

**LEGAL CERTAINTY AND COMPETITION LAW:
CAN THEY BE RECONCILED?**

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Abstract

Legal certainty and the rule of law are important principles in many jurisdictions around the world. An important part of these principles is that laws should be sufficiently clear and predictable, so that individuals can plan their conduct in the knowledge of the legal consequences that will flow from it. In particular, individuals should not be found liable for infringing laws, or be penalised for doing so, where those laws did not provide sufficient certainty in advance that the conduct would be illegal.

Competition laws have frequently been criticised for lacking certainty and predictability. So far most of the criticism in this respect has been levelled at US antitrust law, criticisms that will be discussed briefly in this paper. This dissertation will demonstrate that similar criticisms can be made of the competition laws of many other jurisdictions, using five competition regimes as a representative sample, namely the EU, Australia, Canada, South Africa and Hong Kong (the “subject jurisdictions”).

What is “sufficient” legal certainty? After all, many laws are couched in terms that are, to a greater or lesser extent, vague. This dissertation will argue that a high degree of legal clarity is required of competition laws because of their largely criminal or quasi-criminal nature, and uses the criteria laid down by the European Court of Human Rights as an appropriate benchmark in this respect. We show that, to varying degrees, the competition laws of the subject jurisdictions do not meet those criteria, and therefore they are not sufficiently certain.

We also demonstrate that this lack of legal clarity leads to many adverse consequences in terms of waste of society’s resources, unfairness, harm to the credibility of the legal system, and others.

We then look at possible ways of solving the problem. We show that the existing methods that have been used to bring greater clarity into competition laws, or mitigate the adverse effects of lack of clarity, have not been fully effective in achieving this. Finally we propose a new way forward which mitigates substantially the adverse effects of legal uncertainty in competition laws.

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1 Introduction

Legal certainty is a principle that it is recognised in many jurisdictions. For example, it has been stated that it is:

“...a ‘general principle’ of the jurisprudence of the European Court of Justice and a guiding idea of many, if not all, of the legal systems of the European Union’s Member States. It is similarly a general principle of the jurisprudence of the European Court of Human Rights, whose jurisdiction includes not only all EU Member States, but almost all other states in Europe”.¹

There is no universally-accepted definition of legal certainty. But at a general level, it can be described as a situation in which the law is reasonably predictable and stable, so that individuals and businesses know where they stand under the law, and that they will not be subject to unpredictable changes in their legal status.

Legal certainty is closely associated with the principle of the rule of law. Again there is no universally-accepted definition of this principle. At its root is the notion that societies should be governed by clear and accessible laws, not by the discretion of rulers. An English judge, the late Lord Bingham, summarised the rule of law as follows: “all persons and authorities within the state, whether public or private, should be bound by, and entitled to the benefit of laws publicly made, taking effect (generally) in the future [i.e. having prospective, not retrospective effect] and publicly administered in the courts.”² Laws must not only be published and prospective in effect, they must also be clear enough for individuals to plan their conduct.³

¹ James R Maxeiner “Legal Certainty: a European Alternative to American Legal Indeterminacy?” *15 Tul J Int’l & Comp L* 541, 545.

² “The Rule of Law”, Sixth Sir David Williams Lecture, Centre for Public Law, University of Cambridge 16 November 2006 6-7, available at www.cpl.law.cam.ac.uk (accessed on 9-8-2017).

³ N 2 above.

The rule of law is a principle that is (like legal certainty) espoused by many governments worldwide, and generally seen as one to which democratic societies should aspire. In a statement on 20 April 2016, Mr Ban Ki-Moon, Secretary General of the United Nations, said: “Respect for the rule of law- within and among nations- is one of the foundations of progress in virtually all areas of our work”.⁴ A country’s respect for the rule of law is an important factor in a business’s decision to invest in a particular country. For example, the leader of the UK’s main employers’ organisation, the Confederation of British Industry, has been quoted as saying: “The UK is admired for its legal system and companies see the rule of law as one of the most important factors when deciding where to invest, alongside the ease of doing business and political stability”.⁵

However, there are criticisms that the rule of law is being eroded, even in so-called developed economies. In the business context, for example, a major international law firm produced a report in 2015 on the state of the rule of law in the UK, which went as far as to say that “the very foundations of the rule of law in the UK are weakening”. It criticised the vagueness of laws in certain areas, for example money laundering, financial services regulation, anti-bribery and data protection, arguing that the vagueness in these laws allowed them to be used for purposes for which they were not originally intended, or to prohibit conduct which was not regarded as illegal at the time it took place.⁶

One area of law which has come under increasing attack for its lack of clarity is competition law (or, as it is called in the US, antitrust law) By “competition law”, for present purposes we mean, broadly, those laws which regulate conduct by businesses which is regarded as harming competition in markets.⁷ For example, one commentator says of US antitrust law: “prior to an antitrust action and any alleged violation of the law, no one can know with reasonable certainty

⁴ Available at <https://www.un.org/sg/en/content/sg/statement/2016-04-20/secretary-generals-remarks-ceremony-commemorate-70th-anniversary> (accessed on 19-6-2016).

⁵ Linklaters “In Defence of the Rule of Law” available at <https://www.linklaters.com/en/insights/thought-leadership/rule-of-law-2015/in-defence-of-the-rule-of-law> (accessed on 2-11-2017).

⁶ N 5 above.

⁷ In Chapter 2 we analyse in more detail what competition law means.

what it means to ‘reduce competition substantially’...’’⁸ Another goes as far as to argue that the so-called “rule of reason” under US antitrust law, against which most business arrangements and conduct is assessed, does not comply with the rule of law.⁹

The potential consequences of lack of clarity in competition laws are particularly serious. For example, since they regulate business conduct in the marketplace, and stringent sanctions can be imposed for (and other serious consequences arise from) infringements, there is a real risk that businesses will hold back from competing vigorously for fear of breaking the rules. This is exactly contrary to the policy objective of many of these laws, which is to encourage vigorous competition, in the interests of increasing economic efficiency and benefitting consumers.

Against this background, this dissertation has four purposes:

- Most of the studies that have been conducted so far on the problems of lack of clarity in competition law have focused on US antitrust law.¹⁰ This dissertation will look at these authorities, and extend the analysis outside the US by examining the extent of lack of clarity in the competition laws of five other jurisdictions- the EU, Australia, Canada, South Africa, and Hong Kong (hereafter called the “subject jurisdictions”), and the reasons for this lack of clarity.
- Many laws are to a certain extent are vague. Legal certainty is not a binary concept (certain or uncertain) but a relative one. So is there a relevant criterion or criteria for assessing

⁸ Domenick T Armentano *Antitrust: the Case for Repeal* 2ed (1999) 101.

⁹ Maurice E Stucke “Does the Rule of Reason violate the Rule of Law?” *UC Davis L Rev* Vol 42 No 5 (June 2009) 1375.

¹⁰ N 8 and 9 above. See also, for example, Neil A Campbell and William J Rowley QC “Proposals for Evolving the Patchwork of Domestic Monopolisation and Dominance Laws” *Business Law International* Jan 2016; Daniel A Crane “Rules versus Standards in Antitrust Adjudication” (2007) 64 *Wash & Lee L Rev* 49; Frank H Easterbrook “The Limits of Antitrust” 63 *Tex L Rev* (1984) 1; Jesse W Markham Jr “Sailing a Sea of Doubt: A Critique of the Rule of Reason in US Antitrust Law” (2012) 17 *Fordham J Corp & Fin L* 591; Richard S Markovits “The Limits to Simplifying the Application of US Antitrust Law” University of Texas School of Law and Economics Paper No 177, 19 Jan 2010; James R Maxeiner “Legal Certainty: a European Alternative to American Legal Indeterminacy” 15 *Tul J Int’l & Comp L* 541; Edwin S Rockefeller *The Antitrust Religion* (2007). This literature will be referred to further in Chapters 4 to 7.

whether competition laws are sufficiently clear? We argue that the basic criteria for legal clarity laid down by the European Court of Human Rights (“ECtHR”) under the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) is an appropriate benchmark for competition laws. In doing so, we do not suggest that the *validity* of the competition laws in the subject jurisdictions would be threatened if this benchmark is not met. What we do argue is primarily two things: (a) if the benchmark is not met by the competition law of any state that is a party to the ECHR (which includes all EU Member States), the enforceability of competition laws in individual cases may be jeopardised, and (b) for all states, the criteria for legal clarity laid down by the ECtHR are an appropriate benchmark for competition laws to achieve.

- We demonstrate that the competition laws of the subject jurisdictions fail to meet the ECtHR benchmark, to varying degrees.
- The dissertation will examine the many adverse practical consequences that flow from this lack of clarity, and the measures that have so far been deployed to provide greater clarity, as well as to mitigate the adverse consequences of lack of clarity.
- The dissertation will show that these measures have proved to be largely ineffective, and that the competition laws in most of the subject jurisdictions (and others that follow a similar model) have to be fundamentally re-designed to provide sufficient clarity. We provide recommendations as to how competition laws could, and should, be re-designed for this purpose.

The choice of the subject jurisdictions is not random. The EU has been chosen because it is the model of competition law which has probably been used most widely by other jurisdictions, to greater or lesser degrees, not just by its own 28 member states but also further afield, such as in Singapore, Malaysia and Hong Kong. Moreover, it is one of the “oldest” competition regimes in the world, having been established in 1957. Being a supranational law covering 28 jurisdictions, this has produced an extensive body of case law that is a useful point of reference for other jurisdictions. Canada, Australia and South Africa have been chosen because their competition laws have also been in place for a considerable period of time, and therefore (like the EU) allow an assessment to be made not just of the statutes themselves, but of the experience of the enforcement authorities and courts in interpreting and applying the laws. Hong Kong has been chosen because

it is the jurisdiction, or one of the jurisdictions, which has most recently introduced a competition law, and will therefore provide a useful illustration of whether any lessons have been learnt from the experience of other jurisdictions in terms of clarity in drafting the law.

Competition law is often referred to as having “three pillars”: a rule against anti-competitive agreements between two or more businesses, a rule against abusive conduct by firms with market dominance or substantial market power, and merger control.¹¹ This dissertation will focus on the first two pillars, for the following reason. Whereas, in respect of the first two pillars, the competition laws that we shall examine are largely based on self-assessment (that is, firms have to assess for themselves whether their agreements or conduct will comply with the law), merger control in most jurisdictions is based on a system of requiring an application for prior approval of the proposed transaction before it can be implemented.¹² The same problem of legal uncertainty therefore does not arise: it will usually be clearer for firms to assess whether the relevant financial thresholds are satisfied, than what impact a firms’ agreement or conduct will have on the market and whether it has countervailing benefits that outweigh any harm to competition.¹³ If the thresholds are satisfied, and the transaction is filed with the authority, and not completed unless and until the authority gives its approval, the firms will have complied with the law. Unlike with the first two pillars, firms do not therefore have to assess for themselves, on pain of breaking the law, whether the transaction will negatively affect competition, or qualify for an efficiency or other

¹¹ See, for example, Moritz Lorenz *An Introduction to EU Competition Law* (2013) 34.

¹² In June 2017, it was reported that over 85 jurisdictions had merger control provisions, the vast majority of which contained mandatory prior filing requirements: only in 6 of those jurisdictions was filing voluntary. See David E Vann Jr “International Merger Control” in *Getting the Deal Through* (June 2017), Appendix.

¹³ In 2005, the Organisation for Economic Cooperation and Development (OECD) issued a recommendation to its member countries to (inter alia) “use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review (See OECD, “Recommendation of the Council on Merger Review” (2005) 2). Similarly, the International Competition Network (ICN) recommends that “notification thresholds should be clear and understandable” and that “mandatory notification thresholds should be based on objectively quantifiable criteria”. See ICN “Recommended Practices for Merger Notification and Review Procedures (2017) 5,6.

defence. This dissertation argues, with reference to the subject jurisdictions, that the competition rules against which firms have to assess whether their agreements or conduct will comply with the law are insufficiently clear.

Although merger control will not therefore be a focus of this dissertation, the substantive test for assessing whether a merger or acquisition should benefit from clearance in some of the subject jurisdictions is the same as, or similar to, the tests for assessing other commercial agreements or conduct (i.e., in broad terms, whether it is or is likely to lessen competition substantially, and if so, whether there are countervailing benefits that outweigh the harm to competition). Occasional references will therefore be made to merger cases in discussing the meaning of these tests.

This dissertation is organised as follows. Chapter 2 will examine what competition law is. Although people often talk of competition law as if it has a universally-understood meaning, we shall see that the so-called competition laws in different jurisdictions often have widely-divergent objectives and substantive rules, and that their common characteristics relate more to form than substance.

Chapter 3 will then examine the concept of legal certainty, and how clarity in laws forms part of the concept of legal certainty and the rule of law principle. We identify from the ECtHR's case law an appropriate set of basic criteria for legal certainty against which competition laws can be measured, to assess whether they are sufficiently clear.

Chapter 4 examines the extent of lack of clarity in the competition laws of each subject jurisdiction, and the causes of the lack of clarity. We demonstrate that, to varying degrees, these laws do not meet the ECtHR's basic criteria for legal clarity.

Chapter 5 examines the practical implications of this lack of legal clarity. We demonstrate that the lack of clarity has serious adverse implications. These include high compliance costs, high enforcement and litigation costs, unfairness, reduced access to justice and (as noted above) deterring businesses from engaging in conduct that might benefit the economy and consumers.

Chapter 6 demonstrates that the measures that have so far been used to provide greater clarity (or mitigate the adverse effects of lack of clarity) in the subject jurisdictions' competition laws have been largely ineffective, and that other methods need to be used for this purpose. Chapter 7 looks at these methods, and proposes a re-design of competition laws which would provide sufficient legal clarity. Chapter 8 concludes.

2 What is Competition Law?

2 1 Introduction

Since this dissertation investigates the issue of legal certainty in competition law, we need to be clear what we mean by competition law for this purpose. This Chapter therefore looks first at whether there is a common definition of competition law. Having concluded that there is not, we then go on to look at common components in the competition laws in the subject jurisdictions, how competition and harm to competition are defined, why competition is valued, and what the objectives of competition laws are. This analysis will prepare the ground for the assessment of potential solutions to legal uncertainty in Chapters 6 and 7. It will also draw out the main argument in this dissertation, namely that the lack of clarity in competition laws has such serious consequences that many countries need to conduct a fundamental re-design of competition laws to provide sufficient legal certainty.

2 2 No Universally-agreed definition

There is no doubt that “competition law” is a popular term. A Google search on the term in Hong Kong on 2 November 2017 produced 15.8 million hits. It has its own Wikipedia page. Textbook titles include *Competition Law*,¹⁴ *European Competition Law and Economics*,¹⁵ *EC Competition Law*,¹⁶ and *Competition Law in Canada*.¹⁷ It is perhaps surprising therefore that there is no consensus on the meaning of the term.

To begin with, what is called competition law in some jurisdictions is called something else in others. For example, what is usually called competition law in Europe is called “antitrust law” in the US, “anti-monopoly law” in China and Japan, and (until recently at least) “trade practices law”

¹⁴ Richard Whish and David Bailey *Competition Law* 8ed (2015).

¹⁵ Roger J Van den Bergh and Peter D Camesasca *European Competition Law and Economics: a Comparative Perspective* 2ed (2016).

¹⁶ Georgio Monti *EC Competition Law* (2007).

¹⁷ Susan Hutton *Competition Law in Canada* (2013).

in Australia. Somewhat bizarrely, the term “antitrust” has been adopted relatively recently by the EU to describe a subset of competition law which deals with agreements between businesses, other than mergers, and abuse of market dominance, i.e. most of the conduct subject to competition law¹⁸ – even although the term was originally adopted in the US in the late nineteenth century to denote the large US corporations or “trusts” at which the law was directed.¹⁹

The range of conduct which falls within competition law, antitrust law, anti-monopoly law or trade practices law also varies from one jurisdiction to another. In the EU, for example, competition law is not just directed at business conduct, but also at conduct by EU Member State governments in the form of “state aids” to businesses which distort competition.²⁰ Somewhat illogically, however, it does not include the EU laws on public procurement, which require EU Member State governments to put contracts with private sector companies out to open tender, even although the main purpose of these rules is to ensure that there is competition between businesses for public sector contracts. In Australia, trade practices law covers not just rules on competition, but also, for example, rules against misleading or deceiving consumers,²¹ as well as sector specific rules on access to networks in the energy and telecommunications sectors,²² both of which would normally be regarded as falling outside competition law in the EU. The Canada Competition Act also has rules against deceptive marketing practices.²³

These disparities have not prevented efforts being made to define the term “competition law”, efforts which have not been entirely, if at all, successful. For example, Whish and Bailey state that: “As a general proposition, competition law consists of rules that are intended to protect the process of competition in order to maximise consumer welfare.”²⁴ However, there are at least three problems with this definition. The first is that, as will be seen later in this Chapter, competition

¹⁸ <http://ec.europa.eu/competition/> (accessed on 4-12-2017).

¹⁹ A Neil Campbell, J William Rowley QC “Proposals for Evolving the Patchwork of Domestic Monopolisation and Dominance Laws” *Business Law International* January 2011 6.

²⁰ Treaty on the Functioning of the European Union (TFEU) Art 107, OJ L115/91 of 9.5.2008.

²¹ Competition and Consumer Act (CCA) Part XI and Sch 2.

²² N 21 above Part IIIA and XIC.

²³ Competition Act s 74.01.

²⁴ *Competition Law* 8ed 1.

law in some jurisdictions (such as the EU) was not primarily intended to protect the process of competition (or rivalry between businesses), but to protect the economic freedom of individual operators. Some competition laws, including those of the EU and South Africa, are also intended to prevent dominant operators from exploiting their position vis-à-vis customers and consumers. This objective also has little to do with protecting the process of competition. The second problem is that the goal of protecting competition may be to enhance consumer welfare in some jurisdictions, whereas in other jurisdictions – as will also be seen later in this Chapter – competition is protected for other reasons. The third problem is that, although competition law may take protection of competition as a starting point, there are many situations in which these laws expressly permit competition to be harmed, in order to achieve objectives which are considered more important than competition itself.

Rather than trying to find a satisfactory definition of competition law at this stage, it is therefore more fruitful to examine first what the common elements of competition laws are (using the subject jurisdictions as the sample) before going on to look at what competition and harm to competition mean, why competition is valued, and what the objectives of competition laws are.

2 3 Common Elements of Competition Laws

2 3 1 EU

In the EU, the competition rules are contained in Chapter 1 of Title VII of the Treaty on the Functioning of the European Union (“TFEU”).²⁵ The EU competition rules are unique compared to the competition laws of the other subject jurisdictions, in the sense that, because of their supranational nature, they impose obligations not only on businesses, but also on EU Member States. As was noted in section 2 2, the latter include provisions which prohibit Member States, subject to certain exceptions, from giving businesses state aids in a way which distorts competition in the market. Since such rules do not exist in the national competition laws of the other subject jurisdictions, they can be left aside in seeking to identify the common components.

²⁵ N 20 above.

As regards the competition provisions applying to businesses, these are mainly contained in Articles 101 and 102 of the TFEU. Article 101(1) deals with commercial arrangements between two or more businesses. It prohibits agreements between “undertakings”, decisions of associations of “undertakings”, and concerted practices between “undertakings” (hereafter collectively referred to as “arrangements”) which have as their object or effect the “prevention, restriction or distortion of competition”, and which may affect trade between Member States. “Undertaking” is the term used in EU competition law in essence to describe a business; all entities that are subject to common control are treated as a single undertaking for this purpose.²⁶

The effect on trade between Member States criterion is essentially a jurisdictional one, designed to distinguish matters that have to be judged in terms of local national competition law (where there is no effect on trade between Member States) and EU competition law (where there is).

Article 101(2) states that arrangements prohibited by Article 101(1) are automatically void. However Article 101(1) and 101(2) do not apply if the arrangement satisfies the four criteria set out in Article 101(3). These criteria are that the arrangement must:

- improve the production or distribution of goods or services or promote technical or economic progress;
- lead to a “fair share” of those benefits being passed on to consumers;
- not contain any restrictions of competition which are unnecessary for achieving those benefits; and
- not eliminate competition in a “substantial part” of the products or services in question.

