# Editor's note September 2012

Dear Reader,

I am pleased to present the September 2012 issue of World Competition.

We begin this issue with two articles from one of our most regular contributors, Hearing Officer Wouter Wils.[1] In his first article Wouter deals with the (formal) oral hearing in competition proceedings for the enforcement of Articles 101 and 102 TFEU and under the EU merger Regulation. The article analyses the legal basis, the nature and purpose of the oral hearing. Furthermore, it examines who can request an oral hearing, and who can attend and speak at an oral hearing. In the final section Wouter makes a comparison between the oral hearing and the state of play meetings and goes on to provide some general observations about why an addressee of a statement of objections should decide in favour or against requesting an oral hearing. In his second article, Wouter deals with the role of the Hearing Officer in such oral hearings. After a brief discussion of the status of the Hearing Officer the article examines the various powers and

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[1] Wouter P.J. Wils, *The Principle of Ne Bis in Idem in Ec Antitrust Enforcement: A legal and Economic Analysis,* 26 World Competition 131–148 (2003); Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 World Competition 473-488 (2003); Wouter P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition 567–588 (2003); Wouter P.J. Wils, *The Combination of the Investigative and Prosectorial Function and the Adjucative Function in EU Antitrust Enforcement: A Legal and Economic Analysis,* 27 World Competition 201–224 (2004); Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?,* 28 World Competition 117–159 (2005); 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*, 29 World Competition 3-24 (2006); Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice,* 29 World Competition 183–208 (2006); Wouter P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003,* 29 World Competition 345–366 (2006); Wouter P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice,* 30 World Competition 25–63 (2007); Wouter P.J. Wils, *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, 30 World Competition 197–229 (2007); Wouter P.J. Wils, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, 31 World Competition 335–352 (2008); Wouter P.J. Wils , *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32 World Competition 3–26 (2009); Wouter P.J. Wils, *The Increased Level of Antitrust Fines, Judicial Review and the ECHR*, 33 World Competition 5–29 (2010); Wouter P.J. Wils, *EU Anti-trust Enforcement Powers and the 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,* 34 World Competition 189–213 (2011); Wouter P.J. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement, in Particuliar EU Antitrust Enforcement,* 34 World Competition 353–382 (2011); Wouter P.J. Wils, *Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis*, 35 World Competition 5–26 (2012).

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tasks of the Hearing Officer. The article concludes with Article 3(5) of the Terms of Reference according to which the Hearing Officer may at any point in time present to the Competition Commissioner observations on any matter arising out of any Commission antitrust of merger proceeding.

Phenon Nicolaides' article deals with the modernization of State aid as the European Commission has embarked on a reform of State aid rules. This article examines how the problem of incorrect application of State aid rules can be solved. Over the past two decades the Commission has tried three different approaches to incentivizing Member States to improve their compliance with State aid rules. The approaches include closer cooperation between the Commission and Member States, more detailed scrutiny of State aid measures by the Commission before their implementation and encouragement for more involvement of national courts in the enforcement. Now the Commission recently seems to attempt a fourth approach that can be called "institutional", which involves changes in both the substantive and procedural rules. The author proposes a system of institutional certification. This would entail a system of external verification, a concept that is not new to EU law and policy. In policy areas such as the common agricultural policy or structural funds, national authorities may manage EU funds only after they have been certified to have established the requisite institutional capacity. According to the author, this institutional certification does not need to be limited only to the use of block exemptions regulations.

In our fourth article, Maria João Melícias' article examines the need for EU Courts to clarify the appropriate standard of proof in cartel proceedings. Instead of actually identifying what such a standard is supposed to be, in the past the courts that the Commission must produce a "sufficiently firm, precise and consistent body of evidence" to justify its view. In examining this further, the author first looks at the concept of standard of proof in civil and common law traditions. She then goes on to discuss the fundamental right to the presumption of innocence and its procedural implications. The article observes, that in the absence of an EU provision on the matter, the presumption of innocence provides for a workable solution. Finally the article explores, whether it is appropriate to argue the existence of a single uniform standard of proof.

Andreas Stephan's article assesses whether the economic turndown is likely to have increased the number of cartel infringements in the EU. In times of crisis, existing cartels can break up but empirically many collusive agreements are borne out of economic crisis. Competition authorities in Europe have maintained a hard line in practice by the continued imposition of high fines on firms involved in cartels. The author identifies that difficulties associated with claims of inability to pay evolve from of the lack of transparency. This has an adverse effect on deterrence and should therefore be avoided. The real danger, according to the

author, stems from non-specialized courts. The author concludes that further empirical research is needed over the next ten years to assess the true impact of the economic crisis on cartel formation and public and private enforcement. It is however, more important than ever that a hard line is maintained against bid-rigging, price fixing and market sharing.

Our sixth contribution by Andrea Andreangeli, analyses the current trends in the debates concerning collective redress of injuries caused by anti-competitive behaviour in the EU. The author does this in the light of the more recent case law governing class certification of antitrust collective complaints in the US federal courts and legislative developments in the European jurisdictions. The article illustrates that the Commission's concerns as to collective lawsuits have become less pressing and the author therefore argues for a more open-minded discussion. Furthermore a brief examination of the legislation in force in a number of Member States, which allow for "US style" class actions, provide clear evidence of the acceptance of such lawsuits as a suitable tool for collective redress in several jurisdictions.

I hope you enjoy these diverse and insightful articles,

*José Rivas*
Editor
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