

*The Continual Evolution of Competition Law**

Sir Peter Roth

Introduction

“Whatever instances ... of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system”.¹

So wrote Sir William Blackstone in Vol III of his famous *Commentaries on the Laws of England*, published exactly 250 years ago. Blackstone proceeded to contrast favourably the English common law with continental civil law, and indeed canon law. And he concluded that the comparative clarity of English law

“argues deep wisdom in such as laid the foundations, and great care and circumspection in such as have built the superstructure.”²

Of course, Blackstone was not thinking of competition law, since that lay in the future. The common law had developed a doctrine of restraint of trade whereby contracts which unreasonably restricted the commercial freedom of an individual were unenforceable.³ But the distance between English jurisprudence and the modern concept of competition law is demonstrated by the great case of *Mogul SS v McGregor*,⁴ decided some 120 years after Blackstone wrote his Commentaries. An association of shipowners plying the valuable tea trade between China and England, who had collectively agreed freight rates and the allocation of cargo (i.e., a cartel), responded to the competitive entry of the plaintiff by deciding not only to refuse cargo from any exporter who decided to ship on the plaintiff’s vessels, but that they would put on extra sailings to match those of the plaintiff, at rates which were below cost. The English courts at every level dismissed the plaintiff’s claim on the basis that there was no actionable wrong. In his judgment in the House of Lords, Lord Halsbury LC expressed surprise that the contrary could be suggested:

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¹ *Commentaries on the Laws of England* (ed. Prest), Vol III (1768), para 328.

² *Ibid.*

³ See Heydon, *The Restraint of Trade* (1971), chap 1; Wilberforce, Campbell and Ellis, *The Law of Restrictive Trade Practices and Monopolies* (2nd ed, 1966), chap 1.

⁴ *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25.

“..., after all, what can be meant by “out of the ordinary course of trade”? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself”.⁵

But the decision in *Mogul v McGregor* was not wholly uncontroversial. After the judgment in the Court of Appeal, *The Times* wrote that the case “forces us to realise that we are left with no defence against the monopoly or “trust” except such as the Legislature chooses to give us”⁶. As this case was going through the English courts, what became the Sherman Act was working its way through the US Congress. In the UK, intervention by the legislature came much later. Only after World War II, in 1948, did the Atlee Labour Government introduce a Monopolies and Restrictive Practices Act,⁷ and eight years later Parliament passed the first Restrictive Trade Practices Act establishing a register of restrictive trading agreements which could be challenged by a statutory authority. The UK competition law of the following decades, enacted in a number of statutes, came to be generally regarded as formalistic and cumbersome, and it was of limited scope. The whole approach was later abandoned, with no regrets.

The current position

If we look at the structure of competition law that we have in this country today, it can be seen as resting on three pillars:

- i) What is increasingly referred to as antitrust law (although personally I think that use of the US term in the European context is unfortunate): i.e., the twin prohibitions of on the one hand agreements or arrangements between two or more enterprises which may restrict or distort competition; and the other, of unilateral conduct by an enterprise in a dominant position that amounts to the abuse of that dominance.
- ii) The control of mergers, over a certain size. Currently, this is achieved through distinct and largely discrete UK and EU regimes.
- iii) The provision for market investigations, conducted by the CMA. This third limb is a purely UK domestic tool.

⁵ *Ibid* at 37.

⁶ *The Times*, 15 July 1889: see Cornish et al (eds), *Oxford History of the Laws of England* (2010), Vol XII, p 1052.

⁷ The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948.

Only the first of these three pillars provides for the imposition of financial sanctions, and indeed imprisonment of individual executives in certain cases of hard-core cartels. But the other two also enable the imposition of far reaching remedies. And each of them is founded on statute.

I will return later to say something about merger control and market investigations. For the most part, I wish to consider the antitrust provisions, which apply at both EU and domestic levels in the same way. In that respect, the foundation of modern competition law in the UK is the landmark Competition Act 1998, which adopted entirely the EU model. So indeed has every Member State of the EU for the purpose of the substantive provisions of its own domestic law. And so too have others well beyond the EU. From Brazil to the Philippines, from India to South Africa, states have introduced competition laws not on the US model but reflecting the EU law approach.

Indeed, I sometimes think that competition law is the EU's most successful export. And in all the current controversy concerning membership of the EU, no one has suggested that on leaving the EU we should abandon the *substantive* form or content of these fundamental antitrust prohibitions.

Antitrust law

When one considers the two fundamental prohibitions and the evolution of that antitrust law over the past six decades since the Treaty of Rome, there are three striking features:

- 1) They are drafted in very broad, open-textured language. Thus, Article 101 refers to “all agreements [etc] ...which have as their object or effect the prevention, restriction or distortion of competition and may affect trade”; and Article 102 covers “any abuse” of “a dominant position” in so far as it may affect trade”. It is true that the statutory provisions proceed to set out various examples, which are of course demonstrative, but they are not exhaustive.
- 2) There has been no legislative amendment or elaboration of the core text since the original Treaty of Rome was adopted. The only changes have been the repeated – and irritating – renumbering of the Treaty articles. The only legislative intervention, apart from some specific provisions concerning agriculture,⁸ has come in the requirements

⁸ Under Art 42 TFEU.

for exemption from the first prohibition, i.e. Article 101, through a series of block exemptions set out in Regulations. Those block exemptions are possible because of the provision for exemption in the primary legislation, i.e. Article 101(3). The EU block exemptions are in turn adopted, *mutatis mutandis*, under the UK statute for the purpose of our domestic competition law. But although undoubtedly important, these do not alter the terms of the underlying prohibition. And there are no such regulations as regards the other prohibition, i.e. that of abuse of dominance.

As a result, it has been for the courts to put flesh on these bare bones and to develop their meaning – in EU competition law and thus in UK competition law, since section 60 of the Competition Act requires our courts to interpret the UK domestic provisions consistently with the way the European Courts interpret the European ones. That law has evolved incrementally from case to case, with precedents binding on the national courts coming from the central European Courts in Luxembourg. Those precedents have equally bound the UK courts as regards our domestic competition law which, as I said, mirrors the language of the European provisions. Therefore, this has all the characteristics of common law development of the kind to which Blackstone was referring centuries ago.

