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What has competition law done for the UK? What can it do for the Channel Islands?

Introduction and outline

Ladies and Gentlemen, good afternoon. It is a pleasure to be in the Channel Islands again, although I must confess this is my first visit to Guernsey. My last visit to Jersey was some years ago when I shared a platform with my friend and then colleague, Bruno Lasserre who was at that time President of the French Competition Authority. We spoke about the benefits of competition but I remember we also had an interesting discussion about whether England's claim to Normandy was stronger than France's claim to Les Îles de la Manche[2]. I am sorry he cannot be here this time also as we made a good team, but he, like me, is now a judge, although a rather more senior one in his case, and is sadly otherwise committed.

My task now, as then, is to convince a very courteous but possibly slightly sceptical audience that a properly established competition regime brings benefits to the economy, to business, to consumers and even to government itself. I firmly believe all this to be the case, but I am equally clear that those who claim competition on its own is a panacea for all ills are mistaken also.

My title is loosely borrowed from the remark made by former President of France, Nikolas Sarkozy, at the negotiations for the Lisbon Treaty in 2007:-

"*Competition, as an ideology, as a dogma*, *what has it done for Europe?"*[3]

To be fair, he went on to say *"I believe in competition and the market, but as a means and not as an end in itself."*

Whatever you may think of his first remark, most commentators, even today, would agree with the second.

So, in pursuit of this perhaps ambitious aim, I shall first of all look at what is claimed for competition policy; then I will look at how it has been applied in the UK context,

[1] Chairman, UK Competition Appeal Tribunal ('CAT'). Former Chairman, UK Competition Commission. Any views expressed are those of the author alone and do not necessarily represent the views of the CAT or any other body.

[2] I am now informed that the English Crown's claim was formally abandoned by the Treaty of Paris 1259, in which the King of France also abandoned claim to the Channel Islands. So be it.

[3] Reported in "The Guardian" 25th June 2007

looking briefly at the main areas of activity – cartels, monopolies, mergers and regulation, and at the economic activities of the state.

I shall then put this into an overall policy context and try to draw some conclusions, not only for the UK, but also for the Channel islands, with their particular issues and concerns.

Definitions and Initial Remarks

It may be useful to start by defining some terms**.** *Competitiveness* can mean at least two things. On the one hand it means the state of an economy characterised by effective competition, but it also means the ability of that economy to compete with others*. Competition* is the process by which firms compete with each other for customers and profits, and *competition policy* is the framework that enables and encourages that process to take place.

Competition law is the law that implements the policy. Its main focus is on the activities of private firms, but most systems apply it also to the economic activities of the state. One of the paradoxes of competition policy is that it is aimed at the private sector, yet it is often state activity and intervention that most restrict competition.

In assessing the possible benefits and dis-benefits of competition, there are two points to bear in mind. The first is that we are not talking in binary terms about a state controlled economy on the one hand and a totally free market on the other. Most if not all advanced economies, and I am sure this one is no different, are mixed economies. The argument is about where to strike the right balance, not the principle.

Second, competition is uncertain, unpredictable and can cause economic pain for the unsuccessful. Harmful consequences of this kind may need to be mitigated by the application of other, mainly social, policies, particularly in the short term. Overall, and over the longer term, competition generally makes an economy work better in itself, and better able to compete internationally. It is useful to see it as the "least worst" system, with the default policy position being to encourage it, not to restrict it.

What is claimed for Competition?

With that in mind let us examine the claims made for competition as policy. A recent UK government consultation included the following statement:-

"Effective competition is *central to ensuring a well-functioning economy. Competition supports productivity and growth and ensures that the UK is competitive in a global market."*[4]

[4] "*Options to Refine the UK Competition Regime – a Consultation*" BIS (now BEIS) 25th May 2016 BIS/16/253.

There is a long list of similar pronouncements, both here and in other industrial countries across the globe. These statements, although worthy in tone, might be seen as polemic, rather than instructive, in nature. A slightly fuller offering is as follows:-

"Competitive markets promote efficiency and growth. Their benefits can include lower prices and better products for consumers, greater opportunities for workers, *and a level playing field for entrepreneurs and small businesses that seek to enter new markets or expand their share"*[5]

That statement is taken from a briefing paper issued by the Economic Advisers' Council in 2016 to the former US President Obama.

