

Nicolas Charbit
Sonia Ahmad
Editors

Richard Whish QC (Hon)

**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 Ghiorghies, Massimiliano Kadar, Šarūnas Keserauskas, Ilkka Leppihalme, Munesh Mahtani, Adrian Majumdar, Norman Manoim, Samantha Moblely, 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 been a 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.

1 Nicolas Petit, “The Friday Slot (4) – Richard Whish” (*Chillin' Competition*, 3 February 2012) <<https://chillingcompetition.com/2012/02/03/the-friday-slot-4-richard-whish/>> accessed 27 January 2020.

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,³ 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

3 PaRR, Competition Authorities, Global Directory 2020.

Foreword

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 Castle

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 Ghiorghies

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

Foreword	I
Contributors	V
Table of Contents	VII
Richard Whish Biography	XI

Part I: Competition Policy

Why Competition?	3
Šartūnas 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? Reflections on the European Competition Framework on Online Sales	37
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	
The Restrictive Trade Practices Acts – An Appreciation	321
Peter Freeman	

Part V: Case Studies

Economic Continuity of Liability in Antitrust Damages – CJEU Preliminary Ruling in C-724/17 <i>Skanska et al.</i>	339
Ilkka Leppihalme	
Excess Baggage? – <i>Airfreight’s</i> 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 <i>Daimler / BMW / Car Sharing JV</i> 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	

Independence in the enforcement of EU Competition Law: thoughts on institutional reform and coherence

Miguel Sousa Ferro¹

Abstract: This paper continues the long-standing discussion about the need for independence in the public enforcement of EU Competition Law, placing it against the backdrop of the innovations of the ECN+ Directive in this regard, which have introduced a double standard for the national and EU level. It is argued that the importance and suitability of independence has been overestimated, and that the need for political decisions in certain steps of the enforcement of competition law, subject to democratic control, has been underestimated. It proposes a model for institutional reform which involves the creation of a European Competition Agency, with the Commission being relegated to the exercise of a political veto over certain matters.

I. Introduction

The first time I saw Professor Whish, he was literally smelling the roses in the College of Europe Bruges campus. While I was privileged to learn Competition Law from many professors, with very different backgrounds and approaches, Richard Whish will always hold a special place in my heart. It is, thus, a pleasure and a privilege to contribute to this *Liber Amicorum*.

The most important lesson I learned from Professor Whish was to take several steps back from the Law and look at it in the framework of its underlying objectives and policy. While details matter, it is crucial to take an overall look at the Law with a critical eye, to ask why, and then to assess the results in light of the answer.

In honour of this lesson, I have chosen to dedicate this paper to a topic which has been at the very top of many of the ongoing hot debates in EU Competition Law, while seldom being explicitly mentioned.

As far as EU Competition Law is concerned, these are troubled times we live in. DG Competition is accused of using State Aid rules to invade the sovereignty of Member States and harmonizing national tax laws. It is accused of pursuing a political agenda in several important transatlantic cases, and of distorting Antitrust Law to pursue goals outside the realm of competition policy. Some Member States openly discuss revising EU Law to allow for political intervention overriding Commission decisions, with a view to preferring the creation of European champions over the protection of competition. Soon after being elected, the new Commission President made it known that she would like to see market definitions changed, namely to allow for the same result.

The backdrop to these issues is the discussion about whether Competition Law should be applied by an independent authority focused on a technical assessment of compliance with competition rules alone, or if it should be applied, or subject to override, by a political body, which may weigh other concerns and decide to favour other objectives.

¹ Professor at University of Lisbon Law School and Universidade Europeia (Lisbon). Managing Partner at Sousa Ferro & Associados. Email: miguelferro@fd.ulisboa.pt.

But it's important not to forget the past. There is nothing new about this debate. The idea of an independent European Competition Authority (or European Cartel Office) has been around since the very beginning. High-profile cases periodically bring the issue back to the forefront, but it's never gone.

Following the adoption of the ECN+ Directive, this issue has gained a new level of complexity. We are now living with an institutionalized double standard when it comes to the independence of public enforcers of EU Competition Law at EU and at MS level. The EU Commission, Council and Parliament have agreed that it is fundamental for Arts. 101 and 102 TFEU to be applied by NCAs whose independence from politics is assured, but have no problem with the same rules being applied, at EU level, by a political body.

