An interview with Professor Richard Whish

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Who would you be if you would not be a lawyer?

That's easy – I would have loved to be an opera singer. That would have been my passion. I used to sing in an opera in an amateur group in the city of Bath. I became a member of the Bath opera. I sang in Marriage of Figaro, Magic Flute, the Brandenburgers in Bohemia, and the Kiss by Smetana. I even had an individual part as Reinmar in Tannhäuser. Then my career somehow took me to London, and I stopped singing in 1989, and sometimes I miss it absolutely terribly. But of course, I was not that good. If I would be good enough, I would have been an opera singer. That would have been the best.

Which legal scholar you respect most?

Insofar my life today is in competition law and policy, the most influential person is William E. Kovacic. He is an academic in George Washington University in Washington. He is active as a publisher-researcher, as a teacher and was a member – and at one time Chairman - of the FTC in the USA. And he willingly and endlessly helps developing countries to adopt competition laws. He is an immensely impressive man and influential globally.

What about Lord Denning, the famous 'people's judge'?

Lord Denning was a very brilliant man, he was radical in a sense of being able to pull up the law, redesign and replant it so he was a radical, but I would say that he

was a conservative radical as opposed to a liberal radical and so I admire him but he is not a hero to me. There was an English judge of 18th century called Lord Mansfield who was truly brilliant man and I think more a liberal radical than a conservative radical.

What the Queen's Counsel honoris causa Award means to you?

Let's put it in this way – when I was told I have been given this honour I thought to myself how many people a year are given this honour in the British legal system? Because it does not cost anyone anything to give away an honour so you could make a thousand people honorary Queen's Counsel. I discovered that the right answer was that only six people a year are given this honour. If you think of the whole legal establishment of the UK and there are only 6 honorary QCs a year, it actually means that it is quite a significant honour. So from that point of view it is very nice, and there is a sense in which it is a kind of acknowledgment of what I have tried to do for the last 30-35 years of my life. A nice thing is that when it was announced lots of people who know me from the world of competition law e-mailed me to congratulate me. Actually they said that they felt a kind of a personal happiness about it because it was as though the legal establishment was recognizing competition law as a respectable subject of law. The honour is actually putting competition law on the map as a real legal subject, so that makes me very happy indeed. A personal sadness is that my father died last September of the age of 90 and my mother died in last October in the age of 92 and my honour was announced in last December. It would have been the pinnacle of their lives if they had seen me get this honour. The timing just was a little bit wrong, so tinged with the sadness.

Which book you would suggest to read to lawyers?

I don't feel in any sense like a conventional lawyer. That's why I can't say there is any particular book that I revere as a legal textbook.

If by lawyer you mean somebody who applies technical rules, who applies legal rules to problems, competition law just isn't like that. I always like to talk about competition law and policy, since it's all actually about economic analysis of markets within a legal process. And above that it's politics as well and what competition policy is intended to achieve in any given economy. I find 'competition law' or a 'competition lawyer' inadequate as a term. There needs to be a new noun for what we do. For instance, 'competition lawyer and policy analyst' but that sounds too pretentious or clumsy.

If you are talking about books in general, if I would be marooned on the desert island for the rest of my life with only one book to read, it would be an English novel called Middlemarch by George Eliot, which I think is a wonderful view of provincial life set in the middle of nineteenth century but it could just as well be in 2014 in the sense that all the human life is there. It is fascinating, wise and clever. The heroine Dorothea Brooke reaches the conclusion that the best way to live a

life is to do good works for people, to be humble and not to expect any recognition in return because it is being good that is the important thing. It's not a bad role model.

In couple sentences - what the competition law is about and why it's important?

The competition law is about bringing more happiness to the world. That's a joke, of course. When I was on the board of the Office of Fair Trading (OFT) in UK, the board adopted the approach that the point of competition and consumer law was to make markets work well for consumers. I think that's quite a good starting point. My view has always been that if you are going to have markets, then the people have to respect the rules of the market, which are that you have to behave honestly, that the markets should deliver benefits to the consumers and there must be rules to make sure that the markets work properly. I think competition law is there as a necessary corrective to a possibility of people abusing market.

Is competition law a public good? Is a protection of undistorted competition a public good?

