Taking Competition Law Outside the Box

Liber Amicorum

Avinash Amanarth, Andrea Appella, David Bailey, Rachel Brandenburger, Christopher Brown, Paul Castlo, Carter Chim, Manish Das, Kyriakos Fountoukakos, Peter Freeman, Mara Ghiorgies, Massimiliano Kadar, Šarūnas Keserauskas, Ilkka Leppihalme, Munesh Mahtani, Adrian Majumdar, Norman Manoim, Samantha Mobley, Matteo Montecchi, Okeoghene Odudu, Burton Ong, Harikumar Pillay, Lip Hang Poh, Anne Riley, Vivien Rose, Peter Roth, Miguel Sousa Ferro, Han Li Toh, Pablo Trevisán, Andrea Usai, Iestyn Williams, Mario Ybar
Foreword

Wouter Wils

There is probably no academic competition lawyer who has been more prominent in the past 35 years in the United Kingdom, the European Union and far beyond than Richard Whish.

Richard Whish has taught many generations of students, first at Bristol University, and since 1991 at King’s College London, where as Emeritus Professor since 2013 he remains in charge of the very successful EU Competition Law distance-learning programme, as well as during a long spell at the College of Europe in Bruges. His former students are strongly represented in competition authorities, law firms and academia in Europe (including the UK) and many other parts of the world.

For many years, and still today, Richard has regularly given lectures and presentations, including his very popular ‘recent developments’ lectures, at law firms, economic consultancies, competition authorities and universities around the world. He is also an oft-invited and much-loved conference chair.

Even those (rare) competition lawyers who have not been his student or heard him speak will know Richard Whish through his Competition Law textbook, which from its first edition in 1985 until its current ninth edition, and now written together with his former student David Bailey, has set the standard for competition law textbooks in Europe and beyond. The tenth edition is no doubt already in gestation.

Richard Whish has also a been qualified solicitor since 1977, and was a partner at the City law firm Watson Farley & Williams from 1989 to 1998. He was a member of the Advisory Panel of the Director General of Fair Trading from 2001 to 2003, a non-executive director on the Board of the Office of Fair Trading from 2003 to 2009, and a member of the Board of the Singapore Energy Markets Authority from 2005 to 2011.

In 2014, Richard Whish was appointed Queen’s Counsel Honoris Causa, in recognition of his major contribution to the law of England and Wales outside practice in the courts.
When Richard Whish was asked in an interview by Nicolas Petit in 2012 why he worked in competition law and how he first got into it, he replied:

When I was asked at school what I wanted to do at university I said “Economics”. My (very traditional) school thought that this was madness, and assured me that I should do law. I did so, and basically hated it, although I did quite well. When I went on to do a postgraduate degree [in 1977–78] I took a course called “Monopolies, Mergers and Restrictive Trade Practices” (created by Sir Jeremy Lever), and that was when my career started – the point being, of course, it is law with economics.\(^1\)

At that time, the applicable competition law in the United Kingdom consisted of the monopoly and mergers provisions of the Fair Trading Act 1973, the Restrictive Trade Practices Act 1976, the Restrictive Trade Practices Court Act 1976 and the Resale Prices Act 1976, as well as, following the then still recent accession of the UK to the European Communities (as they were then known), Articles 85 and 86 EEC.\(^2\) In those European Communities, English was not yet the most used common language. In the wider world, most jurisdictions outside North America and Western Europe had no competition laws.

In the Preface of the first edition of his *Competition Law* book, published by Butterworths in 1985, Richard Whish wrote:

In recent years competition law has been developing at a remarkable rate throughout the world. I embarked upon this venture with three particular aims in mind. The first was to describe within one volume the provisions both of domestic and EEC competition law… In particular my aim was to illustrate both the convergences and divergences between UK and EEC law and to question which of the two systems adopted the more rational and coherent approach to particular competition problems. My second intention was to emphasize the importance of considering competition in its economic context… My third aim in writing this book was to provide at least a brief glimpse of the competition (or antitrust) law of the USA… I hope that this book will be of interest not only to students of competition law itself but also to anyone interested in the relationship of law to economics and to students of economics concerned with the effect of monopoly and competition on economic performance. I further hope that it will provide useful comparative material for observers of other systems of competition law.

---


2 The EC (later EU) Merger Regulation had not yet come into existence.
In the 35 years since the first edition of Richard Whish’s *Competition Law*, the competition law landscape in the United Kingdom, in Europe and in the wider world has changed enormously.

