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Also in this issue:
Choice in Private Healthcare, reform for Government agencies and anticompetitive agreements with procompetitive elements

Article 7 ECHR and the UK Cartel Offence
Article 7 of the European Convention on Human Rights posits, *inter alia*, that any criminal offence must be clearly defined in law. This principle of ‘legal certainty’ represents a potential challenge for those who advocate the use of imprisonment as a sanction in cartel cases. In fact, it is questionable whether the current UK Cartel Offence, as a criminal law measure, overcomes this particular challenge and respects the human rights of the accused. The recent BIS recommendation to reform the Cartel Offence may bring the offence more in line with the dictates of European human rights law.

“In the United Kingdom, Section 188 of the Enterprise Act 2002 (EA) allows for the imprisonment for up to five years of those who have dishonestly entered into or implemented an agreement between competitors to fix prices, rig bids, divide markets or restrict output. This piece of criminal legislation was rationalised as an attempt to deter cartel activity. In order to signal the seriousness of such activity, as well as to limit the scope of the offence, the legislature included the *mens rea* of ‘dishonesty’ within its definition. However, by employing this particular definitional construct the legislator created additional problems for the relevant enforcers, problems which have been unfavourable to the successful prosecution of the offence in practice. Consequently, to date there has only been one successful criminal prosecution under S 188 EA, itself a direct result of a plea agreement entered into by the defendants with the US Department of Justice. To rectify this situation the Department for Business, Innovation and Skills (BIS) has advocated the removal of ‘dishonesty’ from the Cartel Offence. The current author agrees that the requirement of ‘dishonesty’ should be so removed. Importantly, removal of ‘dishonesty’ would not only resolve some difficult practical issues but it would also help to ensure that the Cartel Offence respects the principle of legal certainty.

As a result of Article 7 of the European Convention on Human Rights, a criminal offence must be clearly defined in law: it must be possible to predetermine, if necessary with legal advice, what conduct is criminal.

**The Cartel Offence does not have an actus reus which clearly points to criminality and the only gauge for criminality is the jury’s perception of the honest/dishonest nature of the underlying conduct, itself an inherently vague and uncertain concept**.

**Peter Whelan, Lecturer in Law**
and what conduct is not solely by reference to the law. It is arguable that, as currently defined, the Cartel Offence does not meet this standard. The argument runs as follows. The Cartel Offence is conceptually distinct from the cartel prohibitions in Article 101 of the Treaty on the Functioning of the European Union (TFEU) and in Chapter 1 of the Competition Act 1998 (CA). One can violate S 188 EA without violating Article 101 TFEU, as the former provision (unlike the latter) does not require an effect on trade between Member States or an appreciable restriction of competition and does not provide an exemption for agreements which meet the requirements of Article 101(3) TFEU. One can violate S 188 EA without committing an administrative offence under Chapter 1 CA, as the latter also provides an exemption for agreements meeting certain strict criteria. Therefore when the cartel agreement fulfils the relevant exemption criteria, for example, it will not violate national or EU competition law. But, if by entering into the cartel agreement, the cartelist is deemed to be ‘dishonest’ by a jury then he will have committed a criminal offence. The legal certainty problem here is that the criminal offence does not have an actus reus which clearly points to criminality (in that the underlying conduct does not necessarily relate to a violation of national or EU competition law, for example) and that the only gauge for criminality would therefore be the jury’s perception of the inherent dishonesty nature of the underlying conduct, itself an inherently vague and uncertain concept. In short, as juries are the ones who decide what is or is not a dishonest practice, and as the potential cartelist does not have national or EU competition law to guide him, seeking legal advice on the criminality of his actions may not be as fruitful as he would have wished; hence the Article 7 ECHR-related problem.