In view of this fundamental role in the evolution of competition law left to the judges, there has been much discussion of the objects of competition law, and therefore of the intention of the drafters of these antitrust provisions. For what are now Articles 101 and 102 (and I shall just use the current numbering), and the latter abuse provision in particular, it has been suggested that they reflect the so-called ordoliberal school concentrated at Freiburg University in the 1930s and 40s. This was a group of academic economists and lawyers who were concerned about the role of economic power in society. They sought to foster an integrated policy that promoted the dispersion of economic power and avoided its concentration, whether in the state or private enterprise. The market was the key driver, but it had to operate in a manner that was fair, including to smaller enterprises.⁹

More recently, the work of Dr Pinar Akman casts doubt on whether ordoliberalism did play much of a role in the drafting of these aspect of the Treaty, and she suggests that the objectives were more oriented towards efficiency, by fostering growth and the better use of productive forces, while preventing dominant undertakings from exploiting their trading partners.¹⁰

⁹ See Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998).

¹⁰ Akman, *The Concept of Abuse in EU Competition Law* (2015).

Certainly, the competition rules do not prohibit monopoly, as strict ordoliberal thinking would dictate. And insofar as the competition provisions of the Treaty of Rome drew their inspiration from the Treaty of Paris a few years earlier, by which the same six nations established the European Coal and Steel Community, it seems that the competition provisions in the earlier Treaty prohibiting cartels and controlling concentrations were introduced as a result of pressure from the United States. The Americans still had occupying authority in Germany and wielded considerable influence because of the Marshall Plan. They were very concerned at the prospect of the resurgence of pre-war cartels which for those steeped in a culture of the antitrust laws would impede industrial recovery in Europe. A young antitrust professor from Harvard assisted Jean Monnet in drafting the competition provisions of the Paris Treaty.¹¹

Such questions are no doubt historically interesting, but in a sense they are irrelevant. Because the third striking feature of the evolution of this competition law, based as it is on an inter-state Treaty, is that in all the case law there has been no reference to the *travaux préparatoires*. Indeed, until recently such documents were barely accessible. The evolution of competition law has not been constrained, or even guided, by discussion of original intent.

So I turn to look at the way the courts have led the evolution of the two antitrust prohibitions. It would be as inappropriate as it would be impossible to attempt a comprehensive overview. I shall therefore concentrate on a few selected examples to illustrate the approach, first to Article 101 and then to Article 102.

Article 101

I start with two seminal decisions of the ECJ issued in 1966.

*Consten and Grundig*¹² was the first appeal against a decision by the Commission finding a violation of competition law. This case will be so familiar to many in this audience that it is difficult today to appreciate what an amazing case it was at the time. It concerned an agreement by which Grundig appointed the French company, Consten, to be the exclusive distributor of its TV and radio products in France. By various provisions, including the assignment of a trademark, Consten was protected from any possibility of parallel import into France of Grundig products. In their appeal, the parties to the agreement argued that Article 101 had no

¹¹ See Marengo, “The Birth of Modern Competition Law in Europe”, in von Bogdany et al (eds), *European Integration and International Co-ordination: Studies in Honour of Claus-Dieter Ehlermann* (2012).

¹² Cases 56 & 58/64 *Consten and Grundig v Commission*, EU:C:1966:41, [1966] ECR 299.

application to vertical agreements: it was directed at agreements which restricted competition horizontally, between manufacturers. The Italian Government intervened to submit that Article 101 did not apply since such an agreement did not involve a restriction: Grundig was simply transferring to Consten certain powers in order to market its products, which Consten had freely chosen to accept. The German Government also supported the appeal, arguing that Article 101 applied only to restrictions of competition between brands; it did not cover a restriction of intra-brand competition, which is all that this agreement affected. So not only the parties, but two of the then six Member States submitted that such an arrangement was not contrary to competition law.

The ECJ dismissed all these arguments. The Court stated:¹³

“The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers is generally more noticeable than between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85 (1), merely because it might increase the former.”

And the Commission was right to look at this agreement in the context of the whole distribution system set up by Grundig:¹⁴

“In order to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties.”

One can only speculate as to how different the history of competition law would have been if the Court had decided the other way.

The other case from 1966 was *Société Technique Minière* (or *STM*)¹⁵ which was a reference from a national court. This also concerned a distribution agreement. Here too a French company was given the exclusive right to sell in France, in this case certain levelling machines manufactured by a German company, and it agreed not to sell competing machines. The Commission argued that the restriction accepted by the German supplier not to compete with STM in France necessarily amounted to a restriction of competition. But the Court disagreed.

¹³ Ibid, at 342.

¹⁴ Ibid at 343.

¹⁵ Case 56/65 *Société Technique Minière v Maschjnenbau Ulm*, EU:C:1966:38, [1966] ECR 235.

STM was argued just a few days before *Consten and Grundig*, and in contrast with that case, the agreement did not give STM absolute territorial protection since there was no impediment to parallel imports into France. The court therefore emphasised that when a clear adverse effect on competition is not apparent from the terms of the agreement alone, the surrounding circumstances must be considered. Granting sole distribution rights may be necessary in order to penetrate a new market. Therefore, to assess whether the agreement was indeed restrictive of competition:¹⁶

“It is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement, or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation”

The judgment is also notable for explaining that the statutory prohibition will apply, in accordance with its wording, to an agreement which either has the object or has the effect of restricting competition: there was no need to establish both.