This emphasises the dynamic effect of competition, opening up markets, giving opportunities for businesses to start up and grow, and consumers benefitting as a result. One could add to that the encouragement of innovation, which is generally less likely under conditions of monopoly. For as the famous economist Sir John Hicks wrote many years ago:-

"The best of all monopoly profits is a quiet life"[6]

Above all, competition policy focusses on improving "consumer welfare". From this the other benefits to productivity, growth and innovation are said to flow.

Of course a "competitive" economy in this sense does not just happen. The conditions for it must be created and maintained. I mentioned earlier the mixed nature of most modern economies, and the effect of state activity. Besides private monopolies, there are also significant areas of economic activity where there are natural monopolies, often in so called "utility" provision, that is those basic services that businesses and consumers have to acquire or use as part of everyday life, for example in the fields of energy, water, communications and transport. In some cases, particularly in smaller economies, a single provider may be unavoidable.

In these areas the state may intervene to regulate the operators in the monopoly area, providing as near a proxy to the results of competition as can be produced. Economic regulation is therefore an important part of the overall competition policy picture.

Institutions

Before we look at how competition policy is applied we should look at the necessary institutions. We should first emphasize that competition policy itself is properly the

[5] US President Council of Economic Advisers Issue Brief April 2016 p14. The quoted extract continues:-"Competition among firms benefits consumers via lower prices,…greater product variety, higher product quality and greater innovation, which drives productivity growth and helps lift living standards."

[6] Annual Survey of Economic Theory: The Theory of Monopoly, 3 Econometrica 1.8 (1935).

preserve of the political arm of government, as it is part of economic policy. What we are looking at is the institutions that are needed to put it into practice.

There has been a great deal of work done on this subject, mainly thorough bodies like the OECD or the ICN, with a view to assisting emerging economies set up effective bodies to apply the policies that their economic development requires. These have been useful to large countries such as China, and to smaller states such as Singapore or Mauritius.

All commentators agree that what is needed are independent, competent, well-resourced authorities able to address with confidence the major corporations, or even governments, that they have to deal with.

Independence is relative; no authority can or should be completely independent of the state of which it forms part. But it must have *operational* independence. Its board members must be appointed fairly and objectively; they must have the necessary competence, as must the professional staff; and the budget must be sufficient, and sufficiently protected, to enable them to get on with the job.

But it goes further than this in two very important ways.

First is the question of political interference. The competition authorities must receive the support and backing from their political masters not only when times are easy, but also when they are tough. Corporations are normally proficient in political lobbying, as one would expect them to be. Politicians will of course be alive to this, and they need to avoid giving in to the temptation to "have a word with the Chairman" about this or that case. That is a threat to an independent system. If it becomes a habit, quality of casework will decline, and the authority's credibility will disappear. No-one will want to work for an authority that has lost its reputation for independence.

The second important aspect is the rule of law. Authorities must act within the statutory and wider legal framework. Ministers must respect that also, but it is the courts that are the guarantors of the rule of law. It is for the courts to control the work of the authorities, when asked to do so, and to guarantee to the citizens and corporations affected by authority decisions that they will be treated fairly, their objections listened to, and that they will be given a proper opportunity to put their case. Otherwise, we are simply setting up powerful but uncontrollable authorities, which would not be compatible with the sometimes rather inadequate democratic system that we enjoy. And of course the courts must themselves be incorruptible.

Competition policy in practice

Let us now turn to how competition law is applied in practice.

Classically there are three areas of control, cartels, monopolies and mergers, to which we should add economic regulation. EU competition policy includes also

provisions controlling state aids and subsidies, but I will not digress into that complex field here.

Let us look briefly at each of these topics.

Cartels

Cartels, or agreements that restrict competition, are the cardinal sin of competition law. They are the easiest restrictive practice to describe (although not necessarily to discover), their adverse effects are easiest to measure and the offence is as close to the criminal law of conspiracy as it is possible to come; indeed some cartels are criminal conspiracies. You will all be familiar with the Adam Smith quotation.[7]

In the UK, the competition authorities were at one time criticised for not doing enough about cartels. More recently, the newly formed Competition and Markets Authority (CMA) has become much more active. And the biggest cartels extend beyond the UK and generally fall to the European Commission to deal with.