One could perhaps argue that the legal certainty problem is overstated in that violation of national or EU competition law is only one means of underlining the criminality of cartel activity. For example, one could argue that cartel activity itself is inherently ‘morally wrong’ (in that it violates the moral norms against cheating, deception and/or stealing) and that this moral wrongfulness fills the ‘criminality gap’ left by not linking the Cartel Offence to a violation of Article 101 TFEU or the administrative offence in Chapter 1 CA. Admittedly, if accepted, such an argument goes some way to rectifying the problem with legal certainty. However, arguing that cartel activity itself is inherently ‘morally wrong’ is not without its own difficulties. For example, one might be required to demonstrate why consumers should have a right of ownership over the cartel overcharge (to substantiate a claim of stealing) or why by merely placing cartelised goods on a market the cartelist necessarily misleads consumers concerning the absence of collusion (to substantiate a claim of deception). It may also be difficult to reconcile such an argument with the claim that the general public do not intuitively hold cartel activity to be ‘morally wrong’.

One therefore has a choice here. One could keep the Cartel Offence as it is and challenge directly the legal certainty argument by highlighting the inherent immorality of cartel activity, or one could simply remove the definitional element of dishonesty from the Cartel Offence, thereby removing the potential for vague and uncertain perceptions of the jury to substantiate a claim of legal uncertainty. Given the considerable practical problems with dishonesty which have been identified, not to mention the complexity of establishing the inherent moral wrongfulness of cartel activity, it is submitted that the latter option is preferable. This option is also consistent with the current position of the UK Government concerning dishonesty.

1 See, e.g., A Stephan, ‘How Dishonesty Killed the Cartel Offence’ (2011) 6 Criminal Law Review 446.
3 See Department for Business, Innovation and Skills, Growth, Competition and the Competition Regime – Government Response to Consultation, March 2012.
5 See, e.g., Kokkinakis v. Greece A 260-A (1993), [52].
6 Article 7 ECHR ‘implies qualitative requirements, notably those of accessibility and foreseeability’: SW and CR v. United Kingdom [1995] 21 EHRR 363, [35].
8 For an EU-level example, see Reims II OJ [1999] L 275/17.
10 To be sure, as the Cartel Offence is not linked to commission of a Chapter 1 offence under the Competition Act 1998, the cartelist would not have UK law to guide him either.
Healthcare and competition policy has become a hot topic in the UK. The Health and Social Care Bill has completed its passage through Parliament, encountering significant opposition on the way. Even more recently, the OFT, on the basis of its market study of the Private Healthcare Market (OFT1396), have made a market investigation reference to the Competition Commission (OFT1412).

One of the problems with discussing competition in the health care market is understanding the nature of the “product” and consequently how the market is to be defined. That this is a hard question is evident from the opening paragraph (4.1) of the section on market definition of the Private Health market in the OFT market study: “It is widely acknowledged that assessing the likely PH product and geographic market definitions is a difficult task.” Without wanting to disagree with the conclusion, I want to highlight two features of the “product” which may help shed some light on part of the overall discussion.

First, recall the distinction economists make between horizontal and vertical product differentiation. The former is characterised by there being positive demand for all variants even at identical prices. Choice in healthcare between horizontal attributes, such as location, is probably uncontroversial. The latter is characterised by there only being demand for one variant at identical prices; essentially the difference is one of quality. Choice between vertical attributes is likely much more controversial. When it comes to health, if there are genuine differences in quality, we would

Who is choosing and about what? This article first distinguishes between horizontal and vertical attributes of offerings and then unpacks what it is that the patient is supposed to choose. In particular, is the patient there to project manage a health care solution or should this be done by others and if so who?

When it comes to health, if there are genuine differences in quality, we would likely always prefer the best, that is, we would not be interested in such a choice.
likely always prefer the best, that is, we would not be interested in such a choice. If choice among purely vertical attributes is exercised so that some people are choosing lower quality health care, then this must be due to lack of income or lack of information/advice or both. If people think that the choice of health care is different from choosing a car, it is likely the choice among vertical attributes which lies behind this.

