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From the Editor

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Whose welfare should competition policy protect? That is the subject of the first two articles in our Autumn 2006 edition. Is it society at large, including businesses whose profits, after all, ultimately inure to people? Or is it just those people who consume products? The fact that we are even having a debate over whether consumer or total (consumer plus producer) welfare is the right standard for competition policy is remarkable. The U.S. consensus that the antitrust laws should be about competition, not redistribution or protection of small business, is only about four decades old. And only in the last few years did the European Commission start focusing on consumer welfare as its guiding principle. Professors Michael Katz and Joseph Farrell, and Dr. Ken Heyer consider the debate over using consumer versus total welfare as the guiding principle for merger analysis. Both papers generally favor total welfare as the right ultimate objective. However, Katz and Farrell find some of the arguments for having agencies focus on consumer welfare more persuasive than Heyer, who favors a strict focus on total welfare. Moreover, since economists do not generally set policy, this debate is not over.

The debate about the goal of competition policy is followed by a six-paper symposium on state efforts to assist competitors. The EC Treaty prohibits Member States from granting aid to competitors that, roughly speaking, would distort competition in the European Community. This principle has resulted in significant political tension between the Commission—through the Directorate General for Competition (DG COMP), which enforces this aspect of EC law—and Member States. “State aid” was the subject of the May 2006 Antitrust Forum sponsored by the Jevons Institute for Competition Law and Economics at University College London. We are pleased to have papers based on the remarks made by Philip Lowe, the Director General of DG COMP, along with comments on his remarks by Professors Mathias Dewatripont and Frédéric Jenny. Alex Nourry and Nelson Jung then examine what they consider to be the new wave of protectionism sweeping the European Union, as well as the Commission’s efforts to address this issue.

While the United States does not have an equivalent prohibition, there have been attempts to ban certain forms of state assistance on the grounds that

it violates the Commerce Clause of the U.S. Constitution. Professor Peter Enrich, our next contributor, has led this effort and recently argued a case along these lines before the U.S. Supreme Court. (The court rejected the case on procedural grounds without reaching the merits). Maureen Ohlhausen looks at a different, though very important, aspect of state interventions in the competitive process. She focuses on U.S. state legislation that restricts competition, such as laws that limit the interstate shipment of wine (a burden on those of us in Massachusetts who would like to buy wine from California wineries).

The U.S. Supreme Court's decision in *Illinois Tool Works v. Independent Ink* is our featured case for this issue.¹ Reversing long-standing precedent, the Court concluded, after a cogent analysis of tying jurisprudence, that, for the purposes of a tying case, one cannot just presume that a patent confers market power. But, as Richard Taranto argues that the Court also made substantive and methodological contributes to antitrust to which litigators should pay particular attention.

We introduce a new feature in this issue that we will repeat whenever there are worthy subjects: reviews of books on antitrust law. Professor Randal Picker reviews Herbert Hovenkamp's *The Antitrust Enterprise*,² and Professor Richard Whish examines Robert O'Donoghue and Jorge Padilla's *The Law and Economics of Article 82 EC*.³

We end where we started: the purpose of the antitrust laws. Our classic for this edition is drawn from the writings of Walter Eucken, which laid the foundation for the Ordoliberal, or Freiburg, School of competition policy in Europe. Christian Ahlborn and Carsten Grave have translated the work and written an introductory essay that examines this school of thought, which has profoundly influenced EC competition law, from the standpoint of consumer welfare.

On behalf of the journal's readers and its editorial team, I am delighted to extend my thanks to all the contributors to this issue.

1 *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

2 HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2006).

3 ROBERT O'DONOGHUE AND A. JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC* (2006).