A clear example of this enforcement practice is the European Commission's decision against manufacturers of *car glass* (ie car window glass).[8] The investigation lasted nearly four years and the Commission fined the four main suppliers some €1.3 billion in total, with the largest individual fine of €880 million on *Saint Gobin*. The decision was followed by a long and complex process of appeals and private claims for damages, some of which have only recently settled.[9]

This is just one example. The point to note is that cartel activity, once discovered, is generally prosecuted and the message to business should be clear. Cartels can be hard to discover, as they are by their nature secret, but the various "whistle-blower" or "leniency" policies in force around the world give a strong incentive to "own up", leaving every other cartel member uncertain as to how secret the cartel actually is.

Authorities have been criticised for relying too much on leniency applications and not investigating enough on their own initiative. The courts also have been criticised for being too ready to categorise more complex arrangements as obviously restrictive, when their real effects may be more complex[10]. But taken overall the policy is generally regarded as effective.

Of course it is a constant struggle, and new cartels continue to be unearthed, despite the authorities' best efforts and the increasingly severe penalties, including, in the

[7] The Wealth of Nations:-" *People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices".*

[8] European Commission Decision case COMP/39.125 – *Carglass* (Nov 2008). See also Press release IP/08/1685 (corrected 2013).

[9] See eg *Peugot Citroën Automobiles v Pilkington* Case 1244/5/7/15 in the CAT which settled in January 2017.

[10] See eg *Cartes Bancaires v Commission* Case C-67/13P Decision of 11th September 2014 – see also Advocate General Wahl's Opinion of 27th March 2014

US, UK, Germany and other countries, the possibility of individual criminal liability and a jail sentence.

But there is little doubt that the effect of cartel control is significant in economic terms, the policy is generally accepted as necessary and not inherently unfair, and the perpetrators justly condemned.

Monopolies

This is a little less clear in the case of the control of monopoly and the abuse of market power.

Most systems accept that obtaining or holding market power is not objectionable; it is abusing it that causes the problem. However, it can sometimes be very difficult to identify precisely what is an abuse, and to draw a clear distinction between the legitimate and illegitimate exploitation of market power. This is an issue which runs through many of the major recent abuse of dominant position cases, particularly those at the EU level.

Many systems around the world apply a prohibition approach, where the abuse of a dominant position normally attracts high penalties in order to penalise the offender and also to deter others from doing the same.

Both the EU and UK systems categorise abuse of a dominant position as a serious competition law infringement, punishable with high financial penalties. The consequences of "getting it wrong" are therefore very considerable, particularly as private actions for substantial damages will frequently follow from an infringement finding.

For example, the European Commission intervened against the practices of *Microsoft,*[11] which held a very high market share in the internet browsing market, to limit the way in which it led users to use its own browser. This took some years to achieve, with a lengthy appeal process before the Court of First Instance, before the Commission's open browser remedy was adopted.

Another example is the *Intel* case[12], where the Commission objected to Intel's rebate policies which it said encouraged the purchase and use of Intel's microchips rather than those of third parties. The case was subject to appeal, first to the General Court, which upheld the Commission's decision, and most recently to the Court of Justice, which has sent the case back to the General Court.

[11] Case COMP/C-37.792- *Microsoft* and Case T-201/04 *Microsoft v Commission* EU:T:2007:289.
[12] Case COMP/37/990 – *Intel*; Case C-413/14 P *Intel v Commission*, Decision of 6 September 2017.see also Advocate General Wahl's Opinion 20th October 2016. The case has been remitted to the General Court to examine the effects of the practices complained of.

Other examples are the various cases brought against *Google*,[13] which in essence allege that the company used its powerful position to lead or encourage consumers to prefer Google products rather than those of third party providers.

In all these hard contested cases, the abuse claimed is exclusionary in nature, that is it affects the ability of new entrants to come in and disrupt the existing monopolists, if such they are. The harm to consumers is indirect, and, as with the initial reaction to the Microsoft remedy, some consumers may be puzzled by the introduction of more choice as this upsets a comfortable *status quo*.

I have no inside knowledge of these cases, and have no reason to question either the authorities' concerns over these apparent abuses of market power or the companies' responses. My point is that they suggest that for dominant firms, the dividing line between what is legitimate and what is not can be a very fine one.