The second feature is less obvious. Let us think of the product as the solution to a health care problem. In the majority of serious cases, the solution involves many people, instruments, drugs and infrastructure. Thinking about it this way, it is obvious that somebody will need to project manage the solution. There are, at least theoretically, a number of possible candidates for this, but the final consumer (i.e. the patient) is rarely thought of as a candidate ‘project manager’ – certainly not in the NHS. Nevertheless, it would appear from chapter 7 of the OFT report that some people with private medical insurance do choose both their surgeon and anaesthetist and do so as separate choices. The report points out that after a surprise increase in the fee for an anaesthetist, “it is difficult for a patient to switch to an alternative anaesthetist. This is because patients will typically only meet their anaesthetist just before their surgery and at this point patients are unlikely to switch to an alternative” [OFT1396, paragraph 7.8]. One might equally think it unlikely that many would positively choose to project manage their own operation, even if they had the necessary skills and information.

The insight from the report that at least some people do in effect project manage their own operation may come as a surprise, but does this matter? At least it should make us go further to understand why the market for private healthcare has pointed to the patient as the project manager. A starting point is to speculate about who it might be efficient to have doing this. There are several candidates, including GPs, hospitals and Private Medical Insurance (PMI) providers or a combination of these, e.g. GPs or PMIs choosing between offerings by different hospitals. If we believe that the patient is not generally in possession of sufficient good information to make an informed choice about the offerings of complete solutions by hospitals, then the choice must involve the GP or the PMI at some point, either project managing or choosing between different turn-key solutions. Between the GP and the PMI, one might expect that the latter had the more extensive and better experience to use it.

Interestingly, PMI providers do not project manage operations, possibly because of the way the insurance works. The OFT report points out that the price of the health care solution may exceed the amount the PMI provider is willing to pay. If the cap on what the insurance pays for is readily binding, the marginal financial risk of the solution is not carried by the PMI provider. This means that the PMI provider may not have the right incentive on the margin to trade off cost and quality and hence would not be an appropriate choice of project manager. If the marginal financial risk of the operation is carried by the consumer using private health care, this may explain why the consumer is left with a choice they may not be well placed to handle.

This still leaves unanswered who should be project managing the solution to a health care problem. If we want a largely privatised health care system, then thinking through this may help us design the market in a way that makes it work better. For that, are GPs and GP consortia the ideal project managers? An answer to that awaits future research.
When new governments take office they often set about major reform of the bureaucracy. The Conservative-Liberal Democrat coalition is no exception with most of its attention focused on arm’s length agencies. In its two years in office to date, the Coalition has reviewed sector regulators and the principles of economic regulation, reviewed and reformed the system of quangos and has just announced, after some delay, the merging of the Office of Fair Trading and the Competition Commission. As well as abolishing or merging existing agencies, the Coalition has created new agencies such as the Office for Budget Responsibility.

Research that I am currently conducting with my colleague Chris Hanretty will offer some evidence on the longevity of British agencies. The research looks at how long agencies survive and the circumstances under which they are wound up, and tries to estimate the importance of political change in explaining these features. Too much institutional reform creates uncertainty for business and the public and it may raise questions about the independence and quality of decision-making in arm’s length agencies. If reform appears to be, in part, politically motivated the questions about independence will become more pressing. These questions are particularly important for economic regulation because businesses are often making investment decisions over a long period of time and need to have confidence in the stability of the regulatory environment. And although European law provides some protection for the statutory
independence of regulators\(^1\), the threat of abolition or significant reform might still influence, or be perceived to influence, decision-making.

Some features of the British political system exert an important influence over how our institutions are designed, built and demolished. The doctrine of parliamentary sovereignty together with an electoral system that tends to generate single party majorities can deliver great discretion to the government of the day. In the view of some, this type of system ‘drastically heightens the danger of political uncertainty’\(^2\) as an incumbent government cannot commit itself or a successor to a given course of action. Using legislation to create agencies at arm’s length from ministers may help generate policy stability; but if it is too easy to abolish (merge or reform) such agencies via new legislation, then their independence and the credibility they loan to government will be in doubt.