You could say so although that is too academic for me. You want people to compete on merits - so what is competition about, it is about me being better than you, you compete on merits without undue influences. I think this is quite simple and the reason why I get sometimes intolerant with a lot of academic stuff is that the system seems to require clever young people to say simple things in a very complicated doctrinal language. This ends up in the situation where academics use complicated language and are talking only to each other, instead of talking to people who need help in understanding the law. It is a bit like EU decision-makers who are talking only to each other and therefore the EU is in such a mess. Now in UK many people want to leave EU and I feel we have to explain to them every year what the benefits of EU are. We need to bring the message to the people instead of using a complicated language.

How globally widespread and harmonized the competition law currently is? What is the position of EU competition law in a global context?

You can find competition everywhere in the world now, in every kind of economy. 130+ countries in the world with competition law, it is irreversible. Every kind of economy imaginable. There is a huge degree of soft harmonization. EU competition law system in general and European Commission as physical actor in the game are massively influential around the world in the sphere of competition law. European system is one of the top competition law systems in the world. We have to recognize the very good work that the European Commission does.

Where these 130 competition law systems did come from? It is an interesting point. I personally don't like the neo-imperialistic approach, that the World Bank, for example, says 'yes, you can have a loan but you have to have a competition law system in place'. I don't like this at all. But in reality that happens.

For example, 20 years ago I was asked to go to Guyana in South America, a very poor country, and the World Bank or someone was saying 'we will lend you money but you have to install certain laws in place'. Some consultants asked me to go there and to do a field trip analysis on whether they should introduce competition law or not. And it is a country which is poor, population around 700 000, economy is very weak, very few highly educated bright young lawyers, and there is some international bank saying 'you have to have competition law'. This country has only limited human capital. Why would you set up a competition authority, when even the banking system barely functions?

So, I am very opposed to this kind of neo-imperialistic approach. But it happens unfortunately, for example, the Fair Trade Agreement between US and Singapore imposed an obligation on the part of Singapore to enact competition law, and, yes, that is the only reason why they have it. But Singapore is not Guyana, they can do it, they have enough educated people. So I don't have a problem in the end with the fact that Singapore is having a competition law but I don't like the fact that the Americans imposed it on them. And I fundamentally object to someone trying to impose competition law on Guyana. So I wrote my report and basically said you cannot be serious, and they did not adopt the competition law at that time. They have it now, but my report was 20 years ago.

How the competition law is linked to the economics and how important economics is in an application of competition law?

Competition law is an economic analysis of the markets within a legal process. Ultimately it really is about economic analysis of the market. Therefore, an approach where one can find everything written in the statutes is not going to work, because competition law is not like that, it is simply not like that.

What would be the main thing you would say to a person who is a competition law and policy analyst?

That is quite a big question actually. One thing would be that a competition authority has to have a clear policy position as to what it is trying to achieve. One has to answer very fundamental questions – why do we have competition law at all (let's call it law now) – is it because we want to redistribute wealth, is it because we want a market to be fair (whatever fairness might mean), is it because we want to protect the process of competition which means that some people win because they are effective competitors and other people lose because they are ineffective competitors. I think the competition authority has to have a policy position to begin with which has to be an overarching theme to whatever it is trying to achieve. I don't think you can just muddle along from one case to the next without that position.

Secondly, application of competition law in practice is about the economic analysis of markets within a legal process, and that means that one has to respect what law can achieve, but one also has to respect what economics can achieve.

So you have to configure the competition authority in such a way that the lawyers and economists work effectively together. I say that because I have seen situations where the lawyers and the economists were like Montagues and Capulets fighting one another. But I think that is history now. I think that today, in 2014, there is a proper respect both for the discipline of economics and the discipline of law.

And another thing I would say – this is more of a legal point - one must be open minded, one cannot decide at the outset what one wants to achieve and then torture the evidence to make it confess. It is absolutely crucial that one checks and double-checks that the evidence is there and that it really does support one's theory. I think actually this has become clearer over the years that, in so far as you have a competition authority and a court of some kind, which exercises appellate or judicial review function, this is a good thing, and the function of the court is to make sure that the evidence really is there and it supports the argument that is being made. Effective scrutiny of the competition authority's work by the courts is important. The judicial review must involve checking that the evidence is there, is there a decent reasoning behind a decision and, of course, has there been due process. You can't have authorities with a power to impose huge fines, unless they respect rights of defence, that goes without saying.

Do you believe there are enough good competition lawyers and policy advisers?

