

Nicolas Charbit
Sonia Ahmad
Editors

Frédéric Jenny

Standing Up for Convergence and Relevance in Antitrust

Liber Amicorum

Volume I

Igor Artemiev, Svetlana Avdasheva, Helmut Brokelmann, Caron Beaton-Wells, Zeynep Buharali, Julie Clarke, John Davies, Allan Fels, Albert Allen Foer, Eleanor Fox, David Gilo, Svetlana Golovanova, Gönenç Gürkaynak, Marc Ivaldi, Yannis Katsoulacos, Vicente Lagos, Philip Lowe, Santiago Martínez Lage, Robert Ian McEwin, Andreas Mundt, Hiroyuki Odagiri, John Pecman, Duy Pham, Enrico Adriano Raffaelli, Daniel Rubinfeld, Frederic Michael Scherer, Pablo Trevisán, Han Li Toh, Ali Kağan Uçar, Diane Wood

Concurrences
Antitrust Publications & Events

FRÉDÉRIC JENNY

Standing Up for Convergence and Relevance in Antitrust

Liber Amicorum - Volume I

Foreword by Sir Philip Lowe

Editors

Nicolas Charbit

Sonia Ahmad

All rights reserved. No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publisher accepts no responsibility for any acts or omissions contained herein. Enquiries concerning reproduction should be sent to the Institute of Competition Law, at the address below.

Copyright © 2018 by Institute of Competition Law
885 Avenue of the Americas, Suite 32G, NY 10001, USA
www.concurrences.com
book@concurrences.com

Printed in the United States
First Printing, November 2018
978-1-939007-76-6 (hardcover)
978-1-939007-77-3 (paperback)

Cover Design: Yves Buliard, www.yvesbuliard.fr
Book Design and Layout Implementation: Janeil Harricharan, www.janeilh.com

Concurrences Books

Antitrust Liber Amicorum

Frédéric Jenny – Liber Amicorum (Vol. I-II)

Nicolas Charbit et al., 2018

Douglas H. Ginsburg – An Antitrust Professor on the Bench (Vol. I-II)

Nicolas Charbit et al., 2018 - 2019

Wang Xiaoye, A Chinese Antitrust Tale

Adrian Emch and Wendy Ng (Forthcoming)

Ian S. Forrester, A Scott without Borders (Vol. I-II)

Sir. David Edward et al., 2015

William E. Kovacic: An Antitrust Tribute (Vol. I-II)

Nicolas Charbit et al. 2013-2014

Practical Law

Competition Digest – A Synthesis of EU and National Leading Cases, 3rd ed.

Frédéric Jenny, 2018

Choice - A New Standard for Competition Analysis?

Paul Nihoul et al., 2016

Conference Proceedings

Antitrust in Emerging and Developing Countries – Vol. II

Eleanor Fox, Harry First, 2016

Antitrust in Emerging and Developing Countries – Vol. I

Eleanor Fox, Harry First, 2015

Global Antitrust Economics - Current Issues in Antitrust Law and Economics

Douglas Ginsburg, Joshua Wright, 2015

Competition Law on the Global Stage: David Gerber's Global Competition Law in Perspective

David Gerber, 2014

PhD Theses

The Role of Media Pluralism in the Enforcement of EU Competition Law

Konstantina Bania, Forthcoming 2019

Buyer Power in EU Competition Law

Ignacio Herrera Anchustegui, 2017

e-Book versions are available to Concurrences+ subscribers.

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-

tition 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 now outgoing Chair of the OECD Committee would express the same sentiment about Fred Jenny.

Contributors

Igor Artemiev
*Federal Antimonopoly
Service of the Russian Federation*

Svetlana Avdasheva
*National Research University,
Higher School of Economics,
Moscow*

Helmut Brokelmann
*Martínez Lage,
Allendesalazar & Brokelmann*

Caron Beaton-Wells
*University of Melbourne
Law School*

Zeynep Buharali
*ELIG Gürkaynak
Attorneys-at-Law*

Julie Clarke
*University of Melbourne
Law School*

John Davies
Compass Lexecon

Allan Fels, AO
*University of Melbourne
Law School*

Albert Allen Foer
American Antitrust Institute

Eleanor Fox
New York University School of Law

David Gilo
Tel Aviv University

Svetlana Golovanova
*National Research University,
Higher School of Economics,
Nizhny Novgorod*

Gönenç Gürkaynak
*ELIG Gürkaynak
Attorneys-at-Law*

Marc Ivaldi
NERA Economic Consulting

Yannis Katsoulacos
*Athens University of
Economics and Business*

Vicente Lagos
Télécom ParisTech

Sir Philip Lowe
Oxera

Santiago Martínez Lage
*Martínez Lage,
Allendesalazar & Brokelmann*

Robert Ian McEwin
Competition Consulting Asia

Andreas Mundt
Bundeskartellamt

Hiroyuki Odagiri
Japan Fair Trade Commission

John Pecman
Competition Bureau of Canada

Duy Pham
Competition Bureau of Canada

Enrico Adriano Raffaelli
Rucellai Raffaelli

Daniel Rubinfeld
New York University School of Law

Frederic Michael Scherer
*Harvard University,
Kennedy School of Government*

Pablo Trevisán
*Comisión Nacional de Defensa de
la Competencia*

Han Li Toh
*Competition and Consumer
Commission of Singapore*

Ali Kağan Uçar
*ELIG Gürkaynak
Attorneys-at-Law*

Diane Wood
*United States Court of Appeals
for the Seventh Circuit*

Table of Contents

Foreword	v
Contributors	ix
Table of Contents	xi
Frédéric Jenny Biography	xv

Part I: Global Perspectives

Development of Multilateral Cooperation from a National Competition Authority's Point of View	3
Andreas Mundt	
The Next Frontier of International Cooperation in Competition Enforcement	19
John Pecman & Duy Pham	
Frédéric Jenny And The Harmonization Of National Competition Laws	43
Diane Wood	
Due Process And Competition Law: Global Principles, Local Challenges, An Argentine Perspective	55
Pablo Trevisán	
Convergence and Divergence in Singapore's Competition Law Regime	79
Han Li Toh	
The Deepening Interaction of Economics and Competition Policy: Overview and the Japanese Example	93
Hiroyuki Odagiri	

Part II: Economics and Antitrust

Merger Efficiencies And Competition Policy	109
Frederic Michael Scherer	
The Antitrust Economics Treatment Of Standard Essential Patents - the EU v the US	121
Daniel Rubinfeld	
A Methodology for Empirically Measuring the Extent of Economic Analysis and Evidence and for Identifying the Legal Standards in Competition Law Enforcement.....	131
Yannis Katsoulacos, Svetlana Avdasheva and Svetlana Golavanova	
How Accurate is the Coordinate Price Pressure Index to Predict Mergers' Coordinated Effects?	151
Marc Ivaldi and Vicente Lagos	
Why Economists Should Design and Enforce Competition Laws in Developing Countries	171
Ian McEwin	
Excessive Pricing by Dominant Firms, Private Litigation, and the Existence of Alternative Products	189
David Gilo	

Part III: Enforcement Matters

Means and Ends in Competition Law Enforcement	205
John Davies	
OECD-Inspired Reform: The Case of Corporate Fines for Cartel Conduct.....	221
Caron Beaton-Wells and Julie Clarke	
Should Competition Authorities Perform a Consumer Protection Role?	243
Allan Fels	
New Challenges for Anti-Monopoly Regulation in the Digital Economy	255
Igor Artemiev	
Regulation and Antitrust in the Pharmaceutical Field	275
Enrico Adriano Raffaelli	

Data-Related Abuses in Competition Law.....	293
Gönenç Gürkaynak, Ali Kağan Uçar and Zeynep Buharali	
The Arbitrability of Follow-on Damages Claims	311
Santiago Martínez Lage, Helmut Brokelmann	
Revisiting The Political Content Of Antitrust: The Changing Role Of Speech	331
Albert Foer	
Democracy and Markets: A Plea to Nurture the Link.....	351
Eleanor Fox	

Frédéric Jenny

Biography & Publications

Career

Frédéric Jenny is professor of Economics at ESSEC Business School in Paris. He is Chairman of the OECD Competition Committee since 1994, and Co-Director of the European Center for Law and Economics of ESSEC since 2008.

