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## The United Kingdom's Contribution to European Union Competition Law

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EUROPEAN UNION COMPETITION LAW

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*I. INTRODUCTION*

In this paper we address the following issues: whether and how the UK has influenced EU competition policy, what EU competition law and policy might have been without the UK's membership, and the consequences Brexit is likely to have on this policy field.

The main challenge in addressing the first set of questions is methodological: what sources best show the influence of a given Member State to the policies of the Union? What might be said to be the distinctly British approach to a policy field like competition law? Even answering these questions does not necessarily solve all problems, for then one has to work out how British preferences get transmitted in a complex decision-making process which is led by the Commission as a policy entrepreneur, but often mediated via a range of exchanges across a range of institutions.<sup>1</sup> Thus, in Part IIa we start by reviewing the methodological choices that were made to identify how one might go about tracing British influence. A second preliminary issue discussed in Part IIb is on how to identify what one means by 'Britishness' in the context of competition law. Assessments of British competition law before accession are at best ambivalent about the overall institutional design and suggest that the policy behind the various legislative efforts showed little coherence.<sup>2</sup> As discussed in Part IV, it was the UK who copied the EU's competition regime in 1998, so it may be more fruitful to see how far the UK's implementation of the EU regime may both show some specific British features and tell us something of what the UK may have contributed to the EU since that time.

Having identified methods for studying the questions we assess British influences in Part III by considering the role of two senior British officials: Sir Leon Brittan and Francis Jacobs. Their work suggests that there are certain features to the British approach to competition law (focus on economic effects and a skepticism of state intervention) that are distinct from those espoused by others. We then

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1. For an example in the field of energy policy, see T. Maltby 'European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism' 55 *Energy Policy* 435 (2013).

2. See D.J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE* 207-26 (Oxford: Oxford University Press, 1998). For a more critical assessment, see H. MERCER, *CONSTRUCTING A COMPETITIVE ORDER* (Cambridge, Cambridge University Press, 1995).

turn to the enforcement of competition law since 2000 and note a similar tone when courts and public officials apply EU competition law.

## II. METHODOLOGICAL CONSIDERATIONS

### A. Sources

It is well established that the introduction of the rules of competition in the Treaty of Rome was the result of requests from the United States with strong support from German scholars and officials.<sup>3</sup> However the umbilical cord with the US was cut early on and EU competition law enforcement developed a distinctive European flavor. The procedural rules established in Regulation 17/62 centralized power in the Commission, with little space for private enforcement;<sup>4</sup> the substantive interpretation of the rules on competition between the 1960s and the mid-1980s is often said to have been ‘formalistic’ in the EU, while increasingly effects-based in the United States.<sup>5</sup>

The historical records have traced American and German influence in the early years.<sup>6</sup> It is harder to pinpoint the precise contribution that the UK has made to competition law and policy since its entry into the common market in 1973, because there are few sources that allow us to examine this. In other fields of EU Law, where progress is made by the drafting of secondary legislation or where certain national courts can determine the development of EU law, it may be easier to determine the influence of a given Member State. For example in a field closely related to competition policy, the construction of the internal market, the influence of a British civil

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3. W. WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* (New York: Columbia University Press, 2002); K.K. PATEL & H. SCHWEITZER, *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* (Oxford: Oxford University Press, 2011).

4. Council Regulation No. 17/62, 13J.O. 204 (1962), OJ. Eng. Spec. Ed. 1959-62, at 87

5. For an early contribution in this regard, see B.E. Hawk, *The American (antitrust) revolution: lessons for the EEC?*, 9 EUR. COMPETITION L. REV. 53 (1988).

6. G. Marengo, *The Birth of Modern Competition Law in Europe*, in *EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN HONOUR OF CLAUDIUS DIETER EHLERMANN* (A. von Bogdandy et al. eds., 2002) (reviewing the preparatory works); L. VAN MIDDELAAR, *THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION* 160-61 (Yale University Press, 2013) (discussing Germany’s role in the first procedural regulation).

servant, Lord Cockfield, is undoubted.<sup>7</sup> Indeed after the Prime Minister's speech on 17 January 2017 some remarked that her wish to exit the single market is striking because it is seen as a British creation.<sup>8</sup> We would be hard pressed to find traces of any jurisdiction's influence in antitrust that are as marked as this, save perhaps for the influence of Germany in the early years, which is characterized by the role that a number of senior figures from Germany played in the early days in the negotiations of the Treaty of Rome and within the Commission.<sup>9</sup>

The important influence of German officials inspires the first method deployed here: to look at the two key institutions responsible for developing competition policy (the Commission and the Court) and ask how far British members have played a decisive role in shaping the field. Whether this method yields useful insights may be questioned. The numbers of Commissioners and judges whose work we can review is limited: there has been only one British competition commissioner and the Court rules as a collegiate body so working out the role of individual judges is invidious. We can identify the approach of Advocates General but it is not always clear how much of their approach is followed by the Court. Moreover focusing on individuals ignores the work of more junior civil servants and référendaires, who may be said to have an equally important role in the background of policy making. Having said that, two figures stand out whose contribution to the European Union project can hardly be doubted and who have had an important impact on competition law: the late Sir Leon Brittan (Commissioner for competition between 1989 and 1993) and Sir Francis Jacobs (Advocate General at the Court of Justice of the European Union from 1988 to 2006). This is not to say that other Advocates General from the UK have not had a similar influence on competition law, but for present purposes we

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7. Margaret Thatcher's reminiscences on Lord Cockfield are worth recording: 'I always paid tribute to the contribution he made to the Single Market.' But then she also went on to note that as the project developed, '[i]t was too easy for him... to go native and to move from deregulating the market to reregulating it under the rubric of harmonisation.' MARGARET THATCHER, *THE DOWNING STREET YEARS* 547 (London: Harper Collins Publishers, 1993); see also D. Edward, *The British Contribution to the Development of Law and Legal Process in the European Union*, in *THE BRITISH CONTRIBUTION TO THE EUROPE OF THE TWENTY-FIRST CENTURY* 28-9 (B. Markesinis ed., 2002).

8. M. Emerson, *Theresa May's Brexit Speech of 17 January 2017 – Decoding its clarity and ambiguity*, CEPS Policy Insights No. 2017/01 (January 25 2017).

9. See A.C. WITT, *THE MORE ECONOMIC APPROACH TO EU ANTITRUST LAW* 85-6 (Bloomsbury/Hart, 2016) and the sources cited therein.

focus on one member of the court.<sup>10</sup> His background and length of service combine to suggest that his Opinions are likely to have had greater influence than Advocates General who lack these attributes.<sup>11</sup>

Second, we turn to British competition law. One might reasonably think that this would be a useful starting point to trace British influences, for it would allow one to determine what the British understanding of competition law had been and to then try and trace how far this understanding was shifted to Brussels or Luxembourg. However, this exercise reveals something else: it is the EU that influenced the UK, in particular since the Labour government took office in 1997. Moreover, given the paucity of enforcement action by the Office of Fair Trading (“OFT”) first and the Competition and Markets Authority (“CMA”) now, it is also quite hard to see what a particularly British view of competition law is all about even today. At the same time, in judgments of the British courts and in some enforcement activities of the OFT and CMA we can detect what will be labeled as ‘critical deference’ to the approach to competition law found in the EU institutions. This has never led to a major fracture between the British and the EU approach, and only a competition law specialist would notice the subtle differences between the two systems. Yet, the themes that arise from these divergences are aligned to the themes that emerge from the analysis of the work of Brittan and Jacobs.

### *B. Britishness*

In trying to ground the above materials around the theme of Britishness, we can draw on two strands of debate about the role of competition. The first is the widely discussed and often contested

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10. One might also discuss David Edward. For instance, he was the reporting judge in two of the major judgments that explore the concept of collective dominance. *See* *Compagnie Maritime Belge SA et al. v. Commission*, Joined Cases C-395/96 P & C-396/96 P, [2000] E.C.R. I-1442; *Società Italiana Vetro SpA et al. v. Commission*, Joined Cases T-68/89, T-77/89, & T-78/89, [1992] E.C.R. II-1405; *see also* M. Clough, *Collective Dominance: The Contribution of the Community Courts*, in *TRUE EUROPEAN – ESSAYS FOR JUDGE DAVID EDWARD* (M. Hoskins & W. Robinson eds., 2003) (noting that these two were seminal judgments, but that the focus has now shifted to exploring oligopolistic interdependence under the merger rules, and there has been no appetite to explore the notion of abuse of collective dominance under Article 102 since these two judgments).