This paper is written in essay style. I have taken the liberty of taking several steps back and then loosening the reigns of thought. I was surprised where the process took me, and am sharing what follows in the spirit of provocation and intellectual debate. I perceive the ideas expressed herein as the beginning of a reflection, rather than its end.

II. What does it mean to be independent?

The European Union has imposed, in primary and secondary law, obligations of independence on national authorities entrusted with applying EU rules relating namely to banking, data protection, energy, telecommunications, railway, nuclear and radiological protection.² Throughout the years, this legislation has systematically evolved in the direction of greater densification of the requirements of independence. There is also significant case-law interpreting such requirements.³ Antitrust is the latest area to see such obligations imposed.⁴

Accordingly, an ensemble view of the EU legal order provides a relatively clear picture of what the EU legislator and the Court consider necessary in order to ensure independence in the enforcement of complex bodies of technical rules. And these fit into three standard pillars:

- (i) Appointment and terms of office of Head / Board (partly applicable also to staff):
 - a) appointed according to clear and transparent rules;
 - b) appointed from persons meeting conditions of suitability and independence;

² See, e.g.: articles 131 and 282(3) TFEU and article 7 of Protocol No. 4; articles 39 TEU and 16(2) TFEU and article 8(3) CFREU; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, articles 51 to 54; Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, article 57; Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, articles 6 to 9; Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, article 55; Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste, article 6; Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations, article 5; Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, article 76; For a more detailed analysis, see: SOUSA FERRO, M., "Institutional Design of National Competition Authorities: EU Requirements", (2018) 13(2) *Competition Law Review* 109.

³ See, e.g.: Case C-82/07 CMT EU:C:2008:143; Case C-389/08 Base EU:C:2010:584; Case C-614/10 Commission v Austria EU:C:2012:631; Case C-518/07 Commission v Germany EU:C:2010:125; Case C-288/12 Commission v Hungary EU:C:2014:237; Case C-85/14 KPN EU:C:2015:610; Case C-362/14 Schrems EU:C:2015:650; Case C-240/15 ISTAT EU:C:2016:608; Case C-424/15 Garai and Almendros EU:C:2016:780; Case C-560/15 Europa Way EU:C:2017:593.

⁴ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, articles 4 and 5.

- c) appointed for a certain length of term, non-renewable or with limited renewability;
- d) guarantees against dismissal except in certain pre-defined cases of serious misconduct;
- e) must act independently / impartially;
- f) must be subject to an incompatibility regime, including a cooling-off period;
- (ii) Resources:
 - a) must have adequate financial and human resources;
 - b) must have separate annual budget, made public;
 - c) must have legal powers necessary to effectively pursue its mission;
- (iii) Power of political bodies to interfere with activities:
 - a) must be legally separate and functionally independent from other public or private entities, in particular regulated entities;
 - b) must not seek or take instructions from any other body in relation to regulatory tasks (but may be subject to general policy guidelines and to some degree of supervision);
 - c) must not be subject to suspension or overturning of decisions by any authority, other than independent appeal bodies or judicial review.

It is a well-known shortcoming of assessments of independence that they tend to focus exclusively on formal factors, such as those listed above, whereas “there may well be a dissonance between formal and actual independence”⁵, and “informal or de facto independence is also very important, and probably even more important”⁶. Factual independence is infamously difficult to measure, being largely dependent on subjective perceptions, and it would be overly ambitious to attempt to discuss it in this short paper in a systematic way. But specific instances and anecdotes may provide some clues, at the very least, as to the degree of potential variations of factual independence. In any case, since the ECN+ Directive has only imposed obligations of formal independence, the relevance of this discussion, in the present context, is diminished. Furthermore, a discussion of factual independence may be wholly displaced when the head of the agency is him/herself a member of the executive political body.