The EU Commission has issued guidelines on how the assessment of these criteria should be approached.²⁷

²⁶ Case C-73/95P *Viho v Commission* [1996] ECR I-5457.

²⁷ “Guidelines on the application of Article 101(3) TFEU” OJ C101/97 of 27.4.2004.

Article 101(3) could therefore be regarded as a qualified exception to the prohibition in Article 101(1) on the grounds of economic efficiency. In other words, the exception is for agreements that improve economic efficiency (the first criterion), but it is qualified because it only applies if the three other criteria are satisfied. This means, for example, that if consumers do not benefit from the improvement in efficiency to an extent that is “fair”, or the harm to competition is substantial, the exception does not apply. As will be seen in Chapter 4, however, there is substantial uncertainty as to how this exception should be interpreted and applied in practice.

In principle, any arrangement which satisfies the four criteria can benefit from the exclusion, including those types of arrangement which are commonly-regarded as constituting the most serious restrictions on competition, such as price-fixing, market-sharing, bid-rigging and output restriction (these are commonly-referred to in competition law jargon as “hardcore” arrangements). In practice, however, hardcore arrangements have rarely been held to satisfy the exclusion criteria.

Article 102 TFEU prohibits an undertaking that holds a dominant position in the market from abusing that position, insofar as such abuse may affect trade between Member States (as in Article 101(1), effect on trade between Member States is essentially a jurisdictional criterion). Unlike Article 101, there is no express provision for exclusion.

Turning to the competition laws of the other subject jurisdictions, it will be seen that they share with the EU the elements of (a) a rule aimed at preventing arrangements between businesses which harm competition, subject to exceptions, and (b) a rule aimed at preventing any business which has “substantial market power” or “dominance” from abusing or misusing that position.

2 3 2 Australia

In Australia, the competition provisions are contained in Part IV of the Competition and Consumer Act 2010 (“CCA”). Unlike EU law, where all arrangements are subject to a competition test (“preventing, restricting or distorting competition”) there are certain types of arrangement in the CCA that are prohibited in themselves i.e. *per se* (unless a specific authorisation is obtained),

irrespective of their intended, likely or actual effects on competition. These arrangements are regarded as the more serious violations of the CCA, and are as follows:

- “Exclusionary” provisions. This prohibition is aimed at so-called “primary boycotts”, i.e. an agreement between competitors not to deal with one or more suppliers or customers.²⁸
- Hardcore arrangements between actual or potential competitors, i.e. bid-rigging, market-sharing, output- restriction and price-fixing. These arrangements are subject not just to a civil law prohibition, but also a criminal law prohibition if the requisite *mens rea* (knowledge or belief) is present.²⁹
- “Third line forcing”: an arrangement whereby a business sells goods or services or gives a discount, but only on condition that the purchaser acquires other goods or services from a third person.³⁰
- Resale price maintenance.³¹

Other arrangements are prohibited only if they have the purpose, or the actual or likely effect of “substantially lessening competition” (“the SLC test”).³² As with EU law, all types of anti-competitive arrangements may in principle be allowed on certain public interest grounds,³³ although the grounds for authorisation under Australian law appear to be considerably wider than under EU law, as explained in Chapter 4 below.

In Australia, the CCA uses the concept “substantial degree of market power” as the benchmark for triggering the rules on abuse (or “misuse”, to use the Australian term that has at least until recently been used), as opposed to the EU concept of dominant position.³⁴ Australian law also adopted a different approach from EU law to the question of unilateral anti-competitive conduct. There were two main differences:

²⁸ S 45(1)(a), 45(2)(a)(i) and 45(2)(b)(i), in combination with s 4D.

²⁹ S 44ZZRA-44ZZRV.

³⁰ S 47.

³¹ S 48.

³² S 45.

³³ S 88.

³⁴ S 46.

- it was the purpose of the conduct that triggered the prohibition, not the effect; and
- the market power had to be *used* for the purpose in question, whereas this is not necessary in the EU.³⁵

In order to establish a breach, it was necessary to show that the business has “taken advantage” of its substantial degree of market power for one of the purposes specific in the section, namely:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into a market; or
- deterring or preventing a person from engaging in competitive conduct in a market.³⁶

However, Australia has recently adopted fundamental reforms to the misuse of market power provisions. These reforms remove the "take advantage" requirement, and replace the three purposes in the current law with a new test. The new test, which entered into force on 6 November 2017, is as follows:

"A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market".³⁷

This new test will considerably widen the scope of the conduct that will be caught. The implications of this test for legal certainty will be examined in Chapter 4.

2 3 3 Canada

³⁵ Case C-6/72 *Continental Can v Commission* [1975] ECR 495.

³⁶ S 46, as in force prior to 6 November 2017.

³⁷ <https://www.australiancompetitionlaw.org/legislation/provisions/2010cca46.html> (accessed on 7-11-2017).

In Canada, the Competition Act, like the Australian CCA, distinguishes between hardcore arrangements, which are prohibited in principle irrespective of their effects on competition, and other agreements that “substantially lessen competition”. As in Australia, the former category covers price-fixing, market-sharing, output-restriction and bid-rigging, albeit the prohibitions are framed in different terms in Canada.³⁸ Unlike Australian law, hardcore arrangements are subject only to criminal penalties: there is no parallel civil offence. And unlike in Australia and the EU, there is no possibility (even theoretically) of an exemption for such arrangements. (There are also specific offences related to anti-competitive agreements in professional sport and between financial institutions).³⁹

Until 12 March 2010, other arrangements outside the hardcore category also constituted offences if they substantially lessened competition. However, as part of a series of major reforms to the Competition Act which took effect on that date, non-hardcore arrangements were removed from the criminal provisions, and became covered by a new provision, section 90.1, which applies to any arrangement between at least two competitors that “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market” (given its similarity to the Australia test, we shall also refer to this test as the SLC test).⁴⁰

As a result of Section 90.1, and in contrast to the laws of the other subject jurisdictions, agreements that harm competition are no longer *prohibited automatically* by law. If the agreement causes SLC, the Tribunal may (subject to an efficiency exception which is discussed below) issue an order prohibiting any person from doing anything under the arrangement (i.e. a “cease-and-desist” order).⁴¹ Alternatively, the Competition Bureau may enter into a consent agreement with the businesses in question whereby they agree to take certain steps to terminate the SLC instead of the Bureau taking the case to the Tribunal: the consent agreement must be endorsed by the Tribunal.⁴² Entering into and operating the arrangement is perfectly legal until such time as a cease-and-desist

³⁸ S 45 and 47 of the Canada Competition Act.

³⁹ Ss 48, 49 respectively.

⁴⁰ See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03036.html (accessed 27-1-18).

⁴¹ S 90.1(1).

⁴² S 90.1(1)(b).

order is issued or a consent agreement is signed. Illegality only arises if a Tribunal order or Tribunal-endorsed consent agreement is breached.⁴³

Section 90.1 provides that the Tribunal must not make a cease-and-desist order if the arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of the SLC.⁴⁴ Two examples of efficiencies are given in the Act itself: a significant increase in the real value of exports, and a significant substitution of domestic products for imported products.⁴⁵

As with the EU, Canada uses the term “dominant position” in the case of unilateral conduct, although we shall see in Chapter 4 that the definition of the concept is somewhat different.⁴⁶ Like arrangements outside the hardcore category, abuse of dominant position is not prohibited in itself: the Commission can enter into a consent agreement, or it can refer such conduct to the Tribunal and the Tribunal can issue a cease-and-desist order for the future.⁴⁷ In addition, and rather unusually as there is no express prohibition of abuse, the Tribunal may impose an administrative monetary penalty if an abuse takes place.⁴⁸ The Competition Act lists (non-exhaustively) a series of “anti-competitive” acts that will be regarded as an abuse, if they cause SLC.⁴⁹

2 3 4 South Africa

In South Africa, as in Australia and Canada (but unlike the EU and Hong Kong), the Competition Act prohibits certain types of arrangements without any need to show any actual or potential impact on competition. In the case of horizontal arrangements, these are hardcore arrangements, namely:

⁴³ Ss 90.1(1)(a) and 105.

⁴⁴ S 90.1(4).

⁴⁵ S 90.1(6).

⁴⁶ Ss 78 and 79.

⁴⁷ Ss 79 and 105.

⁴⁸ S 79 (3.1).

⁴⁹ S 78.

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; and
- collusive tendering.⁵⁰

Output restrictions are not specifically mentioned (unlike in Australia and Canada), but would be likely in any event to fall within the concept of “indirectly fixing a selling price” (since output is normally reduced to increase prices). In the case of vertical arrangements, minimum resale price maintenance is similarly prohibited.⁵¹

Other arrangements- both horizontal and vertical- are prohibited if they cause SLC, i.e. have the effect of “substantially preventing, or lessening, competition in a market”.⁵² This is subject to an efficiency exception that is modelled on the Canadian one: the exemption applies where a party can prove that there is “any technological, efficiency or other pro-competitive gain” which outweighs the anti-competitive effect. Any arrangement- even if it falls within one of the hardcore categories specifically prohibited- may be exempted by the Commission if it contributes to one or more public interest objectives identified in the Act.⁵³ These are considered in Chapter 4.

Unlike the competition laws of the other subject jurisdictions, the South African law defines the requisite degree of market power triggering the abuse provision partly in terms of market share.⁵⁴ A firm is automatically regarded as dominant if it has at least 45 per cent of a market. There is also a rebuttable presumption of dominance from 35 per cent up to below 45 per cent market share. To rebut the presumption, the business must show that it does not have “market power”. “Market power” is defined as “the power of a firm to control prices, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers”.⁵⁵ (As will be seen in Chapter 4, this is quite similar to the notion of “dominant position” used in EU law). Below

⁵⁰ Competition Act s 4(1)(b).

⁵¹ N 32 above.

⁵² S 4(1)(a) and 5.

⁵³ S 10.

⁵⁴ S 7.

⁵⁵ S 1(1)(xiv).

35 per cent market share there is no dominance unless the business has market power, so the onus is on the enforcement authorities to prove that the firm has market power.

Unlike the other competition laws examined in this thesis, the South African law prohibits certain types of conduct as abuses, without the explicit requirement that authorities must show an adverse impact on competition, and without any possibility of exclusion on grounds of economic efficiency. Specifically, two types of conduct fall into this category, namely charging an “excessive price” to the detriment of consumers, and refusing to give a competitor access to an “essential facility”.⁵⁶ An excessive price is defined as a price that “bears no reasonable relation to the economic value of that good or services, and is higher than that value.”⁵⁷ An essential facility is defined as “an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.”⁵⁸

The law also prohibits dominant firms from engaging in “exclusionary acts”, subject to the same exception which applies in the case of “non-hardcore” arrangements, i.e. if there are “technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects” of the acts.⁵⁹ An “exclusionary act” is defined as “an act that impedes or prevents a firm entering into, or expanding within, a market”.⁶⁰ Some exclusionary acts are specifically listed: for these the onus is on the business to show that there are gains that outweigh the harm to competition. For those not specifically listed, it is for the Commission to do so.⁶¹ This matter is examined in more detail in Chapter 4.

⁵⁶ S 8(a) and (b).

⁵⁷ S 1(1)(ix).

⁵⁸ S 1(1)(viii).

⁵⁹ S 8(c) and (d).

⁶⁰ S 1(1)(x).

⁶¹ See further Philip Sutherland and Katherine Kemp *Competition Law of South Africa* (looseleaf 2000 et seq-) section 7.11.2.

There is also a separate prohibition against price discrimination by dominant firms which is likely to have the effect of substantially lessening or preventing competition: this prohibition is not subject to an exclusion on grounds of economic efficiency.⁶²

As with arrangements between businesses, conduct that would otherwise be an abuse can be exempted by the Commission, if it contributes to one or more public objectives identifies in the Act.⁶³

2 3 5 Hong Kong

In Hong Kong, the rule on arrangements between businesses is materially identical to Article 101 TFEU, prohibiting arrangements that have the “object or effect” of “preventing, restricting or distorting competition”, subject to the possibility of an exception on the basis of the same four criteria as the EU.⁶⁴ Regarding the abuse provision, however, the wording is different from Article 102 TFEU.⁶⁵ There are two main differences. First, instead of using the concept of “dominant position”, the term “a substantial degree of market power” is used. Secondly, the term “abuse” is qualified: the undertaking “must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong”, i.e. the same competition test as for arrangements. This qualification does not exist under Article 102 TFEU.

2 3 6 Conclusion

In conclusion, although there are differences in form and substance between the competition laws of the five jurisdictions examined in this thesis, they share the following common elements:

⁶² S 9.

⁶³ S 10.

⁶⁴ Hong Kong Competition Ordinance Part 2 Division 1. For a discussion of the EU criteria, see section 2 3 1 above.

⁶⁵ N 64 above Part 2 Division 2.

- a prohibition of, or provisions entitling the authorities to intervene against, arrangements between businesses which have negative effects on competition, subject to exceptions; and
- a prohibition of, or provisions entitling the authorities to intervene against, businesses which have substantial market power (or market dominance) abusing that position. In Canada and South Africa there are express exceptions to these provisions, on grounds of superior performance and economic efficiency respectively, but not in the EU, Australia or Hong Kong.

In Chapter 4, we shall use these common elements as a structure for examining the extent of legal certainty in the competition laws of the five subject jurisdictions.

In this section, we have looked broadly at what competition laws look like, and what they do. We have not looked at why they do it. In other words, what are their objectives? What state of affairs are they seeking to achieve which would or might not pertain in their absence? Any law aimed at regulating business conduct must have certain objectives in mind. The objectives of competition laws will be examined in Section 2.6. First, we must look at what competition, and harm to competition mean, and why competition is valued, since all of the laws examined here are aimed in the first instance at preventing harm to competition.

2.4 What is Competition, and When is it Harmed?

It is notable that “competition” is not defined in the competition legislation of any of the subject jurisdictions. In Australia, the CCA does state that competition means “competition in a market”, but the word “competition” itself is not defined.⁶⁶ Looking at dictionary definitions, “competition” is variously described as:

- “The activity or condition of striving to gain or win something by defeating or establishing superiority over others.”⁶⁷

⁶⁶ S 45(3).

⁶⁷ <https://en.oxforddictionaries.com/definition/competition> (accessed on 31-1-2018)

- “[T]he effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms.”⁶⁸
- “[T]he activities of companies that are trying to be more successful than others.”⁶⁹
- “the process or fact of competing”.⁷⁰

It will be noted that only the third of these definitions refers to competition in the *market*, and more specifically to competition for *customers*. Similarly, Whish and Bailey have described competition as “a striving for the custom and business of people in the market place”.⁷¹ However, there can be competition in the market for things other than customers, and therefore this definition may be too narrow. For example, broadcasters compete with each other to secure rights to screen sporting events, and mobile telephone companies compete with each other to secure radio spectrum. Competition laws address harm to competition in the *purchase* of rights, products or services, not just in their sale, as Whish and Bailey themselves recognise.⁷²

This rivalry between businesses is probably what most people have in mind when they think about competition in the market. Under this rivalry concept, harm to competition occurs when the forces of competition (or rivalry) are dampened, so that competition in the market becomes less intense. But how is a reduction in the intensity of market competition measured? Is any reduction of rivals regarded as relevant? Would it be regarded as a reduction of rivalry if two competitors combine their production facilities to reduce costs, or does one look only at whether the reduction of rivalry increase prices in the market (or reduces quality and/or customer choice)? Clearly, cooperation between businesses is common, and produces economic benefits in many cases, so seeking to prevent all reductions of rivals would be too broad. So where should the line be drawn between cooperation that is permissible, and cooperation that is not permissible? These questions will be looked at further in Section 2 6, where the objectives of competition laws are examined.

⁶⁸ <https://www.merriam-webster.com/dictionary/competition> (accessed on 31-1-2018).

⁶⁹ <https://www.macmillandictionary.com/dictionary/british/competition> (accessed on 31-1-2018).

⁷⁰ <http://chambers.co.uk/search/?query=&title=21st> (accessed on 31-1-2018).

⁷¹ *Competition Law* 4.

⁷² At 640-642.

However, there is an alternative to rivalry as a concept of competition, what Monti calls the “economic freedom” concept of competition.⁷³ Under this concept, competition involves freedom from restraints on commercial conduct, and from restraints on access to markets, whether self-imposed by contract, or through restraints imposed by third parties. Such restraints in themselves constitute harm to competition. It has been argued that this concept of competition was derived from the so-called Ordoliberal school of thought in Germany, which will be discussed in section 2.5:

"The original aim of Articles 81 and 82EC was the protection of individual economic freedom. The Ordoliberal concept of competition valued individual freedom as an end in itself...Restriction of competition under Article 81(1) is understood as the restriction of other market participants' economic freedom and as such is prohibited".⁷⁴

Restrictions of competition under EU competition law have indeed traditionally been interpreted in terms of restrictions on economic freedom, as will be seen in Chapter 4. An exclusive distribution agreement is a good example. Such exclusivity has been held to be a restriction of competition under Article 101(1) TFEU (and its predecessors) because it (a) prevents the supplier from selling into the exclusive distributor's allocated territory and (b) prevents other potential distributors from selling in that territory.⁷⁵ Whether the exclusivity has the effect of making the market less competitive, in the sense of resulting in higher prices (for example), is not considered relevant in this analysis.

One problem of this approach is that if a business is to exercise its economic freedom (or freedom to compete) to the full, this impinges on other businesses' freedom. Freedom to compete cannot therefore be absolute, and is only relative. So where should the line be drawn: when can freedom to compete be legitimately restricted?

⁷³ *EC Competition Law* 25-29.

⁷⁴ Katalin Judit Cseres *Competition Law and Consumer Protection* (2005) 248.

⁷⁵ Cases 56 and 58/64 *Consten & Grundig v Commission* [1966] ECR 299.

Another problem, from a practical point of view, is that many, if not all, contracts contain restrictions on commercial freedom, so seeking to prevent all of these restrictions would be impracticable, and indeed economically disastrous. As Bork has said, such an approach “would require the destruction of all commercial contracts and obligations”.⁷⁶ So if competition in the sense of economic freedom is to be protected, there must be criteria for determining which restrictions are permissible, and which ones are not.

One of the later Ordoliberalists, Erich Hoppman, recognised this problem of “drawing the line”, and suggested that a distinction be drawn between “natural” restrictions on freedom to compete, and “artificial” ones. By “natural” he seemed to mean those that result from the process of competition itself- others would be classified as “artificial”. However, this approach has been criticised on the basis that this distinction is difficult to draw, and cannot be drawn without making a value judgment (such as by reference to the effects of the conduct).⁷⁷

EU competition law has also faced the challenge of distinguishing between acceptable and unacceptable restrictions on economic freedom, as we shall see in Chapter 4.

So far we have looked at harm to competition in the context of arrangements between businesses. But as noted in Section 2.3, the competition laws examined in this thesis also prohibit certain types of unilateral conduct by firms with substantial market power or dominance that are considered harmful to competition. Defining harm to competition in the case of unilateral conduct is even more challenging than in the case of arrangements between businesses, because competition itself is a cyclical and self-destructive process: any competition has winners and losers, and winners enjoy periods of substantial market power, often lengthy. How is one to encourage firms to compete vigorously, even aggressively, while at the same time preserving competition? We shall return to this conundrum in Section 2.6.

⁷⁶ Robert H Bork *The Antitrust Paradox: a Policy at War with Itself* (1978) 59.

⁷⁷ For a more detailed summary of Hoppman’s approach, and the criticisms of it, see Sutherland and Kemp *Competition Law of South Africa* 1.7.3; Peter Behrens “The Consumer Choice Paradigm in German Ordoliberalism and its Impact upon EU Competition Law” Europa-Kolleg Hamburg Discussion Paper 1/14 March 2014.

2 5 Why is Competition Valued?

