Editor's Note

We begin this issue with one of our most regular contributors, Hearing Officer Wouter Wils.[1] Wouter's article depicts a thorough picture of the discretionary powers of the European Commission in prioritisation of EU public antitrust enforcement. The article examines the European Commission's broad discretion for choosing which alleged infringements to pursue which albeit, can be neutralized by the General Court. The author also provides a comparison amongst the competition authorities of the EU Member States, highlighting the divergence in their discretion to set priorities. Finally, the author concludes by addressing the benefits and risks of prioritisation. Once again, Wouter has provided practitioners and academics with an interesting piece of literature that helps in understanding the factors that come into play in the European Commission's enforcement of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU) infringements.

Our next article is by Christopher Hodges, who offers a fresh approach to dealing with the conundrum of adding private damages to the current EU public enforcement regime. The author summarizes the historical approach to enforcement, contrasting the US system of private enforcement to the EU's public

[1] Wouter P.J. Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 26 (2003): 131–148; Wouter P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', *World Competition* 26 (2003): 473–488; Wouter Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' *World Competition* 26 (2003): 567–588; Wouter P.J. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 27 (2004): 201–224; Wouter P. J. Wils, 'Is Criminalization of EU Competition Law the Answer?', *World Competition* 28 (2005): 117–159; Wouter P.J. Wils, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-Law', *World Competition* 29 (2006): 3–24; Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', *World Competition* 29 (2006): 183–208; Wouter P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003', *World Competition* 29 (2006): 345–366; Wouter P.J. Wils, 'Leniency in Antitrust Enforcement: Theory and Practice', *World Competition* 30 (2007): 25–63; Wouter P.J. Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', *World Competition* 30 (2007): 197–229; Wouter P.J. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', *World Competition* 31 (2008): 335–352; Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', *World Competition* 32 (2009): 3–26; Wouter P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', *World Competition* 33 (2010): 5–29; Wouter P.J. Wils, 'EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', *World Competition* 34 (2011): 189–213.

Rivas, Jose. 'Editor's Note'. *World Competition* 34, no. 3 (2011): 349–351.

enforcement regime. He proposes to integrate restitution and behavioural control into a single integrated enforcement policy; a different solution than the current ones which have met with considerable objection and political resistance. The author contends that this alternate solution of achieving restitution before imposing public penalties would considerably contribute to restoring balance in the market and overcome the deficiencies of the current system.

The following contribution discusses the problem between public and private enforcement when parallel proceedings are at play. Michael Frese argues that the accumulation of liability in EU competition law infringements must be coordinated or equalized to achieve a coherent outcome in public and private enforcement. While the author mentions the benefits that decentralized enforcement systems carry in terms of availability of resources and proximity, he also illustrates the vices of the EU dual enforcement system against the backdrop of efficiency, effectiveness, fundamental rights and proportionality. The author determines that coordination of parallel liability is the only solution and offers a few proposals to start tackling the problem.

Michael Harker's article is our fourth contribution which sheds light on the debate between two competing standards in antitrust law: consumer welfare versus total welfare. Noting that neither is superior, he asserts that the choice is relative to administrability. This article is a good introduction for lawyers to understand core economic principles that are being altered in its application to antitrust rules in order to achieve administrability. Although it is unlikely that a consensus can be achieved amongst the different disciplines, this is an interesting contribution to widening the otherwise tunnel vision economists and lawyers are said to have.

Malgorzata Sadowska's article deals with the Commission's use of antitrust policy to foster energy market liberalization. While on the surface it may appear as a legitimate mechanism bringing decisive changes to the European energy sector, the author fears the Commission's intervention is incomplete. Particularly, she emphasizes that antitrust enforcement has been marked by widespread use of commitments which are not tailored to rehabilitate the abuse in question. The author draws her analysis from the landmark *E.ON* case of the German wholesale electricity market, arguing that the commitments were not tailored to address the Commission's concerns. She concludes that this new phenomenon of negotiatory antitrust enforcement is risky, as it blurs the line between competition policy and liberalization policy.

The focus of our next contribution is on the Spanish competition regime. Juan S. Mora-Sanguinetti and Pablo Hernandez de Cos analyse the reform to Spanish competition law, identifying the many important changes from the previous law to the new competition framework introduced in Law 15/2007. They outline the significant changes in the new framework, namely the creation of

a single Competition Commission, introduction of a leniency system and the amendments made to merger control. They assess the new regime in accordance with OECD indicators concluding that (despite a few reservations) the overall competition policy of Spain has significantly improved. The authors submit that the new framework has strengthened the competition environment and predict a promising future for Spanish competition law alongside other developed economies.

We shift to a more global discussion on antitrust with our final contribution by Mor Bakhoum.[2] This article provides an overview of the developments in modern competition law for both developed and developing countries. The author contends that there is a convergence both in theory and practice where efficiency is its core principle, but with developing countries drafting competition legislation with goals that go beyond efficiency, a dual language has evolved. The author discusses the impact this will have on the international framework of competition law, but raises an interesting question on whether such a dual language is really the divergence of modern competition law, or if it is a mere reflection of the needs of a developing country's environment. The author asserts that efficiency should be applied in a broader context in developing countries, taking into account the non-economic goals such as redistribution and inclusiveness.

I wish you a pleasant read.

Jose Rivas

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[2] Mor Bakhoum, 'Delimitation and Exercise of Competence between the West African Economic and Monetary Union (WAEMU) and Its Member States in Competition Policy', *World Competition* 29 (2006): 653–681.