Positions in French Government & Judiciary

2004 - 2012: Conseiller en Service Extraordinaire, Cour de cassation

1993 - 2004: Vice Président, Conseil de la concurrence

1986 - 1993: Rapporteur Général, Conseil de la concurrence

1984 - 1985: Rapporteur Général, Commission de la concurrence

1978 - 1984: Rapporteur, Commission de la concurrence

Academic Positions

Since 1972: Professor of Economics (ESSEC Business School)

2017: Global Professor of Law (New York University School of Law's Hauser Global Law School Program)

2014: Global Professor of Law (New York University School of Law's Hauser Global Law School)

2012: David Tadmor Visiting Professor of Antitrust (Haifa University Law School)

1991: Visiting lecturer (University of Cape Town, South Africa)

1984: Visiting Professor (Keio University, Tokyo, Japan)

1983: Visiting Professor (Wuhan University, China)

1978: Visiting Professor (Northwestern University, United States)

Other Positions

Since 1994: Chairman, OECD Competition Law and Policy Committee

Since 2004: Chairman, International Advisory Board Concurrences Review

Since 2015: Chairman, Ethics Commission of the French Federation of Insurance Companies

2016 - 2018: Senior Fellow in the Online Global Competition and Consumer Law Masters Program, University of Melbourne

Since 2015: Member of the Advisory Board of the Centre for Competition, Regulation and Economic Development (South Africa)

Since 2016: Member of the CRESSE Advisory Board

Since 2016: Member of the Advisory Board of the Florence Competition Programme (Institut Européen de Florence)

Since 2017: Member of the Advisory Board, Fordham Corporate Law Institute

Member Scientific Advisory Board of the Interdisciplinary Center for Competition Law and Initiative, Middle East Initiative

Chairman, Scientific Advisory Board, Consumer Unity Trust (CUTS) (India)

Other Past Positions

April 2007 to April 2014: Non Executive Director, Office of Fair Trading, United Kingdom

April 1997 to December 2003: Chairman, WTO Working Group on Trade and Competition Policy

2003 to 2007: Member of the “Conseil scientifique de la mission Recherche, Droit et Justice”, French Ministry of Justice

June 1990 to June 1996: Member of the “Conseil scientifique de l’évaluation des politiques publiques”

1988 to 1990: Chairman of the Working Group “Formation des prix et fonctionnement des marchés dans les économies des pays en transition” (Mission Stoleru, Secrétariat d’Etat au Plan)

1982 to 1986: Member of the Advisory Committee of INSEE (National Institute of Statistics)

Education

1977 Doctorat d'Etat en Sciences Economiques, Université de Paris II
1975 Ph.D in economics, Harvard University
1971 Master in economics, Harvard University
1966 E.S.S.E.C. Business School

Distinctions

Officer, Ordre de la Légion d'Honneur (France)
Officer, Ordre National du Mérite (France)
Knight, Order of the Star (Romania, December 2017)
GCR Lifetime Achievement Award 2016

Selected Publications

Abuse Of Dominance By Firms Charging Excessive or Unfair Prices: An Assessment in Excessive Pricing and Competition Law Enforcement, Springer, September 2018

L'ordonnance du 1er décembre 1986: Aujourd'hui, enjeux et perspectives du droit de la concurrence (with Canivet, G. and Idot, L.) Le Club des Juristes, January 2018

Competition Digest – A Synthesis of EU and National Leading Cases, 3rd ed, Conurrences Review, 2017

The Institutional Design of Competition Authorities: Debates and Trends, in Competition Law Enforcement in the BRICS and in Developing Countries-Legal and Economic Aspects, Springer, 2016, p. 1-57

Disruptive Innovation, Law and Competition, in Conference Proceedings, Innovation - Competition Policy - Economic Analysis, Conurrences Review, N° 3-2016, Art. N° 80712, September 2016

Introductory Remarks, in Conference Proceedings, New Frontiers of Antitrust Conference, Conurrences Review, N° 3-2016, September 2016, Art. N° 80790

Les Autorités nationales de concurrence face au défi de la neutralité concurrentielle, Concurrences, N°4-2015, December 2015, p.1-24

Worst Decision of the EU Court of Justice: the ALROSA Judgment in Context and the Future of Commitment Decisions, Fordham International Law Journal, Issue 3, Vol. 38, May 2015, p. 701-770

Substantive Convergence in Merger Control: An Assessment, Concurrences, N°1-2015, February 2015, p. 22-41

A la recherche de la culture de la concurrence, in *A quoi sert la concurrence?* Behar-Touchais, M., Charbit, N., Amaro, R. (eds) Concurrences, 2014, p. 701-710

Concurrences: Ten years and a Question, Concurrences Review, Idot, L., Charbit, N., (eds), N° 4-2014, December 2014, p. 1

The Recovery of Antitrust Harms in Foreign Legal Systems, in Conference Proceedings, Antitrust Damages Actions in France and in Europe: Current Situation and Upcoming Changes, Concurrences, N°3-2014, September 2014, p. 5-6

General Interest and Economic Analysis, Concurrences Review N°1-2014, February 2014, p. 9 - 14

An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis, (with Lianos, I. Wagner von Papp, F., David, E. et al), CLES Research Paper Series 3/2014, UCL Faculty of Laws, June 2014

Anticompetitive Abuses of Patent Systems and the Role of Competition Authorities, Concurrences, N°4-2013, November 2013, p. 13

Stratégies d'instrumentalisation juridique et concurrences, CEDE, Larcier, Masson, A (ed), 2013, p. 9-13

Competition and Competition Policy in a Globalised World, in *Growth & Equity, Essays in Honor of Pradeep Mehta*, Desai, N. and Mathur, R. (eds), Academic Foundation, May 2013, p.111-113

Regional Agreements in Building New Competition Law Regimes, Selected Essays (with Heimler A.) Lewis, D. (ed), Edward Elgar, May 2013, p.183

Assessing Damages In Antitrust Cases: A Legal And Economic Perspective in *Antitrust Between EU Law and National Law*, Raffaelli E.A. (ed), Bruylant, April 2013

EU Competition Digest 2013, Concurrences Review, May 2013

Industrial Policy and Competition Policy: Preliminary thoughts, in Conference Proceedings, *New Frontiers of Antitrust*, Concurrences Review, N° 2-2013, May 2013, p. 74-78

L'articulation des sanctions en matière de droit de la concurrence du point de vue économique, Concurrences, N°1-2013, February 2013, p. 1-11

Private Enforcement: Current Issues, A Survey of the Main Economic and Legal Issues, Concurrences, N° 4-2012, November 2012, p. 25-29

Competition Authorities: Independence and Advocacy, in *The Global Limits of Competition Law*, Stanford University Press, Lianos, I. and Sokol, D. (eds), 2012, p. 158-176

Export Cartels in Primary Products: The Potash Case in Perspective in *Trade, Competition, and the Pricing of Commodities*, Evenett, S. J. and Jenny, F. (eds), January 2012, p. 99-132

Le calcul des sanctions, Concurrences N° 1-2012, February 2012, p. 1-3

Sanctions civiles et sanctions administratives en droit de la concurrence: une approche économique, RLDC, Issue 28, 2011, p. 157-161

The Economics of Informations Exchange, Concurrences Review N° 2-2011, May 2011, p.1- 4

The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities in *The International Competition Network at Ten*, Essays, Lugard, P. (ed) Intersentia, April 2011

The Economic and Financial Crisis, Regulation and Competition, in *Taiwan 2009 International Conference on Competition Policies/Laws*, Fair Trade Commission (ed) 2010, p. 7-20