These early decisions with their focus on vertical agreements, no doubt also reflected a concern to prevent barriers to parallel trade that would hinder the economic integration of the common market, of what was then the European Economic Community

A few years later, in 1969, the Court of Justice held that a *de minimis* principle applied to Article 101.¹⁷ In 1974, the Court held that the competition provisions of the Treaty are directly enforceable in national courts, paving the way for the development of private actions in competition law.¹⁸ And in 1977, in the first *Metro* judgment,¹⁹ the Court articulated the “ancillary restraints” doctrine, whereby additional restrictions in an agreement which do not go further than is objectively necessary to achieve its principal purpose, which is otherwise unobjectionable, are not caught by the prohibition in Article 101. In that case the purpose was

¹⁶ Ibid, at 249-250.

¹⁷ Case 5/69 *Völk v Vervaecke*, EU:C:1969:22, [1969] ECR 295.

¹⁸ Case 127/73 *BRT v SABAM*, EU:C:1974:25, [1974] ECR 51.

¹⁹ Case 26/76 *Metro v Commission (No 1)*, EU:C:1977:167, [1977] ECR 1875.

maintaining a system of distribution only by selected dealers who fulfil specified quality criteria.

Subsequent decisions have developed and refined that principle, which more recently has assumed significance in cases concerning internet selling.²⁰

I will mention one significant case in the field of horizontal agreements: the judgment in 1994 concerning agricultural cooperatives in Denmark.²¹ There were a number of such cooperatives, mostly of farmers and farmers' associations. The question was whether the rules of a cooperative which forbade its members to obtain their supplies through a competing cooperative contravened Article 101.

The Court noted that a major purpose of the cooperative was to obtain the benefit for their members of volume discounts through bulk purchasing of agricultural supplies, such as fertilisers. So if a member could belong to two competing cooperatives, that would make each of them less capable of pursuing those objectives for the benefit of all the members. Therefore, the Court held that a prohibition on dual membership does not necessarily restrict competition and may even have beneficial effects on competition, although it could have adverse effects because it discouraged members from obtaining their supplies elsewhere. So, said the Court:²²

“... in order to escape the prohibition laid down in Article [101(1)] of the Treaty, the restriction imposed on members ... must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.”

And looking at the facts, the Court indicated that the restriction here satisfied that condition.

Through this decision and others, the Court fashioned the notion of distinguishing between hard-core restrictions which clearly have the object of restricting competition, and on the other hand cases where a wider ranging consideration of the effect of the agreement is required. The courts came to emphasise the need for a realistic assessment of the prospect of competition in the absence of this agreement. *European Night Services*²³ in the Court of First Instance in 1998, which annulled a Commission decision, was an important landmark in that process.

²⁰ See Case C-439/09 *Pierre Fabre*, EU:C:2011:649; Case C-230/16 *Coty Germany v Parfumerie Akzente*, EU:C:2017:941.

²¹ Case C-250/92 *Gøttrup-Klim v Dansk Landbrugs Grovvarereselska AmbA*, [1994] ECR I-5641, EU:C:1994:413.

²² *Ibid*, at para 35.

²³ T-374/94 *European Night Services v Commission*, EU:T:1998:198.

So when people speak of a more economic approach to the interpretation of the meaning of the antitrust provisions, as now reflected in the Commission's various published Guidelines, that was a development which emerged from the developing jurisprudence of the Court.

To illustrate how that process of evolution continues, I will refer to two more recent cases.

In its important judgment of 2014 in the *Cartes Bancaires* case, the ECJ further considered the scope of a restriction by object.²⁴

The Court explained its prior case-law as showing that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. In other words, they can be regarded, by their very nature, "as being harmful to the proper functioning of normal competition". Horizontal price-fixing cartels are the classic example. They are so likely to have negative effects on price, quantity or quality of goods that proof that such effects are likely is redundant. Where analysis of the type of coordination did not reveal a sufficient degree of harm to competition, then it was not a "by object" case and the effects of the coordination had to be considered.

But that did not mean that "by object" cases are confined to specific categories. And the analysis is to be conducted in the overall context. The Court stated:²⁵

"In order to assess whether coordination between undertakings is *by nature* harmful to the proper functioning of normal competition, it is necessary... to take into consideration all relevant aspects - having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets - of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market."

[emphasis added]

And the Court emphasised that the concept of restriction by object should be interpreted restrictively.

The Court of Justice quashed the judgment of the General Court that the pricing rules of a grouping of French banks for the operation of a system of debit payment cards restricted competition by object. The case was remitted for consideration of effects.

²⁴ Case C-67/13P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204.

²⁵ *Ibid* at para 78.

The full implications of the *Cartes Bancaires* judgment are still being worked out. That process follows a course familiar to the common lawyer: illustration and refinement by application on a case-by-case basis. In January of this year, the Grand Chamber of ECJ gave a ruling on a reference from the Italian court.²⁶ The issue arose in the framework of a licensing agreement between a subsidiary of the Swiss pharmaceutical giant, Hoffman-La Roche, and another Swiss multinational, the Novartis group, for the eye treatment medicine Lucentis. Hoffman-La Roche itself sold a drug called Avastin for the treatment of certain tumours. Avastin sold for significantly less than Lucentis. But when it was found that Avastin also worked well for eye disease, doctors in Italy started prescribing it instead of Lucentis. The Italian competition authority found that the Roche and Novartis groups responded by arranging to produce and disseminate scientific opinions which expressed concern about the safety of Avastin when used in ophthalmology, and to downplay opinions to the contrary. The information they disseminated was not false as such: but it was unbalanced and so presented a misleading picture.

The Court held that an arrangement to act in this way gave rise to a restriction by object. The Court referred to *Cartes Bancaires*: here, the relevant context included the complex regulatory rules and control on the marketing of medicines. But the bottom line was that if the purpose of the companies' strategy was indeed to present a misleading picture and so deter the use of Avastin for eye conditions, then that, in the words of the judgment, "must be regarded as sufficiently harmful to competition to render an examination of its effects superfluous."²⁷

There could be no clearer demonstration that the kinds of agreement that constitute a restriction of competition by object is not limited or confined. And it seems to me that the logical inference from this judgment is that if a single pharmaceutical company holding a dominant position in a certain product market adopted such a strategy, then that would constitute an abuse. It is to abuse of a dominant position that I shall now turn.

