Editor's Note March 2014

Dear Reader,

In our first contribution of this issue, Wouter Wils – Hearing Officer at the European Commission – discusses the compatibility of the European Commission (EC) antitrust enforcement system with fundamental rights, where the European Commission acts as both investigator and decision maker at first-instance. This question has been debated for many years and was raised and rejected in two cases before the Court of Justice as far back as the late 1970's/early 1980's. The question became even more prominent in the mid 1990's when the EU was considering accession to the European Convention on Human Rights (ECHR). The article discusses two studies completed on this topic and sheds light on what is a complex topic of law. Following the *Jussila* and *Menarini* judgments, the author concludes that Article 6 of the ECHR, as interpreted by the European Court of Human Rights, provides no grounds for abandoning the current system. The examination is then extended to two situations: where the General Court reviews the finding of the antitrust infringement and where it reviews the fine. The author highlights that the fact that the ECHR and EU law allow the European Commission to act both as investigator and as first-instance decision maker does not mean that the Commission is free to indulge in prosecutorial bias and offers valuable insights into the application of this in practice for the European Commission.

Next, Tjarda van der Vijver seeks to propel a much-needed global debate as to how various jurisdictions around the world deal with justifications as regards prima facie anti-competitive unilateral behaviour. The article takes the jurisdictions Australia, Canada, the EU, Singapore, South Africa and the US and seeks to identify commonalities as to justifications which have been accepted for anti-competitive unilateral conduct. Interestingly, all the jurisdictions under review have embraced the idea that a defendant may invoke a justification for otherwise prohibited unilateral conduct and several of the judgments discussed in the article refer to foreign case law on justifications of prima facie anti-competitive conduct. Section 2 examines the relevant statutory provisions per jurisdiction and while the statutory texts of the jurisdictions do not make clear to what extent a firm may rely on a derogation for conduct that would otherwise be prohibited, a further examination of the case law and other legal sources reveals that all the jurisdictions under review have indeed accepted the existence of a justification plea. The author

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looks in depth at the type of justifications which have been put forward and accepted and provides a number of lessons which could prove useful for EU law.

Our third article, by Alexandros Zografos, discusses the very topical recent Article 102 investigations related to standard-setting which focus on the issue of availability of injunctive relief for Fair, Reasonable and Non-Discriminatory (FRAND)-encumbered Standard-Essential Patent (SEP) holders and the compatibility of such litigation with antitrust rules on unilateral behaviour. The requirement that SEP holders make a FRAND licensing promise is a common strategy for many Standard Setting Organisations (SSOs) nowadays, but this itself has been the source of many heated debates. The author outlines the various academic positions with regard to the appropriateness of SEP injunctions and then turns his attention to the jurisdictions that have already tried to frame the problem and determine when, if at all, injunctive relief can be identified with conduct that is actionable on the basis of Article 102 of the Treaty on the Functioning of the European Union (TFEU), namely the EU, the US and China. The prevailing view across these jurisdictions with regard to injunctive relief for SEPs is that recourse to injunctions should be restricted. The possibility that such recourse could be considered to be vexatious litigation is also discussed. With the recent *Huawei* preliminary ruling from the Higher Regional Court in Dusseldorf still pending and with a number of on-going proceedings at EU level, it would seem that the right choice for the Commission is to proceed with its cases and avoid waiting for the Court of Justice of the European Union (CJEU) to respond to the German reference, as the effects of SEP-wars on consumer welfare in the meantime may prove to be remarkably pernicious.

In their article entitled *Data Protection in the Context of Competition Law Investigations: An Overview of the Challenges*, Monika Kuschewsky and Damien Geradin review three situations where data protection law and competition rules collide: in the course of unannounced inspections (dawn raids) by the Commission; following the receipt of a request for information or a statement of objections; when companies need to collect and further process data from their employees; and finally, when companies themselves access and review data so as to uncover potential competition law infringements (e.g, in the context of a compliance programme). The potential conflict between competition and data protection rules has come to the fore because of the increase in the sheer volume of data following the advent of automatic processing, cheaper storage capacities and the development of electronic means of communication. This very comprehensive article outlines the key data protection notions all competition lawyers should keep in mind and the consequences of non-compliance with data protection law. It also provides a number of practical tips for companies. Following the elevation of data protection to a fundamental right, the increased sensitivity of

individuals concerning their personal data and the forthcoming reform of the European data protection legal framework, data protection law will only gain importance in the future.

Our fifth article by Marek Martyniszyn analyses the development, functions and legality of so-called 'blocking legislation' under international law. It also presents the new Russian blocking order issued in September 2012, which subjects the compliance with any foreign requests for information or discovery requests and with potential foreign decisions and judgments to the prior authorization by a federal executive body nominated by the Russian government. From the perspective of the European Commission's investigation of Gazprom's practices, it is unlikely that the Order will have any major hindering effects at the investigative stage. Should there be a finding of a violation of EU competition law however, the situation will undoubtedly become considerably more complex. Assuming that Gazprom will be found to be in violation of EU competition law, then at the stage of enforcement of remedies, depending on whether the necessary consent is granted by Russian authorities or not, the blocking Order may lead to significant friction between the EU and the Russian Federation.

Our final article by Valeria Falce looks at the 2012 Italian law relating to collecting societies which is aimed, on one hand, at liberalising the related right management system and, on the other, at shaping the future of the new market without considering the relevant implications for the copyright management. The author reviews the founding pillars of the traditional paradigm which justifies the existence of single collecting societies nationally granted exclusive rights. The EU approach followed to address the copyright management legal issues is outlined and compared with the relevant Italian regulation in terms of consistency and coherence. Critical comment is provided relating to the reform of collecting societies recently introduced in Italy and the author draws the conclusion that, despite its pro-competitive objective, the new regulation could almost be described as unsatisfactory and as such, should be rethought.

I hope you enjoy these diverse and insightful articles.

José Rivas,
Editor
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