Improving Judicial Control Of Administrative Decisions in Competition Enforcement, in *Competition Law and Economics*, Mateus, A. and Moreira, T. Edward Elgar, October 2010, p. 71-84

A French Perspective on the Quantification of Antitrust Harm, written contribution to *Workshop on the Quantification Of Antitrust Harm in Actions for Damages*, European Directorate-General for Competition, March 2010

Responses to the Economic and Financial Crisis: Whither Competition? in *Effective Crisis Responses and Openness: Implications for the Trading System*, Evenett, S., Hoekman, B., and Cattaneo, O., (eds) The World Bank and CEPR 2009, p. 217-247

The Economic and Financial Crisis, Regulation and Competition, *World Competition*, Vol 32, December 2009, p. 449 to 464

La crise économique et financière, la régulation de la concurrence, Concurrences, N°2-2009, May 2009, p. 59-68

Merger remedies under the new French regime, *Conference Proceedings*, Concurrences Review N° 2-2009, May 2009, p. 36-37

The EC White Book on competition private enforcement, Conference Proceedings, Concurrences Review N° 2-2009, May 2009,

The “Coming Out” of Abuse of Superior Bargaining Power in the Antitrust World, in the Annual Proceedings of the Fordham Competition Law Institute, International Antitrust Law and Policy, Hawke, B. (ed) Juris Publishing, 2009

Bailouts: how to discourage a subsidies war, in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20* (with Evenett, S.), Baldwin, R., Evenett, S., (eds) 2009, p. 81-85

Les choses hors commerce: le marché des organes, in *Droit et Économie des contrats*, par Jamin, C. (ed) LGDJ, July 2008, p. 207-229

Abus de position dominante et modernisation de l'article 82 du traité CE in *Le Nouveau Droit communautaire de la concurrence*, Brunet, F. et Canivet, G. (eds), Coll Droit des Affaires, Editions LGDJ, 2008

The CFI Decision in Microsoft: Why the European Commission's Guidelines On Abuse Of Dominance are Necessary and Possible, Competition Policy, GCP, Issue 2, January 2008, p. 1-10

Implications of Regulation 1/2003 in National Courts in *Competition Law and Economics, Advances in Competition Policy and Antitrust Enforcement*, Mateus, A. and Moreira, T. Kluwer Law International, October 2007

The Role of Economic Analysis in the French Supreme Court Judicial Review, Concurrences Review N° 4-2007, December 2007, p. 27-35

Cartels: Economic efficiency of sanctions, Concurrences Review N° 4-2006, December 2006, p. 10-30

The State Aid Action Plan: A Bold Move or a Timid Step in the Right Direction? Competition Policy International, Vol 2, No.2, 2006, p. 79-91

Technological Changes and Competition Among Collecting Societies for Music Rights: Is The Enforcement Of The EU Law Sufficient? European Institute, 2005

The EC State Aid Reform, Conference Proceedings, Concurrences Review N° 1-2006, February 2006, p. 63-128.

Modernization of European Law: Lessons for regional groupings, (with Horna, P.) in *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, Brusick, P., Alvarez, A.M, Cernat, L. (eds), UNCTAD, November 2005, p. 281

Frédéric Jenny, French Civil Supreme Court: An economist on the bench, Concurrences Review N° 1-2005, February 2005, p. 5-8

Competition Trade and Development Before and After Cancun, Beesley Lecture, 2004

Design and Implementation of Merger Remedies in High-Technology Industries, in *Merger Remedies in American and European Union Competition Law*, Lévêque, F. and Shelanski, H. (eds), Edward Elgar, 2003, p.16

Oligopoly, Capacity Constraint and Collusion (with Rey, P. and Compte, O.) *European Economic Review*, 46, 2002, p. 1-29

Oligopoly Theory, Collective Dominance and the EU Merger Control: The Airtours/First Choice Decision in Perspective in *Merger Control: Ten Years On*, Papers Presented at the Merger Control 10th Anniversary Conference, 2001

Economic Analysis, Antitrust Law and the Oligopoly Problem, *European Business Organization Law Review*, N°1, 2000, p. 41-57

Globalization, Competition and Trade Policy: Issues and Challenges in *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report on Trade and Competition 1998*, Proceedings of the Seminar (Staempfli Publishers Ltd), 1999

Competition Law Enforcement: Is Economic Expertise Necessary? in *International Antitrust Law and Policy*, Fordham Corporate Law, Hawke, B. (ed), Juris Legal Information, 1999

Media under French Competition Law, *Fordham International Law Journal*, Vol 21, Issue 3, March 1998, p. 679- 745

Competition Policy and Professional Services, *International Trade in Professional Services: Assessing Barriers and Encouraging Reforms*, OECD, 1996

Competition and State Aid Policy in the European Community, *Fordham International Law Journal*, Vol 18, Number 2, December 1994, p. 525

EEC Merger Control: Economies as an Antitrust Defense or an Antitrust Attack, *International Antitrust Law and Policy*, Fordham Corporate Law, Transnational Juris Kluwer, 1993

PART II

Economics and Antitrust

Why Economists Should Design and Enforce Competition Laws in Developing Countries

IAN McEWIN*

Competition Consulting Asia

Abstract

Frédéric Jenny has made an outstanding contribution to the economic understanding of competition laws around the world for more than 25 years. But, at the end of the day, lawyers rather than economists run competition law. Lawyers in developing countries mostly design (copy) competition legislation and run competition agencies because both before and once enacted the problem is seen as legal rather than economic. So, competition laws are simply copied from the United States and Europe, implicitly assuming anti-competitive practices are the same and can be remedied similarly. Local economic circumstances and institutions are paid lip service or largely ignored. This chapter argues new competition laws and institutions in developing countries should not be the “handmaidens of lawyers”, who mostly do not understand real-world economics, but rather economics determined within the legal system. Practical economists should determine what anti-competitive practices should be remedied taking into account local conditions and the costs of intervention.

* Ian McEwin heads *Competition Consulting Asia*. He has a law degree and PhD in economics from the Australian National University. He has been an expert witness in major litigation in Australia and New Zealand. From 2002 to 2008 he worked for the Singapore Government (two years with the Ministry of Trade & industry helping with the design and implementation of competition law, and then for four years as the foundation Chief Economist for the Singapore Competition Commission).

*Use of economics in judicial decision-making is not dangerous at its core, but it holds great potential for misuse in ways that are relatively undetectable, and those who use economics generously tend to do so in ways that are not transparent.*¹

I. Introduction: Economics and Competition Law

This chapter argues that economists, not lawyers, should design new competition laws in developing countries. Enforcement should also be decided by economists not lawyers. Lawyers live in world of legislation and judicial decisions which, only by accident, is related to determining real-world economic policies. The tendency of lawyers to look to other jurisdictions for laws and decisions to copy makes lawyers particularly unsuited to promoting competition in developing countries. The realities of local economics should prevail.

Fred Jenny has been foremost in promoting understanding of competition economics around the world for more than 25 years. I first met Fred in Australia about 30 years ago. He had made some comments on a paper I was presenting to the annual Australian Law Council's Trade Practices Workshop, an event comprising mainly lawyers, with a few judges and economists thrown in. Fred was friends with Maureen Brunt (like Fred, the holder of a PhD in economics from Harvard). I had come into competition law by accident in the mid 1980s. Maureen asked me to co-teach an undergraduate course in the Economics Faculty at Monash University called "Competition and Regulation". She also asked me to contribute to a competition law course in the master's programme in the Law Faculty.

Maureen was the leading industrial organisation economist in Australia at the time and was also a founding member of the Competition Tribunal. Maureen and I argued a great deal about the merits of Harvard versus Chicago economics in class. It was an exciting time and I learned a great deal from her. She had a major impact on judicial understanding of competition law economics in the Federal Court. We both were concerned that competition law improve economic outcomes given local circumstances.

