

## Editorial

ALEXANDER M. WAKSMAN

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## Articles

NIAMH DUNNE

### **Potential competition in EU law** 638

Potential competition refers to the extent to which the activities of undertakings not yet present in a relevant market nonetheless provide a competitive constraint on the behaviour of incumbents in that market. Recent case law of the EU Court of Justice dealing with pay-to-delay agreements in the pharmaceutical sector has considerably deepened our understanding of potential competition as a relevant concept under arts 101 and 102 TFEU. This short article critically assesses the legal test emerging from the *Generics* and *Lundbeck* judgments and considers its applicability beyond the pay-to-delay context.

EUN HYE KIM & MEL MARQUIS

### **A new competition law for Korea: political, economic and legal context** 645

For the first time in 40 years, Korea has completed a major revision of its competition law, the Monopoly Regulation and Fair Trade Act. The new amendments enter into force in December 2021. To mark this occasion, we explore both the broader context and the key features of the legislative reforms. As we discuss, the Korean system balances compatibility with international best practice, on the one hand, and internal priorities on the other. In Korea this dualistic tension is a “feature”, not a “bug”. We begin the article by exploring the political and economic environment in which the Korean competition law regime operates. We also summarise the legal framework and the main institutions that apply the law in this field—the KFTC and the Courts. We explain how the more modest amendments of 2013 changed the MRFTA, and we discuss highlights from the KFTC’s case practice in recent years. Next, we outline the 2020 amendments, which appear to make significant improvements to the Act. We then briefly address the impact of COVID-19 on the KFTC’s activities before concluding.

ALEXANDER FALCO

### **The UK cartel offence: an exploration into the causes of the underperformance problem** 661

Introduced by s.188 of the Enterprise Act 2002, the cartel offence was designed to supplement the deterrence effect produced by cartel enforcement mechanisms present under the Competition Act 1998. The supplementary nature of the offence coupled with its policy goal of deterrence meant that active enforcement was never a priority; the offence was expected to result in no more than six to ten cases per annum. But despite such limited performance aspiration the cartel offence still significantly underperformed and resulted in only seven investigations over its entire lifetime to date. At trial, the underperformance continued with only a 45 per cent conviction rate having been achieved. A 2013 reform failed to reverse this trend; a single case has yet to be opened under the offence as amended. It is the intention of this piece to determine the cause of this underperformance by critically analysing the history and development of the cartel offence in order to delineate factors which may have presented a hurdle to successful enforcement. In noting that the offence was primarily modelled after s.1 of the Sherman Act, comparison will be drawn to the US experience. Here, it will be seen that the Department of Justice shares similar problems prosecuting the US cartel offence at trial, having only secured a 51.5 per cent conviction rate. A stark contrast to the 99 per cent conviction rate secured using pre-trial mechanism not present under UK law. As such, it is submitted that the UK cartel offence has not underperformed in terms of prosecutorial success. In exploring the cause of underperformance in relation to the limited frequency of investigations, investigations opened under the offence will be examined, yielding the finding that there ostensibly appears to be an incompatibility between the cartel offence and the civil regime under the Competition Act 1998. This theory will be developed to argue that the imposition of the cartel offence increased the temporal and procedural cost of cartel investigations to a degree which was unable to be occasioned by the UK’s competition authority, thus resulting in fewer investigations being opened under the offence. These increased costs will be said to be a result of the effects and subsequent attempts to remedy the identified incompatibility which will be demonstrated to be the cause of the dichotomy that exists between US antitrust, the influence of the cartel offence, and EU competition law, the influence of the Competition Act 1998 that resides at the core of the UK’s domestic competition regime.

## **Anti-competitive practices and the role of druggists' unions: mapping the discrepancies in the Indian pharmaceutical industry 682**

The Indian pharmaceutical industry involves several market players intertwined in a close-knit relationship. Recently the interactions between these players have been mired in antitrust issues. The primary takeaway is the discretionary and supervisory powers of the druggists' unions in India. Although such practices have been considered anti-competitive by the Indian Competition authority, nationwide prevalence of such practice is still evident.

## **Opinion**

AQEEL KADRI & SCOTT CAMPBELL

## **Subsidiary liability—the Provimi point answered? 686**

In his Opinion in *Sumal*, Advocate General Pitruzzella considered whether liability for infringements of EU competition law could be attributed to a subsidiary of an addressee of a European Commission Decision. This article discusses the Advocate General's conclusions and how his approach compares to that taken by the English courts in assessing the question of "subsidiary liability" to date.

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