Editorial

Dear Reader,

It is my pleasure to introduce you to this new issue of World Competition. Since our last edition, the Covid-19 pandemic has continued to heavily impact our lives and economy. As already highlighted in our June edition, the effects of this crisis have inevitably touched upon competition law and its enforcement. We have seen competition authorities intervening to tackle some of the negative consequences brought on the market by the health crisis and to adapt their usual ways of working to keep operating in a complete new landscape.

Although the crisis is not fully behind us, this is the moment to begin to take stock of the lessons learned during the emergency and to reflect on what changes will be needed in the antitrust arena, as we approach the recovery phase. I am sure this edition will only kick-start a debate that will take us busy in the months to come.

With a view to reflect the consequences that Covid-19 is having on competition law enforcement at EU level, this issue is opened by an article written by David Henry and Jacques Buhart on a specific competition law instrument, which has been revamped by the European Commission following the adoption of the Temporary Framework: the comfort letter. In their article, *COVID-20: the comfort letter is dead. Long live the comfort letter*?, the authors argue whether the temporary and exceptional system of comfort letters for specific cooperation projects, introduced by the European Commission under the Temporary Framework, should lead to the introduction of 'a more generalized system of comfort letters', in particular with respect to non-full function joint venture. The authors believe that the current tools at the disposal of companies are built around a system of self-assessment, which risks to create legal uncertainty and to discourage competitors to enter into cooperation agreements. Hence, they call for the Commission to build up on the work done under the Coronavirus crisis and to consider the possibility to reintroduce, in a more general manner, the comfort letters, which, in the authors' view, may bring undeniable benefits for both consumers and businesses alike in a post-Covid world.

With the second article, *A Formalistic Approach to Competition Law and Its Risks: The Curious Case of Roche/Novartis*, Patrick Actis Perinetto brings us in the

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Roche/Novartis judicial saga. The author criticices the formalistic approach followed in the Roche/Novartis antitrust proceeding and advises on a more substantive model of competition law assessment to be taken instead. In particular, some key legal questions are analysed by the author to show why a substantive approach should have been preferred, ranging from the definition of the relevant product market and the competitive relationship between the parties and the implications behind their licensing agreement to the role played by the regulatory aspects within the competition law assessment.

The third article, *Disclosure in European Competition Litigation through the Lens of US Discovery*, is authored by Dr Andreas Ruster and Sebastian von Massow and it drives us into the implementation process of the EU Damages Directive, carried out under a comparative angle. The authors take the US discovery model to analyse the German implementation of the EU Directive, with the aim to identify the weaknesses of the new regime for the disclosure of evidence in private antitrust proceedings – as highlighted by the discussions around its implementation in Germany – and to ultimately suggest practical solutions for the future. In particular, the focus of the article lies on four areas: the scope of the discovery and the 'specificity' requirement as set out in the Directive, the practical risks of abuse in relation to the excessive costs of discovery, the attorney-client privilege (or legal professional privilege, as it is known in Europe) and its relative protection, and, last but not least, the consequences of violations.

The fourth article brings us in the digital markets, with Lior Frank analysing the much debated question of digital platforms breakups from a behavioural economic perspective. In his article, *Boundedly Rational Users and the Fable of Break-Ups: Why Breaking-Up Big Tech Companies Probably Will Not Promote Competition from Behavioural Economics Perspective*, the author suggests that consumers should be regarded as 'boundedly rational users', whose behaviours do not necessarily follow strict patterns of rationality and lead them to keep using only one single platform. As a consequence, in the author's view, even after breaking-up Big Techs, only one platform will continue dominating the market. Therefore, Lior Frank calls for abandoning the idea of 'breaking-up Big Techs' and for searching alternative ways to encourage competition amongst digital platforms.

To conclude, in the fifth article we change of setting, by moving to the Indian digital market. In his contribution, *Remedying the mischief created by e-commerce entities in India*, Mayank Udhwani comments the effects of the new Foreign Direct Investment ('FDI') rules introduced by the Indian Department for the Promotion of Industry and Internal Trade in 2018. While the new legislation was aimed at protecting the interests of Indian Small and Medium Sized

Enterprises, the author argues that the FDI rules have rather accentuated the anti-competitive nature of the business model characterizing e-commerce entities in India and proposes some practical ways which may help remedying this 'mischief', by way of amending the Indian Competition Act, 2002.

I wish you a pleasant reading.

José Rivas
Editor
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