Yes, I think there are enough. I think there are lots of very good people actually. I have taught so many wonderfully clever people. I hate that there are some practicing lawyers who are deeply cynical about people in competition authorities because they, of course, represent the client, and the authority is an enemy. Some of the cleverest people I have met in my life are in competition authorities. And I admire these people very much because they could be earning 10 times more than they are, if they were in the private sector, but very often they have a commitment to public service. And enforcing competition law in the right cases is a public service because it is done on behalf of consumers. So, I have got a lot of sympathy for somebody, who decides that he or she is going to miss the benefits they could have in the private sector because they think there is something good they can do in the public sector. I also think that there are some very good people at the Latvian Competition Council and the Supreme Court.

Which is the most interesting competition law judgement you have ever read?

I don't believe in that kind of thing. What I would say is that increasingly, when I look back to the early judgements of the European Court of Justice in competition law, I am not going to name particular judgments, I am struck at how clever some of those judgements of 1960 and the 1970ties are, where those judges had to make sense of the concepts of the competition rules for the first time, like, what is a concerted practice, what is a dominant position etc. Of course, today, after 50 years, we kind of understand the economics, we understand the purpose of the rules, we have endless analysis and academic discussion and refinement and

whatever, and, hopefully, in 2014 we know what we are doing and we can get sensible outcomes in the competition law case. But the entire DNA of the EU competition law was planted in the 1960 and the 1970ties. And some people can criticize these early judgments in many respects, but I am struck just how wise they are. In fact, all the EU competition law infrastructure was established by these clever people back then. A lot of what has happened since has just been application of those principles to various situations. So, I have a lot of respect for what went on in Luxembourg in the 60ties and 70ties. For instance, I think the Continental Can judgment is remarkable, as there is an amazing amount of substance in that judgement.

Do you have any predictions how the competition law will develop in next 10 years?

I think convergence between various competition law systems now just seems inevitable and that it will continue, for example, when it comes to things like what information could competition authorities ask for and what information they cannot ask for because it would be a self-incrimination. I think, increasingly competition authorities, not just within EU but around the world, will apply common standards. What is particularly interesting about this is that it is a soft convergence and not hard convergence mandated by a directive or international treaty. It is that if you put different competition authorities from different countries in one room, inevitably they will find out the best way how to deal with one or another issue. There is a very interesting new book, a series of essays edited by Eleanor M. Fox and Daniel Sokol, where they predicted soft convergence as time goes by. I think that more soft convergence will take place in the near future.

Furthermore, there will be more cooperation between competition authorities because big cartels very often are international, and national law only applies within the territory of the state in question. But the cartel may be affecting the entire world. So, it is just inevitable that Australians, Japanese and Americans and Europeans will help each other out. Now we have cooperation agreements containing the principle of positive comity, where America says, if they get a complaint from the European Commission about an American company harming interests in Europe, the American authorities will take the case on and help the Europeans and *vice versa*. That's positive comity. How remarkable is this?! To sum up, I think there will be more and more international cooperation.

It will also be very interesting to see what will happen to the Apples, Googles and Facebooks of this world because these are literally global entities now and there is always the possibility that a competition authority somewhere is going to dislike what one of them is doing, so that is going to be very interesting to see how the convergence works there. And I don't know what the answer to this is going to be.

Do you agree that a global competition law regime and possibly a global authority would be desirable?

Well, I think that it is unrealistic, and a global competition authority is unimaginable at this stage. I very much doubt that it would be worth trying to establish it. The differences that one gets from one economy to another, from one legal tradition to another, from one culture to another makes the existence of a supranational authority, that applies the same rules to everybody, absolutely unimaginable at this stage of the history of the world, especially if you watch the European Union, which I increasingly foresee falling into pieces over 10 years ahead (I hope that I am wrong!). I do think international cooperation is a good thing but it seems to me that it is probably better to build it from the bottom-up rather than imposing it from the top-down. I think that sometimes people forget what the European Union is. And I think the European Union is an absolutely extraordinary thing, when it comes to the competition law, this is actually a regime of 28 countries of massive differences, with hugely different histories, economies, politics, constitutions etc. And in the end you have a common system of competition law that applies from Croatia to Portugal and from Finland to Greece, I mean it is extraordinary. It has taken 50 years to get where we are but it has worked. In Asia you have got ASEAN which requires its member states like Vietnam, Malaysia and Singapore to have competition law and now they are thinking about ASEAN competition law and who would be the administrative body that oversees this. In Caribbean you have CARICOM which brings together various Caribbean countries. In Africa you have COMESA, and there currently exists COMESA merger control regime. So, this seems to me to be a more plausible way – building it up from the bottom where you can at least identify certain countries in the region that have enough commonality to be able to have shared institutions and pooled sovereignty like EU, ASIAN, CARICOM and COMESA. But the idea of a single world competition authority, I think that is one for the universities.