11. *See* U. Šadl & S. Sankari, *The elusive influence of the AG on the Court of Justice: the case of European citizenship*, *YEARBOOK OF EUR. L.* (forthcoming) whose research suggests that Advocates General who are former academics and who are senior members of the Court are more likely to be followed.

divide in EU antitrust: between those who would like the system to look more to the economic effects and those who take the view that competition law safeguards the competitive process. It will be clear from the findings below that the British have more sympathy for the former, and this is evidenced by the positions taken by Brittan and Sir Francis as well as by the approach taken by the OFT and the CMA since 2000.<sup>12</sup>

The second debate that allows one to explore what might be the distinctively British view rests on the different sort of capitalism espoused in the UK as opposed to the continent.<sup>13</sup> Transposing the literature on varieties of capitalism into the antitrust context, we can suggest that in a liberal market economy (like the UK) privatization and efficiency are seen as the key benchmarks in testing the performance of markets, and that this framework should extend to public services. It is agreed that in the field of telecommunications for example, it was the British who engaged in liberalization first and offered a model for how to open the market to competition, even if it is suggested that they did not offer leadership when the EU embarked upon the long path to liberalization.<sup>14</sup> In contrast, the Continental view considers that the state has a central role to play in delivering public services, with little space for competition.<sup>15</sup>

Finally, one might examine how far British common law methods filtered through as a result of British lawyers or judges. However, we can leave this discussion to a more general discussion on the Court of Justice of the European Union and identify only one salient episode: the recognition of legal and professional privilege by

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12. R. Nazzini, *A Welfare—Based Competition Policy Under Structuralist Constraints: Abuse of Dominance and OFT Practice*, in *TEN YEARS OF UK COMPETITION LAW REFORM* (B.J. Rodger ed., Dundee University Press 2010).

13. See generally *VARIETIES OF CAPITALISM* (Peter A. Hall & David Soskice eds., Oxford: Oxford University Press, 2001).

14. See *EUROPEAN TELECOMMUNICATIONS LIBERALISATION 45* (Kjell A. Eliassen & Marit Sjøvaag eds., Routledge 1999).

15. For a general discussion of the UK versus the Continental approaches and the management of the tension at EU level, see TONY PROSSER, *THE LIMITS OF COMPETITION LAW – MARKETS AND PUBLIC SERVICES* (Oxford: Oxford University Press 2002). For a French perspective, see C. Haguena-Moizard, ‘*Servizi di interesse generale e servizio pubblico “alla francese”*’: dal confronto al ravvicinamento’ in E. FERRARI (ED.) *ATTIVITÀ ECONOMICHE ED ATTIVITÀ SOCIALI NEI SERVIZI DI INTERESSE GENERALE* (E. Ferrari, Torino: Giappichelli, 2007).

the Court of Justice in *AM&S*.<sup>16</sup> It is said that this principle emerged as a result of British lawyers' pleas and the Court was advised by the first British AG (Jean-Pierre Warner); however this ruling has not been universally welcomed because the Court held that advice from independent lawyers was privileged but advice from in-house lawyers was not. Moreover, the AG and Court did not extract this principle solely from British law but drew, as is often the case, from the traditions of all the Member States. Still on common law and on AG Warner's tenure, it has been noted that he led certain other developments that come straight from a common law background: he engaged lawyers in discussion at oral hearings and cited 'precedent' more frequently than other advocates general at the time.<sup>17</sup> These influences on court procedure, while relevant for competition litigation, are left outside the scope of this discussion.

### III. BRITISH INFLUENCES ON EU COMPETITION LAW

#### A. Sir Francis Jacobs

Sir Francis Jacobs has been among the longest serving Advocates General, rendering 588 opinions, of which 50 in competition law cases.<sup>18</sup> One commentator suggested that he was AG in many of the leading competition law cases during his tenure.<sup>19</sup> His Opinions have a number of features that make them stand out: the clear way his Opinions begin with a brief, clear explanation of the issues at stake, his willingness to refer to foreign law,<sup>20</sup> and the

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16. See *AM & S Europe Ltd. v Commission*, Case 155/79, [1982] E.C.R. 1575. See the amusing account of the background in J. Lever 'Foreword' in M. HOSKINS & W. ROBINSON, *A TRUE EUROPEAN – ESSAYS FOR JUDGE DAVID EDWARD* xii-xiii (Oxford: Hart Publishing 2004).

17. See NOREEN BURROWS & ROSA GREAVES, *THE AG AND EC LAW* 167-68 (Oxford: Oxford University Press, 2007). The authors explore how far this AG impacted upon competition law, and one of their principal findings is his interest in safeguarding the rights of the defense. They see this as the result of his background. Unfortunately the authors did not discuss the *AM&S* judgment.

18. I am grateful to U. Šadl for sharing her data on which these figures draw.

19. See Richard Whish, *Competition Law*, in *MAKING COMMUNITY LAW: THE LEGACY OF AG JACOBS AT THE EUROPEAN COURT OF JUSTICE* 118 (Philip Moser & Katrine Sawyer eds., Cheltenham: Edward Elgar, 2008).

20. Writing extra-judicially, he noted how in the *Oscar Bronner* case (discussed below) references to US antitrust were decisive. See Francis Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 *TEX. INT'L L.J.* 547, 555



systematic and clever handling of precedent.<sup>21</sup> For present purposes, we focus on two issues: first how his Opinions demonstrated a more economics-based approach than the rest of the Court. This approach coincided with the Commission's move in the same direction, while this has not yet influenced the Court completely. Second, we consider the many instances where he wrote Opinions in disputes concerning the relationship between competition law and the welfare state.

### 1. The More Economic Approach

Perhaps the most telling illustration that allows us to see the difference in view concerns the assessment of GlaxoSmithKline's ("GSK") conduct in Greece. In brief, the firm noted that its Greek wholesalers were re-selling medicines that GSK shipped to Greece to other markets: since prices for certain medicines are regulated in the various Member States, and the prices in Greece are very low, Greek wholesalers found it profitable to export the medicines. GSK took steps to limit supplies to Greek wholesalers with a view to stopping this conduct and the question arose if this constituted an abuse of a dominant position in view of GSK's dominance in the medicines in question.

The procedural story evolved as follows. First, the matter was taken up by the Greek Competition Commission. Unsure of certain aspects of Article 102 Treaty on the Functioning of the European Union ("TFEU"), the Commission made a reference for a preliminary ruling. AG Jacobs gave an Opinion but the Court dismissed the matter on procedural grounds, holding that the Greek Commission could not make a reference to the ECJ. Second, the matter then was the subject of litigation between GSK and the wholesalers in Greece and the Greek court made a second reference, when the ECJ finally gave an answer on the law.<sup>22</sup>

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(2003); see also *Ministère Public v. Tournier*, Case 395/87, [1989] E.C.R. 2565, for another instance where US antitrust experience was referred to by AG Jacobs.

21. At times perhaps too clever: in *Ministère de l'Économie, des Finances et de l'Industrie v. GEMO SA*, he diagnosed two conflicting strands of case law and proposed a hybrid test whereby both strands would apply to different facts. See Opinion of Advocate General Jacobs, *GEMO SA*, Case C-126/01, [2002] E.C.R. I-13772. Ultimately the ECJ was persuaded to adopt one approach and jettison the other in *Altmark Trans GmbH & Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, [2003] E.C.R. I-7810.

22. The procedural history of this case is complicated: it reached the Court first by way of a reference for a preliminary ruling from the Greek competition authority. See Syfait et al.