Following post-second world war industry protection, Australia was opening up its economy to competition by reducing tariffs, the privatisation of state-owned enterprises and liberalising major sectors including the financial sector. In 1965, a Trade Practices Act was passed, based on the English model. A confidential register of anti-competitive agreements was set up. Maureen Brunt noted in relation to the 1965 Act that:

¹ Eleanor M Fox, "The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window" (1986) 61 NYULRev 554, 588.

The Bill proceeds on the basis that indiscriminate trust-busting is inappropriate since a high degree of market concentration is inevitable. It recognizes that this implies that policy must be concerned not only with horizontal agreements but also with the vertical practices of monopolies and tight oligopolies. It sets up a specially constituted tribunal rather than relying on the ordinary courts. A registration system procedure for examinable agreements is admirably designed to minimize the costs and harassments of investigation and to enable the purposeful selection of cases.²

The initial Commissioner of Trade Practice (and subsequently the first Chairman of the Trade Practices Commission), Ron Bannerman, told me he was astounded at the breadth and complexity of the anti-competitive practices registered. Standard economics did not deal with most of them. Interestingly, the Commissioner and the Trade Practices Tribunal were both *non-judicial* bodies. The aim was to base competition policy and law on the economic realities in Australia at the time.

Due to some concerns that the 1965 Act did not go far enough, and a belief that problems would be solved by passing forward-looking, anticipatory, legislation, in 1974 the Australian Trade Practices Act was passed. While the 1965 Act had been based on the English model, the 1974 Act was based on the United States *Sherman* and *Clayton* Acts. As Maureen Brunt described:

... we are about to move from a system centring on upon case-by-case non-judicial examination to a dual enforcement system (general prohibitions enforced in the courts coupled with case-by-case non-judicial exemptions) ... this is *court-centred* legislation; its success or failure will depend altogether upon its fate in the courts.³

So, the result was a move from competition law principles determined by case-by-case examination of economic realities to a general prohibition system derived from the United States that had been designed to curb the power of trusts. Australia, like the United States, introduced legislation which anticipates possible anti-competitive business conduct and which is interpreted and enforced by lawyers in courts. While the 1974 Act took some account of the practices detailed on the Register, the Act essentially codified the United States jurisprudence at the time. The Act has, until recently, resisted change. The current Act still contains a large number of sections dealing with vertical restraints that reflect pre-Chicago economics. Legislation has a way of being set in stone that lags economic structures, institutions and economic thinking. All the more reason to be careful in implementing competition law in developing countries – where the design and enforcement could protect privilege rather than promote competition.

2 Maureen Brunt, “Legislation in Search of an Objective” (*The Economic Record*, September 1965), reprinted in Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International, 2003) 74.

3 *ibid*, 88.

As a student of industrial organisation in the early 1970s, I wondered whether Australia should simply copy legislation and case law from the United States, to be interpreted both by tribunals (comprising judges, economists and business people) and general courts. There were major underlying differences in economic conditions and institutions between the two countries. While legal systems were roughly similar (the Australian Federal Constitution owes much to the United States), in general, the Australian economy was far more protected and regulated. Given that up to that time federal economic policy-making in Australia was controlled by economists, I wondered whether the control of anti-competitive business practices should be given over to Australian lawyers. Wasn't the economics more important? Shouldn't economists design and control enforcement? Wouldn't lawyers use United States case law as the model for intervention, not Australian economic conditions? But lawyers had won, and the 1974 Act reduced the relative importance of economists in curbing anti-competitive practices.

My interest in the appropriate design of competition law and its enforcement has persisted over the next 40 years, as I became more and more involved in competition regulation and litigation in Australia, New Zealand and South East Asia. It became clear that most countries, like Australia, simply followed developed country competition legislation. Little or no attempt was made to actually assess the actual impact of alleged anti-competitive practices in a local context, much less whether the costs of regulation exceeded any benefits. No examination was made as to whether the legal system was the best way of regulating anti-competitive conduct both in terms of administrative costs and the likelihood of error. As a result, I saw lawyers and judges with limited experience or expertise in business economics making decisions that impacted considerably on business practices. The complexity of legislation that tried to pre-judge in detail what was anti-competitive meant that competition lawyers prospered as business understood less and less. The quality of decisions was determined mainly on legal standards rather than the impact on the economy. Little effort was made to ascertain empirically whether particular business practices had adverse effects in the local context. Nor were interventions evaluated to assess whether they improved economic outcomes.

Despite the fact that most competition law legislation expressly states that economic goals are to be promoted, many lawyers in every jurisdiction where I have worked have expressed disdain for the use of economics. This was usually based on ignorance of economics. Lawyers often see economics as inimical to legal values of distributive fairness and rights. For example:

The detractor asserts that law and economics is dangerous, corruptive, and the enemy of rights and values. The proponent asserts that economics is merely a useful tool for producing knowledge or at least better unde

standing, and that greater knowledge is critical in helping society reach whatever objectives it may have.⁴

The United States pioneered the use of economics in competition law. Australia stressed the importance of economics from the beginning and Europe did so more recently. But in Europe non-economic goals such as economic integration are also pursued. Multiple goals make competition law outcomes harder to predict in advance. In Europe, the weight given to different goals may vary from case to case depending on judicial preferences and understanding (not economic consequences). One strategy developing countries can use to minimise effective competition law enforcement is to have multiple goals.

But as lawyers control competition law and its outcomes, law rather than economics is paramount. For example, in the United States:

The role of the courts is not to decree economic policy but rather to implement antitrust policies enacted by Congress. Antitrust has always been a fact-specific enterprise and courts need to restore the proper balance between fact finding and economic theory by confining economic theory to those areas where it assists antitrust analysis and discarding theory where it gets in the way. In short, we need to return to simple, predictable and administrable – but informed – antitrust rules.⁵

In Europe, Advocate General Kokott similarly notes:

It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case, . . . the Court should not allow itself to be influenced so much by current thinking (*Zeitgeist*) or ephemeral trends but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.⁶

That is the legal way – legislate potentially anti-competitive conduct in detail in advance to provide certainty for business. But are the *benefits of certainty* resulting from proscribing anti-competitive conduct in advance subject to non-expert judicial interpretation preferable to a system of case-by-case examination of practices by those with business and economic expertise who are in a better position to determine the economic effect of anti-competitive practices? After all it is possible to be precisely wrong.

Most developing countries simply copy prohibitions from developed countries – in practice these days from the European Union. As a result, most developing country

4 Fox, n 1.

5 Edward D Cavanagh, “Antitrust Law and Economic Theory: Finding a Balance” (April 2013, St John’s University School of Law Legal Studies Research Paper Series) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253309> accessed 2 August 2018.

6 Case C-23/14, *Post Danmark A/S v Konkurrencerådet (Post Danmark II)* (21 May 21 2015) ECLI:EU:C:2015:343, para 4.

jurisdictions allow competition regulators with economic expertise to initially investigate and penalise anti-competitive conduct, subject to judicial review.

Competition law in developed countries mostly focuses on allocative (or short-term) efficiency. Promoting competition drives prices down to cost, ensuring goods and services are produced at lowest cost and so benefiting consumers. While innovation is considered, it is usually secondary, as the focus is primarily on the effect of anti-competitive conduct on price and output.

After considerable practical experience in a number of countries over more than 30 years, I now believe that economists should play a much greater role in the design of competition law rules and also control competition law decisions – not lawyers. In particular, the legal system is not well suited to promoting competition in new jurisdictions with varying economic conditions and institutions. Simply copying the United States or European models is not only costly but unlikely to be appropriate, particularly in countries where business practices differ, and judges lack any economics training or worse, are corrupt.

II. The Use of Economics in the United States and Europe and its Relevance to Developing Countries

Countries usually introduce competition law to promote economic growth, so economics should drive the introduction and implementation of competition law.