In the European context, would it be a good idea instead of national competition authorities to establish branches of Commission in each Member State working according to harmonized procedures and taking the same approach in every member state?

I myself suspect it is better to have national competition authorities. If the EC would have satellite offices in Riga, Vilnius, Tallinn or Helsinki, they would have to be funded by EU as the EU institutions. The EU budget is composed of tax receipts in member states but the citizens of EU at the moment do not like the EU and the money to be sent off to Brussels. So, I think that if you were to have 28 field offices of the EC, I suspect it would not work because in the end the budget would not be there to adequately staff the local branches of the EC. Therefore, I think it is one of the smart things about Regulation 1/2003 that in the situation where the EC cannot have more resources we will delegate the enforcement function to the national authorities of the Member States which will have to find resources, so this seems to be quite a smart solution actually.

Apart the budgetary considerations – insofar as the national competition authorities are applying Articles 101 and 102 of the TFEU, they are applying the same standards, *de jure* it is a harmonised system.

As to procedures, I don't think one can impose one procedure on everyone because different Member States just have very different legal systems and different constitutions and so on and so forth. Where you can have procedural harmonization that is fine, but I don't think that you can have it in all the aspects. I take a fairly pragmatic approach to these things, I am not the sort of academic who sits in the university and theorizes about things for the fun of theorizing – before one starts redesigning a system in a fairly radical way, I would want to find out first - is there anything wrong with the system? Because if the system is working pretty well, do we want to change it for the sake of changing things or because we have some theoretical model that we think is better. I want to find out is there an empirical case for having change, and if so, lets deal with the issue.

We only have Regulation 1/2003 for 10 years, and actually it has worked incredibly well. I remember all the debate in 2000-2002 where there were many people who said that it is never going to work but it is working remarkably well. Zhou Enlai [Chinese premier] was asked what he thought about French Revolution around in the 1960ties, and he said it was far too early to tell. Well, I think 10 years of the Regulation 1/2003 is not enough either. I don't think we need a radical change at the moment. Major institutional changes can be very disruptive actually. Everyone stops enforcing the competition rules because they have to write new guidance on this and the rules on that.

What is the relationship between WTO law and competition law?

It's a good question. There was a time when the OECD in Paris had a trade committee and a competition committee. They never met and were promoting diametrically opposed policies within OECD. The trade committee would be all about recommending anti-dumping duties to stop the dumping of Chinese bold bearings in the EU, and we got to put up tariff barriers and anti-dumping duties to prevent this "awful" trade. And then the competition committee was all about encouraging lower prices and competition.

And then somebody had a brilliant idea that maybe there should be a meeting between these committees. On one occasion I went to one of those meetings, and it was like listening to people talking totally different languages, like watching two ships passing in the night.

I think, when it comes to WTO, there was a time when the question was whether the WTO should be given some sort of competition role and become a world competition authority. Eventually I think it was decided that it was just not achievable. WTO gave up any ambition in relation to competition. This may not be such a bad thing because the trade agenda is stupendously difficult in itself even without trying to feed competition and investment into that as well.

Have you observed any typical differences in enforcement of EU competition law between the 'old' and the 'new' Member States? If yes, are they merely a legitimate reflection of different priorities and experiences, or something to be weeded out by notably the ECJ?

It's a good question actually. I am not sure that I would say I would see a difference between "old" and "new" Member States. There are differences, but I don't think they run along the old-new contour. It's more about whether a particular Member State is typified by a fairly formalistic approach to law as opposed to economics based and purposive approach to law. I was in a country a couple of weeks ago, I am not going to say what this country is, it certainly is not a new Member State, and I think when it comes to abuse of dominance, the way in which the competition authority in that Member State sees abuse of dominance, it is somewhat different from how we see the same concept in the UK, for example. So, I think that there are differences between Member States in terms of understanding and expectation of what the law is designed to achieve.