Regulation (EEC) No 4064/89 introduced merger control at EEC (later EC and now EU) level in September 1990. The Competition Act 1998 aligned UK domestic competition rules with EC competition law (then Articles 81 and 82 EC) in March 2000. This reform swept away in particular what Peter Freeman CBE QC (Hon) in this Liber Amicorum describes as the “peculiarly British system of control” of the Restrictive Trade Practices Act, which had taken up a significant part of the first three editions of Richard Whish’s *Competition Law*. Regulation (EC) No 1/2003 decentralised the application of EC competition law in May 2004 and made the application of Articles 81 and 82 EC (now Articles 101 and 102 TFEU) mandatory for the competition authorities and courts of the EU Member States whenever they apply domestic competition law to agreements or practices falling within the scope of EU competition law. It also created the European Competition Network, which groups the European Commission and the competition authorities of the EU Member States.

The UK competition regime, however, never became a mere copy of the EU system. The UK system kept, in particular, an interesting specificity in its market investigations and merger control regimes, and the Enterprise Act 2002 added another two, the criminal cartel offence and company director disqualification orders.

In the same 35 years, the European Communities/European Union enlarged, taking in 18 new Member States from southern, northern and central and eastern Europe. In part as a result of this enlargement (of which the UK was always a strong proponent), English became the most used common language in EU circles generally, and in the EU competition law world in particular.

In the same period, competition law also spread around the globe. According to the latest count, competition authorities exist today in no less than 139 jurisdictions. Most of these newer jurisdictions have chosen to follow the EU rather than the USA model.

In the words of Sir Peter Roth in this Liber Amicorum: as competition law has become global, so has Richard Whish.

Richard Whish’s *Competition Law* book (written together with David Bailey since the seventh edition) has become the leading competition law book throughout the EU and in many parts of the world where EU competition law is followed as a model. Students from all over the world have come to London to be one of Richard Whish’s students, and continue enrolling in King’s College

---

London’s distance-learning programme, which he created and continues to run. During the past 35 years, he has taught students from every Member State of the EU and the EEA. Competition authorities and conference organisers throughout Europe, and from South East Asia to Latin America invite him as their speaker of choice to learn about and discuss the latest developments in competition law and policy.

There are no doubt many ingredients to Richard’s extraordinary global success. They include his exceptional capacity to synthesise complex issues and express them in clear and beautiful language, his boundless energy and curiosity, and his personal charm, sense of humour and capacity for friendship.

Richard loves his students, and his students love him. Many of his former students stay in contact with him. Many other competition lawyers and economists have also become his friends. Richard shares with many of them not only his interest in competition law and policy, but also his various other interests, ranging from gardening for conservation (his wonderful garden in Marshfield is devoted to trees, birds and butterflies) to music, and in particular the operas of two other famous Richards, Wagner and Strauss.

This Liber Amicorum truly is a book by friends, coming together from all over the world to honour an exceptional man.
Contributors

Avinash Amarnath
Law Chambers of Avinash Amarnath

Andrea Appella
Dickson Poon School of Law,
King’s College London

David Bailey
Brick Court Chambers
King’s College London

Rachel Brandenburger
University of Oxford
Hogan Lovells US LLP

Christopher Brown
Dickson Poon School of Law,
King’s College London

Paul Castlo
Hogan Lovells International LLP

Carter Chim
Denis Chang’s Chambers
The University of Hong Kong

Manish Das
Dickson Poon School of Law
King’s College London

Miguel Sousa Ferro
University of Lisbon Law School

Kyriakos Fountoukakos
Herbert Smith Freehills

Peter Freeman
Competition Appeal Tribunal

Mara Ghiorgies
Baker McKenzie

Lip Hang Poh
Baker & McKenzie Wong & Leow

Massimiliano Kadar
DG COMP
King’s College London

Šarūnas Keserauskas
Lithuanian Competition Council

Ilkka Leppihalme
Dittmar & Indrenius

Munesh Mahtani
ViaVan

Adrian Majumdar
RBB Economics

Norman Manoim
South African Competition Tribunal

Samantha Mobley
Baker McKenzie

Matteo Montecchi
King’s Business School

Okeoghene Odudu
University of Cambridge

Burton Ong
National University of Singapore

Harikumar Pillay
Baker & McKenzie Wong & Leow

Anne Riley
Antitrust Consultant

Vivien Rose
Royal Courts of Justice

Peter Roth
Competition Appeal Tribunal

Han Li Toh
State Courts of Singapore

Pablo Trevisán
Comisión Nacional de Defensa de la Competencia

Andrea Usai
DG COMP

Iestyn Williams
RBB Economics

Mario Ybar
Garrigues (Chile)
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>I</td>
</tr>
<tr>
<td>Contributors</td>
<td>V</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>VII</td>
</tr>
<tr>
<td>Richard Whish Biography</td>
<td>XI</td>
</tr>
</tbody>
</table>

