Editor's Note June 2014

Dear Reader,

I am very pleased to begin the June 2014 issue by announcing the winner of the Young Writers Award 2013: Florence Thépot.

Her article entitled *Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets* was published in the June 2013 issue. We believe that this article contributes valuably to the antitrust analysis of two-sided markets in the form of online search and social networking.

On behalf of World Competition, I would like to congratulate the author and commend all other candidates for the high quality of their articles.

In our first contribution of this issue, Andreas Heinemann and Aleksandra Gebicka explore the potential competition concerns in the field of social media. Such an exercise is performed through the example of Facebook, the most prominent of the existing platforms. In this context, it is argued that the existing regulatory framework should be adapted in order to be applicable to *free* online services. Indeed, the authors advocate for a refinement of the SSNIP test when applied to this sector, given the two-sided nature of the platforms and the fact that quality rather than price is a decisive factor in such markets. Moreover, they emphasize that the existing network effects and barriers to entry may facilitate the creation or strengthening of a dominant position. Finally, the authors suggest that the current categories of abuse under Article 102 TFEU be adjusted. For instance, potential exploitative conduct might be found in the unilateral imposition of interface changes upon users, the use of personal data and the onerous deletion of profiles. Similarly, the tying of different products and the restrictions of data portability might constitute exclusionary abusive behaviour.

Next, Benjamin René Kern seeks to propel a constructive debate as to how competition authorities should account for innovation competition in merger review. Indeed, it is argued that by failing to correctly consider innovation competition, agencies risk undertaking an unbalanced approach, in particular in the case of mergers between firms which are not active in the same product markets. Section 2 starts by outlining, in light of their application in the US, the shortcomings of the traditional 'potential competition' and 'future market'

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approaches, which do not fully capture the potential anticompetitive effects of a given merger. According to the author, when assessing whether a merger has an impact on the firms' incentives and abilities to innovate, it is necessary to identify the relevant innovation competitors independently from the product market they operate in. Furthermore, their observable R&D programmes and specialized assets should be considered, as well as the trade-off between the efficiency gains derived from integrated R&D efforts and the benefits of independent research. In this context, the author calls for the revision of the existing approaches towards increased legal certainty; a revision which may build upon the so-called Innovation Market Analysis (IMA), the sole framework specifically designed for the assessment of potential anticompetitive effects on innovation.

Our third article, by Miguel Ángel Bolsa Ferruz and Phedon Nicolaides, provides a timely reflection on the economic rationale of rescue and restructuring (R&R) State aid in the EU. The authors start by emphasizing the highly distortive nature of restructuring aid, where rather than remedy a market failure, public intervention may distort normal market conditions by artificially maintaining inefficient firms in the market and altering firms' incentives to invest. Section 3 provides an economic framework for the assessment of the necessity and optimal amount of public intervention in this area. Against that standard, section 4 undertakes an exhaustive review of the European Commission's administrative practice in the period 2000–2013. In light of that, it is argued that the alleged policy objectives of restructuring aid, namely the reduction of unemployment and output losses resulting from firm failure, are not consistently pursued. The authors advocate for a stricter control by the European Commission in this area. In particular, it is suggested that the future R&R State aid guidelines should provide for a strengthened economic analysis of the necessity and scope of the individual measures.

In their article entitled *Investigation of Collusion in Procurement of One Russian Large Buyer,* Andrei Shastitko, Svetlana Golovanova and Svetlana Avdasheva shed light on the standard of proof applied by the Russian Federal Antimonopoly Service (FAS) as to the establishment of anticompetitive agreements. In particular, the authors challenge the interpretation embraced by the Russian agency in light of its investigations regarding the coordination of delivery plans by four major suppliers of large diameter pipes (LDPs). It is argued that the anticompetitive nature of indicative planning and the consequent information exchanges among the parties should have been assessed against the particular features of the market in which the agreements were concluded (i.e., permanent capacity constraints, support of a large buyer with considerable countervailing power, etc.). In particular, in large-scale, complex and risky investment projects cooperation among suppliers can, provided that it is limited to the implementation of the

project, derive significant efficiency gains. The article concludes that the introduction of a clear-cut standard of proof is particularly crucial in jurisdictions with limited enforcement experience.

Our final article by Ruchit Patel looks at the consequences of late filings in Indian merger control. The topic is looked at through the analysis of three recent fining decisions issued by the Competition Commission of India (CCI). Patel highlights that in those cases fines were imposed despite the fact that the relevant transactions lacked foreseeable effects in India and ultimately failed to be implemented. It is argued that such a stringent approach conflicts with the effects doctrine that the CCI is said to embrace and may equally breach basic principles of public international law. According to the author, these cases should be tackled through the introduction of jurisdictional guidelines. In the meantime, and given that delayed filings may lead to fines of up to 1% of the total turnover or assets of the relevant undertakings, this article is undoubtedly worth taking into account by companies doing business in India.

I hope you enjoy these diverse and insightful articles.

José Rivas,
Editor
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