One of the ways in which competition law is 'special' is that relatively few and brief black–letter law rules are clarified by extensive soft–law instruments. Often such clarifications seem anything but obvious. Have you ever thought that there might be constitutionality/ fundamental rights issue arising from the tension between the very abstract rules and the very specific obligations they impose on undertakings?

Well, I am not sympathetic to this kind of reasoning whatsoever. I fundamentally believe in human rights for humans. I am absolutely sure that the European Convention on human rights says important things about human rights like the right not to be taken out of the bed at 4am for an interrogation at the police station etc. But regarding mega corporations which are instructing the top law firms for 1000 euros an hour to answer a simple questionnaire sent to it by the European Commission, I just feel that there is a limit on how many 'human' rights these companies may have. They are having the best conceivable legal advice from the top law firms in the world. When it comes to corporate human rights, the people that derive the best value out of corporate human rights are lawyers, because they can quarrel about that for years, taking cases to Luxembourg and Strasbourg thereby, earning a new Ferrari and maybe a yacht, all on the back of a company's human rights. I am not very sympathetic to that. The principles of EU law, the right to be heard, right to access to file etc. - there are many due process rights established during the years, and that is absolutely enough. Of course, due process is fundamental but why do we have to have this additional overlay of corporate human rights law? I rather keep the human rights law for the humans. And God knows they are at risk in a lot of ways.

If there was one advice you would give to a competition authority operating in a small country with an open economy, what would it be?

I don't think you should have a different kind of competition law rules because it's a small open economy. I think you have the same rules but empirically you ask what the open market issue is. I am not sympathetic to having competition law variations depending on the nature of the economy. One might have different answers to the same question in different cases because the market might be narrow in one case and broad in another.

If a country has a law, which is cast in Article 101 and 102 TFEU terms, which most laws in the world are, then I think, as far as possible, one should apply the principles in exactly the same way. And I don't think it matters what the nature of the economy is. My basic belief is that one should apply, as far as one can, the same standards to all cases.

The real point here is that if it is about market power, it is a question of defining the relevant market and deciding whether there is a market power in that market, and the relevant market might be national, local and it might be the Baltics and it might be the EU. I think that is an empirical question. So, one applies Article 101 and 102 TFEU in exactly the same way. But if one decides it is an open market, then that would imply to me that the geographical market will often be broader than Latvia. And so one shall look at the economic conditions in whatever the broader geographical market is. So, I don't think that there are different competition rules because it is a small open economy, I think you have the same rules.

Obviously there is a difference in legal mentality between common law tradition where judges are used to make up the rules and one cannot find all the answers in the statute and the continental Europe tradition which mostly requires clear rules on the paper. It seems that the competition law is more like the common law. Do you agree?

I already mentioned the Member State where there is a totally different legal tradition and where people like to have clear answers written on paper. This extreme positivism where lawyers expect all the answers to be written down in a statute book simply does not work in the sphere of competition law because competition law is indeed more like common law rather than continental Europe law. You decide the cases on the case-by-case basis, and that is what the European Court of Justice in Luxembourg has always done. For instance, if you look at the words of Article 102 TFEU, there cannot be more than 150 words in that Article; the text of Article 102 TFEU simply does not tell you anything, does it. To understand Article 102 TFEU, you have to read cases of *Continental Can, United Brands, Commercial Solvents, Hoffmann-La Roche, Michelin I, Michelin II* etc. In other words, if you want to call it like that – it is a common law system, Article 102 TFEU only means what the sum total of all the case-law says that it means. This is just a fact of life.

I have been in this business for 35 years and I come across this problem again, again and again, it is in the legal education. What I was trying to say in my lectures

is that you will never get simple answers to competition law questions. Because it is not law in a classical sense. As I said and that was my main point in the lecture, the competition law is about economic analysis of markets within a legal process, and so that means that ultimately somebody has to exercise a judgment. If you are in a continental Europe and you want to be a competition lawyer, you must take absolutely different approach to the law. Lawyers in the continental Europe countries which follow German approach to the law when they apply competition law, they must switch off their traditional approach to law and switch on a common law approach. I don't think that the competition law is the sort of subject where you get simple clear-cut answers to problems. There is a statement by the UK Competition Appeal Tribunal in the case called *The Racecourse Association & others v Office of Fair Trading* [2005] CAT 29 where the tribunal says: "*competition law is not an area of law in which there is much scope for absolute concepts or sharp edges*". In the end one has to exercise his/her judgment to apply competition law concepts. For instance, if the question is whether Google is dominant in the market for search facilities on the Internet, ultimately human beings have to make a decision, you don't turn on the calculator on your iPhone to get the answers as it would be the case, for example, if you had to answer a question regarding how many days you have to give a notice in advance to evict a tenant from your property, for example, which is probably clearly stated in the statute. Therefore, I repeat that extreme positivism simply does not work in the sphere of competition law.