The key difference between AG Jacobs and the ECJ hinges on the grounds upon which a refusal to supply could be justified. Jacobs took the view that three particular circumstances mattered: the regulatory context, the importance of innovation, and the role of wholesalers. He considered that these features militated in favor of giving GSK a chance to justify its otherwise abusive conduct. First, the regulatory context revealed that price differences among the Member States were the result of national regulation, so this was not a case where GSK was using its economic power to divide up the internal market; second, certain legal/moral obligations meant that GSK would not leave the Greek market without the required number of medicinal products for the wholesalers to discharge their public service obligations. Third, innovation is expensive and the higher prices that GSK is able to sell its medicines at in some states provide it with much needed revenue to develop new drugs – to avoid these losses a firm like GSK might refuse to sell new drugs in states where it foresees parallel imports, or it may negotiate higher prices in Greece, thus damaging the (already precarious) finances of that country and others who set low prices to buy medicines. Otherwise, the firms might slow down the rate of innovation. Finally he reasoned that given the market structure, it would only be wholesalers making parallel trade who would benefit from the current practice: ‘it cannot be assumed that parallel trade would in fact benefit either the ultimate consumers of pharmaceutical products or the Member States, as primary purchasers of such products.’<sup>23</sup>

The Court of Justice saw things differently, in two respects: first, in certain parts of its judgment it considered that parallel trade could benefit the final consumer because the conduct of the wholesalers could result in some consumer benefits. Here the Court agreed with AG Jacobs’ policy line and differed on its assessment of the economics of the market. Second, the Court paid much less attention to the innovation argument – it subsumed it into its case law which

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v. GlaxoSmithKline plc & GlaxoSmithKline AEVE, Case C-53/03, [2005] E.C.R. I-4638. Here AG Jacobs rendered an Opinion but the Court held that the Greek competition authority was not entitled to make a reference. The same dispute reached the Court again as a result of litigation between GSK and Greek wholesalers. See *Sot. Lelos kai Sia EE et al. v. GlaxoSmithKline AEVE Farmakeftikon Proionton*, Joined Cases C-468/06 to C-478/06, [2008] E.C.R. I-7139. AG Ruiz-Jarabo Colomer was none too thrilled to write this after AG Jacobs had already expressed his views in the earlier judgment. See Opinion of Advocate General Ruiz-Jarabo Colomer, *Sot. Lelos kai Sia EE*, [2008] E.C.R. I-7144, ¶ 1.

23. See Opinion of Advocate General Jacobs, *Syfait*, [2004] E.C.R. I-4611.

provides that a dominant undertaking is entitled to reduce the quantities it supplies to protect its commercial interests and that this may be lawful if proportionate (e.g. it may be justified to refuse to sell a wholesaler quantities that are significantly higher than it needs for domestic supply and that are ‘essentially destined for parallel export’<sup>24</sup>) The Court’s two moves are, however, contradictory: if parallel trade offers the opportunity for consumer gains, then why tolerate a reduction in such trade on the basis that GSK is entitled to protect its commercial interests? If the public good protected by competition law is the increase in gains for consumers, how can one legitimately allow for a reduction in consumer welfare on the basis that the firm wishes to protect its commercial interests? In contrast AG Jacobs’ analytical stance balances competing welfare effects: considering the impact of the practices in question on allocative and dynamic efficiencies.

This tension is merely one of many illustrations of the contradictions in the case law on abuse of dominance: unspecified theories of harm and an unclear space for justifications. AG Jacobs’ approach instead sought to generate a degree of coherence, while being very cautious. First, he indicated his dissatisfaction with the abuse/objective justification dichotomy:

the very fact that conduct is characterized as an ‘abuse’ suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of ‘prevention, restriction, or distortion of competition’ under Article 81 EC. In my view, it is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all.<sup>25</sup>

The background to this statement has to do with the perception that, to paraphrase Justice Potter Stewart, the sole consistency in Article 102 cases is that the Commission always wins.<sup>26</sup> In practical terms, the semantic twist he proposes is less relevant than the implicit call for a more careful effects-based analysis of restrictive practices.

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24. *Sot. Lelos kai Sia EE*, [2008] E.C.R. I-7139, ¶ 71.

25. Opinion of Advocate General Jacobs, *Syfai*, [2004] E.C.R. I-4611, ¶ 72.

26. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966). Nearly always: The Court annulled abuse decisions in *Europemballage Corporation and Continental Can Company Inc. v. Commission*, Case 6-72, ECLI:EU:C:1973:22 and *Hugin Kassregister v. Commission*, Case 22/78, ECLI:EU:C:1979:138. There have also been some partial annulments, for example *United Brands Company v. Commission*, Case 27/76, ECLI:EU:C:1978:22.

Moreover, the Opinion tries to explore how to craft an efficiency defense to justify the conduct of dominant firms. He is cautious to state that there are very specific facts in this case that justify the approach he suggests, but his analysis incorporates elements that can allow a decision maker to balance the welfare gains and losses from the conduct of the dominant firm. This approach was later followed by the ECJ.<sup>27</sup>

In subsequent litigation on the same set of facts (but this time concerning Spanish parallel traders) we can observe a further development. In an appeal against a Commission decision finding that GSK had infringed Article 101 by agreements banning parallel trade the General Court considered that the appropriate test for legality is whether the conduct harms consumers. This appears to have been inspired by the approach AG Jacobs took. However, on appeal the Court of Justice held that this was an error of law. The true role of competition law was described as follows by the higher court:

There is nothing in [Article 101 TFEU] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.<sup>28</sup>

This disagreement encapsulates very clearly the two visions for antitrust: the General Court's approach is much more in line with the more economics-based analysis of restrictive practices, while the Court of Justice continues to find a wider set of interests that competition law protects.

If we remain with refusals to deal, we can continue to find evidence of this clash between the two approaches by reviewing one of AG Jacobs' most highly regarded Opinions: that in *Oscar Bronner*.<sup>29</sup> This was a dispute between the owner of a newspaper who also operated an efficient distribution network and a rival newspaper

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27. *British Airways v. Commission*, Case C-95/04 P, [2007] E.C.R. I-2373, ¶ 86.

28. *GlaxoSmithKline Unlimited et al. v. Commission*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, & C-519/06 P, 2009, ¶ 63, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62006CJ0501>.

29. *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Case C-7/97, [1998] E.C.R. I-7817. It has been noted that many discussions of the case refer to the Opinion as if it were the judgment. *See* Whish, *supra* note 19, at 120.

who wanted to have access to the distribution network. Here too we can detect a small but significant difference between the approach he recommended and the one the Court followed. Before this judgment it was not clear what was required to show that a refusal to deal was an abuse and the question came up whether an ‘essential facilities’ doctrine should be crafted. AG Jacobs suggested a more restrictive and piecemeal approach. Rather than suggesting a formula, he pointed to a number of policy considerations that should be taken into account. First he noted that freedom of contract and property rights militated against an expansive application of competition law. Then he noted that the welfare effects of imposing an obligation to deal were relevant: in the short run consumers might gain but in the long run access rights might reduce incentives to innovate. Finally, he suggested that attention should be paid to the competitive conditions on the downstream market: if the downstream market is competitive, then an obligation to deal would not safeguard the interest of consumers, but only those of competitors.<sup>30</sup>

The Court of Justice agreed with its AG that on the facts there was likely no abuse (because it was not impossible to duplicate the distribution network of the dominant firm).<sup>31</sup> But it took a different line on the criteria to determine when a refusal to supply would be considered an abuse: at the very minimum the Court suggested that the refusal should be ‘likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified.’<sup>32</sup> It also considered that the service should be indispensable.

The key difference is subtle but significant: for AG Jacobs one has to show that there is harm on the downstream market, for the Court it suffices that the rival has no other means of accessing the downstream market. In most cases this makes no difference, but AG Jacobs would allow a defendant to justify a refusal to deal on the basis that the downstream market is workably competitive – the Court would not entertain this line of argument.

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30. *Oscar Bronner GmbH & Co. KG*, [1998] E.C.R. I-7817, ¶ 54-62.

31. It is of course unusual that the Court effectively ruled on the facts when it was merely asked for assistance in interpreting a question of law.

32. *Oscar Bronner GmbH & Co. KG*, [1998] E.C.R. I-7817, ¶ 41.