Starting in the 1970s, the United States went through an antitrust revolution as it moved from multiple public interest goals to a singular goal based on economic analysis. The end result of that revolution is that antitrust in the United States has some variation of economic efficiency as its sole goal (based on a welfare standard of either total welfare or consumer welfare).⁷

Economics, ideally, is an empirical discipline. Yet empirical work showing that competition law is welfare-enhancing is mixed. For example, an early study by Crandall and Winston⁸ argued that US competition law has been largely ineffective due to problems in separating competitive from anti-competitive conduct, as well the ability of markets to stop anti-competitive conduct. Subsequent studies have come to different conclusions. So how can developing countries distinguish between good and bad conduct? Through economic studies or evolution in the legal system?

Even in the United States, some believe that lawyers are mostly not good at judging efficient conduct (i.e. based on its economic effect) – even with the help of economists. As Roger Noll, former Stanford University economics professor puts it:

7 DD Sokol, “Troubled Waters Between US and European Antitrust” (2017) 115 MichLRev. 955, 956.

8 Robert W Crandall and Clifford Winston, “Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence” (2003) 17 Journal of Economic Perspectives, 3.

Lots of fairly silly ideas, from an economics point of view, are embedded in the law by case decisions. Lawyers have to be driven by precedent, so sometimes they're forced to make arguments that are silly, not because they don't know they're silly, but because that's what the law is.⁹

Europe based its competition law prohibitions on those in the United States. However, “[i]n Europe ... the shift to greater economic analysis ... in competition law started in earnest only in the early 2000s.”¹⁰ While differences between the United States and Europe in competition law decisions can be explained, in part, by differences in the use of economics, differences also occur:

because of different sets of considerations, goals, and institutional design issues ... including noneconomic goals, which are more significantly embedded in the European case law, and significant deference by European courts to DG Competition in the conduct context.¹¹

However, the effect of business conduct is situationally specific – the same conduct can have different economic effects in different regions or countries. Where there are economic and institutional differences, simply copying case law decisions from other countries is unlikely to be welfare-enhancing. Even copying competition prohibitions from other countries may be wrong because the prohibitions are based on factors that may not be relevant to the adopting country.

Yet competition laws are copied from the developed West. Developing country policy-makers and lawyers look to, and are trained, in developed countries by attending courses in Europe and the United States where they learn the basis of decisions in jurisdictions quite different to their own and where courses are taught in highly desirable locations.

The main advantage of using the legal system to promote competition is that the legal system designs rules of conduct that can be understood by businesses and which allow for business certainty because rules are enforced based on those rules and past decisions. Left solely to economists, competition law decisions would be made on the basis of whether the alleged anti-competitive conduct reduced economic welfare in each factual context. This provides less *ex ante* certainty but better (and more costly) substantive decisions. However, less *ex ante* certainty can have an impact on business decision-making in developing countries.

If the sole aim of competition law is to improve economic outcomes in developing countries, then obviously interfering with business conduct (that may be inefficient in developed countries but welfare-enhancing in developing countries) should be

9 Jeff Zalesin, “5 Things that Bother Economists about Antitrust Law” (*Law 360*, 13 April 2016). Available at: <www.navigant.com/-/media/www/site/insights/disputes-investigations/2016/5-things-that-bother-economists-about-antitrust-law.pdf> accessed 20 July 2018.

10 Sokol, n 7, 957.

11 *ibid.*

examined and judged by economists. Once there is a consensus that a competition rule is welfare-enhancing, lawyers can then take over to ensure business certainty and consistency in adjudication of disputes with the help of economists.

Competition law in Europe and the United States mainly focuses on promoting allocative efficiency. But is this the appropriate economic goal for developing economies? Should alleged anti-competitive practices be assessed on the basis of the impact on short-term price and output? Some lessons may be learned from development economics.

Cooter and Schafer divide the modern history of development economics into three main eras.¹² The first, from 1930 to 1975, focused on problems of insufficient capital and the need to modernise. In developing countries, markets by themselves, it was believed, did not do enough to properly allocate capital and transform agricultural economies into industrial. So, development economists focused on industrial policies where state leadership was required. Solutions varied by the extent of government intervention: centrally planned economies under communism; state-enterprises under socialism; extensive regulation under capitalism. The second era, from 1975 to 1990, saw the development problem in terms of overreaching government – trade barriers, subsidies and regulation. The role of governments should be limited. Markets should be left alone to allow prices to reflect real economic costs and to allow flexibility that ensured firms could respond quickly to changing economic circumstances. The Washington Consensus focused on market liberalisation as the main source of growth, achieved by reducing subsidies, trade barriers, entry barriers and unnecessary regulation.

The third era, from 1990 until now, has focused on *institutions*, defined both in terms of the rules (legal and social norms) that constrain business conduct and the organisations underpinning them. Institutions determine the result of economic policies and so competition laws are likely to have different outcomes depending on the institutions in a country. The third era promoted efficient markets, with the role of the legal system being to provide *stable institutions* that promoted effective (competitive and innovative) markets.

Importantly, New Institutional Economics (NIE) recognised that *new institutions are slow to develop*. Yet policy makers continue to argue that developing countries should adopt (transplanted) laws and organisational forms from developed countries – including competition law. In nearly every case, little or no research was undertaken as to whether simply transplanting competition laws was reasonable given considerable differences in institutional settings and whether its introduction was desirable for developing countries. Nearly all the policy debate in developing countries (where public) was conducted by lawyers unable to answer economic policy questions.

12 Robert D Cooter and Hans-Bernd Schäfer, *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton University Press 2012) 194.

NIE offers a way of examining the suitability of competition law in different institutional settings, including for developing countries. Joskow pointed to the problems involved:

Antitrust legal rules must be sensitive to the attributes of the institutions we rely upon to enforce antitrust policies, the information and analytical capabilities these institutions possess, the uncertainties they must confront in the diagnosis and mitigation of anticompetitive behavior and market structures, and the associated costs of type I and type II errors implied by alternative legal rules and remedies.¹³

Developing countries have not examined these issues. Instead, the major impetus for transplanting competition laws came from the United States, largely driven by a desire to reduce the costs of international trade and to provide greater legal certainty for multinationals. Following a report by the US International Competition Policy Advisory Committee (ICPAC),¹⁴ the International Competition Network was formed in 2001:

The ICN is a network of established and newer competition agencies, with the common aim of addressing practical antitrust enforcement and policy issues. The ICN facilitates consensus-building and convergence toward sound competition policy and practice across the global antitrust community.¹⁵

While doing a very good job in educating professionals around the world in the economic and legal intricacies of competition law, little has been done to assess, empirically, the benefits of its introduction or the economic suitability of US/European models for underdeveloped countries. A major reason is that the debate is conducted within the narrow confines of a lawyer-dominated model. Little or no research has been conducted into the efficacy of transplanting competition laws to countries with far less developed economies and institutions.

III. Competition Law and Economic Growth

Economic growth results from innovative actions. For advanced economies this means technological product or process advancements. For developing countries, technological change mainly results from trade and foreign investment, including education. Innovation mostly occurs by adapting the way overseas markets work to

13 Paul L Joskow, “Transaction Cost Economics, Antitrust Rules and Remedies” (2002) 17 *JLEcon & Org* 95.

14 Executive Summary: <https://www.justice.gov/sites/default/files/atr/legacy/2006/06/01/execsummary.PDF> accessed 3 August 2018.

15 ICN, “Factsheet and Key Messages” (ICN, April 2009) 5 <www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf> accessed 2 August 2018.

local conditions and changing organisational forms to improve productivity. Innovations may be disruptive if local markets are weak due to poor property rights protection, poor contract enforcement, lack of remedies against fraud and so on. Researching and prescribing competition laws or administering a legal regime appropriate to local conditions cannot be done within legal systems. Law and economics research is required where the impact is empirically assessed. In practice, lawyers operate within a legislative and judicial world, they mostly simply copy laws from other jurisdictions without considering the economic and social conditions in which they operate.