Governments reform their agencies for a number of reasons. If a government loses confidence in the way that an agency is working, then structural reform is one option. The risk to an agency is amplified by an asymmetry in the political visibility of failure and success – bungles make the headlines with greater certainty than victories. A government also has greater reason to reform if it comes to believe that an agency’s decisions are drifting away from its remit, either as a result of interest group pressure or the approach taken by agency leadership.\(^3\) On the other side of that coin, the politics may drift away from the original goals of the agency. New governments bring new policy ideas and new supporters but even without a change of administration, governments might change their policy position as a result of turnover of personnel or changes in public opinion. Institutional adjustment becomes more likely as the gap between a government’s current policy preferences and an agency’s mission increases. Finally, in defending its quango reforms, the Coalition has put a great deal of emphasis on the idea that there have simply been too many agencies that have added to the cost of bureaucracy and undermined the proper accountability of government.

In theory, passing and revoking legislation in the UK should be easy when compared to systems with a constitutional separation of powers or to political systems that tend to produce coalition government. And if that is the case British governments should face little difficulty in reforming agencies as and when they choose. Most of the research that has been conducted so far on agency life spans has used data from the US. For example, Lewis’s work finds that political factors can be important predictors of agency termination but that agencies can be designed in such a way as to be insulated from the threat of termination.\(^4\) He argues that the insulation works by ensuring an agency sticks closely to the preferences of Congress; it does not work by removing politics from the equation. Research on agency life spans in parliamentary systems is much less developed. Such research is particularly difficult in the UK because of the ad hoc way that the government bureaucracy has developed. The history of administrative reform in the UK is littered with official reports lamenting the complexity of the system of agencies that has been created.\(^5\) Even government can have difficulty enumerating all the agencies it is managing and providing a rationale for the different forms they take. But the question is worth pursuing because it illuminates the trade off between policy credibility and political adaptability that faces politicians.

The experience of the Coalition over the last two years might throw some doubt on the assumption that reform in majoritarian parliamentary systems is easy. The delayed announcement of the merger of the OFT and the Competition Commission, the tortuous debates on the institutional arrangements associated with the Health and Social Care Bill and the successful public campaign to save the Forestry Commission all indicate that reform can be more difficult than is suggested by the formal constitutional position. A large share of the Government’s difficulty with its reform probably does result from it being a coalition and the added complexity of negotiation that entails. But reform can be a difficult process, even when one party has a majority in the Commons.

The difficulty is that the politics of institutional design is often about more than finding the best form for a particular organisation or the most efficient distribution of responsibilities across organisations. Policymakers will also be thinking about how they can protect their policies from future reform and how to make agencies responsive to some social groups rather than others or some
ideas rather than others. In pursuit of these goals, policymakers bargain over the extent of discretion to be delegated to an agency, over what reporting requirements to impose, over what decisions an agency should consult on and who it should consult. Policymakers ask themselves, can an agency be trusted? And, if not, can it be controlled? The position taken by Lord Clement-Jones (Lib Dem), during the report stage of the Health and Social Care Bill, provides an illustration. He objected to the proposed role of the Competition Commission in reviewing the effectiveness of competition because ‘commission members and staff are steeped in competition law principles and it is difficult to get them to attribute equal weight to non-competition objectives.’ Such issues become more crucial when politicians believe the institutional arrangements will last. This would suggest that the firmer are the expectations of institutional stability the more politicised will be the process of institutional design.

Empirical research like ours is backward looking. The regulatory state in the UK has been built in a period, for the most part, of single party majorities and long periods of single party rule. Neither of those two features can be assumed in the future but it remains very difficult to predict the consequences for economic regulation of the changing political system.

