

## Editor's Note December 2014

Dear Reader,

It is a great pleasure to introduce the December 2014 issue which, as ever, is full of high-quality contributions.

In our first contribution of this issue, one of our most regular contributors, Wouter Wills – currently Hearing Officer at the European Commission – discusses the judgment of the General Court in *Intel* (Judgment of 12 June 2014 in Case T-286/09 *Intel v. European Commission*). Wouter's article is incisive, provocative and above all very clear. He does not mince his words and fully supports the ruling of the General Court as solidly based on existing case law and sound economic theory. I just hope that the confirmation of the law by the General Court through its judicial review encourages the Commission to enforce the law with self-confidence. In the most provocative part of Wouter's article *Cui Bono?*, he "raises the question why the so-called "more economic approach" enjoys so much support amongst practitioners and academics. He toys with the answer that such an approach serves the powerful special interests of dominant companies and the economic profession. I found of particular personal interest the reference by Ginsburg and Fraser that during Ronald Coase's long tenure as editor of *The Journal of Law and Economics* (1964–82) he would not publish articles that relied upon mathematical notation (except, perhaps, in an appendix) on the ground that an author who could not express himself in English probably did not know what he was talking about. Intuitively, I have been doing the same as editor of *World Competition*.

In our second article of this issue, Hans Gilliams seeks to propel a constructive debate as to how should the (dis)proportionality of competition fines be defined and assessed. Although the author recognizes the value of deterrence as a general goal of competition enforcement, the article calls for a more rigorous application of the proportionality principle in this area. Indeed, the author notes that, unlike in other areas of Union law, the case law of the European Courts does not provide sufficient guidance for the full application of Article 49(3) of the Charter. Against this setting, the article analyses the implications of the classic proportionality test for the Commission's fining policy and identifies certain features of the Fining Guidelines which would seem to fail such test. In sum, this article undoubtedly adds new insights to the existing literature on proportionality of fines.

In our third article, Colm O'Grady provides an interesting reflection on the role to be played by evidence of exclusionary intent in the enforcement of Article 102 of the Treaty on the Functioning of the European Union (TFEU). The decisional practice of the Commission and the European Courts explicitly recognize the undertaking's (lack of) exclusionary intent as a relevant factor for the enforcement of certain abuses, such as predatory pricing. In the author's view, the use of intent evidence is desirable, as it can help to distinguish legitimate competition from exclusionary conduct, thus operating as a check against both under- and over-enforcement. While acknowledging that intent evidence is not enough in itself for the establishment of an abuse, the author convincingly addresses the main criticisms against the use of intent evidence, which in his view is not inconsistent with the current more effects-based approach.

Next, Catalin S. Rusu analyses whether a regulatory gap exists in the current EU system of merger control as regards non-controlling minority shareholdings. The author acknowledges that, as demonstrated in the *Ryanair/Aer Lingus* case, potentially harmful transactions may escape competition enforcement, most notably where the minority shareholding does not amount to the acquisition of control. In the author's view, this can be partly alleviated by making use of the existing mechanisms, including domestic corporate laws. Nonetheless, the uncertainty created by the remaining enforcement gaps calls for regulatory intervention. In particular, the author suggests that the definition of control currently employed by the EU Merger Regulation (EUMR) be amended to cover problematic non-controlling stakes, and that a pre-notification system be introduced. Whatever the avenue for reform, it should be accompanied by comprehensive guidelines.

Our fifth contribution, by Shilpi Bhattacharya and Roger Van den Bergh, explores the potential contribution of management studies and behavioural theories of the firm to competition policy and enforcement. The authors maintain that the rational choice model traditionally embraced in competition policy does not provide an entirely accurate picture of decision-making within firms. They set forth that firms are not purely rational profit-maximizing actors, but rather *boundedly* rational entities subject to cognitive and organizational limitations. In this context, management studies may help to better understand firm behaviour and could therefore inform the normative debate in competition law.

Our two last contributions take us to Hong Kong. In the first of the articles, Kelvin H. Kwok provides us with an overview of the recently enacted Competition Ordinance, which represents the first cross-sector competition legislation in Hong Kong. The article starts by introducing the reader to the main substantive and procedural provisions of this piece of legislation, most of which resemble their occidental counterparts. The article further identifies the features

which deviate from global trends in the competition community, as well as the reasons behind such deviations. Although the author openly welcomes the adoption of the Ordinance, he notes that some of its loopholes may lead to detrimental under-enforcement scenarios. The author puts forward interesting proposals for overcoming them.

The Hong Kong Competition Ordinance is likewise central to our last article, written by Thomas Cheng and Jolene Lin. In it, the authors advocate for the use of competition litigation under the Ordinance as a means of prompting the widely sought liberalization of Hong Kong's electricity sector. In particular, it is argued that interconnection between the two sole electricity operators active in the region could be achieved by bringing a refusal to deal or an essential facility claim against them. Although the authors view liberalization as a desirable policy objective, they acknowledge that the opening of the market to competition may exacerbate the region's severe air pollution problem. This calls for a proactive enforcement of environmental laws in the wake of liberalization.

I hope you enjoy these diverse and insightful articles.

*José Rivas*  
Editor  
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