

Editorial

Dear Reader,

I am pleased to begin this summer issue by announcing the winner of the Young Writer's Award 2015: Inge Graef. On behalf of *World Competition*, I would like to extend my congratulations to the author.

Inge's article, entitled: '*Market Definition and Market Power in Data: The Case of Online Platforms*', provides an illuminating insight into a timely topic: namely, the interaction between big data and competition. The article, featured in the December issue of volume 38, begins with an in-depth analysis of how companies collect and use data before examining the extent to which data may give rise to a competitive advantage. Some online platforms use their datasets as an additional revenue stream and sell data to third parties as a commodity. For online platforms that do not trade data – but instead use data as a means of providing relevant services to users and advertisers – data is an intermediary product. Companies, such as Google and Amazon, use this data to refine their algorithms which, in turn, enables them to provide more relevant search results to consumers and more tailored services to advertisers. Thus, data can reinforce the position of an incumbent and prevent new entrants into the online platform market. The article concludes by exploring the possibility of defining a potential market for data through looking at the substitutability of different data types and their functionalities.

I also wish to congratulate the author of our first contribution, Alexander K. Pascall, whose article '*Tail Wagging the Dog: The Manipulation of Benchmark Rates – a Competitive Bone of Contention*' has been awarded the GCLC prize 2015 for the best thesis by a student of the College of Europe. A worthy winner, this article covers a complex and under-researched area and enables the reader to understand the salient issues behind the Libor benchmark manipulation scandal in the EU. The author argues that EU competition rules, in their current guise, were neither well adapted nor appropriate for dealing with the Libor rate manipulation scandal. With the evolution of an ever more sophisticated financial marketplace, it is suggested that manipulation of financial benchmarks are better controlled by financial regulatory authorities and not by competition rules. The author concludes that the stretching of existing competition rules to fit future cases of

benchmark/rate manipulation, or manipulation of other financial instruments, risks opening a Pandora's Box of financial practices which fall foul of EU competition rules.

Our second and third articles cover the interaction between Standard-Essential Patents (SEPs) and competition law. The first of these articles delves into the question of whether the elimination of invalid SEPs best serves the public interest and in doing so stimulates competition. The author, J. Gregory Sidak, begins by considering the Commission's position vis-à-vis the right to challenge the validity of licensed SEPs by examining the Technology Transfer Block Exemption Regulations, the Commission's decisional practice and also the Court's recent ruling in *Huawei v. ZTE*. The premise that validity challenges to individual SEPs which form part of larger SEP portfolios marginally benefit consumers is then examined. In his analysis the author focuses on two questions in particular: namely, do invalid SEPs in a licensed portfolio increase licensing costs for a licensee? And do successful validity challenges of individual SEPs marginally reduce the royalties for large licensed portfolios? The final section of the article analyses the marginal harm caused by validity challenges intended to delay a licensee's payment of royalties for an SEP portfolio. The end result is a case advocating that validity challenges of SEPs, in situations where the SEPs in question are part of a large portfolio, are counter-productive from a competition standpoint.

Our third contribution, by Roberto Grasso, considers the preliminary reference judgment in *Huawei v. ZTE* and Commission's decisional practice in *Motorola* and *Samsung*. The author provides a roadmap of the controversial issues in the Article 102 analysis of the pursuit of injunctions by SEP-holders against potential licensees whose products are alleged to infringe on the SEP. The article examines the concept of 'willing licensee' and the framework for Fair Reasonable and Non-Discriminatory (FRAND) negotiations put forward by the Court of Justice of the European Union in *Huawei v. ZTE*. Lastly, the article explores the alternative theories of abuse that would be, in principle, applicable to the circumstances of *Huawei v. ZTE*, *Motorola* and *Samsung* but which were not analysed by the Court or the Commission. The author concludes by highlighting the fact that the recent decisions provide much needed guidance on the boundaries of FRAND negotiations between SEP-holders and potential licensees. Nonetheless, several questions remain unanswered: for example, what constitutes a FRAND offer? What methodology should be adopted when attempting to reach a FRAND royalty rate for an SEP? And, what legal test applies for non-SEPs and/or for which no FRAND commitment was given?

Our fourth article, by Marco Claudio Corradi, looks into the issue of non-controlling financial holdings in EU competition law. After an overview of the literature the author provides a description of the main theory of harm underlying the necessity of intervention by competition law. Economic research has largely focused on the concept of '*passive investment*' (when an acquisition of an equity holding in a company has a disempowering effect; i.e., it produces a counter-incentive to compete). When one considers holdings which consist of hybrid instruments (i.e., not an equity holding in the traditional sense), the situation becomes more complex. The article goes on to briefly discuss coalition voting situations – where a holding wields decisive influence due to the nature of the repartition of the holdings in a company – before exploring the regulatory gap in EU competition law and considering the current case law on this topic. Finally, the author concludes by analysing the Merger Control Reform White Paper and offering a number of policy recommendations.

Our fifth contribution, written by Duy D. Pham, examines the conflicts which occur in international merger reviews and the remedies which can be deployed to resolve such conflicts. In an ever-globalized world, the potential for conflict between national competition authorities (NCAs) is only set to increase. This article first explains why NCAs may reach different conclusions in international merger cases before exploring the use of structural and behavioural remedies in addressing conflicts between different NCAs. The author explores the question of whether post-merger antitrust enforcement is a suitable tool for resolving international merger conflicts. It is important to note that merger remedies inevitably create additional costs for the merger parties and that this can reduce the attractiveness and the value of the transaction. The article concludes that in order to reduce conflicts in the long-term greater convergence of competition laws and cooperation between NCAs is required.

Lukas Solek and Stefan Wartinger are the authors of our sixth and final article, entitled: '*Restrictions of Third Party Platforms within Selective Distribution Systems*'. The growing prominence of third-party platforms has prompted fierce intra-brand competition between suppliers and distributors. Suppliers of luxury products tend to protect the brand image and price level of their products by means of selective distribution. This punchy article examines vertical restrictions via third-party platforms under EU competition law in the light of decisional practice and case law developments in Germany. The authors focus, in particular, upon the question of whether an absolute ban on the use of third-party platforms constitutes a restriction of competition and, if so, whether such a restriction might be exempted under the Vertical Block Exemption Regulation. The authors

conclude their thought provoking article by setting out possible qualitative requirements on third-party platforms which may be considered acceptable.

I hope you enjoy these diverse and insightful articles.

José Rivas
Editor
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