As we saw in Section 2 3, all of the competition laws examined in this thesis start from the principle that harm to competition (whether in the sense of rivalry or in the sense of economic freedom) should be avoided. This implies that competition is regarded in principle as a value to be protected. Why is competition valued? Or more precisely, why is it regarded as important (in principle) to prevent harm to competition? There are both political and economic reasons as to why competition can be valued. We look at each in turn.

According to Gerber, the prime concern of Ordoliberalism, which it believed competition law should address, was private economic power, because it could ultimately lead to political power.⁷⁸ Competition was valued for its propensity to undermine private economic power. Ordoliberal scholars believed that for the risk of private economic power to be minimised, individual freedom needed to be protected as a value in itself. They believed that laws were necessary to guarantee individual businesses their economic freedom, where that freedom was threatened by the private economic power of others. Where private economic power did arise, the businesses in question would be compelled to act “as if” they were in a competitive market. So the primary reason why competition was valued by the Ordoliberals was political, not economic.

It was not just the German and EU competition laws which were influenced by the spectre of private economic power and such power being used to political ends: this was very much a concern when US antitrust law was introduced.⁷⁹ More recently, it seems also to have been one of the concerns behind the introduction of the South African Competition Act in 1998. The purposes of the Act include:

⁷⁸ David J Gerber *Law and Competition in Twentieth Century Europe* (1998) 250-253.

⁷⁹ David J Gerber *Global Competition Law, Markets and Globalization* (2010) 123. For a detailed analysis of the values that have been attributed to competition in the US, and the goals that US antitrust law has been used to achieve, see Maurice E Stucke “Reconsidering Antitrust’s Goals” 53 *BCLRev* 551 (2012).

- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.⁸⁰

Competition is more commonly valued nowadays, at least publicly, for its perceived beneficial *economic* effects, that is, its ability to achieve economic efficiency or consumer welfare. The starting point for looking at the economic benefits of competition is what is normally called neo-classical economic theory, under which markets are considered to work most efficiently in terms of allocating society's resources ("allocative efficiency") where there are many competitors, none of which can influence the market price, and least efficiently where there is a monopoly. The theory is that a rational, profit-maximising business will continue to expand production for as long as it is profitable to do so, that is until the price decreases to such a level as to equal the marginal cost of producing an additional item: this state of equilibrium is called "perfect competition". By contrast, under monopoly, output is lower and prices higher. In these circumstances, some consumers who would have bought the product at a lower price that would still have been above the cost of producing it will stop purchasing altogether. These consumers will now purchase other products from which they will not have received the same benefit. This loss is called the "deadweight loss" of monopoly, and the market is accepted to be allocatively inefficient. It follows that the more competitors there are, the more efficient the market is, and vice-versa.⁸¹

A second type of efficiency according to the perfect competition model is productive efficiency: production costs are lower under perfect competition because when price reaches a point where it equals cost, the only way in which a producer can make a profit is by reducing cost. This saves society's resources, the resultant savings being released for other valuable uses. Monopolists by contrast, the theory goes, do not have this incentive to cut costs and therefore costs may be higher under monopoly, even although the resources are used to make the products that consumers want,

⁸⁰ S 2.

⁸¹ Simon Bishop and Mike Walker *The Economics of EC Competition Law* (2010) Chapter 1.

i.e. the market is allocatively efficient (this productive inefficiency is sometimes called “X-inefficiency”).⁸²

While the perfect competition model provides a useful basic insight into the relative potential social welfare effects of monopoly versus competition, it is unrealistic to expect that such a model could ever be achieved in real life, and even if it was, perfect competition might be socially undesirable. Some of the reasons are as follows:

- It does not take into account the dynamic nature of markets. Perfect competition is a situation rather than a process. It has been described as “a market situation which, although it is a result of the free entry of formerly competing firms, has evolved to the point where no further competition within the industry is possible...both perfect competition and monopoly are situations in which the possibility of competitive behaviour is ruled out by definition”.⁸³ In real life, monopoly may be no more than a stage in the competition process. A monopoly may arise due to innovation, which is an inherent aspect of competition: such monopolies will disappear eventually as other firms start imitating the innovator, or make new innovations that compete with those of the initial innovator.
- For perfect competition to exist, a number of conditions must be present, which are highly unlikely to be satisfied simultaneously in any real market: the number of buyers and sellers must be large, products sold must be homogeneous, suppliers and consumers must be rational and have perfect information about current and future market conditions, and there must be no barriers to entry.
- The “X-inefficiency” theory overlooks the fact that monopolies, like any other business, have an incentive to maximise profits by increasing turnover and cutting costs, and overlooks the discipline exerted by potential entrants (except where the monopoly is a statutory one) and shareholders. As one commentator states: "Monopolists favour profits

⁸² N 81 above.

⁸³ Roger J Van den Bergh and Peter D Camesasca *European Competition Law and Economics 2* ed (2006) 63.

just like any other, thus cost-reducing or demand-enhancing innovation is in their interest as well".⁸⁴

A third type of efficiency which competition is argued to generate, albeit not derived from the theory of perfect competition, is called dynamic efficiency. The argument is that competition tends to drive businesses to be more innovative in terms of bringing new products and services to the market. Monopolies are said to have less incentive to do so. This theory has been strongly criticised. It has been argued that monopoly profits are necessary to engage in research and innovation, that the prospect of monopoly profits is necessary to drive innovation, and that there is no need for public intervention if such monopoly profits are realised because this will attract new entry that will erode those profits (so-called "Schumpeter" theory).⁸⁵

There does appear to be current empirical evidence suggesting that monopoly, or at least a strong market position, is not inconsistent with dynamic efficiency. When one looks at businesses that are alleged to have a dominant position or a monopoly in certain segments of the "high-tech" sector, such as Google or Amazon, it is hard to find any basis for criticising them for not being innovative. It would seem unwise to have a public policy which discourages monopoly. The prospect of enjoying at least a temporary monopoly and monopoly pricing is what drives innovation in the pharmaceutical sector (for example), and without that prospect, the initial research and development costs involved in bringing new products to the market would not be justified. Indeed, the policy need to accept monopoly for a temporary period to drive innovation is what underlies the patent system. Moreover, the potential threat of losing a monopoly or dominant position, once gained, due to innovation by other firms, acts as a constraint on the conduct of the incumbent: another reason not to discourage the acquisition of monopoly *per se*.

Alternative views of how markets work, and should work, were put forward by the so-called Harvard School and (later) the Chicago School in the US.⁸⁶

⁸⁴ Adi Ayal *Fairness in Antitrust: Protecting the Strong from the Weak* (2014) 48.

⁸⁵ Whish and Bailey *Competition Law* 6.

⁸⁶ For a more detailed summary of the views of the Harvard School and Chicago School see Van den Bergh and Camesasca n 83 above 67-85.

The Harvard School's views were developed in the US in the late 1930s and early 1940s and remained the dominant force in US antitrust thinking until the 1970s.⁸⁷ The Harvard School believed that the structure of an industry (such as the degree of concentration and barriers to entry) determined the conduct of businesses within the industry, which in turn determined the performance of the industry (in terms of delivering benefits to consumers). They rejected perfect competition as a policy goal and put forward the alternative of "workable" competition: essentially a set of structural, conduct and performance criteria against which industries could be measured and fulfillment of which determined industry performance.⁸⁸ The Harvard School accepted a relatively high degree of public intervention, including through antitrust law, to achieve workable competition.⁸⁹

The Chicago School's views were radically different. They started from the same premise as the neo-classicist price theorists, namely that businesses were rational profit maximisers. However, they viewed competition as a dynamic process and therefore believed that monopoly was not to be feared as high profits would be eroded by new entry. Even if price competition was reduced, other forms of competition would replace it. Conduct aimed at maximising profits and which is economically efficient should be lawful, and the sole objective of antitrust law should be economic efficiency.⁹⁰

According to Van den Bergh and Camesasca, the Harvard School has had a strong influence on EU competition law, as exemplified by its concern about concentration and the conduct of dominant firms (although, as noted earlier in this section, Ordoliberalism in Germany- which was also concerned with these issues- also had an important impact), whereas the Chicago School has had a greater influence on US antitrust law.⁹¹ This may be one of the reasons why US antitrust law is generally less interventionist than EU competition law. Nevertheless, the central tenets of the

⁸⁷ N 86 above 67.

⁸⁸ N 86 above 70-73.

⁸⁹ N 86 above 75.

⁹⁰ N 86 above 79.

⁹¹ N 86 above.

Chicago School- that markets are robust and self-correcting, and that barriers to entry outside Government regulation are rare- have been strongly criticized by certain US academics.⁹²

In spite of these differing approaches, there does seem to be a general consensus nowadays that competition has an important role to play in generating markets which are economically efficient. As we shall see in section 2.6, economic efficiency is a common objective of competition laws in the subject jurisdictions.

Leaving aside economic efficiency, a second economic value attributed to competition is consumer welfare.⁹³ The theory is that competitive markets are better for consumers than monopolistic ones, because suppliers fight harder with each other to supply better products, or the same products at lower prices. Although increased consumer welfare may seem like an economic value of competition, there is a political dimension too. Everyone is a consumer, and governments and regulators, naturally, like to be popular. For governments, a consumer welfare agenda, including competition law as a weapon in their armoury, can help attract votes and ongoing popularity. Likewise, regulators can demonstrate that they are producing value for their publicly-funded budgets by saving consumers' money, or achieving other positive consumer outcomes. It is easier for governments and regulators to "sell" competition law to the public on the basis of consumer benefits, than on its propensity to improve the overall efficiency of the economy.

It is important to note that these values are not always consistent with each other. For example, protecting economic freedom for its own sake may be economically inefficient and against the consumer's interest. Cooperation between businesses with contractual restraints, such as exclusive distribution agreements, may result in efficiencies that can be passed on to consumers. Similarly, cooperation may result in gains in productive and dynamic efficiency, even if consumers lose out in the form of higher prices. As Jones and Sufrin state:

⁹² Eleanor M Fox and Lawrence A Sullivan "Antitrust- Retrospective and Prospective: Where are we coming from? Where are we going?" (1987) 62 *New York LR* 936, 956-959.

⁹³ See for the EU and US respectively the discussion in Victoria Daskalova "Consumer Welfare in EU Competition Law: What Is It (Not) About?" *The Competition Law Review* Vol 11 Issue 1 133 (July 2015); Joshua D Wright and Douglas H Ginsburg "The Goals of Antitrust: Welfare Trumps Choice" *Fordham Law Review* Vol 81 Issue 5 (2013).

"If competition policy is concerned with consumer welfare rather than social welfare it will be concerned with the transfer of surplus from producers to consumers. However, social welfare may not be maximised by such a transfer. In other words, prohibiting conduct and transactions which reduce consumer welfare may not allow efficiency gains which maximise social welfare".⁹⁴

These potentially conflicting values should be addressed in designing competition law, to ensure it is applied in a consistent and coherent fashion.

2 6 Objectives of Competition Laws

As noted in Section 2 3 above, in defining the essence of competition law, it is not sufficient to simply describe the common characteristics of competition laws: it is necessary to “dig deeper” and look at their objectives, i.e. what state of affairs they are seeking to achieve (or avoid). Given that competition laws are designed to regulate business conduct, and prevent certain types of business conduct, it should be possible to draw a correlation, or identify a causal link, between the business conduct which is sought to be prevented, and certain harm to society.

There has been a vigorous debate (particularly in the US) about what the objectives of competition law *is, are or should be*. As one author puts it: “[t]he literature on the goals of competition law has become a recurrent and rapidly expanding business”.⁹⁵ This dissertation does not engage in this debate or seek to advance the literature on this issue. As regards the “is or are” this is a question of statutory construction of an *existing* statute, which may include a study of the legislative history of the statute in question (see for example the Bork versus Lande debate regarding US antitrust law, which we shall refer to later in this section). By definition, the interpretation of a statute is a matter of national law, and is outside the scope of this paper. As regards the “should be”, this

⁹⁴ *EU Competition Law* 12.

⁹⁵ See Ioannis Lianos “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper 3/2013, and the literature therein cited. For a US perspective see Maurice E Stucke “Reconsidering Antitrust’s Goals” 53 *BCLRev* 551 (2012).

implies a national (or, in the case of the EU, supranational) public policy decision as to what the objective or objectives of the competition law should be. This dissertation takes no view on this issue in itself.

Instead, this dissertation takes the perspective of a jurisdiction which is contemplating introducing a competition law, or amending an existing one, to provide sufficient legal certainty- certainty that does not exist at present under existing competition laws, as we shall argue in Chapter 4. For reasons that will be explained in Chapter 7, it is inevitable in practical terms that most jurisdictions must have competition laws. The question is therefore *what* types of arrangements and conduct to prevent, *why* they should be prevented, and *how* they should be prevented. The objective or objectives of competition law will be of some relevance in assessing the *why* of this question, although we will argue that the objectives are to some extent a *fait accompli* in practice, due in part to the widespread international condemnation of cartels.

Our objective in this section is therefore merely to demonstrate that there are several objectives that could be pursued by a competition law, not all of which are consistent with each other.

Given the perceived values of competition (in the sense of a rivalrous process) as described in Section 2 5 above, it may seem self-evident that the primary objective of competition laws should be to protect competition, by preventing business conduct which harms competition. But as we noted in section 2 4 this section, prohibiting all commercial agreements which reduce rivalry without qualification may lead to undesirable policy outcomes. This is also the case if the term "competition" is used in the sense of economic freedom.. It would be over-simplistic, and even incorrect, to think that competition laws are there to protect competition in itself.

Under the “economic freedom” approach, Hoppman believed that competition in the form of economic freedom would always produce broader economic benefits.⁹⁶ However, it is now clear that restrictions on economic freedom are sometimes justified on grounds of perceived economic benefits, such as consumer welfare. Indeed, EU competition law permits restrictions on economic

⁹⁶ Sutherland and Kemp *Competition Law of South Africa* 1.7.3.

freedom to achieve broader economic benefits. Similarly, under the rivalry approach, any cooperation between businesses arguably reduces rivalry. However, cooperation between businesses, like restrictions on economic freedom, can be economically efficient, as is expressly recognised in the competition laws of Australia, Canada and South Africa. If efficiency is the value, or one of the values, of competition, it would seem perverse to prevent agreements which achieve efficiency. The same applies if consumer welfare is a value attached to rivalry: cooperation between businesses can produce consumer benefits in many cases. Whether the economic freedom or rivalry approach is adopted, therefore, not all restrictions on cooperation can sensibly be prevented. The task is therefore to determine which ones should be prevented and which ones should be allowed.

In the case of arrangements between businesses, one method for “filtering” out harmless cooperation is to lay down some kind of *de minimis* or “safe harbour” provision, so that harm to competition that is considered minor is excluded from the “net” of the competition law. For example, arrangements between competitors whose combined turnover or market share does not exceed certain levels can be excluded, as they are under EU competition law, for example.⁹⁷

Another, more fundamental, method is to ask why you value competition, and see if cooperation can do any better. For example, if competition is valued because it generates economic efficiency, arrangements that improve overall economic efficiency could be allowed. Under this approach, the different efficiencies and inefficiencies (productive, dynamic, allocative) resulting from the arrangement would be assessed, and if in net terms the balance was positive, the cooperation would be allowed. For example, a merger might produce allocative inefficiency through price increases, but produce productive or dynamic efficiencies which far exceed the losses in allocative efficiency, and be allowed on that basis. This is often called the “total welfare standard”.⁹⁸

⁹⁷ See Communication from the Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” OJ C291/1 of 30.8.2014.

⁹⁸ Louis Kaplow “On the Choice of Welfare Standards in Competition Law” Harvard John M Olin Center for Law, Economics and Business Discussion Paper No 693 05/2011, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_693.pdf (accessed on 27-01-2018).

Similarly, it was noted that another value for which competition is embraced is its propensity to generate positive outcomes for consumers. As with economic efficiency, it is accepted by some jurisdictions such as the US that consumers can often benefit from collaboration (i.e. a reduction in competition). As will be seen in Chapter 4, the EU Commission has also stated that consumer welfare is the objective of EU competition law, although this view has not yet been expressly endorsed by the European Courts. So arrangements that produced better consumer outcomes could be allowed. This is often called the “consumer welfare standard”.

In competition regimes that value economic efficiency or consumer welfare, therefore, competition law (as applied to arrangements as opposed to unilateral conduct) can perhaps therefore best be viewed as being based on a presumption. The presumption is that competition (as opposed to collaboration) is the best way of generating economic efficiency, or consumer welfare, unless it can be shown that collaboration (i.e. reducing competition) can produce these benefits more quickly or effectively. Insofar as arrangements between businesses are concerned, competition law in these regimes could therefore be defined as laws that prohibit arrangements between businesses that harm (or at least do not improve) economic efficiency or consumer welfare (as the case may be).

However, it should be noted that economic efficiencies and consumer welfare are both difficult to measure, and in the case of consumer welfare there is the added difficulty that there is no consensus on what the term means: as Stucke notes, it “means different things to different people”.⁹⁹

Whether economic efficiency or consumer welfare is the chosen objective, an assessment of the effects or likely effects of the arrangements is required, and, as will be seen in Chapter 4, this can be a very complex task. Subjective judgments are involved, and this can lead to a great deal of uncertainty for businesses that are trying to assess whether their arrangements comply with the law. As Ezrachi notes:

⁹⁹ “Reconsidering Antitrust’s Goals” 570-591. For the difficulties of defining “consumer harm” see also Ioannis Lianos “Some reflections on the Question of the Goals of EU competition Law” CLES Working Paper Series3/2013 at 15-23.

“Economic theory in and of itself is not monolithic. While neoclassical economics is often presented as the only strand of economic theory, it is one of several strands. Naturally, diverging theories affect one’s perception of the competitive process, the relevant competition forces, one’s assumptions regarding market participants, and the role of institutions in antitrust enforcement”.¹⁰⁰

Many competition laws also allow other public policy values to justify arrangements that harm competition, so that competition is, at most, a qualified value. For example, as we shall see in Chapter 4, in the EU and Australia, arrangements that harmed competition have nevertheless been allowed on grounds of maintaining employment levels, or protecting the environment. In South Africa, the competition law provides that arrangements which harm competition and are not justified by economic efficiency can still be exempted if they produce certain other public benefits, such as promoting “the ability of small businesses, or firms controlled or owned by historically-disadvantaged persons, to become competitive”.¹⁰¹ So such other values can be regarded as more important than competition.

As far as arrangements between businesses are concerned, it is therefore over-simplistic, and perhaps even misleading, to define competition law as a law that protects competition. It is perhaps more accurate to define it as a law determining the circumstances in which competition may be harmed, to achieve other public policy objectives which cannot be achieved, or can only be achieved less effectively, through competition.

So far, we have been considering harm to competition caused by arrangements between one or more businesses. But what about harm to competition caused by firms with substantial market power or market dominance? Prohibiting such conduct is problematic, because, as noted briefly in Section 2 4, competition is by nature a self-destructive process, in that competition by definition produces winners, which in turn reduces competition. If competitors are to compete vigorously,

¹⁰⁰ Ariel Ezrachi “Sponge” *Journal of Antitrust Enforcement* Vol 5 Issue 1 (April 2017) 49.

¹⁰¹ Competition Act s 10.

which competition laws are supposed to encourage, the natural consequence is the exclusion of weaker competitors. So when are the actions of the winner reprehensible? As one author puts it:

“Competition assumes, by definition, that enterprises attempt to “win” the battle of the marketplace – that is, to cause economic harm to competitors. The fact that conduct is intended to cause such harm and that such harm results cannot, therefore, be the criterion for abusive conduct; that criterion must be sought in the characteristics of the conduct or in its other effects.”¹⁰²

In essence, therefore, since successful competitive unilateral conduct excludes competition, a provision which targets exclusionary abuse requires an assessment of what *type* of conduct is considered unfair: in effect, a “code of conduct” for firms perceived to be powerful, and a requirement for them to act as a kind of “benevolent dictator” to accommodate less powerful rivals and help them, to a greater or lesser extent, to gain a foothold or survive in the market.¹⁰³ For example, EU case law has held that exclusive contracts with customers, whereby they agree to purchase their requirements from the dominant firm, and rebates conditional upon them buying all or the bulk of their requirements from the dominant firm, may be regarded as an abuse, even if the customer has agreed to, or even proposed, the exclusivity to get a lower price (although it is still open for the dominant company to demonstrate that such practices have efficiencies which outweigh the harm to competition and which benefit consumers, in which case the conduct will not be regarded as abusive).¹⁰⁴

Another issue is the timescale over which the dominant firm’s conduct should be viewed. It may be that a successful company excludes all its rivals, but if that fact causes prices to rise, this may

¹⁰² Gerber *Law and Competition* 313.