It was AG Jacobs' approach that found its way into the Commission's Guidance Paper on Article 102.<sup>33</sup> This document was an attempt by the Commission to modernize its interpretation of the rules on exclusionary conduct along an approach that focused more attentively on the likely effect of conduct, and in the years leading up to this document, Francis Jacobs was probably the main proponent of a similar vision within the Court.<sup>34</sup>

## 2. The Welfare State and Competition Law

Another line of jurisprudence where AG Jacobs had a role to play is in the interface between competition law and the delivery of public services. Here the matter litigated is how far competition law should apply to the activities of providers of public services (in technical terms, whether these providers should be considered to be 'undertakings' for the purposes of Articles 101 and 102 TFEU), and if competition law applies to them, whether the fact that they must deliver such services affords them an exemption, on the basis that they provide services of general interest on the basis of Article 106(2) TFEU. One of AG Jacobs' lines serves well to encapsulate his position to these legal questions: 'the objective of Article [106(2) TFEU]... is the efficient provision of services of general economic interest.'<sup>35</sup> In other words, it does not matter whether competition law applies or whether the firm is entitled to hold a monopoly on the provision of a service: either the market or the regulatory framework must ensure that the supplier acts efficiently. This is a far cry from the views of those who believe that the disapplication of competition law means that the provider of public services had the right to be left alone.<sup>36</sup>

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33. See Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. C 45/7, ¶¶ 81-90 (focusing on the harm to competition on the downstream market but not on any abstract consideration of harm to competition as such).

34. See generally Giorgio Monti, *Article 82 EC: What Future for the Effects-Based Approach?*, 1 J. OF EUR. COMPETITION L. & PRAC. 2 (2010).

35. Opinion of Advocate General Jacobs, *Ambulanz Glöckner v. Landkreis Südwestpfalz*, Case C-475/99, [2001] E.C.R. I-8094, ¶ 188.

36. Perhaps nicely illustrated by *Italy v. Commission*, Case 41/83, [1985] E.C.R. 880, ¶¶ 13, 14, where Italy appealed against a decision against British Telecom on the basis that this was a public authority and so immune from the application of competition law. The UK intervened instead to support the Commission's decision. *Id.*

Under EU Law there are two techniques by which providers of social welfare services can argue that competition law should not apply: they can claim that they are not undertakings, so that Articles 101 and 102 are inapplicable, or they can claim that Article 106(2) applies to their conduct so that the competition rules should not apply if they would hamper the delivery of a service of general economic interest. AG Jacobs was involved in disputes concerning both lines of argument.

As to the first, the Court generally followed his advice but there was a disagreement in *AOK Bundesverband* that can be used to illustrate the differences that a more market-oriented analysis can make. The dispute arose when it was discovered that the German sickness insurance funds agreed among themselves the maximum amounts they would pay for certain medicines. Was this an agreement under Article 101, or were the sickness funds not to be characterized as undertakings? The Court held that the sickness funds, which covered 90 per cent of the German population and which had an obligation to offer the same benefits to each person, were not to be treated as undertakings because of the exclusively social objective that they pursued. In agreeing the maximum amount of reimbursement they merely continued to pursue this objective under statutory guidance.<sup>37</sup> On the contrary AG Jacobs placed more emphasis on the findings that the various sickness insurance funds did have some space for competition among each other and that as a result, without the agreement they would also have been able to compete on the level of reimbursement offered to their clients.<sup>38</sup> In his view then, the test for legality would hinge upon whether the agreement to restrict price competition could be justified under Article 106(2) TFEU as a restriction of competition necessary to allow the undertakings to deliver a service of general economic interest.

Turning to Article 106(2) TFEU, commentators agreed that the Court has become increasingly lax in allowing Member States to plead this defense but critical as to the precise standard that the Court

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37. *AOK Bundesverband et al. v. Ichthyol-Gesellschaft Cordes, Hermani & Co et al.*, Joined Cases C-264/01, C-306/01, C-354/01, and C-355/01, [2004] E.C.R. I-2524, ¶¶ 61-63. Query if the better analysis of this point was to rely on the state compulsion defense – that is to say: national law required or encouraged the agreements.

38. *Id.*; Opinion of Advocate General Jacobs, *Syfait*, [2005] E.C.R. I-4638, ¶¶ 38-43.

applies.<sup>39</sup> In parallel to this development, AG Jacobs appears to have requested that the Court add a condition to any decision finding that a restriction of competition could be tolerated on the basis that it is necessary to provide the service of general interest: in a judgment concerning the assignment of monopoly rights over the provision of ambulance services, he indicated that it was essential that the provider of the service of general interest be in a position to provide the service effectively. This proviso reflects his earlier understanding of the case law on the application of Articles 106(1) and 102 where he indicated that one strand of the case law shows that a state infringes these provisions when they grant a monopoly to a provider who is manifestly incapable of delivering the service in question.<sup>40</sup>

In sum: competition and efficiency are benchmarks by which public service delivery is monitored, according to his Opinions. The Court has not always followed this approach, in that its case law tries to also accommodate the view of those who support greater market intervention in the name of social justice.<sup>41</sup>

### *B. Sir Leon Brittan*

Sir Leon Brittan described his stint in Brussels in the following terms: ‘I like to think that my work in bulldozing through reforms which levered open markets, intensified competition and put public sector monopolists on the back foot contributed to changing the terms of the debate.’<sup>42</sup> This self-assessment helps us to take into account his role in one of the more significant competition law reforms to which his name is associated: the EU Merger Regulation.<sup>43</sup>

The EU Treaties do not regulate mergers: the Commission proposed a Regulation to address these transactions in 1973 but it was

39. M.G. Ross, *The Europeanization of Public Service Provision: Harnessing Competition and Citizenship?*, 23 YEARBOOK OF EUR. L. 303, 310-11 (2004).

40. An example of his classification of the case law can be found in *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*. See Opinion of Advocate General Jacobs, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, [1999] E.C.R. I-5754.

41. D. CHALMERS, G. DAVIES, & G. MONTI EUROPEAN UNION LAW: TEXT AND MATERIALS Ch.25 (Cambridge: Cambridge University Press, 3rd ed. 2014) (available exclusively as an online chapter).

42. L. BRITTAN, *A DIET OF BRUSSELS – THE CHANGING FACE OF EUROPE* 49-50 (London: Little, Brown & Co, 2000).

43. For a detailed personal account, see L. BRITTAN, *COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET* (Cambridge, Grotius, 1991).



only in 1989 that a Regulation was agreed.<sup>44</sup> Brittan identified the main stumbling block: certain Member States wished to retain competence over mergers because they saw this power as a way of exercising national policies (e.g. industrial, regional or social policies could be implemented by allowing or blocking certain transactions). Others were convinced that having a single merger regulator for the EU would be preferable as a way of facilitating cross-border acquisitions. The way this divide was managed is twofold: first the scope of application of the Regulation was reduced (so that only very large mergers would fall within the scope of Commission scrutiny) and the substantive test by which to assess mergers was left ambiguous, so the battle as to whether one should control mergers only when they had a negative impact on welfare or whether other public interest considerations could play a role was left for another day, when the regulation would have to be applied.<sup>45</sup>

The confrontation happened in the well-known *de Havilland* merger.<sup>46</sup> In brief, two state owned companies (French Aerospatiale and Italy's Alenia) wished to buy a Canadian firm, de Havilland. Together they would have held a dominant position in the market for mid-sized aircraft but supporters of the merger saw this as an occasion to create a European Champion. There was considerable political jostling to secure sufficient votes at the Commission to block the transaction, where Brittan played a major role to convince undecided Commissioners.<sup>47</sup> This was said to have solved the debate in favour of an economics-based welfare standard. Since then, according to Brittan the Commission's merger decisions have focused on 'pure competition considerations.'<sup>48</sup> This is not to say that at times mergers might be cleared for political reasons that may have to do with domestic policies or EU industrial policies, but it is hard to detect more than a handful of instances where this might have occurred. For example, in recent years the consolidation of the

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44. See generally M. ARMSTRONG & S. BULMER, *THE GOVERNANCE OF THE SINGLE EUROPEAN MARKET Ch.4* (Manchester: Manchester University Press, 1998).

45. The final text is Council Regulation (ECC) No. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1989 O.J. L 257/13.