Obviously, the impact of economic policies depends on the way they are implemented, i.e. the *actual* rules of the game and the impact they have on market conduct. Impact depends not only on the rules themselves but also on enforcement effort and the economic context to which they are applied. For example, a seller imposing contractual restrictions on resale will not have any anti-competitive consequences if contracts are not enforced.

Developing countries are usually concerned with more than economic efficiency. Fairness is also often important. But political considerations are also important, especially the impact on concentrated elite/business power. Competition law may be seen as a way of weakening that power – even if less economic efficiency is the result.

Before competition law is introduced there should be an understanding of the likely impact of competition law on efficiency (both short-term allocative efficiency and long-term innovation) as well as on other economic goals such as gross domestic product, employment etc. As well, there should be an identification of regulation that hinders competition. In Singapore, the default position was that competition law would apply to all sectors unless the sector could put up a convincing case that other policy goals outweighed any benefits from additional competition.

Douglas North argues that the success of the West resulted from its more efficient economic institutions which led to the rise of capitalism and which depended on private property protection and restrictions on elite power.¹⁶ As Vries describes:

The diffusion of social power is also thought to have caused, and been caused by, the existence of a so-called “civil society” ... There society had countervailing power against government. Despotism *and* under-government were thereby ruled out, with all the beneficial effects that it is supposed to have had for development and growth. In such conditions, with a network of mutual arrangements and a government that was held in check, trust could arise, which could also enhance opportunities for growth.¹⁷

16 Douglas C North, *Institutions, Institutional Change and Economic Performance* (CUP 1990) 3–10.

17 PHH Vries, “The Role of Culture and Institutions in Economic History: Can Economics Be of any Help?” (2001) 11, available at <www.lse.ac.uk/Economic-History/Assets/Documents/Research/GEHN/GEHNConferences/conf3/Conf3-PVries.pdf> . Accessed 2 August 2018.

Civil society does not effectively exist in many developing countries, so the protection of property rights and restrictions on elite power are likely to be limited. Inserting Western competition law in these circumstances may not be beneficial to the developing country except for elites, including the legal profession. It is possible that implementing competition policies through the legal system *could* lead to worse economic outcomes than if implemented by economists, if the legal system cannot use economic tools. So why *should* developing countries follow a litigious legal model where economic policy is delegated to lawyers largely untrained in economics? Why, when dealing with competition matters, have economists become the “handmaidens of the lawyers”.¹⁸ Should economists serve a secondary role in developing countries?

IV. Why Copy Legislation from Developed Countries?

Lawyers now effectively control competition law in every jurisdiction, with economists playing a subsidiary and often minor role. Decisions on the competitive effects of business conduct are largely decided by judges based on representations by counsel. Decisions are made based on the merits of the legal arguments used within the constraints set by competition legislation and prior judicial decisions. An important determining factor is the resources available to each of the parties involved. This is particularly important in developing countries where elites have the resources to defeat competition regulators. A legal enforcement model means regulatory and adjudicatory (mainly legal) costs are very high coupled with a low probability of economically sound decisions. Decisions are made on the basis of limited facts related to each specific case, even though decisions become applicable to similar conduct in general in the economy – no attempt is made to assess whether decided rules benefit the economy as a whole.

Criticism of judicial decisions or perceived new competition problems have often led to proposals for reform. Usually, with limited empirical economic research, reform proposals worked out in isolation continue to try to anticipate possible future anti-competitive conduct in detail. Over time this has led, usually, to more and more detailed regulation that business cannot understand without paying high legal fees. The legal profession had wrested control. Transactions costs, error and regulatory and legal costs have risen exponentially. This is the model copied by developing countries.

Why should legislation be drafted in detail based on experience in another country? Isn't it better to try and deal with competition problems based on conditions in the implementing country? Aren't experienced business people and economists better able to judge the overall impact of competition law on the local economy and determine appropriate remedies taking the costs of intervention into account than

18 ET Grether, “Economic Analysis in Antitrust Enforcement” (1959) 4 Antitrust Bull 55.

lawyers? Is the reason an implicit belief that the legal system is more independent than vested business interests? Is that assumption valid in developing countries?

Business organisations and transactions form a country's economic history and the relative costs of doing business. Understanding why transactions and organisations have evolved the way they have needs to be understood. Asian business, for example, is dominated by family conglomerates which may pose particular problems for competition design and enforcement.¹⁹

Lawyers mostly use inductive reasoning – starting with the facts and analysing differences and similarities in already-decided fact situations to determine which legal rule is most appropriate. Legal methodology *does not* provide a way of determining economic effects with any pretence to scientific accuracy. On the other hand, economists use deductive reasoning – developing abstract predictive models where the accuracy of the prediction (e.g. does the merger lessen competition substantially) is more important than the realism of the factual assumptions made. This is problematic for the legal system because lawyers judge reliability on the basis of facts not predictions.

When judges lack economic knowledge, they must rely on economic experts – leading to the problem of *epistemic asymmetry* – where judges are not able to detect expert bias and/or choose between competing economic evidence.

... in deciding to call or listen to an economic “expert” judges admit limitations to their knowledge for the purposes of legal decision-making, which is an essential dimension of their legitimacy and authority.²⁰

Of course, this assumes that there is a “correct” economic answer that can be determined by the legal system. In judging whether conduct is anti-competitive, economists generally try to predict the consequences (price, output, innovation) with and without the conduct. The impact of conduct depends on a great many factors which can differ from case to case and country to country. Predicting the likely effects of conduct (as the result of a merger, restrictions in a distribution contract, etc.) is difficult, usually involving probabilities – that is, an expected impact with a range of possibilities. Why should lawyers with no training in predicting economic effects decide cases? This exercise is better undertaken by economists, unrestrained, rather than by lawyers, judges or psychics.

While the legal system decides disputes based on the past and generally understands that legal decisions impact on future conduct, determining the “right” or best decision

19 See R Ian McEwin, “Chinese family firms in SE Asia and Competition Law” in Cassey Lee and Michael Schaper (eds) *Competition Law, Regulation and SMEs in the Asia-Pacific: Understanding the Small Business Perspective* (Institute of Southeast Asian Studies, 2016).

20 Ioannis Lianos, “Judging Economists’, Economic Expertise in Competition Law Litigation: A European View” (2009) UCL CLES Working Paper Series 1/2009, available at <<http://ssrn.com/abstract=1468502>> accessed 2 August 2018.

to shape future business conduct is not paramount. As Massel notes in the United States context:

Antitrust, the central area in the field of competition, is probably unique among the government areas in which economic analysis can be applied. Since our antitrust laws are forms of business regulation, their application is focused on litigation ... Even when broad policy issues are considered in antitrust, the spotlight remains on litigation ... The emphasis is on litigation and the settlement of controversy, not on affirmative, non-litigious government administration.²¹

If decisions are unlikely to maximise economic welfare, and because legal processes are costly (due to admitting evidence under more restrictive rules than economists, the time spent in discovery and other evidential proceedings combined with high lawyer hourly rates), it is hard to see why competition principles should be determined by the legal system. These problems are magnified in developing countries that lack expertise and money to conduct proper evaluations under legal system rules. Better that economists run the system.

V. Economists Should Play the Major Role in Competition Law Design and Enforcement

New jurisdictions should design general competition rules to suit their local circumstances. This means devising a competition law regime which increases overall economic welfare (or colloquially, increasing the size of the economic pie) through improvements in short-term allocative efficiency *and* long-term economic and institutional growth. Where possible, competition rules should also ensure the economic gains are shared to some degree by consumers (distributive justice). There is no need to introduce comprehensive competition laws to begin with. A focus on cartels and distribution contracts might be preferable. Easterbrook argues that:

The legal system should be designed to minimise the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself.²²

This applies equally to regulatory actions. The economic system is more likely to correct monopoly power than regulators or courts. In developing countries, regulators are unlikely to be appealed due to lack of financial resources and the fact that regulators are doing what their authoritarian government wants. Knowing this, regulators are unconstrained and so more susceptible to corruption or government direction. Ironically, competition law can impact adversely on economic growth.