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1 Case C-424/07 Commission v Germany (2009) ECP I-11431

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**CCP 8th Annual Conference**

**What do Public and Private Sanctions in Competition Policy Actually Achieve?**

**14-15th June 2012**

**Thomas Paine Building, UEA, Norwich**

Numerous questions as to the effect and interplay of public and private sanctions have been raised by the current shake-up of the UK public enforcement framework accompanied by a consultation on private antitrust actions. The European Commission has also attempted to provide guidance for the quantification of harm in private antitrust actions. This conference brings together a multidisciplinary set of experts from the USA, Australia and Europe to discuss the recent academic research into these issues.

For more information, a list of confirmed speakers and to book a place, visit our website [www.competitionpolicy.ac.uk](http://www.competitionpolicy.ac.uk) or alternatively contact

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There are two possible ways to exempt an anticompetitive agreement from antitrust sanctions. With a certain degree of stylisation, they can be labelled American and European. Both are predetermined by the historical development of each jurisdiction, and both were introduced to mitigate the rigidity of the prohibition rule. The wording of Section 1 of the US Sherman Act and Article 101(1) unequivocally prohibits all [every] anticompetitive agreements. While the European model clearly defines in Article 101(3) the circumstances under which the agreement may be exempted, Section 1 does not contain such a clause. Without such an exemption clause, literally, all agreements which meet the general requirements of Section 1 would be unreservedly prohibited, and this would be unreasonably bold. This explains the inevitability of the rule of reason – the concept, developed by the US Supreme Court to exempt some agreements from antitrust sanctions, if the agreements, while formally meeting the requirements of Section 1, merit exemption on an objective ground.

A fundamental structural difference between these models is that in the EU the exempted agreements still remain anticompetitive in the sense of Article 101(1), whereas in the US the requirement of the rule of reason can be read in two ways: (i) literal and (ii) realistic. The literal one implies that the agreement remains anticompetitive, but it would be unreasonable to prohibit it (and this formula is comparable to the rationale of Article 101(3)). The realistic one was developed along the lines of law and economics. Its main objective is not in exempting the agreement from antitrust sanctions, but rather in removing it from the scope of Section 1 outright. In other words, it does not address the reasonability of the exemption and/or the sanction, but the reasonability of the very concept of competition: instead of arguing about beneficial effects of an anticompetitive agreement the agreement is seen as not being anticompetitive at all by virtue of its broader welfare effects (the ‘proconsumer → pro-competition’ formula). The same logic is applied in the EU context by those who suggest that some anticompetitive agreements, while formally meeting all requirements of Article 101(1), should not fall within it in the first place. There are many examples in EU case law when such agreements are either called procompetitive, or at least are not considered as anticompetitive. In my view, however, the terms could be clearer, so that if an agreement restricts competition, it should be called anticompetitive. This does not prevent such agreement from having in the same time procompetitive and/or efficiency-generating effects; or from being exempted under the de minimis conditions. In other words, unlike Section 1 of the Sherman Act, the structure of Article 101 requires no overcoming of the notion of anticompetitiveness for the exemption purposes, enabling its mere mitigation by or counterbalancing with other factors. I will propose an alternative structure of Article 101(3), which could help to avoid some semantically misleading connotations, associated with the terms pro- and anti-competitive, which are inevitable under the ‘rule of reason’ type of argumentation.