46. Commission Decision No. 91/619/EEC (*Aerospatiale-Alenia/de Havilland*), 1991 O.J. L 334/42.

47. For an engaging account, see G. ROSS JACQUES DELORS AND EUROPEAN INTEGRATION 178 (Cambridge, Polity Press, 1994).

48. See Brittan, *supra* note 42. For a slightly different assessment, see G. MONTI, *EC COMPETITION LAW 6-12* (2007).

telecoms market was accompanied by significant lobbying by the large players, and one might wonder how effective this has been.<sup>49</sup>

When examining Britain's contribution we should distinguish two aspects: first did he make the Regulation happen? Here he had a good dose of other circumstances that made agreement possible: a huge increase in merger activity in the run up to the finalization of the single market, meaning that industry supported the initiative strongly, and a significant judgment from the Court of Justice indicating that certain mergers might be regulated under Article 101.<sup>50</sup> This case would have given the Commission powers to vet mergers on the basis of Regulation 17/62 and thus Member States were keen to negotiate a solution that would allow them to have some influence in the outcome of EU-wide merger control rules. Second, how far was the competition-focus of the test for mergers due to Brittan's influence? A review of the negotiations by Hubert Buch-Hansen suggests that there were other actors who also supported this, largely due to the convergence towards what he calls a neo-liberal agenda for EU integration.<sup>51</sup> From his perspective Brittan was not then 'bulldozing' market-based reforms but was bringing together a range of views about how the economy should be run that were aligned with the perspective of liberal market economies, which had by then managed to secure pre-eminence.

We can perhaps generalize from this example: it seems clear that for most EU level reforms one Member State can hardly ever claim to do more than inspire a general direction, but that a partnership among EU institutions and Member States is essential to yield a tangible result.<sup>52</sup> Nevertheless, it seems that Brittan's push (both in getting the Regulation through, and in persuading a slim majority of Commissioners to block the de Havilland merger) was essential.

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49. T. Barber, *Lines are crossed on benefits of telecom consolidation*, FINANCIAL TIMES (27 Apr. 2016).

50. See generally *British American Tobacco Co. Ltd et al. v. Commission et al.*, Joined Cases 142/84 & 156/84, [1987] E.C.R. 4566.

51. See generally H. Buch-Hansen, *Rethinking the History of European Level Merger Control: A Critical Political Economy Perspective* (Aug. 2008), available at: [http://openarchive.cbs.dk/bitstream/handle/10398/7729/hubert\\_buch-hansen.pdf](http://openarchive.cbs.dk/bitstream/handle/10398/7729/hubert_buch-hansen.pdf).

52. See, for example Mark Thatcher who has shown that the liberalization of the telecommunications sector was the result of a partnership among a range of EU and national actors and was not the result of the Commission single-handedly acting as a policy entrepreneur. Mark Thatcher, *The Commission and National Governments as Partners: EC Regulatory Expansion in Telecommunications 1979-2000*, 8 J. OF EUR. PUB. POL'Y 558 (2001).

*C. British Competition Law*

It is probably safe to say that before the enactment of the Competition Act 1998, the UK's own competition rules made little impression in mainland Europe. Here is Sir Francis Jacobs' pithy assessment: '[t]he effectiveness of EC competition policy can be contrasted with earlier UK approaches. The UK's system was formalistic, toothless and out of keeping with the newer economic thinking, in the United Kingdom as well as in Europe.'<sup>53</sup> Indeed, the interesting story from the perspective of the ongoing Brexit discussion is the voluntary import of EU competition law by the UK, to which we now turn.

There had been a number of attempts to amend UK competition law to bring it into line with the rules applied by the EU, not least because this would make life easier for firms whose conduct would be tested under both EU and UK rules. However successive Conservative governments hesitated – according to some scholars this was purely based on a concern about what voters might say to the UK borrowing EU rules.<sup>54</sup> It took until Blair's New Labour government for the Competition Act 1998 to emerge: this statute aligns UK antitrust to Articles 101 and 102 TFEU. Moreover, section 60 provides for a convergence rule by which EU Law is a source of law to interpret UK antitrust. Finally, the Competition Appeals Tribunal (the first instance court where appeals against decisions of the OFT are taken) is modeled on the Court of First Instance. Its first President described it as a 'unique example of "soft harmonization" in the area of European procedural law.'<sup>55</sup> At the level of institutions and statutes certain differences remain: for instance the rules on mergers, amended with the Enterprise Act 2002 are not inspired by EU Law, nor are the powers to conduct market investigations.

It is not clear how far any steps the OFT took since the coming into force of the Competition Act 1998 has had any influence on the EU. First, the OFT has not been a particularly assiduous enforcer of competition law; second no British judge has ever issued a request for a preliminary ruling on a matter related to substantive competition

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53. Francis Jacobs, *The Sovereignty of Law: The European Way*, 110 (Cambridge: Cambridge University Press, 2006).

54. Sebastian Eyre & Martin Lodge, *National Tunes and a European Melody? Competition Law Reform in the UK and Germany*, 7 *J. OF EUR. PUB. POL'Y* 63 (2007).

55. Christopher Bellamy, *Some Reflections on Procedure in Competition Cases*, 34 *NEW ENG. L. REV.* 15.

law emanating from a decision of the OFT/CMA. The one time a reference was made was in *Courage v Crehan* which, according to the dominant view in the literature, is a vital judgment that establishes an EU-based right to damages for competition law infringements.<sup>56</sup> However, the aftermath of this specific reference did not have a happy ending for the plaintiff.<sup>57</sup>

However, the approach by the OFT and the British courts suggests a distinctive British approach to antitrust. One must not exaggerate: most jurisdictions in developed states apply broadly similar principles – what I seek to show here are some nuances that in my view demonstrate something particularly British, clustered around the following: enforcement styles and the use of economics by the OFT and informed divergence by the national courts.

### 1. Enforcement styles and economics by the OFT

The OFT has issued few decisions in the field of antitrust. The Public Accounts Committee nudged the OFT politely in 2006 urging it to take more cases,<sup>58</sup> but the report of the Department for Business, Innovation and Skills in March 2012 was less subtle: ‘The Government remains concerned that too few cases are taken forward.... relatively few decisions will lead to less deterrence and a diluted economic impact than one in which more cases could be run.’<sup>59</sup> It is thus ironic to note that in the run-up to Brexit the OFT (now renamed the Competition and Markets Authority) began to increase its enforcement efforts.<sup>60</sup>

There are two possible explanations for the lack of enforcement. One is encapsulated in the position taken by the OFT’s former Chief

56. *Courage v. Crehan*, Case C-453/99, [2001] E.C.R. I-6314.

57. He lost after the House of Lords ruled that in determining the facts the national court was not bound by Commission decisions analyzing the same market but which were not addressing the conduct of the firm being sued by Mr Crehan. *Inntrepreneur Pub Co (CPC) and others v. Crehan*, [2006] UKHL 38. For a critical assessment, see Colleen Hanley, *The Abandonment of Deference*, 44 COMMON MKT. L. REV. 817 (2007). The approach has been applied again recently in *Asda Stores Ltd & Ors v. Mastercard Incorporated & Ors* [2017] EWHC 93 (Comm).

58. ‘The OFT is an organisation in transition, which has yet to demonstrate that it can make effective use of the substantial extra resources it has been given.’ House of Commons Committee of Public Accounts, *Enforcing Competition In Markets* (2006).

59. Department for Business Innovation and Skills, *Growth, Competition and the Competition Regime: Government Response to Consultation* (Mar. 2012) (6.17).

60. Catherine Belton, *UK’s Competition Watchdog Sharpens its Teeth Ahead of Brexit*, FIN. TIMES (Jan. 3, 2017).

Executive that there are other enforcement techniques than prosecution, and that the ‘fetish around numbers of cases and high fines’<sup>61</sup> is unwarranted. Instead, the British competition authority spends a number of resources in providing guidance to business to secure their compliance. This also happens in the aftermath of certain infringement decisions, where the agency explains to the industry how to ensure their conduct moving forward can comply with competition law. The resources devoted to this enforcement style take away from the authority’s capacity to take more cases. A recent example of this found in a decision against a supplier’s distribution agreement where in the aftermath of the decision the CMA also sent an open letter to suppliers clarifying the competition rules as well as other guidance documents for businesses to understand the role competition law plays in shaping distribution agreements.<sup>62</sup>

A second reason for the lack of productivity is that the OFT tries to finesse the application of competition law. Its approach to resale price maintenance (“RPM”) provides a good instance of this. While agreements containing RPM clauses are deemed to be hardcore restraints by the Commission, and so any competition authority would find prosecution very easy, the officers of the OFT prefer a different approach. In a paper published in 2011 some OFT officials explained a preference for screening RPM cases to identify whether there was a credible theory of harm.<sup>63</sup> The prioritization screens were then implemented in deciding which RPM cases to select.<sup>64</sup> It is also notable that some of these decisions were quite lengthy and set out a number of fairly basic antitrust points, almost as if the OFT was trying to educate the parties. One wonders if this is a means of trying to secure better compliance.<sup>65</sup> It has also been shown that the OFT has

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61. Speech, John Fingleton Competition and Growth in Europe (Oct. 10 2014), <http://www.fingletonassociates.com/speeches/competition-growth-europe/>.