III. Why should a competition authority be independent?

The ECN+ Directive pursues the objective of ensuring that NCAs have, *inter alia*, guarantees of independence, and deems these guarantees “essential” to the effective and uniform application of Articles 101 and 102 TFEU.⁷ According to the EU legislator, guarantees of independence are “necessary” for NCAs “to be able to enforce Union competition rules effectively”, and to ensure that undertakings engaging in anticompetitive practices are not faced with “very different outcomes” depending on the authority handling the case.⁸ The Directive focuses on the “operational independence” of the “authorities, their heads, staff and those who take decisions”.⁹

The Directive doesn’t actually explain why independence is deemed essential to ensure effective and uniform application of Articles 101 and 102 TFEU. But one does find some explanations in other EU legislation requiring independent regulators. In the Electronic Communications sector, for example, it is stated that independence is required “to ensure the imperviousness of its head and members to external pressure” and to avoid the “risk of regulatory capture”.¹⁰

⁵ MONTI, G., “Independence, interdependence and legitimacy: the EU Commission, national competition authorities, and the European competition network”, *EUI Working Paper Law 2014/01*, 2014, p. 4.

⁶ GILARDI, F. “The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors”, (2005) 11(4) *Swiss Political Science Review* 139, at 157.

⁷ ECN+ Directive, article 1(1) and recitals 3, 8 and 10.

⁸ ECN+ Directive, recital 5.

⁹ ECN+ Directive, recital 18.

¹⁰ Directive (EU) 2018/1972, recital 38.

In my view, the “independence” of regulators, as it is foreseen in EU Law (see previous section), is meant to ensure the non-distortion of decisions by private interests, and the non-distortion of decisions by public interests other than those legitimately pursued when applying the law in question. Instrumentally to these objectives, it is also necessary to ensure efficiency and effectiveness (the law should be applied by technically capable and knowledgeable bodies, with an adequate level of human and financial resources) and to promote public trust in compliance with the rule of law, namely through transparency, accountability and judicial review.

Political science seems to tend to look at the decision to establish independent regulators as a way of improving the credibility of regulatory commitments and to combat political uncertainty resulting from changes in political leaders. These two objectives are seen as a means to an end: fostering trust, private investment and economic growth.¹¹

It is uncontroversial that rules must be in place to ensure insulation from private interests. However, this concern is not specific to independent regulatory agencies. Any public body must be insulated from undue influence of private interests. This is what conflict of interests, incompatibility and corruption rules are all about. While independent regulators tend to be subject to more stringent rules aimed at pursuing this goal – particularly a cooling-off period –, there is nothing to prevent the same requirements being imposed on politicians and public servants in non-independent bodies.

Thus, I argue, it is at the level of the insulation from other public interests that one finds the real roots of a possible need for independence of competition authorities. But, if this is so, we must consider what are the public interests that should be pursued and taken into account by competition authorities, so that we can then determine, by exclusion, what are the other public interests which they must be insulated from.

To move forward in this analysis, we should distinguish the different branches of Competition Law. Since NCAs are not empowered to apply EU merger control or State aid rules, it is only natural that the ECN+ Directive only requires MS to impose independence when it comes to NCAs applying Articles 101 and 102 TFEU. But this does not necessarily mean that the reasons which may justify imposing independence when applying antitrust rules are not present when applying merger control or State aid rules.

(i) Antitrust

Shying away from the endless debates about the purposes and objectives of Competition Law, allow me to simplify and say that, fundamentally, Antitrust Law is concerned with protecting competition on the market, preventing distortions of competitive behavior deriving from collusive practices and exclusionary or exploitative abuse of market power, on the assumption that such behaviors have a negative impact on consumer welfare and/or on a fair distribution of total welfare.

But this is not all. Articles 101 and 102 TFEU have always been about more than protecting competition on the market. EU Competition Law was created (also) as a tool for the promotion and protection of the internal market. The history of the enforcement of these provisions by the Commission is littered with examples of priority-setting and uses of Articles 101 and 102 TFEU which are best understood in light of the objective of eliminating barriers to parallel trade and defending the proper functioning of the internal market. When MS agreed to establish an internal market, they did so, namely, after having agreed that a system would be put in place to prevent anticompetitive practices from disrupting that market and artificially giving the companies of one MS advantages over others.

¹¹ See: GILARDI, F. “The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors”, (2005) 11(4) *Swiss Political Science Review* 139.