21 Mark S Massell, "Legal and Economic Aspects of Competition" (1960) 2 Duke LJ 157.

22 Frank H Easterbrook, "Limits of Antitrust" (1984) 63 TexLRev 1, 16.

Governments can “signal” to investors that they have remedies against individual or collective market power abuses but, in reality, it is used to disguise government abuses. The task:

... is to create simple rules that will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury.²³

This task is better left to economists unconstrained by artificial legal rules.

Designing, or adapting existing competition law could include:

- Establishing an economic task force to examine likely anti-competitive practices in a developing country, in conjunction with international economic experts with practical experience of evaluating the impact of anti-competitive practices and the costs of intervention, including likely errors in practice given local institutions. This could include a registration system as in Europe and Australia.
- The economic task force proceeds on a case-by-case basis, recommending that anti-competitive practices be curbed when net benefits are demonstrated in the local context, taking into account regulatory and judicial Type I and Type II errors.
- Lawyers devise competition law rules based on above taking into account local legal requirements and regulatory and judicial expertise.
- Economists control the administration of the competition law regulatory agency, e.g. case selection, and constantly revise guidelines for business

If competition law is to serve mainly economic goals, then the institutional structure should favour decision-makers who can best ensure good economic outcomes by predicting the likely consequences of alleged anti-competitive conduct and determining whether an economy is better overall once all the costs and benefits have been taken into account.

But developing countries usually have authoritarian governments and highly unequal income and wealth distributions. Newly introduced competition laws, often introduced at the behest of developed countries in exchange for trade deals, may be used to promote elite interests and so not foster general economic development.

Transparent competition law decision-making is also required if general economic development is to be achieved. However, transparency should not be related to issues such as whether competition law decisions are the same as in other jurisdictions or can be distinguished legally (the province of lawyers). Rather decisions should be based on whether they actually improve economic welfare in an economy. Lawyers

23 *ibid*, 17.

cannot do that. Only economists can examine a country's economic situation and analyse whether competition rules actually improve economic welfare, taking into account any social costs including changes in behaviour and the costs of administration.

Accepting decisions in similar cases from other jurisdictions as precedent is likely to be wrong because:

- Goals in other jurisdictions may be different – innovation is more important for developing countries than short-term allocative efficiency. So, “it is adaptive rather than allocative efficiency which should be the guide to policy.”
- The impact of anti-competitive conduct may be different on price, output and product quality.
- The ability to assess actual impacts may be different
- So, lawyers schooled in other jurisdictions can be dangerous.

New competition agencies and reviewing courts or tribunals are likely to make mistakes – in terms of adversely impacting on economic outcomes. If a regulator prohibits a beneficial practice, then the economic cost is not only for that particular case but also for future beneficial conduct by other firms. New agencies know little of domestic business practices and whether they are efficient or not in local circumstances. Regulators will be sceptical of novel explanations of business success in the local conduct. Instead regulatory lawyers will look to similar conduct in cases elsewhere – because they have no training in examining the efficiency of business conduct. But while the conduct may be same in other jurisdictions, the consequences are different.

Availability of evidence – underdeveloped countries do not have the economic statistics available in developed countries. Also, there won't be as many commercial data firms. Hence the regulator will have to depend to a large degree on data from those being investigated. This makes market definition and determining market shares problematic.

There may be a tendency for lawyers in competition agencies to try and rely on per se rules because they are easy to administer and promote in annual reports. For example, section 4(2) of Malaysia's Competition Act 2010 deems horizontal agreements which (a) fix price, (b) share markets, or (c) limit or control production, market outlets, market access, technical or technological development, investment and bid-rigging “to have the object of significantly preventing, restricting, or distorting competition in any market”. So, irrespective of economic effect, the conduct is sanctioned. Liability is avoided where the benefits of the agreement outweigh the anti-competitive impact, but the onus of proof is on those potentially liable. This means the Malaysian Competition Commission does not have to examine the economic effects – for an agency trying to establish itself this can lead to an inclination

to pursue conduct where there is little adverse economic impact. Often, apparently contractual restrictions have positive benefits in developing countries as they were designed around institutional deficiencies.

Given different economic and institutional conditions, competition regulators in developing countries should conduct full inquiries into every alleged anti-competitive practice, but limits on budgets, data and expertise mean this will not happen. For developing countries, a decision needs to be made about whether to focus on consumer welfare or overall efficiency, taking into account producer welfare. For export-only industries, maximising producer welfare would seem appropriate and not improving theoretical consumer welfare derived from an economic model.

But the reality is, in practice, that lawyers rely on decisions from other jurisdictions. Lawyers have no expertise in assessing the consequences of alleged anti-competitive conduct. Economists examine the economic facts in a case to determine whether a practice has a net adverse impact given local conditions and the likely costs of intervention, both direct (enforcement costs) and indirect (unintended adverse consequences). Ideally the regulator or court should:

... consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be achieved are all relevant facts.²⁴

VI. Conclusions

Fred Jenny has made a considerable contribution to the use of economics in competition law around the world. But economists should contribute more. Economic analysis is technical. This creates a major problem for new competition law regimes run by lawyers because competition law “has become increasingly dependent on expertise that has become decreasingly accessible to non-experts.”²⁵

Neoclassical economics confines the examination of the *effects* of anti-competitive acts mostly in terms of their impact on price and output. So, whether a merger substantially lessens competition is judged on whether the price is increase is likely to be large. Economic models in these circumstances may rely on assumptions unrelated to the circumstances of the case. Moving beyond just the impact as determined by legislation allows for a better understanding of whether conduct is good or bad for an economy, given local circumstances. Unconstrained by legislation,

24 *Chicago Bd of Trade v United States*, 246 US 231, 238 (1918).

25 John E Lopatka, “Economic Expert Evidence: the Understandable and the ‘Huh?’” [2016] Antitrust Bull, 1, 2.

economists can develop more realistic models to judge economic welfare. As Coase notes:

The view that the worth of a theory is to be judged solely by the extent and accuracy of its predictions seems to me wrong. Of course, any theory has implications. It tells us that if something happens, something else will follow, and it is true that most of us would not value the theory if we did not think these implications corresponded to happenings in the real economic system. But a theory is not like an airline or bus timetable. We are not interested simply in the accuracy of its predictions. A theory also serves as a base for thinking. It helps us to understand what is going on by enabling us to organize our thoughts. Faced with a choice between a theory which predicts well but gives us little insight into how the system works and one which gives us this insight but predicts badly, I would choose the latter.²⁶

Depending on models that simply give good predictions on price and output are problematic. Australia started with a case-by-case approach to competition law. Interventions were only made with a proper understanding practices as well as considering the likely impact of conduct across a number of dimensions. With understanding, it could be determined whether outcomes could be improved. NIE adopts this approach by taking:

... a comparative contractual approach to economic organization in which contractual variety is expected to reflect an economizing purpose. The driving force affecting the choice of governance arrangements is the desire to economize on the total costs of goods and services, including costs associated with contractual hazards and the costs of institutional arrangements designed to address such hazards.²⁷

While difficult, surely developing countries should take a comparative approach when adopting competition law. To understand effects requires understanding how markets work in each country. To decide what to do requires understanding how effective new administrative bodies will be and whether the legal system is a help or a hindrance. To promote development goals, instruments and laws different from those in developed countries may be required. Yet rarely is this done.

Courts in developed countries have cut back on the application of *per se* rules – recognising that they may not be beneficial overall – and relied more on *rule of reason* or the application of a cost–benefit analysis of the alleged anti-competitive conduct. The issue is problematic in new jurisdictions in developing countries because the likely adjudication costs are not known and neither is the *net* impact of the alleged anti-competitive conduct. This issue will not even be considered if a new agency is

26 Ronald Coase, “How Should Economists Choose?” in Coase, *Essays on Economics and Economists* (The University of Chicago Press, 1994) 15

27 Joskow, n 13, 96.

run by only lawyers, but it is more likely to be if the agency is run by economists. Economists are better able to evaluate the impact of alleged anti-competitive conduct on the basis of their own methodologies unconstrained by the legal system.