What is good competition law advice?

When it comes to good competition law advice, in the end you are not paying somebody a vast amount of money because they can read what the law says, surely you pay to people for their judgement, for their intuition –as to whether something is on the right side or the wrong side of the dividing line. And that seems to me as it should be. And some of the competition lawyers who complain about the lack of legal certainty and corporate human rights issues, I think they are doing it because they are not very good competition lawyers. If one is a good lawyer, one has that almost gut instinct knowing which side of the dividing line the issue is. That instinct is usually based on many years of practicing competition law. Good competition lawyer is able to go to a board of the undertaking and give clear and precise and clear advice as to what is permitted and what is not and what needs to be done to be competition law compliant. I think that is what the clients are paying for, and they will pay good money for the law firm that has the courage to say this is what we believe in.

Sometimes I get asked to review other people's legal opinions, although I don't like doing it at all, but sometimes I see a legal opinion that goes on page after page after page and by page six,, the opinion says that it is all a real problem and we need to do further research to formulate opinion. I personally don't understand why the clients tolerate this. I would want to go to somebody who I really think had the best instinct imaginable, who would send me one page position paper saying clearly, whether I have a problem or not. I would prefer to

have that even if it costs 10 000 euros instead of long legal opinion which at the end of it says that they don't really know the answer actually. I just don't know why the clients tolerate this. Because very often the partner at the law firm delegates the task of composing a legal opinion to a junior lawyer and that partner has not even read the opinion, so it is some 26 year old who is sending this long and unclear opinion that the client has to spend a fortune for, and the partner has not even looked at it. It is ridiculous.

How likely it is for a small national competition authority within Europe in jurisdiction like Latvia, for example, to be able to greatly impact the development of EU competition law? What would need to happen?

I think that it is perfectly possible. I think that you would have to have a judgment which is very clever and very good. But to have a judgment that is very clever and very good you would have to have very clever and very good judges. I don't have the slightest reason to suppose that there cannot be very clever and good judges in Latvia. Obviously you need a reasoned judgment that contains very cogent reasoning but that is perfectly possible, just like brilliant footballers don't all have to be from Brazil and Netherlands and Spain. The person that gave Real Madrid the lead in the Champions final in Lisbon 2 weeks ago was Gareth Bale of Wales which is not a major footballing nation and yet that goal was from Welsh footballer. So, if the Welsh footballer can score a goal that everyone in the world sees, why can't the Latvian Supreme Court here write a judgment, it is just a question of is it good, is it well written, is it available in a language where people can read it, that is perfectly possible.

You certainly cannot say that UK is a small country, but there are judgments in UK that people elsewhere look at and find valuable. It is also interesting to think of the case like TeliaSonera on a margin squeeze which came from Sweden, at the end the ECJ gave its judgment. I think the Swedish judge in that case did a very good job and she framed the preliminary reference and then later wrote a judgment awarding damages to the complainant. This is the major case of margin squeeze that actually originated in and eventually was decided in Stockholm. Yes, this is a good example I think.

And Post Denmark – ECJ case, that is from the Danish court. The case was referred to the ECJ by a Danish judge in a dispute between Post Denmark and the Danish competition authority.

What are 3 most topical current issues of competition law which are being discussed or being in the pipeline?

I think that is pretty simple. The first issue is the issue of standard essential patents (SEPs) – Samsung and Motorola, it is absolutely enormous. The second issue is leniency documents and whether the follow-on claimants for damages can get access to the leniency documents; this seems to be major preoccupation of the practitioners at the moment. And then, more generally, the third issue is the

damages directive and whether one can encourage and facilitate more damages claims. I think that we have reached the point where it is just inevitable that there will be lots more damages actions. It is fascinating to hear that there is at least one damages case in Latvia at the moment and I have no doubt that there are others in contemplation. I think that the victims of cartels and abusive behaviour should be compensated.