Article 102

The notion of abuse of a dominant position was first used in the Treaty of Paris of 1951, although there expressed simply in terms of use of such dominance "for purposes contrary to the objectives of this Treaty". If the drafting of the Treaty of Paris owes something to American

²⁶ Case C-179/16 *Hoffman-La Roche v Autorità Garante della Concorrenza e del Mercato*, EU:C:2018:25.

²⁷ *Ibid* at para 94.

influence, as I have mentioned, this is not a concept found in US antitrust law. No elucidation is given in the Coal and Steel Treaty, but by the time of the Treaty of Rome, four specific instances or illustrations were added:

“(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

It is striking that for the first decade after the Treaty came into force, the Commission made no attempt to enforce this prohibition. It seems that the first European Commissioner for Competition, Hans van der Groeben, doubted whether it was possible to take proceedings without detailed rules for the conduct of a dominant position.²⁸ Thus the first case to come before the ECJ concerning Article 102 was a reference from the Dutch court, which essentially sought to clarify that the prohibition does not affect the ordinary exercise of a patent right.²⁹

Everything changed in the 1970s. The Commission took proceedings against the German copyright collecting society, finding the terms of the licences it took from authors and composers were too widely expressed.³⁰ That decision was not appealed. But when Continental Can Co, an American corporation which owned a major German manufacturer of metal and light containers, acquired a majority share of a competing Dutch manufacturer of such products, the Commission held that this was an abuse of its dominant position and ordered divestiture.³¹ The appeal gave the Court of Justice in 1973 its first major opportunity to consider Article 102.³²

²⁸ See Akman, *op cit.*, pp 87-88.

²⁹ Case 24/67 *Parke, Davis v Centrafarm*, [1968] ECR 55, EU:C:1968:11.

³⁰ *GEMA*, OJ 1971 L134/15, [1971] CMLR D35.

³¹ *Continental Can*, OJ 1972 L7/25, [1972] CMLR D11.

³² Case 6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215, EU:C:1973:22.

The appellants argued that the prohibition on abuse applied only to exploitation of the dominant position which therefore directly prejudices consumers or business partners of the dominant company. And further, that the dominance must be the means by which the impugned conduct is carried out. Therefore, as a matter of law, Article 102 could not apply to a simple takeover, even if it led to the exclusion of an independent competitor.

The Court rejected those arguments. Significantly, it held that the meaning of Article 102 must be discerned by reference to the policy of the EU expressed in what was then Article 3(f) of the Treaty of Rome and is now rather oddly consigned to Protocol 27 to the current EU Treaties, although still of equal force: establishment of a system ensuring that competition in the common market is not distorted. The Court made clear that the list of abusive practices in Article 102 was not exhaustive. But considering those examples, the Court held that abuse applies not only to exploitative conduct which causes direct prejudice to consumers, but also to exclusionary conduct which interferes with the structure of competition, since that should be seen as indirectly prejudicing consumers.

On the facts, the appellants in *Continental Can* were successful, since the Court found that the Commission's analysis of the market was deficient. The application of Article 102 to takeovers has been effectively superceded by the subsequent adoption of a legislative regime for merger control. But *Continental Can* set the course for the legal approach to abuse developed in subsequent cases.³³

Over the following years, the Court enunciated some basic principles or concepts. In 1979, In *Hoffman-La Roche*, the Court stated:³⁴

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

³³ It is perhaps unsurprising that those who are fundamentally critical of the jurisprudence on Art 102 argue that *Continental Can* was wrong in principle, and not only in its application of Art 102 to a merger: see Akman, *op cit.*

³⁴ Case 85/76 *Hoffman-La Roche v Commission*, EU:C:1979:36, [1979] ECR 461, para 91.

And in 1983 in the first *Michelin* case, the Court said:³⁵

“A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.”

These statements have been cited repeatedly in subsequent cases to this day. They are of course expressed in broad terms and beg many questions. What are the methods of “normal competition”? What conduct impairs “genuine undistorted competition” which the “special responsibility” prohibits?

It must be said that clarification has emerged to varying degrees, depending on the kind of abuse under consideration. Nonetheless, I think they encapsulate two ideas which, although refined over the years, remain fundamental. First, that conduct which is unobjectionable if pursued by a company which is not dominant *may* be an abuse if engaged in by a dominant company: e.g. entry into a long-term exclusive dealing arrangement. Secondly, where a dominant company is able to engage in a course of conduct *only* because of its significant market power, then if that conduct has an exclusionary effect on competitors it, at the very least, merits careful scrutiny.

The Court has over the years had to address a range of difficult questions under Article 102. When is it an abuse for a dominant company to refuse to supply a customer – given that the right to choose your trading partners is the essence of commercial freedom? When is it an abuse to discriminate on price – given that price discrimination is not only common but in many cases pro-competitive as increasing output: charging students lower prices for tickets is an example that comes to mind in this setting? In its more recent judgments, the Court has been more alert to the efficiency gains which may result from a challenged practice, so long as it does not eliminate most competition.³⁶

Genuine undistorted competition may be seen as a process by which enterprises act as rivals to win market share from one another, and their market shares over time result from their relative competitive advantages – in efficiency and the quality of product and service they provide to their customers. Hence the use of the “as efficient competitor” test reflected in some of the

³⁵ Case 322/81 *Michelin v Commission*, EU:C:1983:313, [1983] ECR 3451, para 57.

³⁶ See, e.g., Case C-52/09 *TeliaSonera Sverige AB*, EU:C:2011:83, paras 75-76; Case C-413/14P *Intel*, EU:C:2017:632, para 140.

recent judgments in the assessment of a challenged practice: faced with this conduct, could a company which was as efficient as the dominant firm survive and prosper?³⁷

Again, it would be futile to attempt some compendious discussion of the case law. So I will select two areas in the field of pricing.

It will be recalled that the first example set out under Article 102 refers to charging “unfair” prices. Such prices can accordingly be unfairly high or unfairly low.