If economists take second place to the legal system, then their impact on the drafting of competition laws and their enforcement depends on the ability of lawyer decision-makers to understand economics. If decision-makers either ignore the economic reasoning or misunderstand the economics, then wrong decisions will be made which may impact on future economic growth by constraining future firm decision-making. Why have a Rolls Royce legal adjudicative system not built for purpose when a more effective and fuel efficient non-legal Renault will do?

15 years of archives

23,000 articles

4 DATABASES

Concurrences Review: Access to latest issue and archives

- 10,000 articles from 2004 to the present
 - European and national doctrine and case law
-

e-Competitions Bulletin: Access to latest issue and archives

- 13,000 case summaries from 1911 to the present
 - Case law of 55 jurisdictions
-

Conferences: Access to the documentation of all Concurrences events

- 215 conferences (New York, Washington DC, Brussels, Paris, London, Hong Kong)
 - 300 PowerPoint presentations, proceedings and syntheses
 - 450 videos
 - Verbatim reports (in progress)
-

e-Books: Access to all Concurrences books

- 20 e-Books available
 - 5 forthcoming
 - PDF version (html version in progress)
-

NEW

New search engine: Optimized results to save time

- Search results sorted by date, jurisdiction, keyword, economic sector, author, etc.
-

New modes of access: IP address recognition

- No need to enter codes: immediate access
 - No need to change codes when your team changes: offers increased security and saves time
-

Mobility:

- Responsive design: site optimized for tablets and smartphones
-

Concurrences Review

Concurrences is a print and online quarterly peer reviewed journal dedicated to EU and national competitions laws. It has been launched in 2004 as the flagship of the Institute of Competition Law in order to provide a forum for academics, practitioners and enforcers. The Institute's influence and expertise has garnered interviews with such figures as Christine Lagarde, Emmanuel Macron, Mario Monti and Margarethe Vestager.

CONTENTS

More than 15,000 articles, print and/or online. Quarterly issues provide current coverage with contributions from the EU or national or foreign countries thanks to more than 1,200 authors in Europe and abroad. Approximately 35 % of the contributions are published in English, 65 % in French, as the official language of the General Court of justice of the EU; all contributions have English abstracts.

FORMAT

In order to balance academic contributions with opinions or legal practice notes, Concurrences provides its insight and analysis in a number of formats:

- Forewords: Opinions by leading academics or enforcers
- Interviews: Interviews of antitrust experts
- On-Topics: 4 to 6 short papers on hot issues
- Law & Economics: Short papers written by economists for a legal audience
- Articles: Long academic papers
- Case Summaries: Case commentary on EU and French case law
- Legal Practice: Short papers for in-house counsels
- International: Medium size papers on international policies
- Books Review: Summaries of recent antitrust books
- Articles Review: Summaries of leading articles published in 45 antitrust journals

BOARDS

The Scientific Committee is headed by Laurence Idot, Professor at Panthéon Assas University. The International Committee is headed by Frederic Jenny, OECD Competition Committee Chairman. Boards members include Bill Kovacic, Bruno Lasserre, Howard Shelanski, Isabelle de Silva, Richard Whish, Wouter Wils, etc.

ONLINE VERSION

Concurrences website provides all articles published since its inception, in addition to selected articles published online only in the electronic supplement (around 40%).

WRITE FOR CONCURRENCES

Concurrences welcome spontaneous contributions. Except in rare circumstances, the journal accepts only unpublished articles, whatever the form and nature of the contribution. The Editorial Board checks the form of the proposals, and then submits these to the Scientific Committee. Selection of the papers is conditional to a peer review by at least two members of the Committee. Within a month, the Committee assesses whether the draft article can be published and notifies the author.

e-Competitions Bulletin

CASE LAW DATABASE

e-Competitions is the only online resource that provides consistent coverage of antitrust cases from 55 jurisdictions, organized into a searchable database structure. e-Competitions concentrates on cases summaries taking into account that in the context of a continuing growing number of sources there is a need for factual information, i.e., case law.

- 12,000 case summaries
- 2,600 authors
- 55 countries covered
- 24,000 subscribers

SOPHISTICATED EDITORIAL AND IT ENRICHMENT

e-Competitions is structured as a database. The editors make a sophisticated technical and legal work on all articles by tagging these with key words, drafting abstracts and writing html code to increase Google ranking. There is a team of antitrust lawyers – PhD and judges clerks - and a team of IT experts. e-Competitions makes comparative law possible. Thanks to this expert editorial work, it is possible to search and compare cases.

PRESTIGIOUS BOARDS

e-Competitions draws upon highly distinguished editors, all leading experts in national or international antitrust. Advisory Board Members include: Sir Christopher Bellamy, Ioanis Lianos (UCL), Eleanor Fox (NYU), Damien Gérardin (Tilburg University), Frédéric Jenny (OECD), Jacqueline Riffault-Silk (Cour de cassation), Wouter Wils (DG COMP), etc.

LEADING PARTNERS

- Association of European Competition Law Judges: The AECLJ is a forum for judges of national Courts specializing in antitrust case law. Members timely feed e-Competitions with just released cases.
- Academics partners: Antitrust research centres from leading universities write regularly in e-Competitions: University College London, King's College London, Queen Mary University, etc.
- Law firms: Global law firms and antitrust niche firms write detailed cases summaries specifically for e-Competitions: Allen & Overy, Cleary Gottlieb, Jones Day, Norton Rose Fulbright, Skadden Arps, White & Case, etc.

The Institute of Competition Law

The Institute of Competition Law is a publishing company, founded in 2004 by Dr. Nicolas Charbit, based in Paris and New-York. The Institute cultivates scholarship and discussion about antitrust issues through publications and conferences. Each publication and event is supervised by editorial boards and scientific or steering committees to ensure independence, objectivity, and academic rigor. Thanks to this management, the Institute has become one of the few think tanks in Europe to have significant influence on antitrust policies.

AIM

The Institute focuses government, business and academic attention on a broad range of subjects which concern competition laws, regulations and related economics.

BOARDS

To maintain its unique focus, the Institute relies upon highly distinguished editors, all leading experts in national or international antitrust: Bill Kovacic, Mario Monti, Eleanor Fox, Barry Hawk, Laurence Idot, Frédéric Jenny, etc.

AUTHORS

3,800 authors, from 55 jurisdictions.

PARTNERS

- Universities: University College London, King's College London, Queen Mary University, Paris Sorbonne Panthéon-Assas, etc.
 - Law firms: Allen & Overy, Cleary Gottlieb Steen & Hamilton, DLA Piper, Hogan Lovells, Jones Day, Norton Rose Fulbright, Skadden Arps, White & Case, etc.
-

EVENTS

More than 250 events since 2004 in Brussels, London, New York, Paris, Singapore, Hong Kong, Milan, Moscow and Washington, DC.

ONLINE VERSION

Concurrences website provides all articles published since its inception.

PUBLICATIONS

The Institute publishes Concurrences Review, a print and online quarterly peer-reviewed journal dedicated to EU and national competitions laws. e-Competitions is a bi-monthly antitrust news bulletin covering 55 countries. The e-Competitions database contains over 12,000 case summaries from 2,600 authors.

Nicolas Charbit
Sonia Ahmad
Editors

Frédéric Jenny

Standing Up for Convergence and Relevance in Antitrust

Liber Amicorum

Volume I

Dr. Frédéric Jenny is the renaissance man of competition policy. As an economist, scholar, judge and enforcer, he has helped transform the landscape of global competition enforcement. In this *Liber Amicorum*, distinguished members of both bar and bench, as well as academics from around the world, come together to bear testimony to his international achievements. This collection of 21 articles celebrates Dr. Jenny's career thus far, and also explores other timely and topical areas of competition law and policy.

Concurrences
Antitrust Publications & Events