When the Commission and the NCAs apply Articles 101 and 102 TFEU, they are not only enforcers of undistorted competition on the relevant markets, they are guardians and promoters of the EU internal market. This is relevant when defining which cases to pursue. But it is also relevant when interpreting those provisions (for the administrative authorities and the courts). It explains why imaginative interpretations may sometimes be arrived at, such as identifying agreements in the presence of apparently unilateral behavior by a non-dominant undertaking and then fining only one of the sides of the “agreement”.

It is often assumed that competition authorities should be insulated from all other concerns and interests. And, indeed, it is easy to see how entrusting the enforcement of these rules to an institution which does not pursue strictly competitive and economic concerns can be problematic. It can lead to Antitrust (and merger control and State aid rules) being used as a political or diplomatic weapon, or distorted to pursue a policy agenda alien to competition.

But there is a significant degree of oversimplification in the defense of insulation.

Antitrust Law requires competition authorities (and courts, in both public and private enforcement) to take into account many other policy concerns beyond those mentioned above. And these other policy concerns may override the protection of competition and of the internal market.

First, in an approach akin to the American rule of reason, both Articles 101(3) and 102 TFEU (the latter, via case-law) call for an economic balance test. Even if an agreement is deemed to restrict competition, or if an undertaking is deemed to be abusing its dominance, the behavior will be lawful if its positive economic impact supersedes its negative economic impact. Article 101(3) provides as examples of positive impact the improvement of the production or distribution of goods and the promotion of technical or economic progress. Note the important contrast with block exemption Regulations, which are limited to competitive assessments.

This means that competition authorities cannot be exclusively concerned with protecting competition and the internal market. Even if competition is restricted, and cross-border trade is limited, this may be justified by other economic concerns. Subject to control of proportionality, an anticompetitive agreement might, for example, be justified by the desire to achieve a faster roll-out of a new technology or quicker creation of an infrastructure which will benefit the economy as a whole, including consumers.

Second, under the Wouters case-law¹² (and, to some extent, arguably already in the balance test mentioned above), just like the prohibitions of internal market restrictions may be set aside by various other concerns, and just like it is often necessary to weigh conflicting constitutional principles and decide which should win out, so too the goal of protecting competition is not an absolute, supreme value. There are many other public policy concerns (security, health, environment, justice...) which can act as overriding general principles.

In other words, competition authorities (and courts) cannot apply Antitrust rules without taking into account and weighing a vast range of public policies, going far beyond the realm of competition. Virtually every other public policy may, potentially, override competitive concerns and require a competition authority not to deem an anticompetitive practice to be illegal. And arriving at these decisions in specific cases requires complex, non-economic decisions, of a fundamentally political nature, often going to the core of one’s understanding of a society’s priorities and goals.

This begs the question: is it really necessary, or indeed advisable, for competition authorities to be independent? Should a technical body, subject to very limited democratic control, be entrusted with weighing such a wide range of public policies and deciding what is in the best overall interest of the country and/or Union? As noted by Giorgio MONTI, we shouldn’t be “too simplistic, for it will be

¹² Case C-309/99 Wouters EU:C:2002:98.

obvious that the authority will have to make decisions based on how the firms' actions affect the various interests at play and it is tricky to see *ex ante* how an independent agency should be the best placed body to trade off divergent interests".¹³

There is certainly a clear case for why an independent competition authority is better suited to establish the existence of anticompetitive practices, exclusively on the basis of competitive and internal market concerns, in a way which fosters trust and confidence. Insulation from political bodies reduces the temptation to distort the interpretation of the law or the analysis of the facts to fit a certain outcome which would better meet non-competitive concerns. But something analogous can be said of virtually every area of the law. It would surely be easier to trust that rule of law will be complied with if an independent authority were called to apply tax law, environmental law, urbanism law, etc. This, I think, is the main frailty of any attempt to justify the need for independence. If we follow the logic through, we would conclude that independence would be better for the large majority of enforcement bodies.