More specifically, my task is to contemplate an analysis of the balancing mechanism, which takes place under Article 101(3) in cases when an agreement has simultaneously anti- and pro-competitive effects. This analysis has two interrelated objectives: normative and methodological. The normative one is to justify the necessity of making a conceptual amendment to Article 101(3), which, in addition to its current provisions, would also enable re-authorisation of otherwise anticompetitive agreements on purely competition-centred grounds, implying a) that the competitive process is not necessarily a welfare-enhancing activity; which is therefore b) not necessarily definable in welfare-generating or empirically verifiable terms; and which c) can be enhanced even in some cases, when an agreement remains to be anticompetitive in the sense of Article 101(1). The methodological objective is to compare

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Application of Article 101(3): Addressing the grey area

Oles Andriychuk, CCP Post Doctoral Research Fellow

This sketch addresses the situations when an agreement falls within Article 101 (1), while having at the same time significant precompetitive elements, which are not covered by Article 101 (3).
the regulatory mechanisms of political (elections), cultural (freedom of speech) and economic (antitrust) incarnations of competition and to demonstrate that the model, which exists within the former two, could be also fruitfully applied to the latter one too.

I will not be developing here the substantive premises of my normative claim, which can be found elsewhere; I will thus be simply assuming that the competitive process does indeed have its important normative value, which in some instances goes far beyond its positively verifiable effects on innovations, industrial growth, market integration, consumer and total welfare. This implies that in some circumstances the value of the competitive process cannot be reduced to its positive effects on the broader economic goals only, and yet that in some other circumstances this value can even legitimately conflict with the above mentioned economic goals. This also implies that neither the essence of competition in general nor the procompetitive elements of otherwise anticompetitive agreements in particular should be defined in terms of welfare (exclusively).

Let me now revert to the issue. Both the wording of Article 101(3) and the abundant EU jurisprudence reveal that in order to be exempted from the sanctions of Article 101(2) an anticompetitive agreement should contribute to total and consumer welfare and should not restrict competition more than absolutely necessary. Schematically, EU antitrust prohibition has the following structure:

Remembering that the democratic principles of economic freedom are encompassed in the Preamble of the EU Treaty, and that Article 101 should be understood within the broader context of the Preamble, the big (white) circle encompasses the general principle that all actions of individuals and undertakings are authorised by default as a matter of freedom and liberty. For obvious reasons, some of those actions should be inevitably prohibited. Article 101(1) represents an example of such prohibition as reflected in the middle (red) circle. This rationale however would be too bold, and therefore it is mitigated by the re-authorisation principle as shown in the small (green) circle. Article 101(3) is an example of such re-authorisation in antitrust. In other words, the green circle embraces agreements which are expressions of economic freedom, which are simultaneously authorised under the white circle, prohibited under the red circle and re-authorised under the green circle.

The same model describes regulation of other incarnations of competition. Thus, in political competition all parties are allowed to participate in elections (white circle). Some of them (for example, those with radical ideologies) are prohibited under the red circle, and yet some of those prohibited can be re-authorised. In cultural competition all expressions are allowed by default (white circle), some of them (for example, hate speech) are prohibited under the red circle, and again some of those prohibited can be re-authorised (green circle). In all these instances the re-authorised actions remain belonging to the white and red circles as it is also the case with the European model of antitrust exemption.

I make this comparison not only to emphasise the important similarities between the political and cultural aspects of competition on one hand and the economic incarnation of competition on the other. My primary goal here is to reveal the principal difference in their regulation. To articulate this paradigmatic difference the following amendment to the suggested three-circled model is required: The amendment reflects two fundamental reasons for regulation, which are schematically presented as the reasons of equal importance. These reasons are the following: the eventual re-authorisation (green circle) of otherwise prohibited expressions of freedom (red circle) is provided (1) in order to protect or enhance other important societal values (like consumer welfare, innovations or economic growth); but also (2) to protect or enhance the freedom to compete itself. I will call the first reason an external reason, and the second, accordingly, an internal one.

And here is where my main concern begins. Unlike in politics and culture, where some ‘anticompetitive’ actions are exempted from sanctions on external, and others on internal grounds, in antitrust the latter ground for exemption is missing. In its current form, only the upper (external) part of the green circle is available in Article 101(3). The internal reason for re-authorisation is available only in practice, but not formally. This is why it is marked in diagram 2 as a grey area.