Predatory pricing is well recognised as a means whereby a dominant company can seek to use its superior power to eliminate a competitor. Notwithstanding what Lord Halsbury may have thought in the late 19th century, it is now generally accepted that pricing below cost may be anti-competitive: once the competitor is removed, the dominant company can hike up its price to supra-competitive levels -- and the knowledge that it could engage in that strategy again may deter anyone else from trying to enter the market. In the *AKZO* case in 1991, the ECJ set out two rules to assess the lawfulness of a pricing policy of a dominant firm:³⁸

- i) Prices below average variable cost (AVC), i.e., which vary depending on the quantities produced, must be regarded as abusive. This is on the basis that at such prices each sale generates a loss and so the dominant operator has no interest in such prices except for eliminating a competitor.
- ii) Prices above AVC but below average total cost (i.e. fixed plus variable costs) must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. “Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”

However, not all below cost pricing is exclusionary. It may be to offload surplus or perishable stock, or to enter a market with a new product. This was implicitly recognised by the CFI in a subsequent case,³⁹ and more recently in 2009 the ECJ, following an earlier AG opinion,⁴⁰ refined the *AKZO* test, saying that pricing below AVC is *prima facie* abusive but that this

³⁷ Case C-280/08P *Deutsche Telekom*, EU:C:2010:603, paras 195-202; Case 209/10 *Post Danmark I*, EU:C:2012:172, paras 38-39; cp Case C-23/14 *Post Danmark II*, EU:C:2015:651, paras 57-61 ; *Intel*, n 36 above, paras 142-147.

³⁸ Case C-62/86 *AKZO v Commission*, EU:C:1991:286, [1991] ECR I-3359, paras 71-72.

³⁹ Case T-83/91 *Tetra Pak v Commission*, EU:T:1994:246, [1994] ECR II-755, para 147.

⁴⁰ AG Fennelly in Cases C-395&396/96P *Compagnie Maritime Belge Transports*, EU:C:1998:518, [2000] ECR I-1365, at para 127.

presumption can be rebutted.⁴¹ And there has been recognition also that other measures of cost are more appropriate in some industries with large capital costs.⁴²

Those developments are essentially refinements through subsequent case law of the basic *AKZO* rule. Some have argued that to establish abuse, it should further be necessary to show that the dominant firm would subsequently be able to recoup its losses by charging supra-competitive prices after the competitor had been eliminated. If not, prices will remain low to the benefit of consumers, and competition law should not interfere. In the United States, the Supreme Court held in 1993 that in order to establish predatory pricing as an antitrust violation it was necessary to show probable recoupment.⁴³

The ECJ has rejected the argument that a similar approach should be adopted, most recently in its *France Telecom* judgment in 2009.⁴⁴ I think that is right. There is of course a logic in the US approach. But as a great US judge of an earlier age famously observed: “The life of the law has not been logic; it has been experience.”⁴⁵ First, in their desire to eliminate a competitor, business executives do not always behave in a commercially rational way. And secondly, since the US Supreme Court’s *Brooke Group* judgment, there have been virtually no cases of predatory pricing brought in the US. I cannot believe that is because predation has somehow evaporated as a US business strategy. It points rather to what I believe is of fundamental importance in fashioning rules for the antitrust provisions. Competition law must not become so demanding, or so uncertain, as to prevent its practical application.

As for unfairly high prices, in contrast to US antitrust law, that can clearly be a violation of EU antitrust law. The question of how you establish that there is an unfairly high price is not easy. In the *United Brands* judgment in 1978, the ECJ stated that “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is an abuse”.⁴⁶ The Court then continued:⁴⁷

“the questions ... to be determined are whether the difference between costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself

⁴¹ Case C-202/07P *France Télécom v Commission*, para 109.

⁴² E.g network industries, where long-run average incremental cost (LRAIC) may be preferable.

⁴³ *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*, 500 U.S. 209 (1993).

⁴⁴ n 41 above, paras 112-113.

⁴⁵ O.W Holmes, *The Common Law* (1882), p.1.

⁴⁶ Case 27/76 *United Brands v Commission*, EU:C:1978:22, [1978] ECR 207, para 250.

⁴⁷ *Ibid*, para 252.

or when compared to competing products. Other ways may be devised – and economic theorists have not failed to think of several – of selecting rules for determining whether the price of a product is unfair.”

In fact, economists are not at all clear as to how you might determine whether a price is “unfair”. The *United Brands* decision itself does not help since the Court quashed the finding of abuse by the Commission because the factual basis was found to be defective.

Because of these difficulties, it was thought that competition authorities would avoid bringing excessive pricing cases, and rely on competition to bring prices down. But then the first case of infringement decided by the OFT under our Competition Act was an excessive pricing case, there concerning a pharmaceutical medicine. And on the appeal the CAT approved the various comparative benchmarks used by the authority to determine the question of unfairness.⁴⁸ This is perhaps one of the most difficult areas of abuse. But the Court of Appeal produced a sensitive analysis of what constitutes unfair pricing in the *Attheraces* case concerning an unusual product, pre-race data.⁴⁹ A little over a year ago, the ECJ confronted excessive pricing in the Latvian Copyright case, where AG Wahl cited with approval the CAT judgment in *Napp*.⁵⁰ His broad analysis of the problem took the matter a little further, although the Court in its judgment was more focused on the particular facts of the case.⁵¹ More recently still, the CAT has delivered another judgment on excessive pricing, stressing the need to consider the various alternative benchmarks for assessment.⁵² And the Commission is currently investigating alleged excessive pricing by Aspen Pharma of five cancer medicines⁵³ - so in due course the question of abusive pricing may be considered again by the courts in Luxembourg.

Reflections

These examples from the case-law concerning both antitrust provisions cast some light on what is sometimes described as a tension between form-based and effects-based rules. Of course,

⁴⁸ *Napp Pharmaceutical Holdings Ltd v DG of Fair Trading* [2002] CAT 1, para 392. The CAT observed that “there are, no doubt, other methods.”