¹⁰³ Bork opposed this approach, arguing that firms which excluded competitors through means other than predatory pricing or mergers must by definition have done so through superior efficiency, and any unilateral conduct other than predatory pricing should be allowed on that basis. See *The Antitrust Paradox* 164-165.

¹⁰⁴ Case C-23/14 *Post Danmark*, not yet reported, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-23/14> ; Case C-413/14 *Intel v Commission*, not yet reported, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-413/14>.

well encourage new players to enter the market. Under a Chicago School approach (exemplified by Bork), which has had much influence in the US as we have seen,¹⁰⁵ such conduct would be permitted, but under the influence of the Harvard School, the EU authorities have been less tolerant of such conduct, and taken a shorter- term view.

A good example of the difference between the US approach and the EU approach was the *Microsoft* case.¹⁰⁶ Whereas the US is reluctant to interfere with the property rights of even powerful firms under antitrust law, the EU is more ready to do so. After a lengthy investigation, the European Commission found that Microsoft had abused its dominant position by refusing to supply “interoperability information” to its competitors and to allow them to use such technology to develop and market operating systems for certain types of server computers. The Commission imposed a (then record) fine of 497 million euros on Microsoft, and ordered it to draw up detailed descriptions of the communications protocols by which Microsoft’s operating systems communicate with each other and then to license competitors to use those specifications to develop their own products.

Forrester criticised this approach and contrasted it with the US approach:

“The system of free competition in the market, the system that rewards success and punishes failure, becomes blurred by an excessive degree of paternalism. The US Supreme Court in *Trinko* was unequivocal in condemning this approach and held that ‘enforced...sharing requires antitrust courts to act as central planners, identifying the proper price, quantity and other terms of dealing- a role for which they are ill-suited’.”¹⁰⁷(citation omitted).

Similarly, and more recently, the EU Commission decided that Google had abused its dominant position in the search engine market by favouring its own comparison shopping service in search

¹⁰⁵ N 86 above.

¹⁰⁶ Case T-201/04 *Microsoft v Commission* [2007] ECR II 3601.

¹⁰⁷ Ian S Forrester “Article 82: Remedies in Search of Theories?” 28 *Fordham Int’l LJ* 919, 951 (the author of this article acted for Microsoft in the EU case).

results, and fined Google 2.42 billion euros for doing so- a record EU fine for abuse of dominance.¹⁰⁸ And yet the US Federal Trade Commission (FTC) found no reason to object to Google's same practices a few years earlier.¹⁰⁹

It is interesting to compare and contrast the two authorities' comments on Google's conduct. The EU Commission stated that Google "denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation".¹¹⁰ The FTC, on the other hand, stated that Google adopted the practice "to improve the quality of its search results, that any negative impact on actual or potential competitors was incidental to that purpose" and that the practice "likely benefitted consumers".¹¹¹

The current EU Competition Commissioner, Ms Margrethe Vestager, has openly acknowledged that the EU approach to regulating dominant firms is different from the US approach. She has been quoted as saying:

"We want free markets, but we understand the paradox of free markets, which is that we sometimes have to intervene. We have to believe that it's not the law of the jungle but the law of democracy that works...I never feel more European than when I am in the States. Because we are different".¹¹²

The European Courts have also often said that dominant businesses have a "special responsibility" not to let their conduct impair "genuine" competition.¹¹³ This implies that when a business is

¹⁰⁸ EU Commission Press Release IP/17/1784 of 27 June 2017 "Antitrust: Commission fines Google [euros] 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service".

¹⁰⁹ "Statement of the Federal Trade Commission regarding Google's Search Practices *In the Matter of Google Inc*" FTC File Number 111-0163 January 3 2013.

¹¹⁰ N 108 above.

¹¹¹ N 109 above.

¹¹² "Vestager looks again at Apple tax affairs as EU takes big tech to task" Financial Times 8 November 2017.

¹¹³ Case 322/81 *Michelin v Commission* [1983] ECR 3461.

dominant, it has "special" obligations in terms of competition which do not apply to non-dominant businesses. But this raises at least four questions:

- As a matter of policy, is it appropriate that extra obligations be imposed on a dominant business, especially where such dominance has been won by competing more effectively or efficiently than its competitors?
- Does imposing such extra obligations send the wrong message and discourage businesses from acquiring dominance, thereby inhibiting competition and the achievement of the economic benefits that competition brings?
- Is it *worth* the cost of imposing and enforcing such extra obligations, in circumstances where the dominance may be short-lived (as is particularly the case in technology markets, for example)
- If any extra obligations are to be imposed, what should these obligations be? In other words, what conduct should be considered as an abuse of dominance (or in US parlance, "monopolization")? This involves a similar problem that arises (as we saw) with agreements, namely where to draw the line between conduct which is permissible and conduct which is prohibited.

The answers to such questions may vary from jurisdiction to jurisdiction, depending on their precise economic, historical and cultural circumstances. For example, small economies may be more prone to concentrated markets and even monopolies, and this may lead to greater scrutiny of, and a stricter approach to, conduct by dominant companies that negatively affects competition. The same applies to markets where barriers to entry are high, and where there is limited potential for dominant positions to be eroded by new market entry. The endurance of dominance (and the ability of markets to "self-correct") may also be affected by local consumer preference, language barriers, and access to capital for new investment to challenge the dominant firm.

The subject jurisdictions have approached the challenge of identifying what types of conduct to prohibit in different ways in their competition laws. It is difficult to discern from these laws any consistent philosophy in any of the subject jurisdictions as to the extent to which dominant firms should be regulated by competition law. For example, while the competition laws in most of the

subject jurisdictions (Australia, Canada and Hong Kong) are aimed only at *exclusionary* abuses, i.e. conduct that harms consumers *indirectly* through harming competition, the competition laws of the EU and South Africa also catch *exploitative* abuses, i.e. conduct that harms consumers *directly* through, for example, imposing excessive prices or unfair trading terms. So in this respect, the laws of the EU and South Africa concerning unilateral dominant firm conduct are more intrusive than the other subject jurisdictions. On the other hand, however, for most types of exclusionary abuse, Canada and South Africa have *express* statutory efficiency defences to conduct which would otherwise constitute abuses (except in the latter case for excessive pricing and refusal to supply access to an essential facility): this is not the case in the EU, Australia and Hong Kong. It might suggest a generally lighter touch to *exclusionary* abuses in Canada and South Africa than in the other subject jurisdictions.

Clearly it is desirable (although we shall argue later insufficient), in the interests of clarity, that competition laws that rely on general terms such as “monopolization” or “substantially lessening competition” explicitly state what their objective or objectives are. If there is more than one objective, they must either be consistent with each other, or it must be clear which one prevails in the event of conflicts. A clear statement of objectives helps guide the enforcement authorities and courts in interpreting and applying the rules, and businesses in assessing what types of arrangement and conduct are permitted and prohibited.¹¹⁴ The lack of clear objectives, combined with a law drafted in general terms (which many competition laws are) means that competition law can be used to achieve different objectives, not all of which are consistent with each other, such as the promotion of economic efficiency, promotion of consumer welfare, promotion of the interests of small and medium-sized enterprises, and avoiding market concentration. Moreover, these factors also mean that the objectives pursued through the enforcement of competition laws can vary over time, depending on the policy preferences of those in charge of enforcement and the courts.¹¹⁵

¹¹⁴ Maurice E Stucke “Reconsidering Antitrust’s Goals” *BCLR* Vol 53 No 2 (2012) 551.

¹¹⁵ N 114 above 559-566. For an analysis of the different objectives which have been pursued under EU Competition Law see Ioannis Lianos “Some Reflections on the Question of the Goals of EU Competition Law” CLES Working Paper Series 3/2013.

In the US context, the lack of clearly- stated objectives has led some authors to examine the history of the legislation in an effort to discern Congress's intention in enacting the legislation. Using this approach, Bork argued that the exclusive objective of antitrust law is (and should be) the pursuit of economic efficiency.¹¹⁶ However, Lande disagreed with Bork's interpretation of the legislative history of the Sherman Act, and argued that this history showed that Congress's primary objective was to prevent wealth transfers from consumers to producers, i.e. to avoid consumers having "to pay prices above the competitive level".¹¹⁷

In some jurisdictions the competition laws state their objectives, but in others they do not. In the EU (as in the US, as noted above), for example, the objective or objectives of the competition rules themselves (as opposed to the objectives of the EU as a whole) are not expressly stated. Although the EU Commission has stated that the objective of EU competition law is to promote consumer welfare,¹¹⁸ this view has not yet been clearly endorsed by the European Courts.

In Hong Kong, where the competition law has been largely modelled on EU competition law, the long title of the Competition Ordinance states broadly what the law does, but does not state why it does it:

"An Ordinance to prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit mergers that substantially lessen competition in Hong Kong..."

¹¹⁶ Robert H Bork *The Antitrust Paradox* (1978).

¹¹⁷ Robert H Lande "Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged" 50 *Hastings LJ* (1999) 871 and "Proving the Obvious: the Antitrust Laws were passed to protect Consumers (not just to increase Efficiency)" 50 *Hastings LJ* (1999) 959.

¹¹⁸ Neelie Kroes (ex-EU Competition Commissioner), speech at Fordham Corporate Law Institute, 23 September 2005.

In Australia, the objective is stated to be “to enhance the welfare of Australians through the promotion of competition and fair trading...”¹¹⁹ It is not clear from this wording whether “welfare” is being referred to in the sense of total welfare, (i.e. overall economic efficiency), consumer welfare, or other types of welfare. However, given that agreements and conduct which harm competition (and thereby consumers) can be authorised if they produce efficiencies that outweigh the harm to competition,¹²⁰ it seems that it has been interpreted in the sense of total welfare. That said, other public policy interests, such as maintenance of employment and environmental protection, can still take precedence over harm to competition in some cases, as was noted in Section 2 3.

The competition laws in Canada and South Africa each list a number of objectives. In Canada, the Competition Act states:

“The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”¹²¹

It can be seen that there is one direct objective- “to maintain and encourage competition in Canada”- and four indirect objectives which are presumed to flow from the direct objective.

The problem with these indirect objectives is that they do not all relate clearly to competition, and to a certain extent they conflict with each other. Each of these objectives is presented as being a result of maintaining and encouraging competition. However, assuming that competition means the process of rivalry in the market place, only the first and the last – relating to economic efficiency and consumer welfare respectively– would usually be accepted as resulting from

¹¹⁹ S 2.

¹²⁰ See Chapter 4 section 4 3.

¹²¹ Section 1.1.

promoting and maintaining competition. Would maintaining and promoting competition within Canada expand opportunities for Canadian participation in world markets? Traditionally, the creation of “national champions” (i.e. lessening competition in national markets) has been used by some countries as a tool to compete in international markets. However, Porter has argued that competitive markets at home result in leaner and fitter companies that are better equipped to compete effectively in overseas markets, and this view may have influenced the Canadian policy-makers in setting the law's objectives:

"A nation's competitiveness depends on the capacity of its industry to innovate and upgrade. Companies gain advantage against the world's best competitors because of pressure and challenge. They benefit from having strong domestic rivals, aggressive home-based suppliers, and demanding local customers".¹²²

It is difficult to see how maintaining and promoting competition ensures that small and medium-sized enterprises have an equitable opportunity to participate in the economy (and what is “equitable” is subjective). Successful competitors tend to grow bigger, and bigger firms may enjoy cost efficiencies due to economies of scale, enabling them to set prices at levels which SMEs cannot match and which may even drive them out of the market. If this happens, have SMEs had an “equitable opportunity to participate?” There is a risk that such an objective could be used to give SMEs a “helping hand” at the expense of their bigger rivals, perhaps for political reasons, rather than let the competitive process take its natural course. Indeed, the temptation to use competition law to promote the interests of SMEs exists even in jurisdictions whose competition laws do not expressly contain such objectives. For example, under EU competition law, it has been held that, in certain circumstances, dominant companies may have to keep their prices at a sufficiently high level to ensure that smaller rivals can compete.¹²³

Several commentators have argued that competition laws should not be used to promote the interests of SMEs, and that if this is a chosen policy objective, it should be pursued through means

¹²² Michael E Porter “The Competitive Advantage of Nations” *Harvard Business Review* March-April 1990 73.

¹²³ See the discussion of this issue in Jones and Sufrin *EU Competition Law* 6 ed (2016) 402-407.

other than competition law, such as through the tax system, or state funding. For example, Posner has said:

“Antitrust enforcement is not only an ineffectual, but a perverse, instrument for trying to promote the interests of small businesses as a whole. Antitrust objectives and the objectives of small business people are incompatible at a very fundamental level. The best overall antitrust policy from a small business standpoint is no antitrust policy. By driving a wedge between the prices and costs of the larger firms in the market...monopoly enables the small firms to survive even if their costs are higher than that of the large firm”.¹²⁴

In addition to the “disconnect” in the Canada Competition Act between the direct objective and two of the indirect objectives, the indirect objectives themselves appear to conflict with each other to some extent. Competition promotes economic efficiency (one of the indirect objectives) but, as discussed above, economic efficiency and the interests of SMEs (another indirect objective) may not be compatible. Large efficient firms can undercut SMEs on price, thereby inflicting harm on them, but this helps “provide consumers with competitive prices”- another one of the indirect objectives.

South Africa has adopted the same direct objective and the same indirect objectives as Canada, and therefore the same comments above regarding the “disconnect” between the direct objective and two of the indirect objectives, and conflict between the indirect objectives apply.¹²⁵ In addition, South Africa has added two further indirect objectives:

- “to promote employment and advance the social and economic welfare of South Africans”, and
- “to promote a greater spread of ownership, in particular to increase the ownership stakes of historically-disadvantaged persons”.

¹²⁴ R A Posner *Antitrust Law* 2 ed (2001) 25.

¹²⁵ Competition Act s 2.

It is not clear what the perceived link is between promoting and maintaining competition, on the one hand, and promoting employment and advancing social welfare, on the other. On the one hand, competition may drive the introduction of new products and services that generate employment opportunities. On the other hand, however, competition could drive organisational efficiencies, which might in turn lead to job losses. It is also unclear how promoting and maintaining competition promotes a greater spread of ownership- unless a Harvard School- style view is taken that workable competition requires de-concentrated markets. It is even more difficult to see how competition could “increase the ownership stakes of historically-disadvantaged persons”. Sutherland and Kemp have attempted to reconcile some of these apparently conflicting objectives, for example stating that:

“Competition law should not prop up inefficient firms for the sake of increasing the number of firms in a market, as that does not enhance rivalry in any real sense. Competitors should be protected only if it is in the long-term interest of competition. Ultimately, however, it is competitors that compete; and the South African statute requires that special consideration should be given to the ability of incipient small and medium enterprises, and firms owned by historically-disadvantaged persons, to become competitors on their merit”.¹²⁶

Conflicting objectives increase the level of legal uncertainty, as certain cases in Canada and South Africa demonstrate- these will be discussed in Chapter 4. In Canada, for example, in the *Superior Propane* case,¹²⁷ the court had to consider not only whether the proposed merger would produce efficiencies which outweighed the negative effects of the harm to competition, but also whether or not it would “allow SMEs an equitable opportunity to participate in the economy”. There is no guidance on how one factor should be weighed against the other, and therefore this is a subjective and arbitrary exercise.

In South Africa, the difficulty which the SME objective can cause in the interpretation of the Competition Act is well-illustrated by the *Sasol v Nationwide Poles* case.¹²⁸ This case concerned

¹²⁶ *Competition Law of South Africa* 1.10.

¹²⁷ *Canada (Commissioner for Competition) v Superior Propane Inc* 2003 FCA 53 (Jan 31 2003).

¹²⁸ Case 49/CAC/Apr05.

the interpretation of section 9 of the Act, which prohibits a dominant firm from engaging in price discrimination if such discrimination (*inter alia*) is “likely to have the effect of substantially preventing or lessening competition” (the SLC test). In this case, Nationwide Poles, a supplier of wooden poles for fencing, had complained to the Tribunal (its complaint to the Commission having been rejected) that Sasol, which supplied it with creosote for the poles, had discriminated against it (contrary to section 9) by offering its larger rivals lower prices. The price differential was not contested: the main issue was whether this differential satisfied the SLC test.

The Tribunal took the view that the SLC test, in the context of section 9, had to be read in the context of the SME objective in section 2:

“In short, what the legislature wanted in section 9(1)(a) was to create a threshold, but a low one that related not to competitive *harm* but to competitive *relevance*. The legislature in availing small firms to bring cases and to switch the onus to the dominant firm did not want them faced with an evidential burden they could never meet.”¹²⁹

The Tribunal upheld the complaint on this basis. However, the Competition Appeal Court disagreed, holding that the SLC test had to be interpreted in the light of its natural meaning, and that the complainant had not established that the SLC test had been satisfied.¹³⁰

2 7 Conclusions

This Chapter has shown that:

- there is no commonly-accepted definition of competition law;
- the ability of markets to “self-correct” positions of market power or monopoly (and conversely the degrees of intervention in the market that is considered appropriate) can vary from one jurisdiction to another, and this can affect the way in which competition

¹³⁰ N 127 above.

laws are enforced (as evidenced by the difference in approach between the US and the EU to unilateral conduct);

- the way in which competition law is enforced can vary over time, as evidenced in the US by the development of the Harvard School approach, and the movement away from that to the Chicago School approach;
- there is a significant difference between the EU and the other subject jurisdictions in the way in which the concepts of “competition” and “harm to competition” have been interpreted;
- there are differences between jurisdictions in the reasons why competition is valued;
- there are significant differences between jurisdictions in the objectives their competition laws are intended to achieve, although in some cases the objectives are not clearly stated;
- where the competition laws have stated that they have more than one objective, the objectives are to some extent inconsistent with each other.

With all of these differences, it is therefore difficult to disagree with Monti’s observation that “it is impossible to identify the “soul” of competition law; the most that can be done is to show that there are different, equally legitimate opinions as to what competition law should achieve.”¹³¹ In other words, competition law is an elusive concept, and it is impossible to find a common definition, in the sense of a unified objective which so-called competition laws are intended to achieve.

One thing that many competition laws do have in common (including the competition laws examined in this dissertation), as we noted in section 2.3.6, is their structural components, i.e. rules dealing with anti-competitive arrangements, and unilateral conduct by firms with substantial market dominance. We shall use these components as the framework for examining, in Chapter 4, the relative levels of legal certainty (and uncertainty) in the competition laws of the subject jurisdictions. Before doing so, we next examine in Chapter 3 what we mean by legal certainty.

¹³¹ *EC Competition Law 2-3.*

3 What is Legal Certainty?

3 1 Introduction

The main purpose of this Chapter is to seek to identify whether there is a legal standard, against which it can be assessed whether competition laws are sufficiently certain. We argue that the standard laid down in the ECtHR is an appropriate benchmark. First, the fact that 47 countries have signed up to the ECHR means that the principles laid down in the ECtHR's case law can reasonably be said to be acceptable to a large proportion of the world's jurisdictions. Secondly, the same fact has

given rise to a substantial body of case law that might provide a useful guide not only to ECHR signatories, but also to other countries that are faced with the issue of achieving sufficient legal certainty in competition laws. Although ECtHR case law will be used as the benchmark, references to US case law and literature on the issue of legal certainty in competition law will also be referred to where relevant for comparative purposes.

