and benefits for public and private enforcement actions may differ depending on the type of infringement.

I hope you enjoy reading this novel and insightful articles.

José Rivas
Editor
December 2013