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Standing Up for Convergence and Relevance in Antitrust

Liber Amicorum

Volume I

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Concurrences

Antitrust Publications & Events

Foreword

SIR PHILIP LOWE

I am sure that Volume I of *Liber Amicorum* will contain many learned articles that will honour the work of Fred Jenny. With his renowned intellectual curiosity and rigour, Fred will certainly read all of them thoroughly and may even provide some feedback to the authors on the robustness of their arguments...

This contribution has a much more modest objective. It is to pay tribute to Fred Jenny's enormous contribution to the development of competition policies throughout the world, and in particular to the substantial international convergence in law and practice which he has tirelessly and successfully promoted for more than 25 years.

In 1994, when Fred first became Chair of the Organisation for Economic Co-operation and Development (OECD) Competition Committee, there were only a limited number of jurisdictions in the world which could claim to have anything resembling an established tradition of competition law or competition policy. There were also considerable differences in the stated objectives, the tests, the analytical methods and the institutional structures in different countries. Even within individual countries, laws and policies changed over time with little obvious parallelism or convergence with developments in other countries.

On substance and methods, there were major differences. To name but a few, the US had a strong record in antitrust, but what had started as a policy built on trust-busting, protecting the small and weak against the big and strong, evolved over time into one based on maintaining and promoting consumer welfare. Detailed economic and effects-based analysis of the actual or potential market impact of a business transaction or conduct displaced previous presumptions of anti-competitive harm. Influenced as it had been by previous US law and policy, German cartel law, and subsequently European law, was more ordoliberal and object-based. It sought to guarantee the process of competition on the market, not consumer welfare. French and UK competition policies were explicitly aimed at promoting "the public interest", while Canada adopted a "total welfare" criterion.

As far as processes and institutions were concerned, countries had also gone down different competition roads. Some, like the US, had a prosecutorial enforcement system, while most jurisdictions in Europe had administrative systems. Similarly, some pursued cartels on the basis of criminal rather than administrative law. Some fined the companies responsible, others put their employees in jail.

More generally, many countries preferred to regulate to deal with competition whereas others argued that you should “let the market work”.

To make sense of this diversity of laws and policies and to make recommendations as to what might be best practice in competition law and policy, a clear thinker with exceptional powers of enquiry and analysis was required. It required someone who knew how markets worked and also how they sometimes don’t work. It required someone who could easily grasp the interplay between economics and law. It also required someone who was prepared to listen patiently to all views but be prepared to stimulate debate and critically comment on those views.

In this respect, Fred Jenny has certainly been the right man in the right place at the right time. In a sense, in addition to being professor of economics, he has also had to be a professor of comparative (competition) religion.

The Socratic method has certainly been Fred’s trademark. It is said that Socrates “asked questions but did not answer them, claiming to lack wisdom concerning the subjects about which he questioned others.” If Fred Jenny asks the questions, you can be sure that he has got his answers prepared, even if diplomacy and politeness hold him back from letting you know what they are. Within the OECD Committee, heads of competition authorities such as I, have been only too aware of the formidable nature of a Fred Jenny inquisition. In the first place, the topics which the Committee has been asked to discuss have been carefully chosen by Fred and usually relate to the key challenges you are facing (or you are about to face although you don’t know it) in the work of your authority. So, it was in your interest to prepare your presentation well. Woolly thinking, “langue de bois”, reading out of formal statements without understanding them, as well as long, repetitive tedious interventions would be punished unmercifully by further questioning by the Chair or simply by Fred’s unfailing ability to bring back the discussion to the essential issues he wanted us to address.

If Fred’s principal analytical tool has been dialectic, a host of OECD recommendations and reports on competition issues – on hard core cartels, on merger review, on public utilities, on the conduct of investigations and on exchange of information – bear witness to his equally remarkable powers of synthesis.

The fruits of Fred Jenny’s efforts are evident in the degree of international convergence already achieved in competition laws and policies, as well as in the use of best-practice institutional structures, procedures and analytical methods. Under his chairmanship, the OECD Committee, together with the International Competition Network, has made a major contribution to the progressive establishment of compe-

tion laws and policies in most countries of the world. And Fred Jenny's personal commitment and advocacy has arguably had as much impact in emerging and developing countries as in member countries of the OECD.

No one who has been involved in efforts for more international convergence in competition laws and policies over the last 30 years would want to claim any major breakthrough. If 10 years ago, there seemed to be an emerging consensus on the need for an exclusively competition-related test for mergers, today many voices are again arguing for a public interest test of some kind. Perhaps too many thought, at that time, that the case for criminal rather than administrative sanctions against cartels was gaining ground. Yet, today, the record of criminal enforcement (outside the United States) looks modest.

At least one can say, thanks to the outstanding intellectual leadership of Fred Jenny, that we know much more clearly why competition laws and policies are still very different and why the challenge of international convergence is likely to be a more or less permanent one.

In Oliver Goldsmith's poem "The Deserted Village" he recalled how all those who knew him revered the knowledge and wisdom of the formidable village schoolmaster:

and still they gazed, and still the wonder grew,
That one small head could carry all he knew.

All of us who have been taught, orchestrated and impressed by the Chair of the OECD Committee would express the same sentiment about Fred Jenny.

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