Editor's Note March 2013

Dear Reader,

This year, the GCLC Prize for best dissertation thesis in Competition Law and Policy by a student of the College of Europe was awarded '*ex aequo*' to Ben Holles and Mateo Domecq. I am delighted to present to you the first of the GCLC '*ex aequo*' winners, Ben Holles. His article takes into account the articles by Wouter Wils published in the September 2012 issue, entitled *The Oral Hearing in Competition Proceedings before the European Commission* and *The Role of the Hearing Officer in Competition Proceedings before the European Commission*. The author discusses the role of the Hearing Officer and their evolving powers and status following the new Terms of Reference of October 2011. The author outlines the traditional powers of the Hearing Officer, such as the powers to enable third parties and complainants to participate in the Oral Hearings; to adopt decisions in relation to access to file; to prepare and conduct Oral Hearings, etc. The author then goes on to discuss the procedural reform of the Hearing Officers powers under the 2011 Terms of Reference, widening the scope of the Hearing Officer's review and reporting function. Following this, the author not only suggests a number of reforms to both the function of the Hearing Officer, but also to the role that Oral Hearings play, changes he believes would constitute a positive development in terms of the protection of parties' rights of defence and also in terms of the quality of the final decision

The contribution by Lapo Filistrucchi, Damien Geradin and Eric van Damme discusses the identification of two-sided markets and the importance of this in relation to competition policy and the underlying economic analysis. The authors begin by outlining various definitions put forward by academics of two-sided markets and the characteristics thereof. Here, they explain what makes a market two-sided and how the two-sidedness of a market can be identified. Section two describes the distinctive nature of two-sided markets and in doing so, discusses various elements for example, the indirect network effects between customers, the passing-on of the price difference to the other side, and the distinction between intermediaries and two-sided platforms. In section three, the authors argue that different approaches to the assessment of the two-sided nature of the market are possible which can broadly be divided into qualitative and quantitative approaches. Practical examples of how Competition Authorities decided in reality are given,

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followed by practical advice to both practitioners and Competition Authorities alike. These suggestions are relevant not only to the analysis of traditional markets, such as newspapers and auction houses, but are also useful in the analysis of new markets, such as online social networks; online search engines; and Internet news aggregators.

Our third article by Stanislas de Margerie deals with 'pay-for-delay' settlements and examines what is the right standard to be applied. 'Pay-for-delay' settlements have been frequently seen in the pharmaceutical sector between originator drug companies and generic manufacturers. In addition 'reverse payments', whereby a value transfer takes place from the originator to the generic company, have been the focus of antitrust authorities on both sides of the Atlantic. The Commission considers that agreements that do not restrict the generic company's ability to market its own product to be largely unproblematic but situations where the generics entry is limited are more problematic. In the latter category, a distinction is also made between situations where a value transfer takes place and those where it does not. The situation is far from clear in the EU and even in the US, where the authorities and courts have over ten years of experience in this area, the situation is not clear-cut. The author outlines the views of the various courts and authorities in the US and in evaluating the merits and weakness of these views, demonstrates the difficulties that arise when assessing settlements.

Aitor Ortiz's article looks at cloud computing and the new potential antitrust risks associated with the use of clouds. The author aims to provide answers to two fundamental questions associated with the use of cloud computing: first, what would happen if competing firms began to use cloud services as virtual storage of data to share information for illegitimate purposes and second, how will antitrust authorities detect this conduct and seize this information? In doing so, the author begins by explaining the basics of cloud computing and provides insight into the problems related to cloud computing services, for example, the law applicable to the data stored; data protection and data retention. He then goes on to discuss how firms could store, share and delete information on the cloud without leaving any trace. In section four, the author explains how this technology may impede the antitrust authorities from conducting adequate investigation and the author then proposes preliminary solutions ranging from technological solutions such as the developing of software which would flag anomalies amongst different cloud clients, to legal and regulatory solutions whereby a cloud provider would have to provide a list of clients to the antitrust authorities, for example.

Our next article was written by Malgorzata Sadowska and Bert Willems and it analyses the economic effects of the alleged abuse and proceeding remedy package in the Swedish Interconnectors case. Here, the European Commission believed that the Swedish network operator *Svenska Kraftnät* may have violated Article 102 TFEU by limiting cross-border transmission capacity in order to relieve internal congestion in the Swedish network. The authors examine the economic effects of the behaviour of *Svenska Kraftnät* prior to, during and after the commitments. This is done by examining three common methods of congestion management used by network operators – namely market splitting, congestion shifting and counter-trading – and in applying on or more of these methods, they then go on to look at four scenarios resulting from the case. The results of the four scenarios are compared and the economic analysis is then contrasted with the concerns expressed by the Commission in the case. The article shows that forbidding all congestion shifting can only be justified if the Commission's main objective is market integration, rather than economic efficiency, and offers an optimal market design.

The sixth article deals with the public benefits, as opposed to economic efficiencies, which have been recognized through the authorization process in Australian competition law. The author, Vijaya Nagarajan, looks at 244 authorization determinations of the Australian Competition and Consumer Commission and examines how the types of benefits recognized have changed during periods of economic boom, industrial rationalization and of heightened environmental concern. In charting the various types of public benefits, the author demonstrates the more general approach to competition regulation whereby a number of widely endorsed public benefits can be seen throughout the four decades covered by this article. However, the author also contextualizes these public benefits or economic efficiency reasonings and outlines which were more prominent in defined periods. This ranged from an emphasis on the promotion of cost savings, a factor well established in economic theory, during the seventies, to the situation in 2010 where for the very first time since 1976, the non-efficiency benefits are greater than efficiency based benefits.

The final article in this issue, by Arunava Mukherjee, analyses recently proposed legislation in India which bring bank mergers under the exclusive jurisdiction of the central bank, excluding the jurisdiction of the competition regulator. In order to do so, the article looks at the approaches to bank merger regulation in both the USA and in the EU where bank mergers have been increasingly brought under the scrutiny of the competition regulators. Interestingly, the article outlines the system of dual review in the USA (between the Department of Justice and the Federal Reserve Board) but also the challenges involved in having such a dual review system. In drawing from the experiences in the USA and the EU, the author makes suggestions as to how the regulatory regime for competition in the banking sector may be structured so as to make

Indian competition policy effective while at the same time, addressing concerns of the central bank about its need to be involved in bank merger regulation.

I hope you enjoy these diverse and insightful articles,

José Rivas
Editor
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