The unavailability of the internal grounds within Article 101(3) contributes to the contemporary trend of ‘commoditisation’ of the notion of the competitive process, which leads either to its mutation into the American model or to its reduction to a solely external means to other values (Article 101(3) in its present form). This normative and methodological inconsistency could be solved via a conceptual amendment to Article 101:

‘The provisions of Article 101(1) may be also declared inapplicable in the case of any agreement, decision, concerted practice which while preventing, restricting
or distorting some aspects of competition within the internal market, simultaneously protects, strengthens or improves to an appreciable degree others aspects of competition within the relevant market'.

The proposed amendment merely expands the possibility of re-authorisation of anticompetitive agreements on internal, competition-centred, grounds, framing in legal terms the factual necessity of the procompetitiveness as a separate ground for exemption. The suggested model neither cancels nor diminishes the existing provisions of Article 101(3). Cumulatively, both provisions would constitute a harmonious whole as present in diagram 1, changing the grey area in diagram 2 into the green one. The suggested conceptual amendment is well in line with the more economic approach as it enables not only legal, but also economic definition of procompetitiveness of otherwise anticompetitive agreements; it is also in conformity with decentralised enforcement of Article 101(3); and it does not shift the burden of proof.

Finally, let me mention two instances of potential applicability of the suggested change. Firstly, it can be applied to vertical agreements which enhance inter-brand competition for the detriment of intra-brand competition. Secondly, this model would provide a level playing field for early entry agreements in pharmaceuticals as in this case the prospective anticompetitive effect of such agreements could be mitigated by creating procompetitive outcomes, related to the early entry as such. Overall, the suggested change would merely translate into the language of law the theoretical substance of the European model of exemption, which tolerates simultaneous availability of positive and negative effects of an agreement, extending its applicability to situations where the agreement is both harmful and beneficial for competition.

My proposal is of a purely theoretical nature. I do not argue that the situations, when an agreement is simultaneously anti- and pro-competitive, cannot be dealt with under the current rules. I only argue that the current rules are unclear and can be semantically misleading, because they enable only the following two options: either 1) the balancing of pro- and anti-competitive agreements takes place under current wording of Article 101(3), which does not mention procompetitiveness as a separate reason for re-authorisation, and this causes the mutation of the very concept of competition, requiring its definition in terms of welfare (the ‘pro-consumer → pro-competition’ formula); or 2) to balance pro- and anti-competitive elements of an agreement within Article 101(1), declaring that when the procompetitive elements of the agreement outweigh its anticompetitive effects, the agreement is then overall procompetitive/not anticompetitive (which is semantically misleading inasmuch as the procompetitiveness does not automatically eliminate anticompetitiveness, in particular when different dimensions of competition are at stake). Although the explicit form of balancing within 101(1) is not accepted in EU law, this option is indirectly used by the Commission as a kind of rule of reason. In my view, any claim that a formally restrictive agreement does not eventually harm consumers or other, allegedly, more important types of competition, is an instance of such implicit balancing act.5

The way, in which the Commission balances intra-and inter-brand competition is the most explicit example of the procompetitiveness defence, and the suggested amendment would enable conceptual clarity, merely reflecting upon the objective fact that an agreement can be anti- and pro-competitive in the same time, and that in some instances the parties can use the procompetitiveness of anticompetitive agreement as a mitigating factor in the sense of Article 101(3). Without such an amendment I do not see a reliable legal ground for sacrificing some instances of intra-brand competition for the benefits of its inter-brand incarnation, inasmuch as the current wording of neither 101(1) nor 101(3) envisage such possibility.

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1 Dr Oles Andriychuk, Postdoctoral Research Fellow, ESRC Centre for Competition Policy, UEA. As my fellowship at the CCP is coming to the end and I will shortly commence my lectureship at the University of Stirling, I would like to use this opportunity to express my sincere gratitude to the Centre and its Members for offering an exceptionally fruitful platform for generating, testing and developing various interdisciplinary ideas on the essence of competition law, economics and policy as well as their effective application within the UK, EU and beyond.