Besides outright prohibition, there are other approaches to control of monopolies. One is to rely on the self-correcting nature of markets. If a market is generating monopoly profits, then this will in time attract new entrants and prices will come down. This approach begs the question of how long does the harm continue, and what are the barriers to entry. All the above cases depend to some extent on the authorities' assessment that the dominant firm has closed off entry by others.

Another approach is exemplified by the market investigation regime in the UK, which operates in parallel with the prohibition system. If a market is found not to be working well and damaging competition and consumers, the authority can take measures to improve things. Such measures may be quite drastic. An example of this is the *BAA Airports* case[14], in which the Competition Commission, as it then was, found that common ownership of London's airports and others by BAA was harming competition and ordered a break-up of the group. Gatwick and Stansted airports were sold by BAA as well as Edinburgh.

There are arguments for and against all these approaches. I confess to being personally more inclined towards a system which corrects, rather than punishes, monopoly behaviour, simply because of the difficulties of characterisation that I have described. But the law is the law, and the authorities have no choice but to keep trying to identify abuses of dominance and to prevent them where possible.

Merger control

Merger control is a little less controversial, in that it seeks to prevent harmful market power being created, rather than dealing with it after the event.

Merger control is different in other ways from "normal" competition law. Merging is itself a normal business activity, essential in the sort of free markets that competition

[13] Case COMP/C-3/39.740 *Foundem* and ors.; Case COMP 40099 *Google Android*; Case 40411 *Google Search (AdSense)*. The company has just launched an appeal to the General Court.
[14] Reports 19th March 2009 and 19th July 2011.

is meant to encourage. Merger timetables are very demanding too, with shareholders and executives keen to press on before something happens to derail the deal. For this reason merger control is not seen as punitive in itself; the regime exists to control and deter anti-competitive mergers.

Most mergers that raise difficulty can be compromised or negotiated through the process. The system is fairly predictable and advisers are able to identify what will and will not be acceptable. Occasionally, however, the authorities have to prohibit a merger.

An example of this last year was the proposed merger of *Hutchison 3G's* "Three" mobile phone business and *Telefonica's* "O2" business[15] . This was an EU level decision, but the proposed merger would mainly have affected the UK and both Ofcom and the CMA had made their opposition clear.

The proposal met with unexpectedly firm opposition from the European Commission, and in the absence of a negotiated solution, was prohibited outright. The reasons given were higher prices, reduced customer choice and less innovation. These are very traditional competition detriments and the decision should perhaps have come as no surprise[16].

Most merger control systems require the prior notification of mergers above certain financial thresholds. This is to avoid having to "unscramble the eggs", which is generally thought to be difficult and unsatisfactory[17]. Setting the thresholds at the right level is very important. Set too high, important mergers may escape scrutiny; set too low, unnecessary notifications will clog the system without doing any good. It is obviously important both for business and for the authorities to get the notification criteria right.

Regulation

I described economic regulation as the fourth arm of competition enforcement. This is of course a slight mis-statement. Regulation exists to deal with the *absence* of competition and although all economic regulators claim to be striving to reach a situation where their office is no longer required, this cannot always be the case. Some form of regulation of energy markets, of rail and air transport and water is likely to be with us for some time to come.

Regulation of financial services markets is generally accepted as necessary in the interests of prudence, the security of the financial system, and the protection of investors and the public.

[15] Case M.7612 see European Commission Press Release IP/16/1704 of 11th May 2016.
[16] It is, however, subject to appeal. More recently the European Commission prohibited the proposed merger between the *London Stock Exchange and Deutsche Borse* in Case M.7995, see European Commission Press Release IP/17/789 of 29 March 2017.
[17] The UK system of merger control is, exceptionally, voluntary, and therefore has to deal sometimes with mergers that have already been completed.

Regulation of communications markets is also needed, to open up networks and promote innovation, although here the authorities are often working strongly in tune with industry's own objectives. Generally, regulators have been quite successful in introducing competition in the communications sector, although there is still work to be done. In the UK, Ofcom has wrestled with the conundrum of how far "upstream" competition should be introduced and how far access to network infrastructure needs to be mandated by regulation.

