# Editor's Note

Dear Reader,

Let me welcome you to yet another issue of World Competition Law and Economics Review. As usual, our authors have chosen very original and interesting topics for our September issue.

The first contribution is entitled: ***The Right of Defense in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe.*** In their article, M. Bernatt, M. Botta and A. Svetlicinii, compare the application of the right of defence in competition law proceedings by seven National Competition Authorities (NCAs) of Central and Eastern Europe (Bulgaria, Croatia, Czech Republic and Slovakia, Hungary, Poland, and Romania). The authors study four rights of defence: the right to be informed; the right to access the file; the privilege against self-incrimination; and the legal professional privilege. The article uses as benchmark the standards of the European Commission in competition law cases and the European Court of Justice case law on the right of defence in competition law proceedings. According to the authors, the selected NCAs generally provide lower procedural guarantees in comparison to the European Commission. This analysis is of utmost importance in light of the Directive aiming at harmonizing the powers of NCAs (ECN+ Directive), which is intended to provide more powers to the NCAs. In this regard, the authors claim that the stronger investigative powers granted to the NCAs by the ECN+ Directive should be counterbalanced by a more homogenous application of the right of defence.

The second article by J. García-Verdugo, C. Merino Troncoso and L. Gómez Crus is entitled: ***An Economic Assessment of Antitrust Fines in Spain.*** The article assesses the deterrent capacity of the fines imposed by the Spanish Competition Authority from 2011 to 2015 for the infringement of Article 1 of the Spanish Competition Act. The authors study the evolution of fines in three periods: (1) from January 2011 to October 2013, when the *Comisión Nacional de los Mercados y la Competencia* was created; (2) since that date to the judgment on fines of the Supreme Court in January 2015; and (3) to the rest of 2015. During these three periods, the authors found that the average fine for the first two periods is similar and significantly lower in the last period. The authors define three scenarios and compute deterrence ratios to compare actual and optimal deterrent fines. They have found that most of the fines were under deterrent even when using the lower

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optimal fines of the lower scenario. In the end, the authors conclude that the fining policy of the Spanish Competition Authority between 2011 and 2015 should be considered as significantly under deterrent.

The third article entitled: ***The ECJ ruling in Coty and the future of vertical restrictions in the Internet space***, is co-authored by R. Grasso and G. Tzifa. In their article the authors discuss the European Court of Justice preliminary ruling in the *Coty* case and its implications on the law of vertical restraints. According to the authors, NCAs and National Courts have been enforcing the vertical distribution law in different and sometimes conflicting ways. In this sense, the authors have conducted a very thorough review of the national case law and recognize the important contribution of the *Coty* judgment in clarifying the law and ensuring a more consistent enforcement of competition law in the area of vertical distribution. The article finishes by discussing some of the issues that have not been addressed by the *Coty* judgment, such as the concept of luxury good, given that these could create potential inconsistencies in the application of the competition law provisions by the national authorities.

The next article of this issue is entitled: ***From Standard Oil to Google: How the role of antitrust law has changed.*** In her article, G. Massarotto, considers the role of antitrust and whether self-regulation of the markets is more appropriate than the government intervention via regulation. The author starts by analysing the evolution of antitrust law and provides a valuable insight for the future in relation with the application of the competition law provisions in today's digital markets. After this, the article studies the present role of antitrust in digital markets by observing how digital markets are similar to traditional markets. The author states that even though markets may appear more complex than in the past, market regulation by the governments is not always the best option. On the contrary, the author argues in favour of antitrust enforcement as the preferable option, in this sense, antitrust should gain back its role in driving markets by enforcing the antitrust principles.

The fifth article by J. Hotchkiss is entitled: ***Polar Opposites: Judgments and counterfactuals in Sainsbury's v. MasterCard and Asda v. MasterCard.*** The article discusses the recent cases *Sainsbury's v. MasterCard* and *Asda v. MasterCard* to illustrate the legal uncertainty created by the decentralization of Article 101 TFEU enforcement due to the lack of competence of national courts to apply complex Ex Post counterfactuals consistently. In order to do this, the author has studied several factors such as: the compositions of the courts, their overreliance on expert economic witnesses, the standard of proof, complex court interplay and the ability to refer for preliminary ruling. The author concludes that regardless of the procedural tools that the national courts have been vested with to ensure consistent application of Article 101 TFEU at national and EU levels, the courts are failing to

implement them effectively. This, in turn, is creating significant legal uncertainty as evidenced by the polar-opposite judgments in the *MasterCard* cases.

The last article of this issue by D. Mandrescu is entitled ***Applying (EU) competition law to online platforms: Reflections on the definition of the relevant market(s).*** According to the author, the scrutiny of online platforms under the abuse of dominance provisions of Article 102 TFEU demands re-examining the process of the market definition due to the complexities related with the two or multisided nature of these platforms. The article states that first it is necessary to assess the number of relevant markets to be defined before the scope of the markets can be determined. The author develops an alternative approach to this exercise, to determine the number of relevant markets based on the typology of the interactions facilitated by the online platform and the degree of substitutability of such online platforms with other non-platform undertakings from the perspective of its customers groups. By doing this, the market power is adequately determined by taking into account the business reality of the platforms and the degree of competition that they face.

As always, I hope that you enjoy reading this new issue.

*José Rivas*
*Editor*
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