3 Those societies where free speech constitutes an important public value face many instances where no external justification whatsoever could be provided for free hate speech: when speech is used to promote neo-Nazi (National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)) or racist (Brandenburg v. Ohio, 395 U.S. 444 (1969)) perversions, or significantly hinders individual privacy without any external public justification (Mosley v. the United Kingdom, ECHR, Application no. 48009/08, 10.5.2011). Yet, these acts have still been tolerated because the free circulation of ideas does not necessarily have to be constantly cross-checked by the yardstick of the external values. In some cases the internal justification is available too.


5 For example, Commission Notice ‘Guidelines on Vertical Restraints’, European Commission, Brussels, 10 May 2010, SEC (2010), para. 102: ‘[i]f inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers’. This line of argumentation cannot be done within Article 101(3), as the argument is made about the lack of harm, and not about the presence of benefits. A more general version of this kind of reasoning is present in a claim ‘if the goal of competition is consumer welfare – anything, which does not endanger consumer welfare cannot be anticompetitive’ (within 101(1)); and conversely, ‘everything, which is pro-consumer is therefore procompetitive’ (within 101(3)). This explains the ubiquitous usage of the rhetoric of procompetitiveness as the criterion for re-authorisation, when the procompetitiveness is defined in terms of consumer welfare – which is not (always) the case.
Director’s Letter: News from CCP

Morten Hviid

The waiting is over. We have the Government response to the BIS consultation “A Competition Regime for Growth: A Consultation On Options For Reform” and now know that the competition landscape in the UK will change quite markedly over the next few years. CCP enjoyed the consultation process which led to many blog posts and we are looking forward to engaging in the debate about how the changes will be implemented. This flux in how to organise competition enforcement is currently evident in many countries, where we are not just observing reform, but reforms that go in different directions. For example, while in the UK, consumer protection is to be spun off from the competition authority, in Denmark and the Netherlands this has been added to the authorities’ area of responsibility. The design of enforcement institutions is an under-developed area of research which we are looking forward to contributing to.

The centre is pleased to welcome two new Research Associates: Sven Gallasch and Antony Karatzas, as well as new faculty member Franco Mariuzzo. The Centre has several events planned for the next few months. By the time you read this, we have had the launch of the new book by Pınar Akman ‘The Concept of Abuse in EU Competition Law: Law and Economic Approaches’ held in Lincoln’s Inn in London. As this bulletin goes to press, CCP will be hosting a discussion event on Media Plurality at Westminster Hall in London on 23rd May. Finally, our annual conference in June on ‘What Do Public and Private Sanctions in Competition Policy Actually Achieve?’ is always a highlight of the year.

Recent CCP Working Papers

Innovation Races with the Possibility of Failure
Subhasish Modak Chowdhury and Stephen Martin
CCP Working Paper 11-16

International Corporation in Pharmaceutical Research
Anna Rita Bennato and Laura Magazzini
CCP Working Paper 11-17

Effect of Regulatory Reform on the Efficiency of Mobile Telecommunications
Yan Li and Catherine Waddams Price
CCP Working Paper 12-1

Non Linear and Tariff Differentiation
Stephen Davies, Catherine Waddams Price and Chris Wilson
CCP Working Paper 12-2

Market Structure, Regulation and the Speed of Mobile Network Penetration
Yan Li and Bruce Lyons
CCP Working Paper 12-3

The Impact of Foreign Bank Entry in Emerging Markets: Knowledge Spillovers or Competition Pressure
Minyan Zhu
CCP Working Paper 12-4

Keep to Sustain or Keep to Exploit? Why Firms keep Hard Evidence
Panayiotis Agisilaou
CCP Working Paper 12-5

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