Although they operate differently, competition and regulatory policy are frequently pursuing the same objectives.

One recent example of this is the case of *Sky's Pay-TV* premium sports programming.[18] The background was as follows.

In 2010 Ofcom, following a general review, had required Sky to offer third parties wholesale access to its premium sports third parties at a regulated price (the "WMO obligation"). Sky appealed this decision to the CAT, which found in favour of Sky on the main part of its appeal. BT, as one of the affected business customers, appealed the CAT's decision to the Court of Appeal on the grounds that the CAT had not dealt with all aspects of the case. The Court of Appeal decided that the case should be sent back to the CAT for further consideration. Before the CAT could take this very far, Ofcom conducted a further review and decided that the WMO obligation was no longer needed. As a result it withdrew this requirement on Sky. BT appealed that decision also, but the CAT found against it[19] and the case was not pursued any further.

What is notable from this somewhat complex series of events is that Ofcom was relying on a condition in Sky's licence that required "fair and effective competition". In other words it was using its *regulatory* powers to promote *competition*. Initially it had imposed a significant regulatory measure in the interests of competition but then it had withdrawn it with the same objective. The case shows that the difference between regulation and competition enforcement can often be a matter of form only and that both regulation and de-regulation can be pro-competitive.[20]

Wider Issues

So, having reviewed how the main arms of competition enforcement have been used recently, not without some success, we should ask ourselves, whether the policy has fulfilled the claims made for it.

[18] Case 1246/8/3/16 in the CAT and Case C3/2017/0402 in the Court of Appeal.
[19] 2016 CAT 25
[20] Another example is the CMA's recent market investigation into *Energy Markets*, which decided against capping prices for most customers, as it considered this would *reduce* the chances of increasing competition by discouraging customer engagement..

There is, unfortunately, no easy way either to measure this, or to prove any direct causal link between more competition and increased productivity or growth, as the government's paper I quoted from earlier claims.

Since 2007, UK productivity has stagnated, or even declined. Competition enforcement has continued unabated. There must therefore be other factors at work and those who assume a direct causal link between increased competition enforcement and increased productivity have clearly got some further work to do.

Perhaps it would be better to make a more modest claim. Compared with what *might* have been, continued emphasis on promoting competitive markets *may well* have made things better. This simply illustrates the main theme of this talk, which is that *on the whole*, competition benefits the economy more than monopoly. We must be careful however, not to claim too much for the policy, as more cannot be proved.

The role of the State

Before we try to draw general conclusions, let us look briefly at how state activity affects the analysis.

We mentioned state aids or subsidies distorting competition, but what about when the state itself operates as a provider of goods or services to the consumer? This is an area of increasing controversy in the UK where efforts have been made in several areas to introduce competition to public service provision, sometimes with mixed results.

Higher education is one topical example. The move in 2010 from government block-grant finance to tuition fee financing with a maximum capped fee per student, funded by a compulsory loan system, was intended to promote competition between universities and improve choice for students. Recently it has been subject to some criticism. There are accusations of a fee cartel, complaints that competition is taking place on the "wrong " parameters (student comfort and facilities rather than quality of teaching or research) and that chief executive remuneration is too high.

My view is this. It is surely not wrong in principle for universities to be made to compete for students. Of course that is not the only thing that they have to do, and it is important to be clear what that aspect of the competitive process is meant to achieve and not to expect it to do other things as well. Above all, the principle of allowing some competition where possible should not be drowned out by other concerns.

Public health provision is another example. Again, it is not unreasonable to ask health service providers to compete for the custom of the commissioning groups formed for that purpose. Experience suggests this may improve choice of treatment for patients and the quality of the service they receive.

However, in this case, some of the key elements needed to make competition work are missing. Prices are mainly set centrally, not as a result of the competitive process; and those providers who perform badly cannot, unlike in some other economic sectors, be allowed to "fail" as public health provision may suffer as a result. Indeed, some of the incentives that are normally seen as necessary for competition to work cannot be risked in public service of this kind.

