Editor's Note

The September 2009 issue of the journal once again has received a high number of outstanding contributions.

In the first article of this issue, Lisbe Finell discusses the impact of the reform of Article 82 EC on the transparency and administrability of its application. Having clear and administrable legal rules is important for both companies and regulators. For the companies, clear and transparent legal standards increase legal certainty and induce optimal investment in compliance. From the competition authorities' perspective, clear and administrable rules facilitate consistent application of Article 82 EC, and reduce the risk of legal error. Otherwise, as Professor Hovenkamp states in the inside cover of his book *The Antitrust Enterprise*, 'the problem of poorly designed rules is severe, because in the short run rules weight much more heavily than principles'. Ms Finell analyses the European Commission's Guidance on enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings, and concludes that although it has improved the transparency and the administrability of Article 82 EC in some respects, for example, by clearly concentrating on consumer welfare as policy objective, several important factors in the legal standard are still left opened and undefined. The author warns that this lack of clarity may reduce the incentive for companies to comply with the legal rules.

The second contribution comes from Selene Rosso and deals with the important topic of private antitrust enforcement. Drawing on the example of Italian case law, the author demonstrates the problems faced by private parties in claiming antitrust damages such as difficulty in determining the competent court, the pliability of the government to lobbying pressures, or the reluctance or inability of the Courts to deploy economic concepts in calculating damages. Ms Rosso proposes ways to address these drawbacks and to make damage claims more attractive to the victims of anticompetitive behaviour. In particular, the article suggests that jurisdictional rules need to be amended to make it cheaper and easier for private parties to bring an antitrust damages claim before a national Court. In addition, the author proposes the involvement of national competition authorities in private litigation, which would increase the accuracy of assessments of damages. The latter proposal could be usefully implemented not only in Italy but also in other EC Member States. The author has been short-listed for the *4th Young Writer's Award*.

Next, Abayoumi Al-Ameen continues the topic of private enforcement by discussing the role of restitutionary remedies in Competition Law. He criticises as too categorical the position of the UK Court of Appeal, pronounced in the case *Devenish Nutrition*

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Ltd & Ors v. Sanofi-Aventis SA (France) & ors, that restitution was not a valid remedy in competition law disputes. The author claims that under certain circumstances restitution should be allowed in antitrust damages cases since it can help to attain the goal of corrective justice as well as support market efficiency and consumer welfare. Mr Al-Ameen supports his argument by providing examples of application of restitutionary remedies by Federal Trade Commission in the United States and employing economic concept of 'efficient breach' and game-theory tools. Based on this analysis, the author recommends that the position of UK Courts should be changed, albeit with caution. The author is a candidate for the *4th Young Writer's Award*.

In our fourth contribution, a legal scholar Charalambos Savvides and an economist Daniel Antoniou tackle the topical question of the application of EC state aid rules to ailing financial institutions. In particular, the authors seek to answer whether State aid to ailing financial institutions should be regulated by general State aid rules applied to all the other sectors, or requires a special legal framework that would take into account the special features of financial markets. The authors point to two important features of financial institutions: their role as facilitators of the real economy and their interdependence. Although, according to the authors, the former feature of the financial sector is not sufficient to justify a special State aid regime, the latter characteristic cannot be adequately addressed under the general legal framework, and this provides the reason for special treatment of ailing financial institutions. This article has also been short-listed for the *4th Young Writer's Award*.

The article by John Meisel brings us to a specific field of telecommunication networks. The article discusses the differences in approach taken by the US Federal Communications Commission (FCC) to traditional narrowband networks based on copper loops and circuit switches and broadband networks built with fibre loops and packet switches. The author illustrates these differences through analysis of the orders issued by the FCC in response to telecommunications companies' petitions to forbear from certain federal regulations. Based on the practice of the FCC and US Courts, the author uncovers the economic analysis and principles governing forbearance orders. Mr Meisel concludes that the FCC is cautious in deregulating the legacy narrowband networks and less so in deregulating broadband facilities and network. The author argues that a more aggressive approach could be taken in deregulating narrowband services, at the same time, he warns that reckless deregulation in broadband might lead to concentration of market power in the hands of one or few players.

In the next contribution, Martti Virtanen and Pekka Valkama take a conceptual look at the notions of distortion of competition and competitive neutrality. The authors note that, despite the importance of these two concepts, there has been a lack of clarity as to their meaning both in academic and policy discussion. They come up with an elegant analysis of the concept of competitive neutrality, demonstrating its relation to distorted competition. The paper provides the list of sources generating competitive neutrality problems and discusses how these problems can affect supply and demand. The authors also argue that a distortion of competition can mean not only reduced but also increased

competition, and that this has to be borne in mind in conducting a competitive analysis. Although the paper has a primarily theoretical focus, the authors also indicate various policy responses to competitive neutrality problems.

We conclude this issue with an article by Reza Rajabiun, which provides interesting insights into the interaction of internal and external consideration faced by countries in designing their competition laws. Mr Rajabiun argues that due to international trade considerations, national governments are interested in exempting their exporters from liability for anticompetitive practices carried out abroad. Per se prohibitions and private action rights limit the discretion of the government to protect private and public monopolies against liability; therefore, most industrialized countries prefer a rule of reason approach and central enforcement. The author supports his argument by analysing developments in the enforcement regimes in EU Member States with a particular focus on Poland. Mr Rajabiun concludes that strategic considerations might have played an important role in precluding the development of more active private enforcement throughout EU Member States. He warns, however, that lack of effective private enforcement and clear-cut rules limit the credibility of substantive competition rules.

I wish you a pleasant read.

Jose Rivas
Editor
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