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Editorial - 'Competition law and the Courts' in view of the Interface between
Law and Economics

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The details of available remedies, enforcement mechanisms and conditions of litigation not only raise questions of procedure but can strongly influence the substance of competition law. Remedies, enforcement and the degree of judicial review of decisions within a multi-level legal system have the ability to shape the very notion of what the objectives of various competition law provisions are and what consequences should be drawn from their violation.

The four articles in this edition of the Competition Law Review, presented and discussed at the Luxembourg conference 'Competition law and the Courts' in September 2013, not only discuss their specific topics but also revisit these fundamental questions. They thereby point at the intellectually fascinating but always contentious issue of the factors to be taken into account in competition law.¹ The articles illustrate with vivid case studies how competition policy notions such as the 'distortion of competition' and the concept of an 'aid' are being shaped when applied in the context of other internal market policies such as public procurement and the provision of Services of General Economic Interest.

The contributions to this edition of the Competition Law Review thereby implicitly ask whether competition policy can almost exclusively be aimed at economic 'efficiency' or whether a broader mixture of political, legal, economic and procedural-justice related objectives should be pursued. These, mostly, constitutional value choices are specified first and foremost in the specific provisions on competition policy in the TFEU. They have, however, been made most visible in Treaty norms such as the Charter of Fundamental Rights. The constitutional value choices of the Union include social cohesion and social policies ensuring equality of citizens, access to services and minimum working and living conditions. They have been described aptly as trying to

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¹ For example Okeoghene Odudu opened his editorial to Volume 6, Issue 1 of the Competition Law Review dealing with the non-efficiency objectives in competition law with a discussion of the three 'classic' objectives in US anti-trust law citing, first, economic efficiency, second, political objectives such as the protection of democratic government against the overly powerful individuals, and, third, a social objective of ensuring competitiveness within a society (Richard Hofstadter, 'What Happened to the Antitrust Movement' in: Sullivan (ed.), *The Political Economy of the Sherman Act: The First One Hundred Years*, Oxford University Press (Oxford, 1991) 20-31, at pp. 23-24). Odudu, like many others, found that in EU competition law the CJEU had turned predominantly to the economic efficiency argument.

ensure a ‘continuous link between the economic and the social, the political and the constitutional.’²

In view of this, ‘efficiency’-centred model of competition policies, based on economic analysis of the markets, has advantages and disadvantages. It benefits from decision-making based on a scientific method. The advantages of a scientific approach are using verifiable input, accepted methods of assessing parameters and objectively reviewable calculation methods. Such method can add to the transparency and impartiality of decision-making and can be a valuable tool in calculating potential effects of a decision. However, in view of the broader objectives of the Treaties and the necessary linking of economic efficiency with other societal goals, this type of input covers only part of what needs to be taken into account in decision-making.

The question of whether distortions to a market can be tolerated in the process of achieving specific and sometimes competing policy goals remains a political issue to which the contributions to this edition give valuable input. Constitutional values, as is shown in the contributions to this edition, are not only related to the substance of a case, they also play a role in the choice of the enforcement and remedies. Albert Sanchez Graells, for example, analyses how also the structure of bodies granting remedies and subsequent litigation will influence competition-policy related balancing of interests in decision-making. He explores ‘configuring public procurement review bodies and courts as “State aid courts” for the purposes of the simultaneous enforcement of both sets of rules in a single setting of “private” litigation.’ The question of efficiency versus other policy goals is also at the heart of Pieter Van Cleyenbreugel’s contribution on standards of judicial review by national Courts the CJEU. What kind of ‘recovery’ of illegal State aid should be used as remedy is the topic of Tim Bruyninckx contribution. He therein searches for a broader vision of remedies than is applied to date – arguing in effect also for a broadening of interests to be taken into account. Finally, Roberto Cisotta, in discussing the merits of collective redress in antitrust damages actions, discusses the balance between private and public interests in enforcement. He shows, *inter alia*, how procedural rights such as access to documents and transparency influence the overall balance of powers and interests taken into account in enforcement procedures. The articles in this issue are thus not only a good read in their own right, they also give some realistic background to broader theoretical issues discussed in the context of contemporary competition law and policy.

² Michelle Everson, European economic rights and national State aids policy in conflict: the problem of the democratic securing of welfare, in: Erika Szyszczak (ed.), *European Handbook on State Aid Law*, Elgar (Cheltenham, 2011) 327-335, at p. 331; Christian Joerges, Florian Rödl, Informal politics, formalised law and the “social deficit” of European integration: Reflections after the judgement of the ECJ in Viking and Laval, 15 *European Law Journal* 2009, 1-19.