62. Competition and Markets Authority, Bathroom Fittings Sector: Investigation Into Anti-Competitive Practices (May 17 2016), available at: <https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices>.

63. Matthew Bennet et al, *Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy*, 33 *FORDHAM INT’L L.J.* 1278, 1297-98 (2011)

64. Unfortunately, the document attesting to their implementation has vanished from the web, but a reference may be found in a slide deck on file with the author. For an example of a decision where several filters were examined before proceeding against an RPM agreement see its decision in the market for mobility aids, see <https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector>.

65. For discussion of this point, see Mathew O’Regan, *United Kingdom: Pride before a fall in online advertising restrictions or getting away with illegal behavior that harms*

applied a more economics-based approach in its abuse of dominance case law.<sup>66</sup> This requires more resources and accounts for the relative paucity of cases and may account for the lower numbers.

## 2. Informed Divergence by the Courts

It is perhaps worth starting this discussion with reference to an Opinion by AG Jacobs where he advised national courts to avoid making too many references for a preliminary ruling to the Court.<sup>67</sup> This message has then been internalized by the British judiciary – and in the context of antitrust one of the arguments against making a reference to the Court is that frequently the difficulty in these cases hinge not on understanding the law, but on applying settled principles to new facts.<sup>68</sup> This allows the British courts to be innovative in the interpretation of EU competition law.<sup>69</sup> One example of this relates to vertical restraints where the anticompetitive effects are the result of the existence of a range of contracts similar to the one at hand, and where an agreement that was originally lawful becomes unlawful once further such agreements are entered into. The English Court of Appeal thus indicated that agreements may shift in and out of legality as the market conditions alter.<sup>70</sup> The ECJ had never explained whether this was the correct way of interpreting Article 101(2) but the courts in England preferred to settle this on their own.

A more recent instance where one can see critical deference is found in *Streetmap v Google*. Here the claimant argued that Google

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*vulnerable consumers?*, KLUWER COMPETITION BLOG (Nov. 18, 2014), <http://kluwercompetitionlawblog.com/2014/11/18/united-kingdom-pride-before-a-fall-in-online-advertising-restrictions-or-getting-away-with-illegal-behaviour-that-harms-vulnerable-consumers/>.

66. R. NAZZINI, *A Welfare-Based Competition Policy Under Structuralist Constraints: Abuse of Dominance and OFT Practice*, in TEN YEARS OF UK COMPETITION LAW REFORM (B. Rodger ed., 2010).

67. Opinion of Advocate General Jacobs, *Wiener S. I. GmbH v. Hauptzollamt Emmerich*, C-338/95, [1997] E.C.R. I-6497. For discussion, see M. Hoskins, *Discretionary References: To Refer or Not to Defer?*, in TRUE EUROPEAN – ESSAYS FOR JUDGE DAVID EDWARD (M. Hoskins & W. Robinson eds., 2003).

68. *Professional Contractors' Group v. Inland Revenue* [2001] EWCA Civ 1945, [91].

69. And at times even critical of the approach of the European Courts, for example *The Racecourse Association and others v. Office of Fair Trading* finding it hard to reconcile certain judgments, but then interpreting the law itself rather than making a reference for a preliminary ruling. [2005] CAT 29, [167].

70. *Passmore v. Morland plc* [1999] 3 All ER 1005. For discussion, see G. Monti, *EU Competition Law*, in THE CAMBRIDGE COMPANION TO EUROPEAN UNION PRIVATE LAW 292-3 (C. Twigg-Flesner ed., 2010).

had abused its dominant position in the search market to exclude Streetmap from a downstream market where both competed to offer useful maps for users, by promoting Google's maps more effectively than the claimant's services. At first blush the judge had no objection to this allegation, since leveraging one's dominant position from an upstream market to a downstream one is a common feature of many abuse of dominance cases.<sup>71</sup>

However, Roth looked closely at the key ingredients of the concept of abuse. In particular, the judge confronted the question of the kind of effect that had to be shown. On this point the ECJ had only recently spoken in *Post Danmark II*. There it held that there was no appreciability threshold for the prohibition to apply, largely because the dominant undertaking was already harming competition by its presence that any further weakening could not be tolerated.<sup>72</sup> Roth J held that this approach was fine when the dominant position and the abuse both occurred in the same product and geographical market: for instance on the facts of *Post Danmark 2* when the former state monopolist is alleged to have granted loyalty rebates to customers, and forcing a new entrant from a newly opened market. In these scenarios an aggressive application of Article 102 can complement the liberalization of the postal services sector. However, he held that when the abuse was taking place in a downstream market that was not dominated by anyone, this approach could not stand. In his view a *de minimis* threshold is necessary when the abuse is taking place in a downstream, non-dominated market, especially when Google's conduct on the market where it is dominant was not questioned: it would be 'perverse' to find that it abuses its dominance in the downstream market without there being an appreciable weakening of competition in that market.<sup>73</sup> He felt that the case law from the CJEU did not prevent this conclusion since it could be distinguished on the facts.<sup>74</sup>

In this case the judge appears to treat the judgments of the Court of Justice in the way a common law judge might treat judgments from the same court: persuasive but not binding. Some might legitimately question if this is the kind of deference one should show to the

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71. *Streetmap.EU Ltd. v. Google Inc.* [2016] EWHC 253 (CH).

72. *Post Danmark A/S v. Konkurrencerådet*, Case C-23/14, 2015, ¶ 70-74, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0023>.

73. *Id.* at ¶ 98.

74. *Id.* at ¶ 97.

superior court. On the merits, however, the approach taken makes eminent sense.

Summing up, it appears that within the EU British officials helped to guide two developments: an effects-based analysis of competitive restraints and a preference for competitive markets even in the provision of public services. As regards the effects-based approach the OFT/CMA's practice suggests that its approach is even more focused on abandoning formalist approaches to competition law: its stance on resale price maintenance is a good illustration of how the harsh rule under EU Law, whereby RPM agreements are said to be restrictive by object, is tempered by setting up a range of filters to determine which RPM cases to prioritize. This investment in pre-screening is a contributing factor to its lower productivity. We find similar critical deference in the way the British courts handle EU precedents, which may suggest that there are national variations in the way EU law is applied.<sup>75</sup> This last point suggests that the straitjacketing effects of EU law may be less rigid than some Brexit supporters might think, and that judicial conversations could give a role for national courts to inform the development of EU competition law.<sup>76</sup>

#### IV. AFTER BREXIT

In this section, we speculate on what might happen after the UK withdraws from the EU. At the time of writing there is much uncertainty about the specific relationship that will be forged. In what follows we assume that the British will not join the European Economic Area and speculate on what impact this so-called 'hard Brexit' (by which we assume that the UK exits from the internal market) might entail for the two sides.

##### A. Post-Brexit EU

What have the British done for EU competition law? What might be lost? A distinguished expert suggested that 'the UK made major contributions to the debate about the reform of the EU Merger

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75. For an overview of differences in the field of abuse of dominance, see P.L. Parcu, G. Monti & M. Botta (eds) *ABUSE OF DOMINANCE IN EU COMPETITION LAW – EMERGING TRENDS* (P.L. Parcu, G. Monti & M. Botta eds., Edward Elgar 2017).

76. These conversations are better established in other fields of EU Law, *see generally* Chalmers, *supra* note 41, at 222-29.