In this Chapter, we look first in section 3 2 at what legal certainty means. One facet of this concept is that laws should be sufficiently clear that the individual knows, in advance of engaging in any given conduct, what legal consequences will flow from it. It is this facet of legal certainty, in the particular context of competition law, which is the focus of this dissertation. Section 3 3 examines why clarity in laws is valued. Section 3 4 notes that there is a great deal of divergence in the clarity of laws, and that while some are relatively specific in their terms, others are more vague and generic. Section 3 5 looks at the legal requirements for clarity in laws which exist in Europe (with brief references to US law), particularly in regard to criminal law and laws which interfere with fundamental rights and freedoms. Section 3 6 then looks at the issue of how clear competition laws should be, and in particular whether they should be regarded as criminal laws, and as laws interfering with fundamental rights and freedoms. We argue that they should. Indeed, as we shall see later in this Chapter, the European Court has held that the enforcement of EU competition law must comply with the protections contained in the ECHR (as now implemented in EU law by the Charter of Fundamental Rights of the European Union), including the requirement for legal clarity.¹³² The ECtHR has held the same in respect of the law of at least one state which is party to the ECtHR (Italy, which is also an EU Member State, and has a competition law closely modeled on EU competition law, like the national competition laws of many other EU Member States).

Having established that the criteria for legal certainty laid down by the ECtHR form an appropriate benchmark for competition laws, this will enable us to assess in Chapter 4 whether, and if so to what extent, the competition laws in the subject jurisdictions are sufficiently clear.

3 2 Meaning of Legal Certainty

¹³² OJ C303/1 of 14.12.2017.

Legal certainty is an important legal concept that is recognised in most legal systems. For example, Maxeiner states that “it is a guiding idea of many, if not all, of the legal systems of the European Union’s Member States”; is a “general principle” of EU law and the jurisprudence of the European Court of Human Rights (ECtHR) (whose jurisdiction covers almost all countries in Europe); and “is closely related to the principles of law discussed in the United States as the ‘formal rule of law’”.¹³³

As with competition law, there is no uniformly- agreed definition of legal certainty. It is a multi-faceted concept, comprising a number of what might be called “sub-principles”. Maxeiner identifies five of these sub-principles under the EU general principle of legal certainty:

- laws and decisions must be made public;
- laws and decisions must be definite and clear;
- decisions of courts must be binding;
- limitations on the retroactivity of laws and decisions must be imposed; and
- legitimate expectations must be protected.¹³⁴

After an extensive analysis of the principle of legal certainty as it features in EU case law, Raitio concludes as follows:

“Based on the case study the principle of legal certainty in EC law refers to the principle of non-retroactivity, protection of legitimate expectations, protection of vested rights, issues of procedural time limits and immediate application of the law, as well as the use of comprehensible language in the administration of the EC”.¹³⁵

¹³³ James R Maxeiner “Legal Certainty: a European Alternative to American Legal Indeterminacy?” *15 Tul J Int’l & Comp L* 541.

¹³⁴ N 133 above.

¹³⁵ Juha Raitio *The Principle of Legal Certainty in EC Law* (2003) 382.

Similarly (but not co-extensively with the EU sub-principles), in the US “[t]he essential elements of the formal rule of law are: laws should be validly made and publicly promulgated, of general application, stable, clear in meaning, consistent, and prospective.”¹³⁶

As we shall see, the ECtHR’s jurisprudence also recognises the sub-principles that laws should be made public (or “accessible”) to those subject to them; that they should be clear and predictable in their application; and that they should not be retroactive (at least as far as criminal laws are concerned).

In addition to the sub-principles listed above, one could add that the concept of legal certainty encompasses the idea that individuals should be given reasonable notice before new regulation or legislation affecting their rights or obligations is introduced, i.e. they should not be taken by surprise. As one author has put it:

“[t]here should be a reasonable period of time between the creation of the said expectation and the enforcement of the regulation so that those persons can take measures against the liabilities imposed on them by the given action”.¹³⁷

That there should be no sudden, unexpected changes in a person’s legal status also underlies the concept of limitation periods for litigation or prosecutions. These are justified on the basis that persons should have certainty after a given period that they will not be sued or prosecuted for past conduct. Legal uncertainty could also refer more generally to an environment within a given jurisdiction where laws are subject to frequent change, causing disruption to commercial transactions and making investment decisions difficult: such a situation could be said to lack sufficient legal certainty. Laws should therefore be stable over a reasonable period of time.

This dissertation focuses on the “sub-principle” of legal certainty (and of the rule of law) that a law should be sufficiently clear that individuals or businesses can know what legal consequences

¹³⁶ N 133 above.

¹³⁷ Taha Ayan “The Principle of Legal Certainty in EU Case Law” *TODAY’S Review of Public Administration* Vol 4 No 3 September 2010 149, 162.

(if any) will flow from their conduct. For example, will the conduct be legal or illegal, or subject to a possible injunction or cease-and-desist order? If illegal, what sanctions could result – a financial penalty, disqualification (for example, from driving, or from being a director of a company) and/or others? As the late English judge Lord Diplock put it:

“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that flow from it”.¹³⁸

Another English judge, the late Lord Bingham, described this notion of clarity as his first “sub-rule” of the rule of law principle, and said that the individual might be expected to obtain legal advice, in appropriate cases, to find out what the law is:

“... the law must be accessible and so far as possible *intelligible, clear and predictable*. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, *even if that means taking advice* (as it usually will), and the answer when given should be *sufficiently clear that a course of action can be based on it*”.¹³⁹ (emphasis added).

3 3 Why is Clarity in Laws Valued?

In the same way that we asked in Chapter 2 why we value competition, it is useful to ask why we value clarity in how laws apply to our actions. It is submitted that there are at least five main reasons. We deal with each of these reasons in turn.

The first reason is fairness. Many societies believe in the rule of law as a guiding principle. While there is no universally-agreed definition of what is meant by the rule of law, the English judge Lord Bingham has defined it in the following terms:

¹³⁸ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638.

¹³⁹ N 2 above.

“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”¹⁴⁰

Under the rule of law, it is regarded as inherently unjust that someone should be held to have broken the law, or otherwise be subject to a change in legal status, as a result of a given act or omission, without having been given reasonable notice in advance that these consequences would flow from that course of action. As noted above, according to Lord Bingham’s first sub-principle of the rule of law “if everyone is bound by the law, they must be able without undue difficulty to find out what it is”.¹⁴¹ This concept of fairness underlines the rule that exists in all of the subject jurisdictions (and many others) that criminal laws should not be applied retrospectively, that is, to conduct which took place prior to the law’s introduction. It also means that existing laws, i.e. those that were in effect when the conduct took place, should be clear and predictable in their application to particular conduct. As we shall see, this concept of fairness is reflected, for example, in the US “void for vagueness” doctrine, which the US Supreme Court has held to be embodied in the due process provisions in the US constitution. It is also reflected in the European Convention on Human Rights (“ECHR”), to which all EU Member States, and many other European countries, are party, as well as the constitutional laws of the other subject jurisdictions.

Secondly, clarity is valued because with clear laws comes freedom. Individuals know the boundaries of their freedom of action, and can act within those boundaries in the knowledge that they will be free from coercion by the state. By contrast, in an environment where individuals do not know what legal consequences might follow from their actions, this uncertainty may lead them to hold back from carrying out actions which might actually be legitimate, thereby interfering with their freedom.

The third reason is that in free and democratic societies, the preference is for governments to govern according to rules rather than discretion. This is Lord Bingham’s second sub-principle of the rule of law: “questions of legal right and liability should ordinarily be resolved by application

¹⁴⁰ N 2 above.

¹⁴¹ N 2 above.

of the law and not the exercise of discretion”.¹⁴² This does not mean that the legislature can never delegate decision-making to a government minister or regulator. What it does mean is that the parameters of, and criteria for, the exercise of the discretion must be clearly laid down in the law.

The fourth reason relates to the doctrine of separation of powers that exists, to greater or lesser extents, in many democratic societies.¹⁴³ This doctrine requires that legislation be adopted by duly elected representatives of the people, not by the government or the courts. The more vague and unclear the rules are, the greater the risk that a regulator responsible for enforcing the law, or the courts, are effectively forced to make the rules rather than to enforce or interpret them, i.e. effectively to take on the role of the legislature. This is a question of degree. For example, whether the courts are making the law rather than interpreting it in a given case may itself be unclear and a matter of debate.

The fifth reason is economic in nature, and relates more to businesses rather than individuals acting in their personal capacity. In the same way that unclear rules may cause individuals to hold back from engaging in conduct that may actually be legitimate, thereby hampering their freedom (the second reason described above), unclear rules may also cause businesses to do so. But in the business field this is not just a matter of protecting their freedom for its own sake. Lack of certainty may cause businesses to refrain from carrying out certain investments, or engaging in other conduct or transactions that are beneficial for the economy and society as a whole, so that there is an economic cost to lack of clarity. Chapter 5 will examine in more detail the economic costs of lack of clarity in the field of competition law.

There is a possible sixth reason, but this one is more open to debate. The view has been advanced that laws need to be clear if they are to achieve their public policy objective, because if laws are unclear people are unlikely to comply with them. For example, Gerber has said:

¹⁴² N 2 above.

¹⁴³ See for example the research findings in a UK House of Commons report available at <http://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf> (accessed on 27-1-2018).

“Only to the extent that law provides knowable content can it serve most of the social purposes it purports to serve. This means that it can serve these purposes only where authority-based decisions about the content of the law can be predicted with reasonable confidence”.¹⁴⁴

Some economists and legal scholars have disputed this view, arguing that laws are more likely to achieve optimum compliance if they are somewhat vague, rather than precisely clear:

"A bright line rule causes all individuals either to steer into the same safe harbour, even if that harbour is quite costly for some, or to ignore the harbour entirely if the harbour is simply too costly. The effect of the rule is likely to be one of two extremes: either excessive compliance or nil. A vague standard, on the other hand, does not attach sharp changes in the probability of liability to small changes in a particular behaviour selected as the turning point for liability; rather, as behaviour improves, there is a gradual reduction in the probability of liability that elicits different responses from different individuals. These responses are likely to fall between the two extremes induced by the bright line rule and thus likely to more closely approach some optimal outcome".¹⁴⁵

3 4 Specific Rules and Generic Rules

Some laws are more clear and specific than others. At one end of the scale are road traffic laws, for example. A prohibition against parking on a double yellow line, or driving at a speed of over 70 miles per hour, could hardly be criticised for being legally uncertain. But many other laws are grey, rather than black and white, and involve the exercise of judgment. For example, to assess

¹⁴⁴ David J Gerber “Searching for a Modernised Voice: Economics, Institutions and Predictability in European Competition Law” *Fordham Int LJ* Vol 37 1421, 1424.

¹⁴⁵ Gillian K Hadfield “Weighing the Value of Vagueness: an Economic Perspective on Precision in the Law” *82 Cal L Rev* 541, 545 (1994).

whether a given action (or omission) may result in liability for negligence under the law of tort, one would have to ask at least the following questions:¹⁴⁶

- Did the person who allegedly caused the harm owe a duty of care to the person allegedly harmed?
- Was there a breach of that duty?
- Did the breach directly cause the harm?
- Was the harm a reasonably foreseeable consequence of the breach?

Each of these elements may be open to argument in individual cases. For example, there may be room for argument as to whether a duty of care existed, or whether the breach of duty directly caused the harm (or whether in fact there was a prior cause, or a supervening cause). Equally, in assessing whether a duty of care existed, this issue has to be viewed from the perspective of a “reasonable person”: what is reasonable in any given case may be open to debate and ultimately the court has to decide.

On the continuum of clarity, there are laws that may seem on their face to be clear, but upon further examination are not as clear as they appear to be. Take the crime of theft, for example. One might think that theft can be defined quite simply: the appropriation of someone’s property without that person’s consent. But the definition of theft in England and Wales, for example, is more complex. The Theft Act 1968 contains five key concepts, each of which is subject to a detailed definition:

- “dishonestly” (the appropriation of the other person’s property must have been done dishonestly);
- “appropriates”;
- “property”;
- “belonging to another”.¹⁴⁷

¹⁴⁶ See <https://legaldictionary.net/tort-law/> (accessed on 27-01-2018).

¹⁴⁷ Ss 2-5.

The individual definitions of these concepts themselves contain certain exceptions. For example, an appropriation is not to be regarded as dishonest if the accused believed they would have the other's consent if the other "knew of the appropriation and the circumstances of it."¹⁴⁸ And "appropriation" includes not only a situation where the person stole the property, but also "any later assumption of right to it by keeping or dealing with it as an owner."¹⁴⁹ Clearly, assessing whether the crime of theft has been committed will in many cases involve a detailed enquiry as to the state of mind of the accused at the time, and the precise factual circumstances.

With some laws the focus is not, or not only, on the nature of the conduct (unreasonable, dishonest, etc) but on its effects. For example, in many jurisdictions, a "breach of the peace" can constitute a criminal offence, or lead to other legal sanctions. A typical definition of breach of the peace is that contained in Scottish law, which is "conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community".¹⁵⁰ Clearly there may be room for disagreement in individual cases whether the conduct caused or was likely to cause the relevant effects ("alarm to ordinary people" and "serious disturbance to the community") such as to render the conduct unlawful. As we have seen in Chapter 2, the competition laws of the subject jurisdictions for the most part fall into this category: the legality of most types of agreement and conduct under competition law depends on an assessment of their effects on competition. However, it is one thing to assess the actual impact that someone's conduct has had on those around them; it is quite another, as we shall argue later, to assess the future impact that a business's arrangements or conduct will have on the market, and whether any negative effects can be justified by efficiencies or other factors.

Why is it that some laws (such as the road traffic examples given above) can be drafted in very clear and specific terms, while many other, perhaps most, laws use wider more general language to describe the conduct which is targeted by the law? The reason depends on the law in question. With the tax example, there has to be a fixed sum that is due for the purpose of government budgeting and administrative convenience, on the one hand, and to enable citizens to plan their

¹⁴⁸ S 2(1).

¹⁴⁹ S 3(1).

¹⁵⁰ *Smith v Donnelly* 2002 JC 65.

financial affairs, on the other. A law that said “you will pay such sum of tax that the government shall reasonably demand, based on your individual circumstances” would clearly be unworkable. Moreover, taxation is a form of interference with individual property rights, and the constitutional laws of some jurisdictions, such as the US and EU, require such interferences to be clearly prescribed by the law.¹⁵¹

In the case of speed limits, their basic justification is human safety: more accidents are caused by fast driving than slow driving. There may be many drivers who can drive safely at fast speeds but there are also many who cannot, and it is felt better in the interest of safety to “over- regulate” the former in order to make sure the latter are caught (setting different speeds for different classes of driver would clearly be unworkable). Over- regulation in a rule such as this is causes so-called “Type 1 errors” or “false positives”, whereas under-regulation leads to so-called “Type II errors” or “false negatives”. Under this approach, the choice of rule depends on which error is in net terms more costly to society: the least costly alternative should be chosen.

However, with many laws regulating conduct, it is not possible to set such clear and specific rules. The reason is that it may not be possible to foresee all of the different forms in which the conduct targeted by the law will be engaged. Attempts to do may result in offensive conduct “slipping the net” of the law because it does not fall within one of the acts listed in the legislation. The conduct which is targeted must therefore be described in more general terms. These could be called generic rules. For example, in tort law, it is impossible to foresee all of the different ways in which the tort of negligence can be committed, and therefore the law must rely on general concepts such as “reasonableness” and “duty of care” which can be applied to the facts of individual cases. In the context of criminal law, the UK Privy Council has stated:

“In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may properly wish to prescribe as criminal may best be described by reference to the nature of the activity, rather than particular methods of

¹⁵¹ See for example Article 1 of Protocol 1, European Convention on Human Rights and Fundamental Freedoms, available at www.coe.int (accessed on 27-1-2018).

committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience”.¹⁵²

For example, in one US case, the defendants challenged California’s unfair competition law for being unconstitutionally vague (a concept we will return to later). The law in question criminalised any “unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” In rejecting the challenge, the court held:

“ ‘Unfair competition’ and ‘unfair or fraudulent business practice’ are generic terms. Like the terms ‘nuisance’ or ‘negligence’ they must be translated into specific situations of fact in order to be cognizable. The attribute of generality does not of itself, however, require a holding of nullity for vagueness... it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery. What constitutes ‘unfair competition’ or ‘unfair or fraudulent business practice’ under any given set of circumstances is a question of fact, the essential test being whether the public is likely to be deceived.”¹⁵³

There is a very important practical reason for using a description of the nature of the conduct rather than attempting to predict the various forms it can take when drafting the statute. If such attempts fail to catch all of these forms (which, as noted above, is likely) this may require the whole legislative process to be put in train again in order to widen the statute to capture the forms of the conduct that were missed, with all of the costs and disruption which that process involves.

¹⁵² *Sabapathie v The State (Mauritius)* [1999] UKPC 31 para 19.

¹⁵³ *People v Nat’l Research Co of Cal* 201 Cal App 2 d 765 (1962) (citations omitted).

With many laws, where it is the nature of the conduct that triggers the legal consequences, the conduct is qualified by the use of certain descriptors, to capture the conduct that is targeted, while excluding benign forms of the conduct. For example, the passage from the US case cited above referred to “unfair competition” and “unfair or fraudulent business practice”. Where the *effect* of the conduct is a necessary condition of liability, a word such as “substantial” might be used, in order to put a quantitative filter on the effects which trigger the law’s application, and exclude minor effects (otherwise a great deal of time and effort might be spent in tackling conduct with minor effects, which may not be efficient). We saw in Chapter 2 that most of the subject jurisdictions use the SLC test (“substantially lessen competition”) in their competition laws. If a certain *purpose* is a trigger for liability, but the individual engaged in conduct with several purposes in mind, liability might be triggered if the relevant purpose was the “predominant” or a “substantial” one. Terms such as “substantial” and “predominant” involve different degrees of assessment and therefore uncertainty, as we shall see when we examine the competition laws of the subject jurisdictions in Chapter 4.

Certain general descriptors of human conduct contained in laws are clearer than others. The concept of negligence in tort law involves an assessment of the standard of care that a *reasonable* person would exercise in the circumstances. Although opinions may differ on how that standard applies to a particular set of facts, the test involves a degree of objectivity by referring to the benchmark of a “reasonable person”. The same could be said for “fraudulent”, which implies intentional dishonesty. At the other extreme is “unfair”, which in itself is a subjective notion: what one person may consider fair, other persons may consider unfair, and without any objective benchmark or criterion for judging unfairness it is difficult or even impossible to say who is right. Similarly, the word “excessive” means “too much”- but how much is too much? Again this is subjective. As we shall see in Chapter 4, the word “excessive” has caused serious difficulties in competition law.

It may seem instinctively to be the case that specific rules are preferable to generic rules when it comes to predicting the legal outcome of certain conduct. However, Raban has claimed that this view is a “fallacy”, and confuses a lawyer’s ability to predict the consequences of applying the law with people’s ability to predict the consequences of their actions: “what may be perfectly certain

and predictable for lawyers and judges applying the law may fly in the face of people's predictions".¹⁵⁴ He argues that, while specific, clear rules are superior "by definition" in predicting the application of the law to given conduct, "vague legal standards are often better in many situations for allowing people to predict the consequences of their actions".

Raban gives as one example the traditional rule that, where the terms of a contract are clear and unambiguous, effect must be given to them, even if it does not accord with the parties' understanding of their agreement. This rule is clear for lawyers to apply. However, it would result in unpredictability for the parties. Admission of extrinsic evidence of the parties' intentions and other matters would mean that the outcome was more predictable for the parties. However, this argument would not appear to apply to competition law, where the uncertainty (or lack of clarity) results for the most part precisely *because* liability depends on a multitude of indeterminate factors, as we shall see in Chapter 4.

