Editorial

Dear Reader,

It is with great pleasure that I introduce this new issue of world Competition. As in the past, this issue is full of high-quality articles.

The first article entitled: ***Civil Liability for Single and Continuous Infringements***, provides an in-depth analysis of the legal concept of Single and Continuous Infringement (SCI) in civil antitrust litigation. This topic is of utmost importance since the proliferation of procedural rules that facilitate damages actions for competition law infringements. According to the author, Michael J. Frese, the extension of SCI findings to follow-on civil litigation can, on the one hand, facilitate private actions against cartelists and, on the other hand, have negative implications for defendants with a more limited role in the infringement, i.e. having to pay for other parties' conduct. In order to limit the exposure of defendants, the article identifies three types of limiting principles (awareness of the infringement, scope of the binding effect of the infringement decision and contribution claims). The author concludes that even though the parties injured by a cartel should be able to recover any harm they have suffered, the interests of defendant should not be ignored, provided that the facilitation of private actions and the extension of the SCI principle increase the exposure to damages claims. In order to avoid this, appropriate limiting principles have to be put in place to elude opportunistic claims and that defendants pay for harm they could not have prevented. For this purpose, the review courts should scrutinize SCI findings and national courts should limit the binding effect to the challengeable parts of the decision. In addition, effective procedures for contribution claims have to be adopted to guarantee that liability is proportionate with the company's responsibility for the harm.

The second contribution by Johan W. van Gronden is entitled: ***Services of General Interest and the Concept of Undertaking: Does EU competition law apply?*** The article deals with the important question of the applicability of the EU competition rules to the provision of public services. To answer this question, the author explores which limits to the broad concept of undertaking can be found in EU competition law. The article provides a thorough analysis of the relevant case law of the EU courts in relation with this topic. The author first examines the settled case law on the concept of undertaking in EU competition law. Then, the author analyses the convergence between EU competition law and free movement

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law. Finally, the article studies three recent judgments (cases: *CEPPB, TenderNed* and *DZP/UZP*), which further develop on the concept of undertaking. The author concludes by arguing in favour of a three-prong test that should be carried out for determining if the provisions of EU competition law apply: (1) the supply of the services concerned is predominately dependent on public funding; (2) the objective of the public funding is to achieve a public interest goal; and (3) the activities concerned are closely related to this public interest goal.

The third article entitled: ***Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: a Comparative Study of the Italian and UK Experiences***, is co-authored by Margherita Colangelo and Claudia Desogus. The authors conducted a very interesting comparative analysis of the Italian and UK experience in the application of competition law to exploitative practices in the pharmaceutical sector. The article briefly reviews the relevant literature and practice on excessive pricing, with a focus in the pharmaceutical sector. The authors have examined the *Aspen* case (by the Italian Competition Authority) and the *Flynn* case (by the Competition and Markets Authority), which relate to excessive pricing of off-patent drugs. In addition, they have conducted a thorough analysis of the tests used by the competition authorities in these cases. In the end, the authors state that the intervention of competition authorities on excessive prices should be exceptional and based on a case-by-case approach. The most important aspect of such intervention is the determination of the method of analysis. According to the authors a price-cost analysis is the most appropriate methodology, although they suggest it should be cross-checked through the application of other methods.

The fourth contribution of this issue is entitled: ***Rationale behind State aid control over tax incentives.*** In her article, Diheng Xu, covers a very interesting topic, the application of the EU State aid rules to fiscal measures granted by Member States to multinational enterprises and the appropriateness of applying State aid law to tax measures. The author first analyses the reasons why governments use tax incentives as State aid (correct market failures, support infant industries, stimulate exportation, attract foreign direct investment and improve equality), arguing that tax incentives are more efficient and flexible than direct subsidies, while the latter can be more transparent than tax incentives, to a certain degree. After that, the article studies the rationale for granting fiscal State aid and, also, the rationale for regulating this type of State aid. Finally, the article concludes by stating that governments grant tax incentives as State aid in order to achieve different objectives that have beneficial effects. However, tax incentives can also produce negative effects with respect to efficiency and equity in the market, in order to prevent these, tax incentives have to be legally regulated at the EU level.

The last article of this issue is entitled: ***Drawing the Boundaries between Hub-and-Spoke Cartels and Vertical Agreements: Lessons from the United Kingdom and***

the United States to Chilean competition law. In his article, Diego Hernández, develops on the distinction between hub-and-spoke cartels and vertical agreements under Chilean competition law. For this purpose, the article explores the current case law and practice in the jurisdictions of the United Kingdom and the United States, this is done with the objective of determining when an indirect exchange of information falls under the horizontal agreements provision of the Chilean Competition Act (Article 3(2)(a)) and when such a conduct is treated as a vertical agreement or exchange of information and, as a consequence, it should be scrutinized under the general prohibition of the Competition Act (Article 3(1)).

As always, I hope that you enjoy reading this new issue.

José Rivas
Editor
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