Editor's Note

Dear Reader,

It is my pleasure to introduce the first issue of *World Competition* for the year. This edition of the journal has a particularly international flavour, delivering salient insights into recent developments in antitrust regimes on three continents and across a diverse range of issues.

This issue is opened with a piece from European Commission Hearing Officer Wouter Wils, one of our most frequent contributors. Wouter's article, *Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network*, considers the fundamental procedural rights of companies which are the subject of the Commission's enforcement procedures under Articles 101 and 102 TFEU, or similar procedures taken by EU Member States' competition authorities. The article proceeds to consider what rights are conferred and their source, before exploring the relationship between fundamental procedural rights and the effective enforcement of Articles 101 and 102 TFEU. The paper then asks whether it is permissible for national competition authorities enforcing Articles 101 and 102 TFEU to provide for a lower or higher level of procedural rights than the level of fundamental procedural rights applicable in enforcement actions brought by the Commission. Wouter identifies Germany as a Member State with a lower level of protection of legal professional privilege and concludes that companies can directly invoke EU law to uphold their rights. Wouter also concludes that it is generally possible for national competition authorities to grant more extensive procedural rights to companies, but this is subject to a significant limit, as Wouter explains, with regard to in-house legal professional privilege.

Emmanuel Combe and Constance Monnier authored the second article in this issue entitled *Why managers engage in price fixing? An analytical framework*. The piece scrutinizes the incentives for a manager to engage in a cartel, applying a cost–benefit analysis to assess such a decision at the individual level, including psychological and behavioural factors. The focus then moves to the levers that are (or should be) available, either within the company or externally at a public authority level, to reduce the incentives to an individual to become involved in a cartel and, more broadly, the role of public policy in preventing this behaviour.

Our third article also inspects a facet of the law applicable to cartels. Pieter Huizing's *Proportionality of Fines in the Context of Global Cartel Enforcement* assesses the fundamental elements of national and international cartel sanctioning practices

'Editor's Note'. *World Competition* 43, no. 1 (2020): 1–4.

from a proportionality perspective, applying both retributive and consequentialist theories of punishment. This analysis reveals that the existing framework for setting fines for international cartels falls short of providing proportionate overall punishment due to a number of shortcomings. Pieter builds upon his discussion about these shortcomings by considering how these deficiencies can be addressed, calling for coordination of sanctions between authorities pursuing the same cartel and a reconsideration of the fundamental elements of national cartel fining methodologies. The article concludes that for authorities to successfully impose proportionate punishments, the authorities themselves must consider the retributive and consequentialist objectives that have already been imposed elsewhere for the same overall cartel conduct.

The fourth article, entitled *The Optimal Assessment Rule for EU State Aid Procedure*, comes from Anna Nowak-Salles. Her article plugs a gap which had existed in EU State aid literature by considering the optimal assessment rule for State aid procedure. The paper highlights how informational asymmetries at different points of the State aid procedure combine with complex rules to create a high probability of error in application, particularly in the preliminary examination rather than the formal investigation. With this distinction in mind, the paper suggests that the State aid assessment requires different assessment rules for the preliminary and formal investigations, something which is neither implicitly nor explicitly carried out currently. The contribution ends by calling for guidelines or best practices to be used and made known, particularly regarding the difference between the two stages of the State aid procedure, so that greater quality and transparency can be imbued in the decision-making process. This is particularly prescient given the ongoing revision of the State aid guidelines, where questions about the practical aspects of the application of the current guidelines are sure to emerge.

Following on from his previous article which considered a similar theme in Volume 42, Issue 4, of World Competition, Eyad Maher Dabbah returns with *Brexit and Competition Law: Future Directions of Domestic Enforcement*. This article considers and analyses the future path of UK domestic competition law enforcement in light of Brexit, addressing a broad range of issues such as the likelihood of significant reform and aspects of institutional structure of the UK competition law regime, as well as changes to UK competition law which are already on the on horizon.

Our next article takes us across the Atlantic to the US, specifically to examine mergers in the media industry. Annika Stöhr, Victoriia Noskova, Philipp Kunz-Kaltenhäuser, Sophia Gaenssle and Oliver Budzinski's piece, *Happily Ever After? – Vertical and Horizontal Mergers in the US Media Industry*, analyses recent vertical and horizontal mergers in the US industry for audio-visual content, using a theory-driven approach to consider the economic effects of these types of mergers on market competition, with a particular focus on digital media content distribution.

The ensuing discussion focuses primarily on three topics, asking whether the current state and development in merger activities in the US audio-visual content industry should give cause for concern, whether vertical or horizontal integration would be more preferable for the overall welfare and competition in the industry, and then these strands are brought together to consider the implications for antitrust policy. Having identified a number of issues, the piece turns to solutions, recommending a stricter approach to vertical merger control in the industry, as well as more active abuse control against already vertically integrated media companies.

Finally, Sven Gallasch and Naoko Mariyama bring us an analysis of an area of competition law which has already been significantly scrutinized in Europe and the US, namely pay for delay settlements. *Should Pay for Delay Be a Cause for Concern in Japan?* considers how it is that pay for delay settlements allegedly do not take place in Japan's pharmaceuticals market, in spite of the fact that similar incentives exist there as in other jurisdictions. The authors proceed by doing a comparative analysis with the US and EU, where the practice has been found to be unlawful, to assess the susceptibility of the Japanese pharmaceutical sector to pay for delay settlements.

I wish you pleasant reading.

José Rivas
Editor
March 2020