⁴⁹ *Attheraces Ltd v British Horseracing Board Ltd* [2997] EWCA Civ 38.

⁵⁰ Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*, EU:C:2017:286, para 44 and n. 27.

⁵¹ EU:C:2017:689

⁵² *Flynn Pharma Ltd and Pfizer Inc v CMA* [2018] CAT 11. See also Decision no. 18-D-17 of the French *Autorité de la concurrence* finding excessive pricing by Sanicorse regarding waste disposal prices charged to hospitals in Corsica (20 September 2018).

⁵³ Commission Press Release IP/17/1323 of 15 May 2017.

competition law should not be formalistic, like the old RTPA. It must take account of features of the market and all the surrounding circumstances. But it must be remembered that the antitrust provisions are not only applied by the competition authority on a very full investigation, often over an extended period and gathering information from a range of third parties. In the first place, the antitrust rules can, and increasingly are, applied in litigation brought by private parties, who do not have those resources or indeed powers. Secondly, and more fundamentally, the interpretation given to the antitrust provisions set a standard for commercial behaviour. Outside the field of hard-core cartels, most business men and women do not want to infringe the law. They want to get on with their commercial activity in a lawful manner. And when they ask if it is permissible to price in a certain way, or to offer a particular form of rebate, it is no help to be told that they must instruct economic consultants who will build a model of the market and then give them an answer a few months later. So to some extent, the antitrust rules have to be form-based.

Further, I think there is sometimes too much of an emphasis on pricing effects, to the virtual exclusion of all other effects. Of course, competition on quality and service are also important, and economists tell me that price is used as a proxy for quality and service, although I confess I sometimes find that process of approximation a little hard to follow. It is here that consumer choice to my mind also plays a part.

In 2004, the owners of the main crematorium in Hertfordshire which had for many years accepted funerals from all the local funeral directors, told one local, family-owned firm called Burgess that they would no longer accept funerals handled by that firm, although there was no question of Burgess not satisfying their usual conditions of trade. The crematorium was owned by a rival firm of funeral directors. There is a limited number of licensed crematoria and most of Burgess' customers understandably did not want to use a crematorium far away. So this withdrawal of supply had a devastating effect on Burgess' business. The then UK competition authority, the OFT, held that even assuming the crematorium was dominant, there was no abuse. They were clearly influenced by the fact that they considered there remained sufficient competition in the market without Burgess. so that the price of funerals and cremations, would not rise.

On appeal the CAT quashed the decision and held that there was here an abuse.⁵⁴ The Tribunal found that it was not normal practice in the industry for a crematorium to refuse access to a

⁵⁴ *JJ Burgess & Sons v OFT* [2005] CAT 25.

local funeral director without objective justification. So the strengthening of the rival firm which resulted from Burgess' exclusion was not competition on the merits. And consumers would suffer, since the local population would lose one of the three funeral directors from whom to choose. It is significant that the Consumers' Association intervened in the case in support of Burgess, because it was concerned about the need to protect consumer choice.

The *Burgess* case has been largely forgotten, but it highlights the importance for consumers of maintaining competition for matters other than price. That is not to turn competition law into a law for the protection of competitors rather than the competitive process. There was no suggestion that Burgess was less efficient than its rivals.

The courts must of course interpret the law in accordance with the underlying purpose as set out in the Treaty and identified in the *Continental Can* case long ago by reference to the then Article 3 of the Treaty: maintaining the competitive structure of the market. The ECJ reiterated that as the basis of the antitrust rules in its judgment in an Article 102 case, *British Airways*, in 2007;⁵⁵ and in an Article 101 case, *GlaxoSmithKline*, in 2009.⁵⁶

No doubt that is based on the theory that competition is the best way to promote economic progress and the welfare of consumers. In *TeliaSonera* in 2011, the Court expressed it a little differently, stating that the function of the antitrust rules is “to prevent competition being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.”⁵⁷ But, in my view, none of this entitles the courts to substitute a consumer welfare test any more than an economic progress test or a vague public interest test when deciding whether or not the antitrust rules are infringed.

I am not suggesting that it is irrelevant to look at the effect of the impugned practice on consumers: far from it, and in some circumstances an improvement in efficiency may amount to an objective justification for conduct that might otherwise constitute an abuse. That is an issue still being developed in the case law concerning loyalty rebates. But while the interpretation and application of the antitrust rules is informed by economic analysis, it is emphatically not economics but law.

In steering the evolution of that law, the courts have been doing what common law courts always do: moving it forward incrementally, and sometimes developing new principles. Even

⁵⁵ Case C-95/04 *British Airways v Commission*, EU:C:2007:166, para 106.

⁵⁶ Cases C-501/06P etc, *GlaxoSmithKline Services v Commission*, EU:C:2009:610, para 63.

⁵⁷ *TeliaSonera Sverige*, n 36 above, para 22.

for the pure common law, free from any statutory underpinning, the courts act in this way. Lord Bingham in his essay significantly entitled *The Judge as Lawmaker*, provides a selective catalogue of substantial changes in English law in recent times made by the judges.⁵⁸ With open-textured, constitutional style legislation, the judicial task in development of the law may be even greater.

Of course, some of the judgments in antitrust law from the European Courts can be criticised, as can the judgments of all courts. The development by the UK courts of principles for recovery for economic loss in cases of negligence was described by Lord Bingham, perhaps charitably, as “somewhat erratic”. If as I suggest, the Court of Justice has been functioning very much like a common law court, then for the common lawyer we might wish that its judgments read more like common law judgments. Their compressed reasoning can make them opaque and they are sometimes Delphic in their utterances. In part, that is the result of having a single, collective judgment, with no facility for individual dissents or indeed concurring judgments. In that respect, they of course resemble many continental judgments.