I agree that there are good reasons to have an independent competition authority decide on issues which only require the analysis of competitive and internal market concerns. But I would also tend to say the same about many other areas, where the same model is seldom proposed and almost never seriously discussed. And I am unable to justify the differentiation. The difference cannot be found simply in the need to ensure effectiveness and uniformity of EU Law, because then the same requirement would apply whenever national administrations were called on to apply any other rules of EU Law. The rules on free movement of EU citizens, for example, would surely be more rigorously and uniformly applied if the national bodies entrusted with their enforcement were not also pursuing political concerns associated to the implementation of a national immigration policy, maximization of national tax revenues or reduction of social security expenditure.

And what about the part of competition law which goes beyond competitive and internal market concerns? No democratic polity can live entirely comfortable with the idea of delegating potentially crucial political decisions onto a body insulated from democratic control. This may, to some extent, be unavoidable due to the inevitable role of courts. But it needn't be so when it comes to administrative authorities.

The enforcement of competition law may indeed involve crucial political decisions, which arise (only) when applying exceptions to the restrictive rules. Accordingly, political control over decisions may be justifiable when non-competitive concerns are in question. This may be exercised through negative control. Thus, an "appeal" to a political body may be foreseen, as is already possible in merger control in various MS and, to a smaller degree, in State aid at EU level.

In the decentralized system for the enforcement of EU competition law, this raises the problem that, in order to protect the effectiveness and uniformity of EU Law, this appellate political body would have to be an EU institution. This would require a rethinking of the relationship between NCAs and the European Commission.

If one allows political control over a 2nd phase of enforcement (exceptions), the impact and usefulness of independence in the 1st phase of enforcement is reduced. But it doesn't disappear, by far. Indeed, the political vetoes foreseen in EU and national competition law are exercised extremely seldom. It is politically costly and risky for politicians to contradict an independent regulator, especially if it is held in high esteem. Generally, this effect may ensure a high threshold for overriding political concerns, justifying the overruling of the independent competition authority.

¹³ MONTI, G., "Independence, interdependence and legitimacy: the EU Commission, national competition authorities, and the European competition network", *EUI Working Paper Law 2014/01*, 2014, p. 2.

(ii) Merger control

Ironically, merger control is the branch of Competition Law which is, in a sense, the least political. Both Antitrust and State aid rules incorporate within themselves political judgments, requiring competition authorities to take into account many other policy considerations beyond competition and the internal market in order to conclude if a behaviour is illegal. Merger control does not. The decision of a competition authority to prohibit or authorize a merger (with or without conditions) is – must be – exclusively rooted in an assessment of the competitive impact of the concentration on the market (although there is some – limited – room for broader economic considerations).

Of course, the prohibition or authorization of a concentration may have profound and wide-reaching economic consequences. It may be extremely detrimental to the pursuit of many other public policies and goals. But the legal criteria for the assessment of concentrations excludes those other considerations.

This is why several Member States entrust an independent competition authority with the task of applying merger control rules, but then allow prohibitions to be appealed to the Government (or a member thereof). And it is why, recently – and many times before –, there have been calls for a similar mechanism to be instituted at EU level. There may be politically overriding reasons to intervene to authorize or to prohibit a concentration.

The politicization of merger control raises, typically, three types of concerns: (i) distortion of competition within the internal market; (ii) need for EU/national champions; (iii) economic warfare against foreign multinationals. The option for a political control system limited to veto over prohibitions has the advantage of preserving the effects of independence in what concerns the third type. If political control were limited to the EU level, the only concern left would be the potential overruling of competition rules to allow for the creation of EU champions.

As things stand, the lack of independence also raises the possibility of merger rules being used at MS level to distort competition within the internal market. This concern could be mitigated by a further expansion of the EU notification thresholds (increasing the number of mergers assessed by the Commission), and/or by a more frequent use of Article 22 of Regulation (EC) 139/2004 and the expansion of the possibility foreseen therein to the Commission's own initiative (without requiring request from a MS).

Interestingly, while EU law does not foresee an appeal to a political body from Commission negative or positive decisions, it does foresee a mechanism of political override by NCAs when certain national public concerns are at stake – public security, plurality of the media and prudential rules, and possibly other interests subject to assessment by the Commission (Article 21(4) of Regulation (EC) 139/2004). In practice, the provision is interpreted very strictly and the Commission should be expected to fight any attempt from MS to block concentrations it authorized, except in the most extreme of cases. It should be noted this possibility is mirrored, to different degrees, in several MS, by requirements of favourable opinions from other authorities entrusted with safeguarding these other interests, some of which are also independent regulatory authorities. On the other hand, it is very bizarre to give an independent regulatory agency which should be concerned only with competition policy the power to oppose the approval of a merger at EU level by invoking political, non-competitive, national concerns. This mechanism should be eliminated and replaced by political control exclusively by the EU Commission, upon request from MS governments.