What do you expect from the private enforcement directive? Do you expect that this initiative will significantly change the architecture of competition law enforcement in Europe and will we end up with American style litigation culture?

I don't think so, no, because there are factors in American situation which are very different, certainly from how you litigate in UK and other member states of EU. In US, if you win the case, you get treble damages to begin with. We don't have that in EU. In US, if you litigate and lose, you don't have to pay other side's costs, certainly in England and Wales if you lose, you need to pay other side's costs, therefore you will think seriously before bringing a claim, because other side's costs can be millions of pounds or euros. Against this background you are not going to litigate if you haven't got a good case. So, it is very different from US situation. Furthermore, in US you have this contingency fee set up – you can agree with lawyers that they will get 50% of all damages and you can pay nothing to them if you lose. This is not the case in Europe as far as I am aware, although, of course, you might have some element of contingency fee but that still does not mean that you would not need to pay other side's costs. I think that there are perfectly intelligent measures which can be put in place to stop the most outrageous features of what is going on in the US. I don't like the US litigation culture at all, I think it is absolute madness. But I think that with a little bit more wisdom and stability we can prevent that from happening in Europe.

As for is the private enforcement directive going to transform the legal landscape I think that the legal landscape has already been transformed. There is no major cartel decision of the European Commission in recent years that has not led to follow-on action for damages, it is a reality, it is here and now. It may not be happening in Latvia yet but it is happening in England and Wales, Netherlands, Germany. Any of these big cartels are being litigated for damages, it is here and now, it is with us already. I think that what the draft directive does, it will cause some member states to modernize their laws and that will make them more available to damages claimants if compared to the position existing at the moment but damages claimants in major cases they can already sue somewhere. All this directive does I think is to help some member states to come up to the standard of everybody else, so I don't think it changes the landscape. You might get more claims in Latvia as a result of the directive but the damages world is here already generally in Europe.

What do you think of the independence of national competition authorities and their link to the effective judicial review?

I think these two concepts – the independence of NCA and effective judicial review - are related and unrelated. First point to make, which to me seems to be absolutely obvious, is that competition authority must and should be independent because competition law is very complicated ; it has major consequences for undertakings as to the way in which they conduct their business. So, I think that as far as possible the competition enforcement should be a technical exercise where competition authorities analyse the markets, look for detriments to consumer welfare and then proceed accordingly. And idea that the government is sitting on authority's shoulder giving different directives seems to be fundamentally undermining the whole object of the competition law enforcement exercise. So, I think you have to have robust independence. I think that senior people at the competition authorities must be very robust and willing to stand up against prime ministers and finance ministers and parliamentary committees.

The point about the judicial review – it is related in that if the competition authority is not accountable to the ministers, they have to be accountable to someone. So the best form of accountability is to be subject to robust judicial review in which you have to justify your decision. So, I think that there has to be a proper system of judicial review but I think that judges who exercise that judicial review they must be willing to engage with the substance of cases. One of the things I find frustrating around the world is that sometimes judges are asked to adjudicate on a competition case, and they don't really understand what is going substantively in terms of economic analysis of markets, and so they fall back on the legal process because judges are good in spotting procedural errors. I think sometimes the courts hide from the truth of substantive competition law analysis by finding procedural errors; this is really a serious problem. So I think you want an effective judicial review but by people who review as to the merits not just to the procedural correctness.

Do you think it's a good idea to have commercial law divisions exercising also competition law competence within the existing courts (as promoted by the Foreign Investors' Council and the Latvian Law Institute)?

Yes, I think that this is a good idea. I am not particularly in favour of the idea of having a separate specialist competition courts especially in smaller jurisdictions, and Latvia is a small jurisdiction for these purposes, where you don't want 5 judges to be sent to this specialized court simply for deciding competition law disputes because there will never be volume of cases. Within the existing court structure it would be a good idea to identify particular judges who are competent in the world of commercial law generally and some of whom have a knowledge of and expertise for competition law. That seems to me entirely sensible thing because, lets make no mistake about it, a difficult competition law case is difficult, a margin squeeze case, for example. So, the idea that I am a judge who did a divorce case yesterday, I am doing landlord-tenant case tomorrow, I am doing armed robbery on Friday, today I will do margin squeeze case. I think that to develop some expertise must be a good think. But not as a separate specialised court.