Nonetheless, I think the ECJ has three distinct advantages when it comes to the development of competition law. First, the Commission intervenes in every case where it is not already a party, thus performing a sort of amicus role on references from national courts. In some cases, individual Member States intervene as well. Secondly, the AG provides the court with a kind of super-amicus: an independently researched and fully articulated discussion of the issues by a sophisticated judge. Any competition lawyer can think of AG Opinions that have been particularly influential in the evolution of competition law. Thirdly, with the enlarged EU, the Court of Justice now has a steady flow of cases raising substantive questions of competition law, far beyond the number that would reach the higher courts of an individual Member State. If abuse of dominance is the area where the recent evolution of the law has been most profound, in the last decade the ECJ gave 18 judgments concerning substantive issues under Article 102.

I think that in a post-Brexit world, where future Luxembourg judgments are not binding and the British courts can no longer make references, our courts may benefit from intervention by the CMA in private litigation that raises important questions on the application of competition law.

⁵⁸ In Bingham, *The Business of Judging* (2000), p 29.

New Challenges

Evolution inherently does not cease. What may lie ahead? Prophecy is precarious, especially for a sitting judge who cannot know what particular issues may come before him.

But digital markets and the power of some of the major platform based companies are now subjects of much debate. Clearly, competition law has to be able to address them.

We are all indebted to the discussion by Professors Ezrachi and Stucke in their stimulating book on *Virtual Competition*.⁵⁹ More recently still, there have been increasing calls to take action against the so-called FAANGs: Facebook, Amazon, Apple, Netflix and Google. It has been remarked that their combined share price exceeds the GDP of Ireland or Pakistan.

The operations and power of such technical behemoths undoubtedly raise many issues: effective taxation; data protection and privacy; offensive and inflammatory content; and so on. These are no doubt important issues but they are not issues for competition law and the competition rules should not be distorted in a quest for some overall solution.

Competition law, as I have emphasised, is concerned with preventing distortions to a competitive market. So it is from that perspective that the developments require consideration.

I think there is a danger in lumping these high tech giants together, just because they are all big, successful and American. They have very different characteristics. For example, Apple, even if it may in some respects be dominant – as to which I express no opinion – its success is significantly based on the development of hardware products on which it continues to face competition: the iPhone and iPad. Other major companies which appeared supremely powerful in an industry have subsequently lost their prominence through technical developments. Remember Kodak in photographic film and Nokia in mobile handsets.

These companies are not a heritage of former state monopolies reacting against new entrants in a recently liberalised market. On the contrary, their remarkable success is the result of innovation and enterprise that has produced very popular products. I suspect that the overwhelming majority of people here use Google daily and Amazon frequently. You may well also look at YouTube, and have an address on Gmail. I won't ask how many of you have a Facebook account. The products of these digital giants have not only improved our lives as consumers but also brought commercial opportunities to many smaller firms. As that great

⁵⁹ *Virtual Competition: The Promise and Perils of the Algorithm Driven Economy* (2016).

American judge, Learned Hand, stated many years ago: “the successful competitor, having been urged to compete, must not be turned upon when he wins”.⁶⁰ So we should be cautious and not rush to embrace what has, rather pejoratively, been termed a new ‘hipster’ antitrust.⁶¹

However, I think there are some very genuine concerns about some of the so-called super-platform companies, arising from the combination of elevated network effects and the self-enforcing market power that comes from the accumulation of data. The more consumers that use Google’s search engine and Amazon’s shopping platform, the more attractive they are for advertisers and retailers, and vice versa. And the data about us which they acquire as we use them, enables them to strengthen their offering further. These circumstances can give rise to exceptionally high barriers to entry by others into the market. Moreover, these technical giants are continually expanding into adjacent markets, often on the back of their massive accumulation of data.

Four concerns can be highlighted. First, that the market power of digital giants is not used to stifle dynamic competition – competition by innovation that is well recognised to be so important for economic progress. Secondly, as Prof Tirole has emphasised, that these platform markets should remain contestable – so that the potential for new entry is retained.⁶² Thirdly, that as these companies move into related markets where they are not dominant, they do not leverage their market power to distort competition in that related market. And finally, that they do not use their power in ways that are exploitative of consumers and small suppliers.

Does our competition law have to evolve new tools to address these problems? Here I return to the other two pillars of the overall structure to which I referred at the beginning: merger control and market investigations.

First, merger control. A test for merger control based on establishing a substantial lessening of competition (the test under UK merger control) or a significant impediment to effective competition (the broadly equivalent test under the EU Merger Regulation) certainly can take account of dynamic competition, as several recent decisions of the European Commission have shown.⁶³ But assessment of this dynamic does not fit well with the more robust measures on which competition authorities traditionally rely. In 2014, the Commission cleared Facebook’s

⁶⁰ *United States v Aluminium Company of America.*, 148 F.2d 416 (2d Cir.1945), p.430.

⁶¹ See Kahn, “Amazon’s Antitrust Paradox”, 126 Yale LJ 710 (2017). Cp. Muris and Nuechterlein, “Antitrust in the Internet Era: the Legacy of *United States v A&P*”, George Mason Law & Economics Research Paper No 18-15 (2018), <https://ssrn.com/abstract=3186569>.

⁶² Tirole, *Economics for the Common Good* (2017), chap 14, esp. at pp 397-400.

⁶³ E.g., M.7559 *Pfizer/Hospira*, 4 August 2015; M.7932 *Dow/Du Pont*, 27 July 2017.

acquisition of WhatsApp on the basis that they were not close competitors in consumer communications apps, there would be significant technical difficulties integrating WhatsApp and Facebook, and any enhancement of Facebook's collection of data was only relevant in the context of competition for online advertising.⁶⁴ The fact that it emerged subsequently that the Commission had been misled over the technical hurdles (for which Facebook was fined €110 million)⁶⁵ does not remove the concerns over this decision. Facebook paid effectively \$19 billion to take over WhatsApp and that prompts the question where it saw the commercial benefits that justified such a remarkable price. Reference to the price is wholly absent from the Commission's decision.