Thus, in several MS there is a right of political veto over negative NCA merger decisions, and positive decisions may sometimes also be blocked by opinions of authorities responsible for defending other types of interests. At EU level there is an arguably limited right of political veto by NCAs over positive Commission merger decisions. Differently from Antitrust, merger rules are entrusted to an independent authority but subject to political checks and balances, in varying degree depending on the legal order.

(iii) State aid

State aid is the most inherently political of the branches of Competition Law. It is also the branch where the Commission, inevitably, has the broadest discretionary margin in applying competition rules, both when qualifying whether a measure constitutes aid and when determining if it is or should be exempted.

Applying Article 107(1) TFEU requires a purely competitive approach. By contrast, applying Article 107(2) and 107(3) requires extremely sensitive political judgment calls. Should the aid given to make good damage caused by an exceptional occurrence be deemed proportional and should that occurrence be deemed exceptional? Is the positive impact of a given aid measure in creation of jobs more important than its negative impact on the market? Should market integration be somewhat sacrificed in order to pursue a given environmental protection policy? Should a State be allowed to save a certain bank because of a perceived systemic risk to its economy, or should it be allowed to fail? Etc.

It is no wonder, therefore, that only the European Commission is allowed to apply Article 101(3) TFEU. In this case, it has been deemed unacceptable to allow national courts to make what tend to be, first and foremost, non-legal assessments of complex political realities. It is also unsurprising that Article 108(2)(§3) allows the EU Council, by unanimous vote, to sidestep the European Commission and to create *ad hoc* exceptions to Article 107 TFEU. This possibility has been used in the past, albeit rarely.

The enforcement of State aid rules is clearly divided into a first phase with competitive concerns and a second phase where the weighing of broader concerns is required. However, the fact that these rules are enforced by a political body means that the broader concerns can – and often do – influence the decisions in the first stage. And the door can swing both ways in these assessments.

Although this could change if the Council so wished, it is the Commission who adopts block exemption Regulations for State aid rules. These regulations express options and compromises between competition policy and other public policies. They are a largely underestimated tool of economic and political intervention by the Commission at MS level.

Finally, it should be kept in mind that State aid rules only apply to national measures. EU Institutions – and the Commission in particular – are legally free to grant aid which distorts competition on the internal market, and there is no independent authority empowered to intervene in such cases.

IV. Is the Commission independent?

Stating that the Commission is not an independent regulator is so obvious as to be tautological.¹⁴ The Commission is a hybrid body, partly an administrative agency, partly a political body. It is the executive branch of the European Union, legally entrusted with the promotion of the general interests of the EU and the implementation of all EU policies. Its enforcement of EU competition law is similar to having a national competition decision adopted directly by collective decision of a MS Government.

Competition decisions are adopted by the Commission as a whole. When it comes time to vote, the Competition Commissioner is but one among the many voices of Commissioners entrusted with promoting other public policies. Legally, the Competition Commissioner must resign if requested to do so by the Commission President, who may also reshuffle policy areas.¹⁵ The Commissioners' cooling-

¹⁴ See, e.g.: TOWNLEY, Christopher, *A framework for European Competition Law: coordinated diversity*, Hart, 2018. Notwithstanding Article 17(3)(§2) and (§3) TEU and Articles 245 and 298(1) TFEU.

¹⁵ He/she is also subject to compulsory retirement by the CJEU, upon request from the Council, not just on the basis of serious misconduct, but also on the basis that he/she no longer fulfils the conditions required for performance of duties.

off period is not as strict as the one imposed on national regulators. The Commission as a whole is subject to a motion of censure by the European Parliament.