Raban also argues that vague rules are preferable in many situations because "they replicate, one for one, the social, moral, economic or political norms that already prevail and which, given the nature of the phenomena they describe, cannot be reduced to clear and determinate language". He gives the example of laws where liability depends on concepts or mental states such as coercion, reasonableness, good faith, malice and intention- concepts that have to be applied on a case-by-case to a variety of situations. Again, this argument does not appear to apply to competition law, where liability requires an assessment of the effects or likely effects of arrangements or conduct on competition, and a judgment of whether harmful effects on competition (however those effects may be defined) are judged to be offset by certain public benefits (except in the case of those categories of arrangement where such effects are presumed, i.e. hardcore arrangements such as price-fixing and bid-rigging). It will become clear in Chapter 4 that this is an entirely different, more complicated and more subjective assessment than whether someone acted in good faith, maliciously or reasonably.

¹⁵⁴ Ofer Raban "The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism" 19 *BU Pub Int LJ* 175 (2010).

We saw in Chapter 2 that the subject jurisdictions' competition laws all contain generic rules targeting arrangements and conduct which harm competition, subject to certain other criteria being met (such as dominance or SMP being established in the case of unilateral conduct). As well as these generic rules, Canada also has specific (or *per se*) rules prohibiting certain types of hardcore arrangements, namely price-fixing, market-sharing, output-restriction and bid-rigging. Australia and South Africa also have specific rules that prohibit hardcore arrangements, but provide for authorisation to be granted if they lead to public benefits which are regarded as outweighing the harm they cause to competition. In the case of the generic competition rules, we shall see in Chapter 4 that the subject jurisdictions have faced major challenges in defining what sort of harm to competition to prohibit, and even the concept of harm to competition itself, in a way that is clear enough for businesses to apply to their conduct.

3 5 The Legal Requirement for Clarity in Laws

3 5 1 Introduction

The fact that laws can be generic rather than specific does not mean that there are no legal limits as to *how* generic (or unclear) laws can be. Many jurisdictions have constitutional requirements for clarity in certain areas of the law to protect citizens' basic rights. In this section we look primarily at the position in Europe under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), by way of example.¹⁵⁵ Brief references will also be made to the position in the US and Hong Kong.

In Europe, we shall see that a relatively high degree of legal certainty is required in two areas—criminal laws, and laws which interfere with the rights and freedoms guaranteed by the ECHR. In one of the subject jurisdictions, Hong Kong, it also appears to be the case that this requirement applies to a third category: laws that interfere with citizens' freedom generally, even outside those rights and freedoms which are specifically guaranteed by the terms of Hong Kong's constitution.

¹⁵⁵ Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 27-1-2018).

In this section, we shall deal primarily with the requirement for a high degree of legal clarity in criminal law. This is because, as we shall see in section 3.6, there has been a vigorous debate as to whether competition law should be treated as criminal law for the purpose of protecting the rights of the alleged violator, including the right to legal certainty. We also touch briefly on the high degree of legal clarity required for interferences with fundamental rights and freedoms, and discuss whether competition law constitutes such an interference, and whether therefore a high degree of clarity is required on that basis too.

3.5.2 The Requirement for a High Degree of Clarity in Criminal Law

In Europe, the requirement that criminal law should achieve a minimum standard of clarity has been given supranational binding legal effect by the ECHR, in those states that have acceded to it. These include not only all of the 28 EU Member States but also 19 non-Member States, i.e. 47 in total.¹⁵⁶ Article 7 of the ECHR provides (to the extent relevant to this thesis):

“No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

This provision embodies the principle of *nulla crimen, nulla poena sine lege*: no-one should be held guilty, or penalised, for a crime which was not a crime or subject to a penalty at the time the conduct in question took place: the principle of non-retroactivity. This does not just mean that new criminal laws must not have retrospective application. It has also been held to mean that no-one can be prosecuted for an offence under a *pre-existing* law, in circumstances where that law was so unclear that it could not reasonably be predicted that the conduct in question would

¹⁵⁶ <https://www.coe.int/en/web/portal/47-members-states> (accessed on 31-1-2018).

constitute an offence.¹⁵⁷ The following main principles on the requirement for clarity have emerged from the ECtHR's case law:

- As a general principle, “criminal law must not be extensively construed to an accused’s detriment, for instance by analogy”.¹⁵⁸
- It follows that an offence must be clearly defined in the law. This requirement is satisfied “where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what actions will make him criminally liable”.¹⁵⁹
- The law does not need to specify precisely how it will apply in all factual situations. This is because laws must be flexible enough to cope with a variety of factual situations. A degree of vagueness in this sense is therefore inevitable.¹⁶⁰
- Points of law which are unclear from the wording of the statute or prior case law may also have to be clarified through the case law.¹⁶¹ Under the Article 7 principles, it is recognised that absolute clarity in laws is not necessary and is probably unattainable. The purpose of the courts is to fill gaps in the law through their judgments in the cases that come before them. However, as a general principle, the courts should restrict themselves to interpreting unclear points in the existing law, not effectively make new law and thereby usurp the role of the legislator. As the former English judge Lord Bingham put it: “It is one thing to alter the law’s direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and predictable, something that a prudent person would allow for, the other not.”¹⁶²
- Nevertheless, for an act or omission to be unlawful, the outcome from this clarification must not only be consistent with the “essence” of the offence, it must also have been reasonably possible for an individual, with the benefit of legal advice, to predict this

¹⁵⁷ *Kokkinakis v Greece*, judgment of 25 May 1993 para 52; *SW v United Kingdom*, judgment of 22 November 1995 para 35.

¹⁵⁸ N 157 above.

¹⁵⁹ N 157 above.

¹⁶⁰ *Cantoni v France*, judgment of 11 November 1996 para 31.

¹⁶¹ *SW v United Kingdom* n 157 above para 36.

¹⁶² N 2 above.

outcome. If this is not the case, the individual's conviction will be in breach of Article 7 and will therefore be invalid. The ECtHR has often made the following statement, in cases where Article 7 has been invoked in respect of allegedly unclear laws:

“However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, *provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.*” (emphasis added).¹⁶³

These principles therefore do not dictate that criminal laws be absolutely certain. They recognise, as we noted earlier that national courts have done, that a degree of vagueness is necessary in most laws to allow them to be flexible enough to cope with a variety of factual situations- what we referred to in section 3 4 as “generic” laws. They also recognise that points of law in statutes may need to be clarified through the case law. This is permissible, subject to two conditions: the outcome must be consistent with the “essence” of the offence, and a lawyer must be able to predict the outcome of the clarification.

Two questions arise here, namely what is meant by “essence” of the offence, and what is meant by “legal advice”?

It seems from the ECtHR case law that the term “essence” of the offence means the same as the commonly-used terms “essential ingredients”, “essential elements”, or “constituent elements” of the offence, i.e. the factual elements which the prosecutor must prove for the prosecution to be successful. For example (emphasis in quotations below added):

¹⁶³ *SW v United Kingdom*, n 157 above.

- The English Crown Prosecution Service has stated that “the *essential element* of the crime of conspiracy is the agreement by two or more people to carry out a criminal act”.¹⁶⁴
- The Judicial Commission of New South Wales, Australia has said that “to make out the offence [of dangerous driving causing death] the Crown must establish beyond reasonable doubt each of the following *essential facts or ingredients of the offence*: that the accused was the driver of a vehicle; that the vehicle was involved in an impact; that the impact caused the death of the deceased; and that at the time of the impact, the accused was driving the vehicle in a manner dangerous to another person”.¹⁶⁵
- Sir Anthony Mason NPJ, for the Hong Kong Court of Final Appeal, has said that “It is necessary to define the *constituent elements* of the offence... In my view, the elements of the offence of misconduct in public office are: a public official, who in the course of or in relation to his public office, willfully and intentionally culpably misconducts himself”.¹⁶⁶

3 5 3 How clear do Criminal Laws need to be?

The Article 7 principles do not answer the question of what *degree* of legal uncertainty in laws is permissible. In other words, for a prosecution to be successful, is it the case that the lawyer, advising the client:

- should have had no reasonable doubt as to the outcome?
- should have been satisfied, on a balance of probabilities, as to the outcome? or

¹⁶⁴ http://www.cps.gov.uk/legal/h_to_k/inchoate_offences/#Conspiracy (accessed on 30-11-2017).

¹⁶⁵ https://www.judcom.nsw.gov.au/publications/benchbks/criminal/dangerous_driving.html#p5-260 (accessed on 30-11-2017).

¹⁶⁶ *Shum Kwok Sher v HK SAR*, FACC1/2002 para 84.

- should have been aware that there was a reasonable possibility of the outcome?

Given that the standard of proof for criminal prosecutions in many jurisdictions is beyond reasonable doubt, there is a strong argument in principle that, if there is a reasonable doubt as to whether the conduct would be lawful or unlawful, the client should be acquitted, in accordance that the benefit of any doubt should be given to the accused. However, in many cases the ECtHR has taken a stricter view and appears to favour the third approach, i.e. if the accused, with legal advice, should have known that there was a possibility (presumably a reasonable one) that the action would be illegal, no defence based on Article 7 is available. In other words, the courts are effectively saying “if in doubt, don’t act”. Some of these cases are referred to below, by way of example. In effect, this arguably means that the courts are condoning the uncertainty, and construing it in favour of the State, not the individual. As Buxton has said:

“...it is difficult to discern in the ECHR jurisprudence any general principle that the criminal law must be accessible and certain above a very modest level, and where certainty of criminal law has come into issue in ECHR questions, the standards required by the Convention jurisprudence have been distinctly undemanding”.¹⁶⁷

For example, in *Jorgic v Germany*, which involved the forcible removal of Bosnian Serbs in the former Yugoslavia, the issue was whether the crime of genocide under German law required the physical destruction (i.e. killing) of a group, or whether it could extend to destruction of a group as a social unit.¹⁶⁸ In upholding the German Court’s decision in favour of the latter, and rejecting the applicant’s claim that the German law was insufficiently clear in this respect, the ECtHR held that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he *risks* being charged with and convicted of genocide.

In another case, *Cantoni v France*, concerning the sale of pharmaceutical products by a French supermarket, the ECtHR held that if the individual, with the benefit of legal advice, should have

¹⁶⁷ Richard Buxton “The Human Rights Act and the Substantive Criminal Law” [2000] *Crim LR* 331, 332.

¹⁶⁸ Judgment of 12 July 2007.

predicted even *the risk of prosecution* (as opposed to actual conviction) this would be sufficient for the law to comply with Article 7.¹⁶⁹

The assessment as to whether laws are sufficiently clear to comply with Article 7 can be somewhat arbitrary and subjective, and judges in the same case may take different views as to whether the benefit of the doubt should be given to the individual or the State. A good example is *Soros v France*, a case involving a conviction for insider dealing against the financial trader George Soros.¹⁷⁰ Mr. Soros was convicted of insider dealing in 2002 by a Paris court. He challenged the decision before the ECtHR, arguing that, at the time of his conviction, the French law on insider dealing was not sufficiently clear as to whether it applied to persons (such as himself) who did not have any professional or contractual relations with the target company. The ECtHR rejected his challenge, but only by a narrow majority of four to three.

The majority of judges said that, given Mr. Soros's experience as an institutional investor, "he could not have been unaware that his decision to invest in shares in [the target company] entailed *the risk that he might* be committing the offence of insider dealing" (emphasis added).¹⁷¹

The dissenting judges, on the other hand, opined that neither legal advice, nor an analysis of the case law, would have enabled Mr. Soros to know clearly that his proposed conduct *was* prohibited. In other words, Mr. Soros could legitimately take the view that his conduct would not be illegal. They expressly cited the first principle of Article 7 cited above, namely that if a provision of law gives rise to a "reasonable doubt" as to its meaning, it is the accused who should benefit, not the legislature which has failed to clearly express itself.¹⁷²

There are strong arguments in principle that the mere possibility that conduct will be held illegal should not be enough for a law to be sufficiently clear under Article 7:

¹⁶⁹ N 160 above.

¹⁷⁰ Judgment of 6 October 2011.

¹⁷¹ Para 57.

¹⁷² Dissenting Opinion annexed to majority judgment, ninth paragraph.

- In a free society, it is assumed that people are free to act to the extent they are not legally prohibited from doing so. This means that any uncertainty in the law should, as a matter of principle, benefit the citizen, not the State. Even the ECtHR itself has said so. This view is consistent with views of the rule of law expressed by Lords Diplock and Bingham, referred to in Section 3 2, concerning the need for predictability, and minimising the extent of administrative or judicial discretion in interpreting laws. As noted above, given that the standard of proof for criminal prosecutions in many jurisdictions is beyond reasonable doubt, there is a strong argument in logic that any reasonable doubt as to whether the conduct would be lawful or unlawful should benefit the accused.
- Formulations suggesting that the mere risk or possibility of illegality should preclude the individual from acting are contrary to the above principles, and in particular the requirements of the rule of law. They are tantamount to an express tolerance of vague and uncertain laws. Carried to their logical conclusion in the competition field, for example, a law which simply said “anti-competitive conduct is prohibited”, without defining what “anti-competitive” actually means, leaving this to the decision of the authorities, might be valid and enforceable, because it would put the individual on notice that any conduct which could conceivably have an effect on competition (however defined), or perhaps even the spirit of competition, *might* be illegal. This appears to offend freedom and rule of law principles.

So why was the ECtHR prepared to set the bar for legal clarity at such a low level in these cases, in spite of the stated principle that the benefit of any doubt as to the law’s meaning should be given to the accused? The answer is not clear, but there are a number of possible explanations- all of them admittedly speculative. It may be that the conduct in *Jorgic* was felt to be *mala in se*, that is, so obviously morally reprehensible and against society’s norms that no clear, explicit law should have been necessary to guide the individual’s conduct. In *Cantoni*, since human health was at stake, the ECtHR may have felt that the business should have erred on the side of safety, and on that basis the law gave sufficient notice to guide its conduct, even although it was not drafted with the greatest clarity. Finally, in both cases, the ECtHR may have felt that the decisions it reached would be more in tune with public expectations of justice than effectively overturning the prosecutions.

3 5 4 The Broad Notion of “Criminal” under the ECHR

A very important point to note is that, under the ECtHR’s case law, the notion of a criminal law is defined broadly, and it does not depend on whether the law is classified as criminal under the domestic law of the country concerned. This is an “anti-avoidance” measure: if what was criminal depended only on national classification, a signatory state could avoid the fundamental rights and freedoms laid down in the ECHR merely by classifying the offence as non-criminal.

Under ECtHR case law, there are three criteria that have to be taken into account (the so-called *Engel* criteria¹⁷³) in assessing whether a legal contravention is criminal:

- Does the national law in question treat the contravention as criminal?
- Is the contravention of “general concern and application”, as opposed to being limited to a particular industry or profession?
- Do the sanctions for contravention include a penalty that is intended as punishment and/or a deterrent, as opposed to compensatory?

If the answer to the first question is yes (domestic law classifies the offence as criminal) this is likely to be an end of the matter: the offence will also be classified as criminal for ECHR purposes. If the answer to the first question is no, however, consideration will then be given as to whether the offence is of general concern and application, and whether the sanctions include a deterrent or punitive penalty.¹⁷⁴ The ECtHR has held that the second and third criteria are alternative, not cumulative:

¹⁷³ *Engel v Netherlands*, judgment of 8 June 1976.

¹⁷⁴ *Ozturk v Germany*, judgment of 21 February 1984.

“It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere”.¹⁷⁵

A good example of the wide concept of “criminal” under the ECHR is the case of *Ozturk v Germany*.¹⁷⁶ Mr Ozturk was fined for careless driving, having driven his car into a parked car. As regards the first of the *Engel* criteria (national classification) such road traffic offences had been “de-criminalised” under German law, and were classified as regulatory offences as opposed to criminal offences. However, as noted above, national classification of the law as non-criminal is not conclusive as to its status under the ECHR. As regards the second criterion, the nature of the offence, the ECtHR noted that the offence was not directed towards “a given group possessing a special status” but “towards all citizens in their capacity as road users”. The German government argued that criminal offences involved a “degree of ethical unworthiness such as to merit the moral value-judgment of reproach that characterised penal punishment”, whereas this was not the case of such road traffic offences. However, the ECtHR held that the fact that this was “a minor offence hardly likely to harm the reputation of the offender” was irrelevant.¹⁷⁷ Finally, as regards the third criterion, the ECtHR held that the purpose of the penalty was to “punish as well as deter”, and the “relative lack of seriousness of the penalty at stake...cannot divest an offence of its inherently criminal character”.¹⁷⁸

This case law has been applied outside Europe. For example, Hong Kong has a statutory Bill of Rights that includes the equivalent of Article 7 and other ECHR protections of fundamental rights. The Hong Kong courts have interpreted the concept of criminal offence in the Bill by reference to the ECtHR case law. In a case involving insider dealing, which at the time was treated as a civil not criminal matter, the Court of Final Appeal held, applying the *Engel* criteria, that it should be regarded as criminal for the purpose of the Bill, because of the substantial deterrent and punitive

¹⁷⁵ *Jussila v Finland*, judgment of 23 November 2006 para 31; *Menarini Diagnostics v Italy*, judgment of 27 September 2001 para 38.

¹⁷⁶ N 174 above.

¹⁷⁷ Para 53.

¹⁷⁸ N 177 above.

penalties which insider dealing attracted.¹⁷⁹ The Court held that this meant that the accused should not have been compelled to give evidence incriminating himself, and that the Hong Kong criminal standard of proof (beyond reasonable doubt) should have been used.

The *Engel* and *Ozturk* cases concerned Article 6 of the ECHR, which lays down certain procedural safeguards for persons “charged with a criminal offence”, as opposed to Article 7, which also refers to “criminal offence”. There is no reason to believe that the ECHR concept of “criminal offence” is any different under Article 7 from what it is under Article 6, and therefore the same wide concept of “criminal offence” should in principle apply in assessing whether laws are subject to the requirements of clarity under the ECHR.

3 5 4 Lesser Safeguards for “Less Serious” Criminal Offences?

The ECtHR has taken the view, in the context of Article 6 ECHR, that criminal offences differ in their degree of seriousness, and the level of procedural protection may be lower in the case of less serious offences than for more serious ones. For example, in *Jusilla v Finland*, a Finnish tax authority imposed a penalty equivalent to 308.80 euros on a trader for making certain errors in his tax return.¹⁸⁰ The trader appealed to the local administrative court, requesting an oral hearing (pursuant to the normal legal requirement to grant one), and that the tax inspector and the applicant be called as witnesses. Finnish law gave the court a discretion to dispense with the requirement to have an oral hearing, where the court took the view that such a hearing was unnecessary. The court exercised its discretion in this case, and refused an oral hearing on the basis that the written submissions were sufficient to dispose of the case, and that an oral hearing would not give the trader any additional protection. The trader then brought an action before the ECtHR, claiming that this refusal constituted a breach of his right to an oral hearing under Article 6 ECHR.

The ECtHR had no difficulty establishing that the imposition of the penalty was of a criminal nature for the purpose of Article 6 ECHR, in spite of the relatively small sum involved, because the offence in question (submitting incorrect information in a tax return) was of general rather than

¹⁷⁹ *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

¹⁸⁰ Judgment of 23 November 2006.

sector specific application, and the penalty was intended to be punitive and deterrent. The second and third *Engel* criteria were therefore satisfied. However, it went on to state that criminal offences vary in their degree of seriousness, and as this one was at the lower end of the scale of seriousness, the Article 6 guarantees did not apply “with their full stringency”.¹⁸¹ It agreed with the Finnish court that the applicant’s rights had been adequately safeguarded through the written process, that an oral hearing would not have given him any further protection, and that therefore there had been no breach of Article 6 in refusing the application for an oral hearing.¹⁸²

The ECtHR’s reasoning in *Jusilla* can be (and has been) subject to certain criticisms. Apart from the fact that it does not sit comfortably with the wording of Article 6, which seems to require an oral hearing in *all* cases, the assessment of where an offence sits on the scale of seriousness, and hence the degree of procedural protection to which the alleged offender is deemed to be entitled, would seem to be rather subjective, and different judges may take different views on this issue. Moreover, the seriousness of an offence may vary over time- witness in the case of competition law, for example, the gradual criminalisation of cartel conduct that seems to be taking place globally, and the ever-increasing level of fines.¹⁸³

There is another argument too. Even within the *same* offence, the seriousness of the particular conduct can vary dramatically. Take the offence of careless driving. In Hong Kong, for example, depending on the degree of culpability, the penalty can range from a relatively modest financial penalty to a number of years in prison.¹⁸⁴ This is another reason not to single out particular offences, and say that some are more serious than others.