So scrutiny of such mergers has to be applied with more imagination. But the jurisdictional tests that engage merger control in the first place are not well suited to the phenomenon of technical giants acquiring start-up companies that have developed a new digital product or application. The EU Commissioner for Competition has publicly recognised the limitations of the current EU system in this regard.⁶⁶ Last year, Germany amended its competition law to introduce a threshold for merger control based on the consideration paid for the acquisition, even when the turnover of the acquired company was very low.⁶⁷ And an economic study recently produced for the German Ministry of Economic Affairs has further proposed that test under merger control should cover the acquisition by a dominant company that could become a potential rival in the future if that is part of an identifiable strategy to fight off competition through acquisition.⁶⁸ That is an area which I think requires urgent attention. I would hope that coordinated initiatives through the OECD may be possible, since we will cease to come under the umbrella of EU merger control after Brexit. As these are largely international markets, a harmonious approach is desirable.

As for market investigations, here the UK can make a distinct contribution. They enable the competition authority to conduct a full examination and the menu of remedies available under the statute is extensive, going so far as compulsory divestiture. Such investigations have not

⁶⁴ M.7217 – *Facebook/WhatsApp*, 3 October 2014.

⁶⁵ M.8228 - *Facebook/WhatsApp (Art 14(1) proc.)*, 18 May 2017.

⁶⁶ Speech by M.Vestager, “Competition the mother of invention”, 18 April 2016: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-mother-invention_en Even the Facebook/WhatsApp merger did not meet the thresholds for examination under the EU Merger Regulation but was referred to the Commission by the merging parties under Art 4(5) of Reg 139/2004.

⁶⁷ 9th Amendment to the German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), introducing Art 35(1a) with effect from 9 June 2017. See Mundt, “Sixty years and still exciting – the Bundeskartellamt in the digital era”, (2018) *J of Antitrust Enforcement* 6, 1-4.

⁶⁸ See <https://www.d-kart.de/en/next-level-competition-law-the-study-that-will-serve-as-a-basis-for-the-reform-of-abusive-practices-in-germany-and-europe/>

in the past been carried out as regards a single company. They are usually deployed for oligopolistic markets or systemic practices. But there is no reason why a market investigation cannot be made as regards a single company. Section 131 of the Enterprise Act provides that the investigation into prevention or distortion of competition can cover “any conduct ... of one or more than one person...” And the 2013 amendment of the statute enabled such investigation to cover conduct on more than one market – so-called cross-market references.⁶⁹ Therefore such an investigation could also be conducted into certain kinds behavioural discrimination where there is concern at its anticompetitive effect.

The significant advantage of a market investigation over the use the antitrust rules is not only its broad scope and flexibility. It does not involve any finding of unlawfulness or the imposition of financial penalties, which engages a quasi-criminal approach. And it does not expose the company to claims for damages. Of course, investigations take time, fashioning remedies is challenging, and it can be difficult to determine what conduct should be regarded as anti-competitive. As Lord Currie, former chairman of the CMA, observed:⁷⁰

“These questions pose a dilemma for the competition authority: intervene too early and you suppress innovation; intervene too late and a dominant position is established that threatens open competition and innovation. There is a tipping point: intervention before that may be counter-productive, but intervening after tipping may be futile.”

As for the antitrust rules, they are of course applicable to digital products and markets and I believe the courts will continue to evolve them to meet these new challenges. Algorithmic competition is already with us, but the algorithms currently are written and installed by human beings and such arrangements can be caught by Article 101. In 2016, the CMA indeed condemned two companies for coordinating pricing by algorithm of their offerings on, as it happens, Amazon.⁷¹ In saying that, I do recognise that once the commercial strategy is itself devised and implemented by AI, we may have to think further.

The concept of abuse of dominance is also adaptable to these developments. In a case in the High Court concerning Google’s promotion of Google Maps on its general search engine, I held that if a company is dominant, then discriminating on the dominated market in favour of

⁶⁹ Enterprise Act 2002, sect 131(2A); similarly for Ministerial references, sect 132(3A).

⁷⁰ Speech at the *Concurrences* Innovation and Economics Conference, King’s College London, 3 February 2017. Available at <https://www.gov.uk/government/speeches/david-currie-on-the-role-of-competition-in-stimulating-innovation>

⁷¹ Case 50223, *Online sales of posters and frames*, 12 August 2016. The decision was not appealed.

its distinct product that competes on a market where it is not dominant can constitute an abuse, although there I found that the specific conduct at issue was objectively justified.⁷² The Commission’s decision on *Google Shopping* last year adopted a somewhat similar view that such leveraging is abusive: it does not constitute competition on the merits.⁷³ We shall see what the European Courts make of this in Google’s pending appeal. There is pending before the CAT a claim against Google for abuse by withdrawing access for a smartphone app to its Google Play, which is said to be an essential gateway for app developers to reach users of Android smartphones.⁷⁴ And as Article 102 covers the imposition of not just unfair prices but, expressly, “unfair trading terms”, it may be asked whether a requirement to give extensive permission to use your data, often imposed through small print terms on conditions compressed on your screen for which we all just click consent, might that in some circumstances be an abuse?⁷⁵

So I end where I began: with William Blackstone. The foundations laid for modern competition law have served us well. The courts will continue, no doubt with care and circumspection, but I trust equally with creativity and determination, to extend the superstructure. In that way, our competition law will continue to evolve.

⁷² *Streetmap.EU Ltd v Google Inc and Others* [2016] EWHC 253 (Ch).

⁷³ Case AT.39740 *Google Search (Shopping)*, 27 June 2017. See in particular at recitals (341)-(344).

⁷⁴ See *Unlocked Ltd v Google Ireland Ltd* [2018] EWHC 1363 (Ch); an interim injunction was granted in the High Court and the claim was then transferred to the CAT. However, the claim has been stayed since the claimant went into administration while the administrators seek funding to pursue the proceedings.

⁷⁵ Cp the Preliminary assessment by the German Federal Cartel Office in its abuse of dominance proceedings against Facebook: Press release of 19 December 2017 available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html