## Part I: Competition Policy

- Why Competition?                                                        | 3    |
  - Sarūnas Keserauskas                                                   |

- Anchoring Competition Policy: Keep Consumer Welfare and Carry On      | 17   |
  - Adrian Majumdar and Iestyn Williams                                   |

## Part II: Aspects of Article 101 and 102 TFEU

- Luxury Goods: The Right to Selective Distribution Strategies?          | 37   |
  - Reflections on the European Competition Framework on Online Sales   |
    - Andrea Appella and Matteo Montecchi                                |

- Article 101 and the Rule of Reason                                      | 53   |
  - David Bailey                                                          |

- The Standard and Burden of Proof, and the Delineation of the Object Box| 75   |
  - Carter Chim                                                          |

- Article 102 TFEU and Efficiency Pleas: A “Fact-Check”                  | 89   |
  - Massimiliano Kadar                                                   |

- The Object/Effect Distinction                                           | 101  |
  - Okeoghene Odudu                                                      |

- Allocating Anti-Competitive Agreements to the “Object Box”: A View from Singapore | 121 |
  - Burton Ong                                                           |
Abuse of Collective Dominance: Pushing (While Narrowing) the Boundaries ................................................................. 141
Mario Ybar

Part III: Procedure

Access to File and the Protection of Confidential Information .......... 163
Munesh R. Mahtani

In Search of the Perfect Settlement Procedure ................................. 177
Samantha Mobley and Mara Ghiorghies

The Hybrid Settlement Conundrum ................................................. 205
Anne Riley

Part IV: Regulation and Enforcement

UK Competition Law: At a Crossroads? ........................................ 229
Rachel Brandenburger and Paul Castlo

Why Design Matters to the Success of Competition Agencies .......... 253
Norman Manoim

Independence in the Enforcement of EU Competition Law: Thoughts on Institutional Reform and Coherence ................. 271
Miguel Sousa Ferro

Varying Models of Competition Law Enforcement .......................... 287
Sir Peter Roth

The Competition Appeal Tribunal’s “Merits” Jurisdiction: Is There a Case For Change? ................................................. 301
Christopher Brown and Manish Das

Peter Freeman

Part V: Case Studies

Economic Continuity of Liability in Antitrust Damages – CJEU Preliminary Ruling in C-724/17 Skanska et al. ................................. 339
Ilkka Leppihalme

Excess Baggage? – Airfreight’s Varied Contribution to Our Legal Landscape .......................................................... 365
The Right Hon Dame Vivien Rose DBE
The Ernst & Young Judgment and Gun-Jumping in EU Merger Control: Towards a Consistent Enforcement Trend of Gun-Jumping Cases? .......... 385
Kyriakos Fountoukakos

The Commission’s Merger Practice and New and E-Mobility: A Case Study: the Daimler / BMW / Car Sharing JV merger ............... 403
Andrea Usai

Part VI: International Perspectives

A Fine Mess: A Review of India’s Fining Jurisprudence and Learnings from the EU ................................................................. 415
Avinash B. Amarnath

Competition Advocacy in Singapore’s Competition Law Regime ........ 435
Harikumar Sukumar Pillay and Lip Hang Poh

Unlocking Constitutional Fundamentals of Argentine Competition Law And Policy................................................................. 451
Pablo Trevisán

A Multi-Faceted Approach for Competition Issues in the Digital Era ... 471
Han Li Toh
This Liber Amicorum highlights the global reach of Professor Whish's influence. Enforcers, academics and practitioners from around the world pay tribute to the mastery of competition law that Professor Whish embodies, and has shared with students with trademark erudition and enthusiasm. At this important juncture in the history of the EU and the UK, this tribute is a timely compendium of views from both sides. The legendary 'object box' is analysed anew, along with enforcement issues. It also includes voices from further afield, discussing recent developments in competition law. The diversity of topics covered is testament to the breadth of Professor Whish's authority, and illustrates a legal landscape which he has helped shape through clarity and common sense.

Foreword by Wouter Wils
Prof. Dr. Wouter Wils is a Hearing Officer for competition proceedings at the European Commission and Visiting Professor at King's College London.