¹⁸¹ N 180 above para 43.

¹⁸² N 180 above para 48.

¹⁸³ These points were made by Donald Slater, Sebastien Thomas and Denis Waelbroeck in “Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?” College of Europe Global Competition Law Centre, GCLC Working Paper 04/08 21,22.

¹⁸⁴ http://www.clic.org.hk/en/topics/common_Traffic_Offences/Careless_Driving/ (accessed on 5-12-17).

In any event, it is submitted that, even if one was to accept that certain *procedural* safeguards under Article 6 ECHR can be dispensed with for offences deemed less serious, this does not mean that the *substantive* requirement for legal certainty under Article 7 can also be slackened for such offences. As noted above, the ECtHR in *Jusilla* was at pains to point out that dispensing with an oral hearing did not prejudice the accused: his rights were adequately protected through the written proceedings. In contrast, a firm which is found liable for an infringement in circumstances where it could not have predicted its conduct was illegal has to rely on the full force of Article 7 for protection: there is no alternative means of protection within Article 7 (or its equivalent in other jurisdictions).

3 5 5 A Brief US Comparison

In the US, the requirement for a high degree of certainty in criminal law is, as in Europe, constitutionally guaranteed. As long ago as 1891, the US Supreme Court stated that “[L]aws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”¹⁸⁵ Similarly, in 1926, the same court said:

“That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of the due process of law”.¹⁸⁶

As the above passage indicates, the requirement for legal certainty in criminal law has therefore been held in the US to flow from the Fifth Amendment to the US constitution on due process of law, which reads (in relevant part): “[N]or shall any person... be deprived of life, liberty or property, without due process of law...”.

¹⁸⁵ *United States v Brewer* 139 US 278 (1891) 288.

¹⁸⁶ *Connally v General Construction Co* 269 US 385 (1926) 391.

In Europe, the ECtHR cannot invalidate a national criminal law which is not sufficiently certain, or a decision enforcing such a law- it can only declare that the enforcement of the law in a given case is in breach of the ECHR requirement for legal certainty.¹⁸⁷ (It can also award damages for violation of Convention rights and freedoms, where the domestic law of a signatory state provides insufficient compensation¹⁸⁸). In the US, however, the Supreme Court can strike down laws which are insufficiently clear under the so-called “void for vagueness” doctrine. Over the years many US laws have been held to be void for vagueness in the criminal sphere. For example, in *Kolender v Lawson*, the Supreme Court struck down a law against vagrancy on the grounds that the prohibited activities of “loafing”, “strolling” or “wandering from place to place” did not give people fair notice of what sort of conduct was prohibited and could criminalise innocuous everyday activities.¹⁸⁹

3 5 6 Laws interfering with Fundamental Rights and Freedoms

As well as with criminal laws, the ECHR imposes requirements for clarity in national laws that interfere with the fundamental rights and freedoms guaranteed by the ECHR.

The ECHR tolerates national interferences with some fundamental rights and freedoms, such as freedom of expression, but only if such interferences comply with certain criteria, including that they are “prescribed by law”. This term has been held to mean that these laws must be accessible

¹⁸⁷ AH Robertson and JG Merrills *Human Rights in Europe: A Study of the European Convention of Human Rights* 3ed (1993) 311; Michel de Salvia “Can the Reparation awarded to Victims of Violations under ECHR be Considered a Real ‘Just Satisfaction?’” in Attila Fenyves, Ernst Karner, Helmut Koziol and Elisabeth Steiner (eds) *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011) 388.

¹⁸⁸ Robertson and Merrills n 188 above 311.

¹⁸⁹ 461 US 352 (1983). For a full discussion of the void for vagueness doctrine and its history see Cristina D Lockwood “Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine” *Crdozo Pub Law, Policy and Ethics J* [Vol 8:225 2010]; “Void for Vagueness: an Escape from Statutory Interpretation” 23 *Ind LJ* 272, 274 (1947-1948).

(i.e. ascertainable), and foreseeable (i.e. predictable) in their application to particular circumstances. If they are not, the ECtHR can declare that they are an unlawful interference with the fundamental right in question. This may leave the state in question with no option but to change its law to avoid future challenges. Unlike Article 7, which only applies expressly to criminal offences, interferences with fundamental rights can be under either criminal or civil laws for the requirement of clarity to apply.

For example, in *Sunday Times v United Kingdom*, the English courts held that a newspaper publisher had committed a contempt of court by publishing an article concerning ongoing litigation.¹⁹⁰ The publisher challenged this finding before the ECtHR, arguing that the English law on contempt of court was so unclear that it could not predict with sufficient certainty that publishing the article would constitute an offence. On this basis, it argued that the English law on contempt of court was an unlawful interference with the company's freedom of expression.

The ECtHR acknowledged that the UK law on contempt of court was an interference with the fundamental right of freedom of expression. As such, the law had to be sufficiently clear to be lawful: it should not be so vague that it was not reasonably foreseeable that the article in question would constitute a contempt of court. The court said that:

“[a] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹⁹¹

Applying this test, the ECtHR rejected the appeal in this case (albeit by a very narrow margin), holding that the UK law was sufficiently clear to be compatible with the ECHR.

In the US too, there is a constitutional requirement for a high degree of legal certainty for laws which interfere with constitutionally- guaranteed rights and freedoms, in particular those guaranteed by the First Amendment to the US constitution, including free exercise of religion,

¹⁹⁰ Judgment of 26 April 1979.

¹⁹¹ Para 49.

freedom of speech and the right to peaceable assembly. This is often referred to as the “overbreadth doctrine”.¹⁹²

As noted above in relation to criminal offences, unlike the US Supreme Court under the US constitution, the ECtHR does not have power to strike down national laws interfering with fundamental rights and freedoms which are excessively vague: it can only declare that the law is an unjustified interference on this basis. In practice, however, such a declaration (as under Article 7) may leave the state in question with no option but to change the law to comply with the ECHR requirements on clarity, in order to pre-empt future challenges.

3 5 7 Laws interfering with Freedom Generally

In a free society, it would seem reasonable to expect that everyone is able to go about their own business generally without intervention by the public authorities, unless there is a clear legal basis for the intervention. Hong Kong’s constitution, the Basic Law, which was adopted on the transfer of sovereignty over Hong Kong from the UK to China, seems to say as much. While it lists a number of specific rights and freedoms which are found in many national constitutions, such as freedom of expression and the right to privacy, it also goes on to state in broad terms (unrestricted to the specific rights and freedoms): “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as *prescribed by law*” (emphasis added).¹⁹³

On this basis, it would also seem reasonable to expect that if you are prevented or restricted from doing something by a public authority purporting to act under a particular law, the law should be sufficiently clear to justify the intervention.

To take an example, there may be minor road offences which may in a particular jurisdiction fall outside the sphere of criminal law, such as parking in a restricted area. But if there was no sign stating that parking was not allowed in that area, or the sign was phrased in ambiguous language,

¹⁹² See summary and case law at www.law.cornell.edu/anncon/ (accessed on 15-11-2017).

¹⁹³ Basic Law Article 39, available at <http://www.basiclaw.gov.hk/en/basiclawtext/> (accessed on 15-11-2017).

it would seem to be unreasonable and unfair (by most people's standards) to be penalised for parking there. So there is an argument that a relatively high degree of legal certainty should apply to public interventions against private freedoms generally.

3 6 Does the Legal Requirement for Clarity apply to Competition Law?

3 6 1 Introduction

In section 3 5, using primarily Europe as an example, we saw that the requirement for clarity in laws is constitutionally- guaranteed in the case of criminal laws, and laws which interfere with fundamental rights and freedoms. In this section we look at whether competition law should be subject to a similar high degree of legal certainty. We shall focus mainly on the issue of whether competition law should be treated as criminal law according to the ECtHR's standards, and subject to the requirement of a high degree of clarity on this basis. Having demonstrated that this is the case, we shall look at the additional legal implications that this conclusion entails. Finally, we touch briefly on whether competition law interferes with fundamental rights and freedoms, and whether a high degree of legal clarity is required on this basis too.

3 6 2 Is Competition Law Criminal Law?

We saw in Chapter 2 that the competition laws of some of the subject jurisdictions, namely Australia, Canada and South Africa, include express criminal offences for engaging in hardcore conduct. If the ECtHR's case law is to be used as an appropriate benchmark, there is little doubt that these rules against cartel conduct would be subject to the same high standard of certainty required for criminal offences generally. As we saw in section 3 5 2, national classification of a law as criminal is likely to be determinative of its criminal status under the ECHR under the first *Engel* criterion. In any event, the second and third criteria would also appear to be satisfied in the case of expressly-criminalised hardcore conduct: the rules are of general concern and application, and the penalties for infringement are intended to be punitive and deterrent, as opposed to merely compensatory.

But what about agreements and conduct which are not expressly- criminalised? In the three jurisdictions just cited, this would include non-hardcore agreements and abuse of dominance/misuse of market power. In the other two subject jurisdictions, the EU and Hong Kong, this would apply to all agreements and conduct falling within the scope of the competition law.

Certainly, there are strong arguments in principle why a high degree of clarity under competition law should also apply even to agreements and conduct which are not expressly- criminalised. These include the following:

- Like criminal law in the normal sense of the term, competition laws are enforced by the State, or by regulators under powers delegated by the State, against private entities, as opposed to being purely a matter of private civil enforcement, such as contract and tort law.
- The constitutional requirement for clarity in criminal laws has been justified by the courts on the basis of the severe adverse consequences of being found guilty. Breach of competition law- even outside the hardcore cartel area- can also be punishable by severe financial penalties that are intended to deter further breaches, as is the case with many criminal offences. The recent fine of 2.42 billion euros imposed by the EU Commission on Google for abuse of dominance in the search engine market is a clear example.¹⁹⁴ Moreover, a breach of competition law can also attract private claims for damages, whether on a follow-on basis (after a finding of infringement) or a standalone basis, and damages awards can be very high.
- A finding, or even allegation, that a business has breached competition law, as with criminal offences, can carry a great deal of stigma. Competition law penalties make headline news, and headlines such as “EU hits Google with a record antitrust fine of \$2.7 billion”,¹⁹⁵ and “Qualcomm fined 997 million euros by EU for paying Apple to exclusively

¹⁹⁴ EU Commission Press Release IP/17/1784 of 27 June 2017 “Antitrust: Commission fines Google [euros] 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service”.

¹⁹⁵ www.cnbc.com (accessed on 1-11-2017).

use its chips”,¹⁹⁶ clearly indicate to the public that the companies have engaged in conduct which is officially considered wrongful. Competition officials often “talk up” the infringements by using criminal law analogies, such as theft and robbery. For example, an ex-EU Commissioner has said “[It] is up to us to show that when we break up cartels, it is to stop money being stolen from customers’ pockets.”¹⁹⁷ Similarly, an ex-head of the Australian Competition and Consumer Commission has been quoted as saying about price-fixing: “It is simply theft, stealing from consumers, and in the view that the ACCC has had for years now, if you can put people in jail for stealing from taxpayers, evading tax, if you can put people in jail for stealing from the social welfare department, then you ought to be able to put people in jail for stealing from consumers, sometimes literally millions or hundreds of millions of dollars through this form of straight theft.”¹⁹⁸ Such efforts to stigmatise conduct have also been made in the context of abusive conduct by dominant companies. For example, in a case brought against Intel under US antitrust law, the New York Attorney General was quoted as saying that “Intel robbed its competitors of the opportunity to challenge Intel’s dominance...”¹⁹⁹ In the EU context, it has been argued that there is a “clear EC policy to stigmatise violations of EC competition law through the way in which offences are presented to the public and the consequences of their breach”.²⁰⁰

¹⁹⁶ www.theguardian.com (accessed on 25-1-2018).

¹⁹⁷ Neelie Kroes “Taking Competition Seriously- Anti-Trust Reform in Europe” International Bar Association/European Commission Conference, Brussels 10 March 2005.

¹⁹⁸ “Extra powers to ACCC over price-fixing” WA Today 24 July 2009 available at www.watoday.com.au (accessed on 28-10-2017).

¹⁹⁹ “New York antitrust suit accuses Intel of bribery” 4 November 2009 www.cnet.com (accessed on 15-01-2018).

²⁰⁰ Donald Slater; Sebastien Thomas; Denis Waelbroek “Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?” GCLC Working Paper 04/08 15, available at <http://aei.pitt.edu/44310/> (accessed on 3-11-2017). In relation to Article 102 in particular, an English High Court judge has commented; “Once upon a time, a long time ago, the lack of legal certainty in regard to the parameters of Article 102 was not such a big deal. This was because there wasn’t a great deal of stigma attached to an infringement, there weren’t huge fines, and private enforcement of the competition rules was not really in the mainstream. So if the legal lines weren’t so bright, it didn’t matter too much. But things have obviously changed enormously. *There is stigma- a great deal of stigma- attached now*” (emphasis added). The Hon Mr Justice Barling in Barry Hawk (ed) *International Antitrust Law & Policy: Fordham Competition Law 2013* (2014) 454.

- Businesses themselves are very conscious of this stigma and wish to avoid it. After an extensive survey amongst businesses, the UK competition authority (the Office of Fair Trading (OFT) as it then was) found in 2010 that “the key drivers for competition law compliance were the fear of reputational damage and financial penalties”.²⁰¹ In a subsequent survey commissioned by the OFT’s successor, the Competition and Markets Authority, 78 per cent of the business respondents in 2015 identified potential harm to reputation as a reason for complying with competition law. This was the fourth most important reason given (after being the right thing to do ethically, providing a level playing field, and “it’s the law”: factors which also have reputational implications) and ahead of the risk of sanctions.²⁰²

At least two further factors support the arguments for a high degree of clarity in competition law, even in respect of arrangements which are not expressly-criminalised:

- We shall show that the competition laws of the subject jurisdictions, to a large extent, satisfy the second and third *Engel* criteria: the laws are of general application, and (with certain exceptions) they provide for punitive and deterrent penalties. This is particularly significant for the 47 countries that are signatories of the ECHR, which have to ensure that their competition laws comply with the clarity requirement- as well as jurisdictions like Hong Kong which follow ECtHR case law in interpreting their constitutions. But it is also significant for other countries with competition laws: the fact that so many countries have signed up to the ECHR means that the principles laid down in the ECtHR’s case law can fairly be said to be representative of the views of a large proportion of the world’s governments, and indeed arguably the people they lead. So this case law might also provide a useful guide to non-European countries that are faced with this issue.

²⁰¹ “Drivers of Compliance and Non-Compliance with Competition Law” OFT 1227 May 2010 6.

²⁰² “UK businesses’ understanding of Competition Law” IFF Research 26 March 2015 41,42. See also Barry Rodger “Competition Law Compliance: The CMA 2015 Study, Compliance Rationales and the Need for Increased Compliance Professionalism and Education” *ECLR* Vol 36 No 10 (Oct 2015) 423.

- The ECtHR has indeed confirmed in the case law that national competition laws can be treated as criminal for the purpose of the protections of the accused laid down in the ECHR if they satisfy the *Engel* criteria, even though not classified as criminal under national law. The European Courts have confirmed the same regarding EU competition law. These protections include the requirement of clarity under Article 7 of the ECHR.

We deal with each of these two points in turn.

3 6 3 Are the Subject Jurisdictions' Competition Laws Criminal under ECHR Standards?

As regards the second *Engel* criterion, EU competition law would certainly satisfy this criterion, as it contains prohibitions which are of general, rather than merely sectoral, application. The competition laws of the other jurisdictions would also do so, for the same reason, with the exception of Canada, in respect of non-hardcore arrangements. As we saw in Chapter 2, Canada does not *prohibit* such arrangements or subject them to penalties. They can, at most, be subject to a cease-and-desist order for the future. Assuming the order is complied with, there are no further adverse consequences for the firm concerned. Moreover, the reason for the introduction of the new lighter-touch regime for non-hardcore arrangements which took effect in 2010 was that many strategic alliances between competitors are economically beneficial and should be allowed. As the Competition Bureau has said in its guidelines:

“Strategic alliances can permit Canadian firms to capture the benefits of rapid technological changes and dynamic competitive conditions. They can permit firms to combine capabilities and resources so as to lower the costs of production, enhance product quality, and reduce the time required to bring new products to market. Such pro-competitive collaborations, even when they involve competitors, can often benefit

Canadians by allowing firms to make more efficient use of resources and accelerate the pace of innovation.”²⁰³

It is hard to imagine that the ECtHR, faced with these facts, would view the Canadian treatment of non-hardcore arrangements as satisfying the second criterion, if it had the jurisdiction and opportunity to review the Canadian law.

As regards the third criterion, punitive and deterrent penalties, there is no doubt that EU competition law would satisfy this criterion, as it provides that firms can be fined up to ten per cent of their worldwide turnover for infringements. In its guidelines on penalties, the EU Commission has said:

“Fines should have a sufficiently deterrent effect, not only to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behavior that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).”²⁰⁴

In Hong Kong, the Tribunal can impose a fine of up to ten per cent of the business’s Hong Kong turnover for any infringement, whether first-time or not, so the Hong Kong competition law would also fulfill the third criterion. In Australia too, substantial penalties can be imposed for infringements either inside or outside the hardcore category, which are clearly intended to act as a deterrent. Whether a person has previously engaged in similar conduct is expressly stated to be a factor, presumably an aggravating one, that can be taken into account in setting the level of the penalty, which implies that penalties are to be set at a level intended to deter further infringements.

In Canada and South Africa, however, the position as to the third criterion would be less straightforward.

²⁰³ “Competitor Collaboration Guidelines”, preface, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html> (accessed on 1-11-2017).

²⁰⁴ “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” OJ C210/2 of 1.9.2006.

In Canada, outside the expressly- criminalised hardcore category of arrangements, no penalties can be imposed for engaging in arrangements which substantially lessen competition (they can only be imposed if a Tribunal order, or Tribunal-endorsed consent agreement is breached). Accordingly, insofar as such arrangements are concerned, the third *Engel* criterion (as well as the second) is unlikely to be fulfilled. As regards abuse of dominance, although it is not expressly prohibited by law (but can be subject to a cease-and-desist order), the Tribunal can still impose a substantial penalty for such conduct – up to 10 million Canadian dollars for the first abuse and up to 15 million Canadian dollars for subsequent abuses.²⁰⁵ The Competition Act states that the purpose of the penalty is “to promote practices by [the person subject to the penalty] that are in conformity with the purpose of this section and not to punish that person”.²⁰⁶ However, promoting compliance is difficult to distinguish from deterring non-compliance, and the latter is in turn difficult to distinguish from penalising non-compliance. In reality, under ECHR standards, the Canadian administrative penalty provision for abuse might well be regarded as punitive and therefore be treated as criminal.

Certain commentators have indeed questioned the constitutionality of this penalty provision under Canadian law. For example, Bishop argues that the factors which can be taken into account in setting the level of the penalty could mean that the penalty is set at a level which is much higher than what is necessary to deter the conduct in question, and therefore means that the penalty is of a “denunciatory” (or “retributive”) nature rather than a purely deterrent one, meaning that it is a criminal one. This, he argues, is inconsistent with the fact that the standard of proof for abuse is a civil rather than criminal one, and that the policy intent behind the abuse provision is that it should not be treated as a criminal provision.²⁰⁷

²⁰⁵ S 79(3.1).

²⁰⁶ S 79(3.3).

²⁰⁷ Grant Bishop “The Economic Consequences and Constitutionality of Administrative Monetary Penalties for Abuse of Dominance” (2013) *Canadian Competition Law Review* 37. See also George N Addy, John Bodrug, Charles Tingley “Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement” (2012) *Canadian Competition Law Review* 277, 302-304.