Regulation in the early years of the 2000s and again to the complex issue of the “reform” of Article 102 TFEU later in that decade.<sup>77</sup> The reform of the merger regulation was a very technical affair, which can be explained briefly in this way: originally the EU merger Regulation allowed intervention only if the merger strengthened or created a dominant position, when this was likely to substantially impede effective competition. In contrast the UK’s Enterprise Act 2002 (and the US provisions) allows intervention where there is a risk that the merger may substantially lessen competition. The basic difference is that the latter is more in line with the way economists review a merger, focusing on the impact of a transaction and not on the competitive structure of the market post-merger. In 2004 the Merger Regulation was redrafted so that the substantive test is aligned to the standards in the UK and US.<sup>78</sup> The reform of Article 102 is an attempt by the Directorate General for Competition to depart from the highly criticized approach that it took (and the Court has sanctioned) and develop tests for illegality grounded on mainstream economics.<sup>79</sup> Thus the ideas underpinning these moves by the Commission have the same inspiration as those that we have seen informed the approach of Brittan and Jacobs.

However, the claim that the UK had a hand in these two developments might overplay British influence. It was an Italian Commissioner (Mario Monti) who pressed for both: his training as an economist probably made him sympathetic to the use of a more economics-based approach.<sup>80</sup> Moreover, if one reviews the literature it appears that the advocates for reform are a cosmopolitan set of practicing lawyers, economists and scholars. Even the Merger Task Force, which was instituted to specialize in mergers, contained a number of scholars from a diverse range of national traditions who

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77. R. Whish, *Brexit and EU Competition Policy*, 7 *J. OF EUR. COMPETITION L. & PRAC.* 297 (2016).

78. For discussion, see A. Oldale & J. Padilla, *EU Merger Assessment of Upward Pricing Pressure: Making Sense of UPP, GUPPI, and the Like*, 4 *J. OF EUR. COMPETITION L. & PRAC.* 375 (2013).

79. See generally M. Marquis & E. Rousseva, *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU*, 4 *J. OF EUR. COMPETITION L. & PRAC.* 32 (2013).

80. N. Levy, *Mario Monti’s Legacy in EC Merger Control*, 1 *COMPETITION POL’Y INT’L* 99 (2005).

readily embraced the more economics-based approach.<sup>81</sup> Thus it is hard to see documentary evidence of the major contribution Richard Whish says the UK has made in the twenty-first century.<sup>82</sup>

On the contrary, the discussion in Part III suggests that once Lord Brittan left the Commission, the move towards a greater economics-based analysis of competition law was fixed. Since then one could rely on a much wider constituency of EU officials who are committed to taking the modern approach to antitrust forward. None of the Commissioners that have succeeded Brittan have altered the direction of competition policy. Karel van Miert, a socialist, might have been expected to revert to a more *dirigiste* style, but barring a few decisions he kept the course maintained by Brittan;<sup>83</sup> Mario Monti accelerated the development of a more economic approach;<sup>84</sup> Neelie Kroes kept insisting on the importance of competitive markets even during the deep recession that started in 2007,<sup>85</sup> Joaquim Almunia and the present incumbent Margarethe Vestager have not changed course either.<sup>86</sup>

The Court remains a more difficult entity to understand, which may suggest the judges are divided on the application of competition law. The judges were at one in rejecting the supposed demotion of competition law in the Lisbon Treaty but have steered an ambiguous

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81. The Merger Task Force was slowly disbanded starting in 2003, in the aftermath of significant defeats of Commission decisions at the hand of the General Court. See N. Levy *EU Merger Control: From Birth to Adolescence*, 26(2) *WORLD COMPETITION* 195 (2003).

82. It is fair to say that senior OFT members contributed in conferences debating the reform of the merger regulation and that German officials seemed opposed to the reform. See for example: J. Vickers, *How to Reform the EC Merger Test?*, in *RC MERGER CONTROL: A MAJOR REFORM PROCESS* (G. Drauz & M. Reynolds eds. Richmond, IBA, 2003); J. Fingleton & D. Nolan, *Mind the gap. La riforma del regolamento comunitario sulle concentrazioni*, 2 *MERCATO CONCORRENZA REGOLE* 209 (2003). At any rate, some have argued that the reform of the Regulation ‘has had little if any impact on the outcome of merger decisions since 2004.’ S. BISHOP & M. WALKER, *THE ECONOMICS OF EC COMPETITION LAW* 360 (3rd ed. 2010). This is also confirmed by other studies, for instance T. Reeves & F. Dethmers, *EU Merger Control Since the Introduction of the 2004 Reforms*, 2013 *FORDHAM CORP. L. INST.* 153 (B. Hawk ed. 2014).

83. K. VAN MIERT, *LE MARCHÉ ET LE POUVOIR: SOUVENIRS D’UN COMMISSAIRE EUROPÉEN* (Éditions Racine, 2000).

84. M. Monti, *European Competition for the 21<sup>st</sup> Century*, 24 *FORDHAM INT’L L. J.* 1602 (2000).

85. N. Kroes, *Competition, the Crisis and the Road to Recovery*, Address Before the Economic Club of Toronto (Mar. 20, 2009).

86. Charlemagne, *The Enforcer*, *THE ECONOMIST* (May 2 2015) (noting her interest in procedural openness as opposed to her predecessor’s preference for the use of commitment decisions to resolve anticompetitive concerns).

path when asked how far the interpretation of competition law should be based exclusively on the welfare effects of restrictive practices.<sup>87</sup> At the level of Advocates General, Nils Wahl is perhaps even more radical than AG Jacobs: in his Opinion in *Cartes Bancaires* he has nearly succeeded in introducing a truncated rule of reason in Article 101, and the Court largely followed him;<sup>88</sup> in *Intel* the approach he suggested would steer enforcement along the lines the Commission wishes.<sup>89</sup> Thus, the judicial pendulum may swing towards the economic way suggested by the British.

### *B. Post-Brexit UK*

A working group has been created to consider the impact of Brexit on UK competition policy (the Brexit Competition Law Working Group): it has published an issues paper in 2016 and has received some written responses.<sup>90</sup> The paper rightly notes that should the UK join the EEA the result is relatively simple: little will change save that the UK will lose a formal voice in the shaping of EU competition policy. It then considers short term and long term matters that should be discussed in case Brexit severs the links with the EU in a more profound way.

Here we take a different tack than the practical one which the members of the working group elected. There are two themes that can be considered in gazing into the future of Britain when we listen to the main claims in favor of leaving the EU: one is the wish to ‘take back control’<sup>91</sup> of national policies and the other may be reduced to the phrase ‘global Britain’, the wish to see the UK open to trade with one and all.<sup>92</sup> Below we explore how far these two themes (taking back control and global Britain) might play out in competition law.

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87. *Konkurrensverket v. TeliaSonera Sverige AB et al.*, Case C-52/09, [2011] E.C.R. I-564, ¶¶ 20-22 (rejecting the demotion of competition law); see Chalmers, *supra* note 41, 1046-1050 for an assessment of recent case law, showing how some cases point towards a more effects-based approach and others towards retaining the current framework.

88. *Groupement des cartes bancaires (CB) v. Commission*, C-67/13, 2014, <http://eur-lex.europa.eu/legal-content/EN/SUM/?uri=CELEX:62013CJ0067>.

89. *Intel Corporation v. Commission*, C-413/14 P, 2014, <http://curia.europa.eu/juris/celex.jsf?celex=62014CC0413&lang1=en&type=TEXT&ancre=>.

90. The issues paper and responses are available at [www.bclwg.org](http://www.bclwg.org).

91. A. Runswick, *Just who is it taking back control with Brexit?*, *THE GUARDIAN* (Mar. 30, 2017).

92. Seán Molloy, *Global Britain: Theresa May's Ersatz Vision*, *THE DISORDER OF THING* (Jan. 31, 2017), <https://thedisorderofthings.com/2017/01/31/global-britain-theresa-mays-ersatz-vision/>.