In Antitrust, Article 103 TFEU leaves significant room for the Council (subject to Commission initiative, and after consulting the Parliament) to limit and condition the application and interpretation of Articles 101 and 102 TFEU. The non-use of the options this provision provides is a constantly renewed political choice. In merger control, the Council may similarly amend the Merger Control Regulation. In State Aid, Article 108(2)(§3) TFEU allows the Council to overrule the European Commission and to create *ad hoc* exceptions to Article 107 TFEU, and Article 109 TFEU allows the Council to adopt legislation seriously limiting the Commission's freedom in interpreting and applying Article 107.

Turning from the legal framework to practice, it's probably not particularly controversial to state that all branches of EU Competition Law have known examples of decisions guided by considerations beyond the competition sphere (or, at least, perceived as such). Although most competition decisions are adopted in written proceedings, with no opposition from other Commissioners, there have been examples of decisions proposed by the Competition Commissioner being voted down by the college,¹⁶ which strongly suggests that the voting was determined by other policy considerations. Changes in Competition Commissioners have led to different philosophical approaches and to different outcomes of specific cases.

The conclusion about the Commission's lack of independence has broader implications for lack of independence in the public enforcement of EU Competition Law in the EU as a whole. Although the ECN+ Directive requires NCAs to be independent, it does not change the fact that, at the (administrative) public enforcement level, EU merger control and State aid rules are applied exclusively by a non-independent regulator, and that EU Antitrust rules can be applied by a European non-independent regulator or by national independent regulators, but the latter may be deprived of their competence to act by a decision of the supranational non-independent regulator (*primus inter pares*).

That being said, I am unaware of any decisive evidence that the degree to which politics interfere with the application of Competition Law by the European Commission has had a significant impact in reducing trust in compliance with the rule of law and in dissuading private investment and economic growth in the EU.

V. A proposal for institutional reform and coherence

The Commission's defence, through its proposal of the ECN+ Directive, of the need for NCAs to be independent, is an embarrassing case of double standards and a manifestly incomplete exercise of reasoning. To begin with, there are two very large elephants in the room.

First, the Commission itself is not independent, it is a political body which takes decisions in competition cases by weighing a range of other political concerns. It sits at the top of a hierarchy and can deprive the NCAs of their competence to act. The *ratio* of the ECN+ Directive is that bodies responsible for the enforcement of competition law must be insulated from other political interests at national level. But no insulation from other political interests is deemed required, and none is provided, at EU level.

This may raise interesting issues if the Commission tries to enforce the Directive's requirement of NCA independence in infringement proceedings. The EU's competence to impose that obligation, and therefore the validity of the provision, is predicated on the need for such rules in order to guarantee the

¹⁶ See, e.g.: LAUDATI, L., "The European Commission as a Regulator: The Uncertain Pursuit of the Competitive Market" in MAJONE, Giandomenico (ed.), *Regulating Europe*, Routledge, 1996, p. 230

effectiveness and uniformity of application of EU Law. It is hard to sell that proposition in a system where the *primus inter pares* is not subject to the same guarantees.

Second, saying that NCA independence is necessary to ensure the effectiveness of the public enforcement of Articles 101 and 102 TFEU, while saying nothing whatsoever about national courts and judicial review of NCA decisions is manifestly craven. Be it issues of political independence *stricto sensu* (as recent and ongoing litigation before the CJEU has shown) or, more reasonably and frequently, issues of lack of sufficient and adequate human and financial resources, the characteristics of national courts which control the decisions of NCAs is a fundamental component for the success or failure of the public enforcement of EU Antitrust Law in the MS. EU Law is just as entitled to interfere with MS sovereignty and institutional autonomy when addressing the make-up and functioning of administrative authorities as of judicial ones. The basis for EU competence is the same. Sooner or later, we will have to recognize that, for example, the review of NCA decisions by first instance judges who have none or insufficient training in competition law jeopardizes the effectiveness of EU Antitrust Law (the same logic would also extend to private enforcement). The alternative is to continue to pretend that effectiveness and uniformity are assured without a judicial review subject to the same guarantees of independence.