We all know that the SSNIP test and market definition are the tools for measuring market power and they are almost universally accepted around the world as the main and central mechanisms of competition law. But we all know from the practice that these concepts involve quite a huge subjective and imprecise element. Speaking in very general terms, do you think that at some point in the future we will come up with something better than the SSNIP test and market definition to measure the market power?

Well, if you mean will we one day have a computer or mobile application that can sort out the answer, no I don't think that will be the case. I think that evidence is essential in defining market and ascertaining whether someone has market power. I think that it does become more and more possible to put together a decent evidence that says, for example, that the reason I know that flying from London to Brussels is substitutable with going by train from London to Brussels is because of evidence. You know the Channel tunnel was closed by fire in 2013 and look what happened to air plane ticket prices. It is about evidence. I am very sceptical about articles in journals of economics that says 'we just have discovered a new way how to define a relevant market' and then you read this vast article with footnotes that is longer than a page and also involves jazzy algebra. And it seems so clever, let's give the guys a Nobel prize, and then you think about it at the end of it – and you say that is no different from the market definition set out in the SSNIP test, simply they are using very clever diagrams and algebra to prove it. I am very, very sceptical about people that I think are actually trying to make their own reputations rather than advance the knowledge of the subject. So no, the short answer to your question is No. There is no application possible for determining market power.

So, in the foreseeable future – 20 to 25 years – there will be no other more sophisticated and better method of measuring market power?

People will create new methodologies, sure and some of them will probably be good and they will get incorporated into the practice. But do I think that there is some silver bullet that will change all of this – no, I don't. I think that determining whether someone has a market power will still be a question of judgment and assessment of evidence. I think that market power is market power, and market power was the same in ancient Rome as it is today. Ancient Rome had laws on cartels. Also the Constitution of Zeno of 483 AD, for example, had competition law provisions.

About the European Competition Network (ECN) – you said that in the near future we will have more interrelation going on between the national competition authorities. Do you think that the ECN is functioning well and optimally at this stage?

Well I have no official position with any competition authority now. I was on the board of Office of Fair Trading (OFT) in UK until 2009, so I don't have any insight into the internal work of ECN. There are other people you have to ask about that. I

can say that externally it seems that the system that we set up in 2004 has worked remarkably well, at least better than anybody anticipated that it would. Commissioner Almunia has now set up a review of Regulation 1/2003 after 10 years but it seems to me that it does work very well. And we heard someone from Latvian Competition Council saying that it works extremely well from the practical point of view.

You are now Emeritus Professor at Kings College London! What are your future plans?

It is very simple! I will carry on doing what I am doing. I love what I am doing. I am no longer a full time teaching professor at Kings which means I no longer have to be at Kings for seminars, I don't do administrative or bureaucratic work. That is rather nice because these things can be a little bit tedious. I still direct the King's distance learning EU competition law course, and I absolutely love it. I do lots of what I am doing today, which is I go to lot of countries and talk about competition law and policy with lawyers, with competition authorities, with judges. I love doing that. There is a small matter of having to do the 8th edition of my book by December 12 this year because on that date I am going to India and I have promised that it will be done by that date. There is so much to do, it is a very hard work to go from one edition to another edition because every day of the week there is something new, a new decision, judgment, new consultation paper, new directive. And my book covers both EU and UK law, so it is a monumental task to do it all. So, I just carry on as before. I have got no intention whatsoever to retire, and I will be carrying forward as before but without some administrative tasks which have been a little bit boring actually.

Will we ever see a reference in your book to a decision issued by a Latvian Competition Council?

Well, the answer to that is that if there was a national decision which sheds important light on application of EU law, then yes, I would cite it in my book.

How many Latvian students have you had so far?

I don't know. I was thinking about that when I was coming here. Certainly a lot more than one, lots of Latvian students over the years. Just on distance learning diploma course there have been quite a lot of Latvian and Lithuanian students. What strikes me is that I have met lots of Latvians and Lithuanians but I cannot remember particularly meeting any Estonians.

What do you wish to Latvian competition community? What is your message to them?

I believe that the competition law and policy is a force for good, I really do believe that. And so I want people to understand it and, in so far as they practice it, I want them to practice it well rather than badly. And I think that a lot of people are

practicing it well, and if I have contributed to that in some way, then I am pleased with what I have done.