

Editor's Note September 2014

Dear Reader,

I would like to welcome you to the September 2014 issue, which covers a broad range of interesting topics through some high quality contributions.

In our first contribution of this issue, Philip Bentley and David Henry explore the complex issue of document disclosure in the course of antitrust damages actions. The authors emphasize that such actions are characterized by acute information asymmetries, as the evidence necessary to substantiate a damages claim usually lies in the hands of another party. Moreover, claimants face different procedural rules according to the Member State in which they find themselves. In this setting, the authors praise the attempts, crystallized in the draft Damages Directive, to establish a level playing field for claiming compensation against competition law breaches across the EU. Indeed, the Directive sets out a general obligation for national courts to disclose to the claimant the evidence held by the parties or the competition authority, albeit with some important exceptions. This adds to the existing avenues for obtaining evidence from the competition authorities, which the authors evaluate and compare. In the authors' view, however, it remains to be seen whether the Directive will have a genuine facilitating effect on antitrust damages actions in the EU.

Our second article, by David Riley, seeks to shed light on the concept of single and continuous infringement, increasingly applied by the European Commission in cartel investigations. In view of their analysis of a number of Commission and Court decisions, the authors call for increased transparency and consistency in the application of the concept by the Commission. In turn, while the General Court has been willing to intervene where the Commission misapplied the concept, uncertainty remains as to the standard of proof and the adequate redress. An analogous analysis is performed as regards the concept of single repeat infringement. Moreover, the authors affirm that legal advisers should bear in mind the implications of an eventual combination of the infringements for leniency or settlement procedures. Finally, the likely future developments in the application of the concept are identified.

In their article entitled *A Practitioner's Guide to Price Concentration Analysis*, David Wirth and Temi Akinrinade explain the functioning and applications of Price Concentration Analysis (PCA) in a way accessible to non-economists. To that end, section 2 starts by providing an overview of the rationale and mechanics of this quantitative tool, as well as of the data required. Section 3 analyses recent UK and EU cases in which PCA analysis was heavily relied upon. The authors highlight the numerous applications of PCA, which are not limited to merger control cases but extend to some market definition and abuse of dominance aspects. Finally, section 4 identifies the main methodological issues raised by this type of empirical analysis. Given the increased use of PCA by UK and EU competition authorities, this article is undoubtedly worth taking into account by competition law practitioners.

Next, Carlos Górriz provides a timely reflection on the creation of the Spanish National Commission on Markets and Competition (NCCM) at the end of last year. The new agency, which results from the merger of the pre-existing competition authority and several sectoral regulators, has been the target of contrasting opinions. In the author's view, the rationale behind its creation does not wholly justify the recourse to such a ground-breaking change in the agency's institutional structure. In his view, the process that led to the creation of the NCCM, which constitutes the fourth instance of institutional reorganization of the agency in the last fifty years, lacked the desirable consensus and neutrality. Moreover, it is argued that some of the features of its current legal status could jeopardize the agency's independence and effectiveness. As a result, the author envisages a decline in the level and efficiency of the agency's activity.

Our final article by Tiancheng Jiang looks at the Chinese approach to market definition and abuse of dominance in dynamically competitive markets. The analysis is performed through the lens of one of the most significant antitrust cases since the enactment of the Chinese *Anti-Monopoly Law* in 2008. The author argues that the features of newly developed industries such as the Instant Messaging (IM) market require the consideration of different parameters in order to define the market and assess market power. In particular, the existence of economies of scale and dynamic competition for the market are likely to be the key indicators of a dominant position. The final section of this article undertakes a comparative analysis of the Chinese approach and that of the European Commission and the European Court of Justice.

I wish you a pleasant read.

José Rivas,
Editor
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