Editorial

Dear Reader,

It is with great pleasure that I introduce this autumn issue of *World Competition* which, as ever, is full of high-quality articles.

In our first contribution, one of our most regular contributors, Wouter Wils, provides an assessment of the leniency programme in the European Union (EU) twenty years after its introduction. The author begins his article with an overview of the provisions of the 2006 Leniency Notice before demonstrating, through an analysis of cartel enforcement and leniency applications, that leniency enjoys a prominent role in cartel enforcement at EU level today. The article is then split into two parts: the first part outlines the positive effects of leniency on cartel enforcement, and the second part sets out the possible negative effects on cartel enforcement. On the positive effects of leniency, the article focuses specifically on two aspects, namely: the improved collection of evidence, and the destabilizing effect of leniency on cartels. For the counter argument, the article highlights a number of criticisms advanced against leniency. These include: the lowering of the penalty level (which the author identifies is a red herring as the total level of fines has actually increased following the introduction of the 2006 Fining Guidelines); the facilitation of the creation and maintenance of cartels; the negative moral effects and the issue of recidivism; the impact of fines on market structure; and, finally, the author looks into the question of whether the success of a leniency programme is dependent on the ability of an authority – in this case the Commission – to conduct its own individual investigations. All in all, this article provides an interesting account of the implications of leniency substantiated with a – not overwhelming – smattering of statistical data. It is also worth noting that the Annex, which lists each individual application for leniency since its introduction, is most useful.

Our second article is entitled: '*Coherence in the Application of Articles 101 and 102: A Realistic Prospect or an Elusive Goal?*'. The author, Luc Peeperkorn, begins by setting out why coherence in the application of competition law is essential before exploring the objective(s) of Articles 101 and 102 and the gradual shift towards a more effects-based approach. This, the author explains, is in part due to developments in the US and in academic thinking, and in part due to the introduction of EU merger control and the review of the Commission's policy

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towards vertical restraints in the nineties. The impact of the shift towards an effects-based analysis on the coherent application of Articles 101 and 102 is then examined. The author explores the question of how to determine whether a restriction, under Article 101, is a restriction by object. He identifies the following sub-questions: first, how to determine whether a particular type of restriction will have net negative effects and, second, how to determine *in an individual* case whether the restraint in a particular agreement is an example of such a type of restriction (thereby falling into the by object category). In a final section, the article considers coherence in the application of Article 102 before offering some interesting concluding remarks.

Our third contribution, by Marc Abenhaïm, explores the concept of public distancing in cartel cases. Under the *Polypropylene* judgment, the Court of Justice held that there is a presumption that an undertaking takes into account an instance of information exchange in its conduct on the market. In theory, a company that has attended one or more anticompetitive meetings may rebut this presumption (and escape liability) by showing that it has publicly distanced itself from the anticompetitive discussions. In reality – as the author identifies – public distancing has been mentioned in forty-six cases, invoked in ten of these cases, and been successful in none. After explaining the origins of the public distancing concept, the author discusses the concept in the light of the principle of presumption of innocence. The author goes on to examine the case law concerning public distancing, focusing in particular on: the scope of the *Anic* presumption and just how often a company is required to distance itself from the anticompetitive discussions; the rigidity of the public distancing requirement; and, finally, the limited review of this concept by the Courts. This insightful article concludes that the concept of public distancing is at odds with the presumption of innocence and closes by asking whether it is not time for the Court of Justice to 'publicly distance itself' from its current case law.

Our fourth article, entitled: '*Calculating the Cartel Fine: A Question of Jurisdiction or a Question of Economic Importance?*' provides a thought-provoking analysis of the recent *Innolux* judgment and its possible implications. The authors, Philip Bentley QC and David Henry, begin by providing an overview of the LCD cartel case and the Commission's fining policy. The article examines the *Guardian* case where the Court of Justice held – in a European Economic Area (EEA) context – that for the purpose of fine calculation no distinction must be made between sales to independent third parties and internal or captive sales. The authors ask whether this principle should be extended, as in *Innolux*, to the internal sales of a cartelized product made outside of the EEA and later sold by a related party inside the EEA. The *Innolux* judgment raises some interesting considerations, namely: is the question one of jurisdiction or merely one of determining the economic

importance of the infringement? Equally, does the *Innolux* approach infringe the principle of *non bis in idem*? On this last question, the authors set out in a table the different categories of possible sales channels for the cartelized products. The authors conclude that, in order to provide greater legal certainty, the rules concerning fine calculation should be coterminous with the rules on jurisdiction and that third-country competition authorities should be encouraged to adopt a similar approach.

Our fifth contribution, by Vikas Kathuria, covers the topic of pharmaceutical mergers in emerging markets. This article focuses on two themes, namely: the access to generic drugs, and the efficiencies of production brought about by mergers in emerging markets. On the first question – the acquisition of local generics by multinational corporations (and the fear that such acquisitions will lead to unavailability of generic medicines) – the author argues against using competition law as an industrial policy tool and shows how competition law tools themselves can ensure consumer welfare. On the second question – how efficiency defences in mergers play out – the author argues for a more positive treatment of efficiency claims in emerging markets. In applying the theoretical framework set out in order to understand the nature of competition law in emerging markets, the author demonstrates that the application of competition law is sector specific and, moreover, is guided by the socio-economic and industrial realities of a particular jurisdiction.

The subject matter of our sixth, and final, contribution is the treatment of price-related cartels under the Chinese Anti-Monopoly Law. This article, written by Yichen Yang, first sets out the relevant provisions of the Anti-Monopoly Law before embarking on an analysis of four substantive and procedural issues which have yet to be addressed under the Chinese competition law regime. The first of these issues is the absence of a clear boundary between the application of the Anti-Monopoly Law and the Price Law (adopted ten years prior to the Anti-Monopoly Law, and which represents the notion of a centrally planned economic tradition). The second issue concerns the uncertainty surrounding the '*by object*' test adopted in recent decisions by the National Development and Reform Commission (NDRC). The absence of any unequivocal guidance, either by the Courts, the NDRC or through any guidelines, casts a shadow of legal doubt and unpredictability over horizontal price fixing cases in China. The third issue is the disparity between the burden of proof in public enforcement and private litigation in Resale Price Maintenance (RPM) cases. This, the author argues, is perhaps the result of contrasting legal opinion in the EU (where RPM remains a per se prohibition) and in the US (where, at federal level, the Court in *Leegin* removed the per se prohibition label). The gap of burden of proof, arguably, has led to an inconsistent enforcement against RPM cases. The fourth and final

issue identified is the deficiency in the application of basic competition law techniques in assessing anticompetitive effects.

I hope that you enjoy these diverse and insightful articles.

José Rivas
Editor
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