Editorial

Dear Reader,

I am delighted to present a collection of particularly unique and well-crafted articles in this spring issue of *World Competition*.

Before kick-starting my introduction to the articles on offer, I wish to convey my personal thanks and gratitude to Professor Valentine Korah, our Book Reviewer Editor, who after many years' service, will be leaving the Journal. Valentine joined *World Competition* in December 1999, and has been a most able, understanding and knowledgeable colleague throughout her tenure. I would also like to take this opportunity to welcome Professor Ioannis Lianos and Dr Despoina Mantzari to *World Competition* who will be taking over as the new Book Review Editors.

Our first article is an intriguing contribution, written by John Temple Lang, which provides a comparison between the *Microsoft* and *Google* cases enabling the reader to grasp the legalistic arguments which have been advanced during the course of the Google investigation. The author offers a critical commentary on the failure of the European Commission to effectively define 'exclusionary abuse' under the Treaty and the Guidelines. This has far reaching implications in the ongoing Google investigation, where the 'exclusionary abuse' in which Google is purported to have engaged is the subject of much contention. It will be most interesting to see if this article stimulates fresh academic debate.

Our second contribution is a study into the antitrust class action written by Spencer Weber Waller and Olivia Popal. The article examines the curtailing of the antitrust class action in the US. The tightening of the requirements under Rule 23 of the Federal Rules of Civil Procedure by the US Supreme Court and the increased emphasis on redress of antitrust class action claims through arbitration have diminished the role of the class action in antitrust cases. In contrast, outside of the US, countries are placing increasing importance on class actions as a means of adequately compensating victims of collusion. Whilst the antitrust class action remains a rather underdeveloped private enforcement tool in EU Member States, things are slowly changing. In 2013, for example, the European Commission put forward a proposal for collective redress reform, which aims to establish a framework for collective redress in Member States. The article briefly covers the

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function of and the concerns arising from collective redress mechanisms in a number of national jurisdictions (including the UK, which has arguably one of the most advanced antitrust class action legislation of all EU Member States). The authors then discuss the impact of EU Directives on arbitration clauses in consumer contracts and, in the final section, examine the role of the opt-out and special purpose vehicles in antitrust class actions. All in all, a very comprehensive and fascinating article covering an evolving area of competition law.

In our third contribution, Massimiliano Kadar, Thomas Buettner and Andrea Cilea, deliver a punchy, well-written article which delves into the question of when spare capacity of non-merging firms is sufficient to offset anti-competitive effects resulting from a merger. As the authors explain, in the past the European Commission has focused on the *ability* of the non-merging companies to expand output (through the availability of spare capacity) and not the *incentive* of such companies to do so. However, in two recent decisions the European Commission has taken into account *both* the ability *and* incentive of non-merging companies in homogenous goods industries to expand output, when considering whether a merger will be detrimental to competition. The authors further explain that this approach is supported by the Horizontal Merger Guidelines and that it represents, perhaps, a change in the European Commission's approach to merger analysis within homogenous goods industries in the future.

The pursuit of efficient regulatory standards in patent litigation is the topic of our next article by Ralf Boscheck. The author provides an insight into the current patent trends and regulatory concerns, and then examines the lack of consensus in recent academic literature with regard to the role of patent assertion entities (PAEs) and their impact on innovation and competition. The divergence of economic analysis and the difficulty in adapting the role of PAEs to existing competition laws explains perhaps why the US judicial, federal and state reforms have turned their attention towards attacking the drivers of the PAE business model. This thought-provoking article concludes by offering some considerations as regards the European patent assertion context.

Our next article is a particularly original analysis of the state of play of the European Commission's merger control practice in the pharmaceutical sector. Floris ten Have, Jan Truijens Martinez and Evangelia Demertzi offer a fascinating glimpse into the justifications raised by the merger parties and the factors taken into consideration, by the European Commission, during the merger control procedure. The first section of the article focuses on the market definition analysis. Particular emphasis is placed on the European Commission's preference to define single molecule based markets, as opposed to multi-molecule markets, and most useful insights can be gleaned by the author's own comments with regard to how European Commission behaves in practice. In the second section, the authors

explore the impact EU Member State national regulation has on the European Commission's assessment. The concept of 'big picture' analysis, that is to say a focus on portfolio competition, is also discussed, and the authors examine the European Commission's considerations with regard to market entry/exit and the role of over-the-counter markets. In the third section, the European Commission's practice with regard to 'pipeline products' is considered and, the forth section, covers the importance of active pharmaceutical ingredients, contract manufacturing and the outlicensing of pharmaceutical products. Lastly, the remedies imposed by the Commission are examined, with some interesting analysis of past Commission decisions. This particularly original piece provides some useful practical insights into the European Commission merger control practice in the Pharmaceutical sector.

Our final article, written by Nicolas Petit, covers the topic of tacit collusion in an oligopoly situation. Specifically, the article examines whether there should be a theory of liability with regard to the abuse of collective dominance, through re-pricing by collectively dominant companies aimed at offsetting the pro-competitive effects of disruption. The article offers an explanation into the effects of disruption on oligopolistic markets and the re-pricing of products which may follow any such disruption. Following on from this, the author investigates the advantages and disadvantages of using abuse of collective dominance as an *ex ante* enforcement tool against re-pricing strategies, before offering a brief overview of decisions and judgments which raise the question of abuse of collective dominance in the EU.

I hope you enjoy these diverse and insightful articles.

José Rivas
Editor
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