Third, all the branches of competition law require, in varying degrees, other political concerns to be taken into account. An independent technocratic body is not well suited to decide on these other concerns, without a right of appeal to a political body. Thus, complete political insulation of Antitrust decisions at national level is not an ideal solution when it comes to the application of certain provisions and for certain assessments. Conversely, allowing a political body to decide on strictly competitive issues can lead to distortive outcomes, as was evidenced by the recent statement by the newly elect President of the European Commission that the method for market definition should be changed to better fit a certain desired political outcome.

A differentiation must be made between the different areas of competition law and the different rules in question. Some decisions must be insulated from political considerations and pressure. But minimizing the democratic deficit of the EU Institutions requires the courage to admit that certain decisions are political, they must be, and that they should be entrusted to a political body with an overall view and the mission to protect common EU interests. Competition is not sacrosanct, sometimes it must give way to more important political concerns. Let us admit this reality and set up a transparent system to enforce it, subject to judicial review.

In light of all the above, I believe a much deeper institutional reform is needed to ensure the coherence and effectiveness of the system. This reform would require doing what was discussed already prior to Regulation (EC) 1/2003, and which MS have so far been unwilling to accept. On the one hand, we need a greater degree of “federalization” of the public enforcement of EU Competition Law. On the other hand, we need to ensure true independence at the “federal” level, except in those issues where broader political concerns must come into play.

This – for now, utopian – approach would involve the creation of a new EU Agency, responsible for the public enforcement of EU Competition Law (European Competition Agency, “ECA”), with regional offices spread throughout the EU to ensure greater proximity to the addressees of the decisions and working in the languages of the MS in the respective region. The Board of the Agency would adopt all the decisions prepared by the regional offices. The ECA would be subject to the requirements and guarantees of independence which the ECN+ Directive has put in place for NCAs. Its decisions would be subject to judicial review by the GCEU and CJEU.

NCAs would continue to exist and to enforce national and EU Antitrust law, as well as national merger control rules. But they could be precluded from applying Article 101 or 102 TFEU on a case by case basis, by decision of the ECA (*ex officio* or upon request), just as they may be today by decision of the

Commission. They would have to notify the ECA of the opening of an investigation, even if they deemed the practice not to significantly affect trade between Member States, so that the Agency could carry out its own assessment and decide, if it so wished, to investigate the case itself. Leniency applications submitted to the ECA would be deemed to produce immediate effects in all MS, even if the Agency were to decide that Articles 101 and 102 TFEU were not applicable and to forward the case to an NCA.

Certain decisions of the ECA and NCAs, regardless of whether they were positive or negative, would be subject to a possible political veto by the European Commission (*ex officio* or upon request), as the political body best suited to weigh a broad range of (potentially conflicting) political concerns, beyond the scope of competition policy, and as guardian of the internal market and common EU interests.

Specifically, the Commission would be entitled to overrule, on the basis of non-competitive concerns (subject to judicial review, namely in what concerns compliance with the principle of proportionality):

- (i) ECA / NCA positive or negative decisions relating to:
 - a) Article 101(3) exemption;
 - b) Economic balance test for Article 102;
 - c) Wouters exemption for Articles 101 and 102;
- (ii) ECA positive or negative decisions relating to:
 - a) Authorizations of concentrations under the EMCR;
 - b) Article 107(2) and (3) TFEU.

VI. Conclusion

This paper has argued that the need for independence of competition authorities is often overstated. In fact, in varying moments and contexts, authorities enforcing EU competition law are required to carry out inherently political assessments which go far beyond the realm of competition policy or even of purely economic assessments.

There is incoherence in a system which imposes independence on NCAs, while requiring them to make non-competitive political assessments, and while failing to submit national courts who review NCA decisions to the same guarantees of independence. This incoherence is made greater by the fact that the Commission, *primus inter pares*, is a hybrid political body.

It is my belief that a healthy and sustainable system for the public enforcement of competition law requires greater honesty and transparency in dealing with these issues. As an EU citizen, I want to see the rule of law respected, and to be sure that political considerations will be absent where they are not called for. But I also do not want technocratic bodies, entirely insulated from democratic control, to be entitled to prohibit practices, concentrations or State aid measures, and to impose conditions and remedies, while failing to take into account broader concerns, potentially overriding general interests. Such concerns should be taken into account by a political body which answers – at least indirectly – to the people, and can be trusted to pursue common EU interests.