Symposium on Competition Law

COMPETITION AFTER BREXIT: DIVERGENCE FOR DIFFERENTIATION OR PARALLELISM FOR CONSENSUS

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It is an enormous pleasure to be here, at this great University, and at this conference, which deals with a topic that is, at the same time, topical and seeking to identify a path for the future. Thank you for the invitation.

Since assuming the Presidency of the Competition Appeal Tribunal – the "CAT" for short – I have aften been asked whether divergence is inevitable, given the reality of Brexit. Competition law, after all, was (in substantive, if not procedural) terms the most unified jurisdiction across the European Union; and also – given the significance of trade and economic ties between Member States – one of the, if not the, most important subject-matter jurisdiction. Although the United Kingdom has now left the European Union, Articles 101 and 102 TFEU live on, in the Chapter I and Chapter II prohibitions.

In these circumstances, given the importance of transnational consensus, and the substantive similarity of the relevant laws, surely divergence is unlikely. And I agree that divergence, purely for its own sake – to make a point, as it were – is short-sighted and undesirable.

But nevertheless, divergence there will be. Competition law in the United Kingdom is surging: not only do we have the usual "regulatory appeals", but also private actions and now collective actions. The CAT is blazing a trail. In the last few days, the first substantive Trucks decision was handed down: *Royal Mail v. DAF Trucks*, [2023] CAT 6. This is important in a variety of areas, most notably pass-on. A little longer ago – but still recently – the CAT handed down a detailed decision on how two-sided markets are to be analysed (*BGL v. Competition and Markets Authority*, [2022] CAT 36); and on the extent to which mergers could be barred on grounds of "dynamic" competition (*Meta Platforms v. Competition and Markets Authority*, [2022] CAT 26).

These decisions are cutting edge – and therein lies the problem. We are an important jurisdiction, having to decide these matters before most other courts have considered them.

It may be that where the CAT leads, others will follow. But that is not our call. I have absolutely no doubt – given the cases on the CAT's docket – that this is a trend that will continue for the foreseeable future; and it is a challenge that we welcome.

I appreciate that it is odd to speak of a law of the United Kingdom – the laws of Scotland and England and Wales are proudly independent. Yet the law of the United Kingdom is the right label for competition law in this country, and it draws upon all that is best in the common law traditions of Scotland, England and Wales. The common law – with its innovative and incremental approach to issues, including issues arising out of legislation – is one of this country's greatest achievements.

It is a matter of pride that the CAT has, as its main conference room, the Mansfield Room, named after William Murray, the First Earl of Mansfield.

Educated in Perth, at the Grammar School there, Mansfield was an early Scottish export to the benefit of commercial law throughout the world, and in particular in the jurisdictions operating out of London. With the Act of Union 1707, the House of Lords became the highest court of appeal in both English and Scots law, and the advocate who was master of both, as Mansfield was, had a plentiful practice of exciting cases. Mansfield was involved in most appeals to the House of Lords, Scottish or otherwise. And then there followed his great career as Lord Chief Justice of the King's Bench. In a judicial career that spanned 32 years, Mansfield was overturned only six times…statistics to dream of, today.

Competition law in the United Kingdom is intrinsically multi-jurisdictional. I am very proud to have as judicial colleagues on the CAT, Lords Ericht, Young and Richardson – and very grateful to the Lord President for making them available to sit given the other urgent responsibilities which burden all the jurisdictions of this United Kingdom. Subject to availability, they sit on any type of CAT case – whether there is a Scottish connection or not.

St Andrews seems to have provided more than its fair share of economists to the CAT (the market investigation is only a few months away, I am sure!) and (although I cannot say too much) I am hopeful that our recent competition for new ordinary members will bear great, including great Scottish, fruit.

And here lies my hope for consensus in differentiation. The CAT will never, consciously, turn its eyes away from the international horizon, including the law of the EU, which was the original source of our present competition law. This law we must now develop, on our own, but with a sure and clear sense that competition law is internationalist at heart. Whilst we are

a United Kingdom jurisdiction, if ever we presume to think we know all the answers internally, without wider reference, we will have lost our bearings.