Moreover, some of the professionals involved object strongly. A distinguished medical consultant wrote recently:-

"Huge sums are being wasted through the present complex system of commissioning healthcare….The market sets different parts of the NHS against one another and leads to a fragmented approach…A return to a system in which healthcare is planned for a given population would ensure an integrated approach, improve care, restore professionalism…"[21]

I am not for a moment suggesting that it is unreasonable to hold such views. Public health is a novel area for competition, at least in the UK. Moreover, competition *does* indeed set one provider against another; that is the whole point of it. Normally, this encourages providers to improve their offering in order to gain new custom, rather than lowering quality through fragmentation, but this may not always be so.

We should also remember that the problems of the NHS are of a very particular kind, not least the fact that, being in the eye of politics, every innovation or change is subject to close media scrutiny from the start. So it is possibly not a case where introducing competition will work easily.

Nonetheless there are encouraging signs, for example the examination of hospital mergers by the CMA under normal merger control criteria, enabling a rational view to be taken on the necessary balance between the needs of efficiency and patient welfare.[22]

The distinguished Professor's favoured alternative to competition is central planning. I do not find this attractive. Whatever may be appropriate in a public health context, the record of central planning in the wider economy at large is not impressive, and we should not forget the experience in the UK in the 1960s and 70s when it was much more prevalent than now. In general, the state has been shown to be an inefficient economic operator and a poor guardian of productive assets.

[21] Letter from Professor Robert Elkeles, "*The Times*", 29th August 2017; the Professor wrote a similar letter in January 2015.
[22] See eg the *Central Manchester University Hospitals/University Hospital of South Manchester* merger inquiry (Decision of 3rd August 2017).

Conclusion: Competition Law in the Channel Islands?

So much, you may say, for the generality. But surely, none of this applies to small economies like those of the Channel Islands, with their mixture of state and privately owned monopoly utility providers, their strong emphasis on financial services, (where promoting competition has never been easy to do) and their concentrated economy with emphasis on effective rather than multiple provision?

I put the question mainly for the sake of argument. It is my strong belief that most if not all of what I have said does indeed apply to economies like those of the Channel Islands. This is only partly because it would not be sensible for one part of a major regional economic grouping to apply a radically different approach to economic policy from that of the remainder.

It all comes back to the "least worst" proposition and a few very simple points.

Competition *does*, over time, promote productivity, efficiency and innovation. It may not do it immediately or perfectly, or even in every case, but on the whole it does.

It is also normally to be preferred to the alternatives. The state-controlled centrally-planned economy has been shown not only to be ineffective in delivering growth and prosperity, but it is also not compatible with the degree of personal and economic freedom that citizens and businesses expect.

From that point of view competition is rather more than the "least worst" policy option.

Of course, market assessments can be difficult; and authorities will from time to time err either on the side of doing too much, or, equally damaging, doing too little.

But we all know cartels are bad (and we should never believe those who say that all cartels have been stamped out, particularly in smaller economies, where they simply go underground). There is no sense of grievance stronger than that of someone who is the victim of a price-fixing conspiracy.

Market power can also be difficult to gauge and monopolies hard to condemn. Of course, not all monopolies are bad, not even all state monopolies, and in some situations there may be no alternative. But it remains the case that *on the whole* they perform less well than competitive markets. In the Channel Islands context, I am sure there are many views in this audience on the experience of Gatwick Airport, but perhaps we should ask whether it was better or worse when under BAA's control?

Which bring us back to Sir John Hicks and the monopolist's quiet life. This can be comfortable for the incumbent, and even for some consumers, for a surprisingly long time, but a quiet life breeds complacency and inefficiency. When the monopoly is finally exposed to competition it can be blown away completely. Meanwhile, consumers in general, other businesses and the economy as a whole suffer.

And if you are going to have competition policy, you need the institutions to carry it out. Ministers applying competition law have not had a happy time of it on the whole. The proof is that nearly 20 years ago, when faced with deciding whether BSkyB (as it was) should be allowed to acquire control of Manchester United Football Club, the then Secretary of State Mr Peter (now Lord) Mandelson concluded that it might be better if such matters were decided by independent competition authorities. That led directly to the system we presently have in the UK. Operational independence, professional staff, good governance, a proper budget and respect for the rule of law all go with that territory.

So, I rest my case. I may not have convinced those determined not to be convinced, but in these days of post-truth, fake news and the bonfire of the experts, I place myself unashamedly on the side of what I regard as the rationalists in favour of competition and would encourage others to do the same.

Thank you.

Peter Freeman