### 1. Legal Links to the EU

Any person wishing for hard Brexit with the EU would, upon reading sections 10 and 60 of the Competition Act 1998 immediately see these sections as prime targets for deletion as they fly in the face of domestic control. Section 60(1) of the Competition Act 1998 seeks to ensure that questions arising in interpreting this Act ‘are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law.’ Section 60(2) then imposes a duty on the competition authority and national courts to ensure that there is no inconsistency between British law and the principles laid down by the European Court and any decision of that Court. And section 60(3) provides that competition authorities and courts must have regard to decisions and statements of the Commission. Clearly this relinquishes far too much control, and whatever its impact has been, it has to be repealed because it makes British judges subject to EU institutions. Section 10 is equally offensive: section 10(1) codifies the case law of the ECJ by which Commission decisions bind national authorities and section 10(2) provides for a system of parallel exemptions: if an agreement which does not affect trade between member States would otherwise fall within the scope of a Block Exemption Regulation then it is also exempted under the Competition Act 1998.<sup>93</sup>

From the perspective of those wanting to take back control these two sections clearly have to go. More generally, one might wonder if the Euro-skeptics might take offence that the language of the two prohibitions in the Act mirror Articles 101 and 102 TFEU. Thus one might even argue that the scheme of the statute as a whole has to be got rid of, even if hardly any of the provisions in the Competition Act 1998 are due to a requirement coming from EU Law. Moreover, some think that the interpretation of competition rules remains far too formalistic in the EU and that taking back control would allow the UK to regulate markets with a more effective approach to cases.<sup>94</sup>

However, there is a tension with the other Brexit desiderata: global Britain. One of the arguments the vast majority of competition

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93. Competition Act 1998, c. 41 (Eng.) To be precise it is exempted from the Chapter 1 prohibition, which is the equivalent of Article 101 TFEU.

94. John Vickers, *The Economic Consequences of Brexit*, OXFORD REVIEW OF ECONOMIC POLICY (Dec. 7, 2016), <http://www.bclwg.org/wp-content/uploads/2016/12/Vickers-British-Academy-7-Dec-16.pdf>.

lawyers press is the importance of a convergent approach to the interpretation of competition law.<sup>95</sup> Imitating the EU is simply a way to favor business wishing to operate across the European Economic Area. As many others have pointed out in various fora, there is only so much control one can have of national laws in a global economy. Accordingly it may be prudent not to jettison much of the architecture that links the UK to the EU, in order to safeguard the reasonable expectations of businesses in the long term.<sup>96</sup> Indeed, there are aspects of the Government's White Paper, which suggest that, at least in the medium term post-Brexit much of the EU *acquis* will be simply copied into domestic legislation to offer businesses a seamless transition. Only in the longer term will revisions be considered.<sup>97</sup>

However, even in the long term it is not easy to see what major changes could be brought to UK competition Law: as we have shown above the UK has already been able to diverge slightly from the approach favored by the EU in discrete instances. Is a more radical agenda likely? At the present moment, it remains to be seen how far the global Britain policy may be undermined by a policy to protect domestic businesses. In the summer of 2016 Theresa May indicated that takeovers of national firms would be subjected to tighter scrutiny: "A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain."<sup>98</sup> It is not clear how far this statement (made while she was running for the leadership of the party) will translate into policy.

## 2. Economic Links to the EU

As discussed above, for mergers that have an EU dimension, the Commission has exclusive competence. For global deals the

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95. See David J. Gerber, *Comparative Law and Global Regulatory Convergence: The Example of Competition Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 120 (Maurice Adams and Jacob Bomhoff eds., 2012).

96. See Lord Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 LQR 433, 439 (1997). This is also a recurring leitmotif used when explaining the virtues of English contract law.

97. Department for Exiting the European Union, LEGISLATING FOR THE UNITED KINGDOM'S WITHDRAWAL FROM THE EUROPEAN UNION, 2017, Cm. 9446, at 7. It is ironic indeed that before EU law can be got rid of in the UK, the government proposes to transpose a significant part of that law into domestic law, retaining thus the need to engage with developments in EU legislation until such a time as the legislation is substituted.

98. *Theresa May to back new investment vetting system*, FIN. TIMES (Oct. 10, 2016).

Commission and its US counterpart have established a framework for cooperation that normally works very smoothly so that the two sides agree on the reasons why a merger should be challenged and on the remedies necessary to make sure that a merger does not harm competition.<sup>99</sup> On occasion the discussion includes other major jurisdictions.<sup>100</sup> Sir John Vickers (a member of the Brexit working group) has indicated that ‘duplication of merger control will have substantial costs both for businesses and the authorities. Given the size and complexity of international mergers, the resource implications for the CMA could be major.’<sup>101</sup> One might imagine that a bilateral agreement like that with the US would serve Britain well. However, we would like to suggest a more radical solution: can the UK not, most of the time, free ride on the Commission’s merger decisions?

Consider this: at the moment, if a merger has an EU dimension the Commission will look at the impact of the merger across the relevant EU markets. If a Member State believes that the merger has a specific effect in its jurisdiction it can ask the Commission that the merger (or parts of that transaction) should be referred to that authority.<sup>102</sup> As things stand, there have only been 112 requests for referral out of over 6000 mergers notified.<sup>103</sup> It suggests that for most transactions with an EU dimension, Commission scrutiny will likely protect the UK market too. Thus, a different modality of cooperation could be explored that allows the UK to intervene in mergers that affect the UK when the national authority it is not convinced that the global solution likely to emerge from the Commission is unsuitable for its market. This would comport fewer resources than vetting all mergers that have an EU dimension. One might wonder whether a similar approach might be implemented also for the purposes of restrictive practices: this would not oblige the CMA to agree with the

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99. Decision of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, O.J. (L 95) 38.

100. See e.g. OECD, *Working Party No. 3 on Co-operation and Enforcement: Remedies in Cross-Border Merger Cases* (Oct. 29, 2013), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2013\)6&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)6&docLanguage=En).

101. *Vickers*, *supra* note 94, at 5.

102. Council Regulation 139/04/EC on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. L 24/1, art. 9.

103. See European Commission Statistics, <http://ec.europa.eu/competition/mergers/statistics.pdf>.

conclusions of the Commission, but it would allow it to depart from those instances where it considers that the Commission's approach is not addressing relevant market failures. This system is likely to be cumbersome but it may serve to avoid the CMA's scarce resources being deployed to duplicate all actions taken by the Commission.

#### V. CONCLUSION

The British influence suggested in this chapter is perhaps predictable: the British pushed for an approach to competition law that is based on testing the economic effects of the commercial activities under scrutiny, and favored freer markets. In pursuing these lines, they challenged the view that restrictions to competition were to be found when conduct harmed the competitive process simpliciter, and they challenged the state's role in the provision of utilities. This is what one might have expected even without being an expert in competition law.

These effects began to make themselves felt from the late 1980s. Revolutionary then, they are now embedded in the EU's system. As suggested above, it was with the internal market project that the British managed to insinuate a free market based regulatory approach within the EU more generally and the economic transitions occurring then facilitated a push towards a vision of competition law that we find ordinary today: a technocratic venture to safeguard economic welfare. That this approach has now become mainstream is probably due less to the influence of the British, however, than on factors that facilitated a particular vision of antitrust since that time.

In large part, this vision became the global standard as a result of epistemic communities that are not based on nationality but are clusters based on expertise and a shared vision for antitrust,<sup>104</sup> like the regulars at annual events like the Fordham Competition Law Institute's September conference, or at the European University Institute's annual competition workshops in June.<sup>105</sup>

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104. See Frans van Waarden & Michaela Drahos, *Courts and (epistemic) communities in the convergence of competition policies*, 9 J. OF EUR. PUB. POL'Y 913, 914 (2002) (considering the Europeanisation of German, Austrian and Dutch competition law).

105. Jean-Francois Bellis, *After Forty Years: The development of European Competition Law – Views from Fordham*, 2014 FORDHAM COMP. L. INST. 545 (2014); John Temple Lang, *After Forty Years: The Development of European Competition Law – Views from Fordham*, 2014 FORDHAM COMP. L. INST. 555 (2014).

The above suggests that what we have referred to as the “British” vision of competition law is likely to continue to influence the way the Commission operates even post-Brexit.<sup>106</sup> However the future of competition law in the UK is much less certain as policymakers will have to navigate the difficult path between taking back control and re-establishing a global presence for Britain in the world.

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106. See Jean-Francoise Verstryngne, *Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy*, 1984 FORDHAM CORP. L. INST. 673, 681 (1984). Indeed, one can even find traces of the more economic approach in the early 1980s. The author was a member of the cabinet of Frans Andriessen (who served as competition commissioner between 1981 and 1985) and noted that already by then the Commission was using more economics to assess restrictive practices.