In South Africa, the law distinguishes between hardcore arrangements such as price-fixing or market-sharing, which can attract penalties for a first-time infringement, and other types of arrangements, where only a repeat of previous conduct found to be in breach of the law can attract penalties. The penalty itself is substantial – up to ten per cent of the business’s annual turnover. While there is no doubt that hardcore arrangements would satisfy the third *Engel* criterion, the position is not clear regarding non-hardcore arrangements where first-time infringements carry no penalty at all.²⁰⁸

A similar distinction is made under the South African abuse provisions, between abuses which are expressly specified (such as excessive pricing and refusal to provide access to an essential facility), which can be subject to a penalty for a first time infringement (up to the 10 per cent turnover maximum) and other, non-specified abuses where only a repeat of a previous infringement can attract a penalty.²⁰⁹ Again, conduct in the first category would satisfy the third *Engel* criterion, but the position is not clear regarding conduct in the second.

However, in any event, since the *Engel* criteria are alternative rather than cumulative, if the South Africa law were to fulfill the second criterion (which is likely, as explained above) this would be sufficient for it to qualify as criminal under the EHCR standards.

3 6 4 South Africa’s rejection of ECHR standards regarding the criminal status of Competition Law

In section 3 6 3 above, we discussed whether the subject jurisdictions’ competition laws would be treated as criminal under the ECHR standards, thereby requiring a high degree of legal clarity. However, the adjudicators of competition law in South Africa have expressly rejected these standards.

²⁰⁸ Competition Act s 59

²⁰⁹ N 209 above.

In the *Federal Mogul* case²¹⁰ the Competition Tribunal found that Federal Mogul (“FM”) had contravened section 5 (2) of the Competition Act, which prohibits minimum resale price maintenance (RPM). The Commission asked the Tribunal to impose a penalty of ZAR 8,500,000 (approximately USD 623,401) on FM for the contravention, which the Tribunal was entitled to do under the Act. However, FM argued that the imposition of a penalty would be unconstitutional. The basis of its argument was that the penalty was of a criminal law nature, and therefore FM was entitled to the constitutional protections afforded to persons charged with a criminal offence, including the criminal standard of proof – beyond reasonable doubt – and the right to remain silent. The Competition Act did not offer those protections, and therefore to that extent, FM argued that it was unconstitutional. FM cited the ECtHR case law referred to above in support of its argument that, although the sanction was not expressly criminal under the statute, it was of a punitive and deterrent (and therefore criminal) nature, such as to render the constitutional protections applicable.

The Tribunal, however, disagreed, stating that “we are not obliged to follow the dominant European approach if we feel that the dissenting arguments are more forceful and in accordance with our own system”.²¹¹ The Tribunal distinguished the ECHR from the South African Constitution in the following way. Whereas under the ECHR all of the due process protections were “bundled” into Article 6, and therefore none of them would apply unless the proceedings were treated as criminal, under the South African constitution, the right to procedural fairness and right of access to the courts were applicable to both civil and criminal proceedings, and therefore the need to develop an extensive notion of what was criminal was “more compelling” in Europe. (The Tribunal held that in any event Article 6 ECHR would not preclude the imposition of a penalty, in particular because it did not impose the criminal standard of proof).

The Tribunal also found that courts no longer have a “bipolar” view of the law – that something is either criminal or civil – and that there could be administrative penalties which were in neither

²¹⁰ *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd* 08/CR/Feb01.

²¹¹ Para 47.

category. In deciding whether a transgression should be classified as criminal, the Tribunal laid down three criteria:

- The nature of the transgression – by reference to its history and purpose, is it “typically of a criminal nature”?
- What is the nature of the penalty?
- Is there a “rational connection” between the conduct the legislature seeks to prohibit and the sanction it imposes? The greater the disjuncture between the two, the more likely it is that the sanction will be regarded as punitive and the greater the degree of protection that must be afforded.²¹²

As regards the nature of the competition law, the court distinguished between the criminal treatment of cartels in certain jurisdictions and other competition law transgressions. With the latter it pointed to the following characteristics as indicating that they were not of a criminal law nature:

- The absence of any *mens rea* requirement.
- “Competition transgressions contain no moral or normatively condemnatory aspect”: whether an action will constitute an infringement will depend on matters such as whether there is market power and whether the effect on competition is substantial.
- For these reasons the criminal standard of proof is not appropriate.

Regarding the nature of the penalty, the Tribunal noted first that a penalty could only be imposed in the case of a clear contravention (such as RPM) or repeat offences – in other words the defendant ought to have known that the action was unlawful.

Referring to a number of cases, particularly in Australia, and commentators, the Tribunal distinguished between two purposes of punishment – retribution and deterrence. Whereas retribution implies that the action is immoral and bad, a penalty designed only to deter does not

²¹² Pars 70-76.

have such a connotation. It is designed (and set at a level) for the pragmatic purposes of preventing recurrence, by making it more costly than not for the defendant to re-offend, and by deterring others from committing contraventions.

Although the Tribunal held that section 5(2) was not free of any retributive element, it held that deterrence was the primary purpose.

Finally, on rationality, the Tribunal held that a penalty with a cap based on a percentage of turnover was rational since increased turnover was normally an effect of anti-competitive conduct and reflected loss to consumers. Impliedly, the Tribunal therefore held that there was no “disjuncture” between the conduct and the sanction. (However, against this, it could be argued that where, in a particular case, a penalty was set at a level close to the cap, in circumstances where the increase in turnover as a result of the contravention was minimal, there could be a significant disjuncture between the conduct and the penalty).

On appeal, the Competition Appeal Court again rejected the arguments that section 59 triggered the constitutional protection afforded in criminal cases, but for different reasons.²¹³ It held that the protections only applied to persons who had been “formally charged” with an offence, and that only the National Prosecution Authority could do so, not the Competition Commission. Section 5 (2) was not therefore of a criminal law nature. The Court also noted that in criminal matters, imprisonment is normally provided as an alternative to a penalty, which was not the case with section 5 (2).²¹⁴ “The rights set out in section 35 (3) of the Constitution are reserved for those people who have been charged in criminal matters and who are likely to be sentenced to a term of imprisonment. It is the imprisonment aspect, which deprives a charged or accused person of his liberty, which is sought to be protected by the entrenchment of the rights”. In addition, the penalty did not form part of the person’s criminal record, which the Court considered was also a relevant factor.

²¹³ *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission* 33/CAC/Sep03.

²¹⁴ Pars 37, 38.

However, Prins and Koornhof argue that subsequent South African case law has called into question the view that the penalties under the South Africa Competition Act are not criminal, and that urgent clarification of this issue is needed:

“The rather strange apparent *status quo* in contemporary South African competition law when considering the opinions found in current case law is as follows:

1. Complaints of prohibited practices are submitted to or initiated by an investigative body, which conducts investigations of a seemingly *criminal* nature into these complaints;
2. That investigative body may decide to refer and prosecute complaints of prohibited practices before a separate, adjudicative body whose processes are neither *civil* nor *criminal* in nature, but rather *sui generis* and inquisitorial in approach; and
3. That adjudicative body may decide, upon determination of prohibited practices on the part of the respondent, to impose administrative penalties which are seemingly *criminal* in nature”.²¹⁵

In conclusion, all of the competition laws of the subject jurisdictions would appear to fall within the definition of criminal laws if the ECHR standards were applied, on the basis of one or more of the *Engel* criteria, even in respect of non-hardcore arrangements and conduct which are not expressly-criminalised, with the exception of the regime for non-hardcore arrangements in Canada. However the same does not necessarily apply fully under the national laws of the subject jurisdictions, as the South Africa example demonstrates.

3 6 5 ECtHR and European Courts’ Case Law on Competition Law as Criminal Law

We shall see in this section that the ECtHR has regarded a national competition law in Europe as criminal for the purpose of the ECHR, applying the *Engel* criteria, and the European Courts have also accepted that EU competition law is criminal for the purpose of the ECHR protections, including Articles 6 and 7. We shall deal with each in turn.

²¹⁵ D Prins & P Koornhof “Assessing the nature of competition law enforcement in South Africa” *Law, Democracy & Development* Vol 18 (2014) 136.

As regards the ECtHR case law, one case in which it held a national competition law *not* to be criminal was *Neste St Petersburg v Russia*.²¹⁶ The Russian competition law at the time of the conduct in question (1999) prohibited agreements or concerted practices between businesses dealing in the same commodity market that could result in (*inter alia*) price-fixing. However, the law provided that the competition authority could authorise such arrangements if (broadly speaking) the benefits exceeded the costs. The law provided that certain remedies could be imposed by the competition authority in case of infringement, including disgorgement of profits gained from the infringement and even compulsory division of the business, but not financial penalties or imprisonment. Appeals against the authority's decisions were heard in the commercial, not criminal courts, and under the Russian Criminal Code, criminal responsibility only applied to individuals, not companies.

The Russian competition authority decided, after investigation, that a number of petrol supply companies had infringed the law by price-fixing, and ordered them to pay to the Government the amount of the profit they had received as a result of the infringement. They appealed against the decision on the grounds, *inter alia*, that they should have been given the benefit of, but were denied, the procedural safeguards under Article 6 of the ECHR, arguing that the offence was criminal for the purpose of the ECHR.

As regards the first *Engel* criterion, the proceedings were not classified as criminal under domestic law. As to the second criterion, the Court held that the law was not criminal in nature, for a number of reasons. First, the law was of sectoral (rather than general) application, applying as it did only to commodity markets, not industry-wide. This reason would have been sufficient in itself to dispose of the second criterion, but the court went on to state that, under the law, "monopolistic behaviour may even be authorised by the State if proven to serve common good. Genuinely criminal behaviour is not usually subject to such utilitarian justification".²¹⁷ A third reason it gave is that "freedom of market competition is a relative, situational value and encroachments on it are

²¹⁶ Judgment of 3 June 2004.

²¹⁷ Para 10.

not inherently wrong in themselves”.²¹⁸ (As noted below, these second and third points are inconsistent with, and appear to have been overruled by, subsequent ECtHR case law).

As regards the third *Engel* criterion, the ECtHR held that this also was not met, because the law did not provide for punitive and deterrent penalties for infringements.

However, more recently, the ECtHR ruled in *Menarini Diagnostics v Italy* that the Italian competition law was to be regarded as constituting a criminal offence for the purpose of the ECHR.²¹⁹ This law was very closely modeled on EU competition law, prohibiting arrangements which prevent, restrict or distort competition, as well as abuse of dominance. The law did not expressly criminalise any arrangements or conduct, but the competition authority could impose financial penalties of up to ten per cent of the business’s turnover for infringement. The law nevertheless provided (like the Russian competition law in *Neste St Petersburg*) that the competition authority could authorise arrangements if they produced public benefits that outweighed the harm to competition.

In the case in question, the competition authority decided that a number of suppliers of diagnostic tests for diabetes had engaged in price-fixing, in breach of the competition law. As the law was not classified as criminal under Italian domestic law, the issue again turned on the application of the second and third *Engel* criteria.

On the second criterion, the ECtHR held that it was fulfilled, because the law was aimed at protecting market competition and hence affected the general interests of society that are normally protected by criminal law.²²⁰ This impliedly overruled the comment in *Neste St Petersburg* that “freedom of market competition is a relative, situational value and encroachments on it are not inherently wrong in themselves”. Moreover, whereas in *Neste St Petersburg*, the authority’s power to authorise certain arrangements was a factor in ruling that the second criterion was not fulfilled,

²¹⁸ Para 10.

²¹⁹ Judgment of 27 September 2011.

²²⁰ Para 40.

in *Menarini*, a similar authorisation power did not alter the ECtHR's conclusion that the second criterion was fulfilled.²²¹

On the third criterion, the EHRC held that this was also satisfied, because the penalty was of a punitive and deterrent nature.²²²

Turning to the European Courts' case law under EU competition law, the early cases did not refer to the ECHR protections, at least where EU Commission decisions were challenged on grounds which included lack of legal certainty, and the European Courts showed little sympathy to the parties' objections on this ground.

In the very first case in the European Court on abuse of dominance under Article 102 TFEU (then Article 86 of the EEC Treaty), namely *Continental Can*,²²³ a business, which the Commission found to be dominant in the relevant market, had acquired a competing business, thereby virtually eliminating competition in the relevant market. The issue was whether the acquirer had abused its dominant position by doing so. Article 86 had hitherto only been held to apply to "exploitative" abuse, i.e. conduct by a dominant company which directly exploited its position by imposing unfair prices or other terms on customers or suppliers, and not cases where, as in this case, the conduct affected the structure of the market.

In his Opinion advising the Court, Advocate General Roemer pointed out that the natural or literal meaning of the word "abuse" indicated that there could only be an abuse if the dominant position was used as an instrument, and used in an objectionable manner. In other words, there could be no abuse without use. The Advocate General's view is consistent with the natural, dictionary meaning of the term. The Oxford English Dictionary, for example, defines the verb "abuse" to mean "to use (something) to bad effect or for a bad purpose". It was common ground between *Continental Can* and the Commission that the former did not use its dominant position to effect the acquisition in question.

²²¹ The authorisation power is contained in Italy's Competition and Fair Trading Act 1990 s 4.

²²² Paras 41, 42.

²²³ Case 6/72 *Continental Can v Commission* [1973] ECR 215.

The Advocate General also advised the Court to adopt a narrow interpretation of Article 86, on grounds which were consistent with Article 7 ECHR (although he did not expressly mention this provision):

“It is quite clear that the Commission is attempting to interpret Article 86 extensively by equating the damage to consumer interest which occurs when competition ceases to exist, i.e. when there is a limitation of possibilities of choice, with damage to the consumer consequent upon a limitation of production as a result of a dominant position. As a matter of principle, this interpretation must be subject to doubt in the face of a provision as drastic as that contained in Article 86 which constitutes a prohibition (probably having as a consequence nullity in civil law) and for the infringement of which a penalty is provided. In the light of this, there is a great deal to be said for the theory that one ought to give a narrow interpretation, i.e., that one ought to be cautious in attempting analogies and that one ought to demand – as the applicants consider correct – that there must be a case of an infringement of at any rate the kind enumerated in the examples set out in Article 86, par. 2 (a) to (d). Put into other words therefore, one ought in this connection to proceed from the principle *in dubio pro libertate*, as that principle was emphatically underlined by well-known authors in relation to the relevant regulation of paragraph 22 of the German law against restriction on competition, with the object of adhering closely to the text of the provision”.²²⁴

However, in its judgment, the Court simply ignored the Advocate General’s view that Article 86 should be construed narrowly, and that the benefit of the uncertainty should be given to the applicant. Instead, it upheld the Commission’s view that Article 82 could apply to acquisitions, on the grounds (amongst others) that the competition provisions would otherwise be rendered ineffective.

²²⁴ N 223 above 255.

European judicial challenges to competition infringement decisions on grounds of legal certainty since *Continental Can* have mostly focused on arguing that no fines, or lower fines, should be imposed because of the uncertainty, not that no infringement existed in the first place. Even with fines, however, the European Courts have rarely upheld such challenges, and appear to have taken the view “if in doubt, don’t act”. In other words, the regime is given the benefit of the doubt, not the individual.

For example, in another early case on abuse of dominance under EU law, *Hoffman-la Roche v Commission*,²²⁵ which concerned exclusive purchasing and fidelity rebates, the pharmaceutical company Hoffman - la Roche argued that no fine should have been imposed on it because the concepts of “dominant position” and “abuse” had not been sufficiently defined through the case law. The Advocate General, advising the Court, agreed, stating that even with legal advice, the applicant was entitled to have reasonable doubts as to whether the conduct was illegal. However, the Court refused to quash the fine on this basis. The Court said that the “possibility, if not the probability, of this application of the law had to be taken into consideration by a vigilant commercial operator”.²²⁶ In other words, “if in doubt, don’t act”.

Later on, the European Courts recognized that the principle of non-retroactivity (including legal certainty) embodied in Article 7 ECHR applied to EU competition law. For example, in 2005, the European Court stated:

“The Court of First Instance held, first of all and correctly, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.”²²⁷

²²⁵ Case 85/76 [1979] ECR 461.

²²⁶ Para 134.

²²⁷ Case C-189/02 P *Dansk Rorindustrie v Commission* [2005] ECR I-5425 para 202.

In spite of this statement, in the *Microsoft* case, the European General Court refused to quash the fine imposed on Microsoft, on the basis that the company “ought to have been aware that its refusal *might* infringe the competition rules”.²²⁸ (emphasis added).

Nevertheless, in recent cases the European Courts have recognised that, although EU competition law is not expressly classified as criminal (indeed, EU law expressly states that penalties are not to be treated as criminal²²⁹) it is to be classified as criminal for the purposes of the ECHR, including Article 7, which has now been incorporated into Article 49 of the EU’s Charter of Fundamental Rights (“the Charter”) which took effect along with the Treaty of Lisbon on 1 December 2009.²³⁰

In *AG-Treuhand v Commission*, the applicants challenged the infringement decision itself, not just the penalty, on the specific basis that it was not sufficiently predictable to comply with Article 7 of the ECHR.²³¹ The issue was whether the Commission was correct to attribute liability for an infringement of EU competition law not only to the members of a cartel itself (a group of chemical producers which had engaged in price-fixing), but also a consultancy firm which had assisted with administrative arrangements for operating the cartel, such as reserving meeting rooms and travel arrangements, and storing secret documents. The consultancy firm argued that it was not sufficiently foreseeable on the basis of previous case law that it would be held guilty of an infringement in these circumstances, and therefore the infringement decision was contrary to Article 7 (and therefore the Charter).

The Court accepted that Article 7, as implemented by the Charter, applied to EU competition law. However, it rejected the consultancy firm’s argument on legal certainty. It held that, although the European Courts had never explicitly ruled on a similar issue, the applicant “should have expected, if necessary after taking appropriate legal advice, its conduct to be declared incompatible with the

²²⁸ Case T-201 *Microsoft v Commission* [2007] ECR II-000.

²²⁹ Council Regulation 1/2003 OJ L1/1 of 4.1.2003 Article 23(5).

²³⁰ OJ C303/1 of 14.12.2007.

²³¹ Case C-194/14P not yet reported, available at:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-194/14%20P> (accessed on 25-10-2017).

EU competition rules, especially in the light of the broad scope of the terms ‘agreement’ and ‘concerted practice’ established by the Court’s case law”.²³² The Commission’s infringement decision was therefore held to be consistent with the Article 49 of the Charter (and therefore Article 7).²³³

In the academic literature too, there is a consensus that EU competition law, and the national competition laws of states that are parties to the ECHR, should comply with the clarity requirements of Article 7, at least in cases where punitive or deterrent penalties are sought.²³⁴

It is true that these competition laws are not directly subject to Article 7, in the sense that their validity is at risk if they (in conjunction with relevant case law interpreting and applying the laws) do not provide sufficient clarity. It is only enforcement action in which punitive or deterrent penalties are sought that is directly at risk of being declared invalid. So are vague competition laws which do not satisfy Article 7’s standards of clarity acceptable, as long as no punitive or deterrent penalties are sought? We shall argue in Chapter 6 that this is not the case, and that vague competition laws result in significant harmful consequences even if no such penalties are sought. Moreover, it should be recalled that Article 7 lays down the principle that no-one should be *found guilty* of infringing a law which is insufficiently clear, not just the principle that they should not be *penalised* for doing so. The ECtHR’s case law under Article 7 provides an appropriate benchmark in terms of the level of certainty to which those in charge of drafting competition laws should strive.

3 6 6 Is Competition Law a “Less Serious” Criminal Offence, and is Less Legal Certainty therefore required?

²³² N 231 para 43.

²³³ N 231 paras 26-47.

²³⁴ See for example Andreas Scordamaglia “Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees” *The Competition Law Review* Vol 7 Issue 1 (December 2010) 5; Kristina Nordlander and Patrick Harrison “Are Rights Finally Becoming Fundamental?” *CPI Antitrust Chronicle* Feb 2012 (1); Donald Slater; Sebastien Thomas; Denis Waelbroek “Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?” GCLC Working Paper 04/08 available at <http://aei.pitt.edu/44310/> (accessed on 3-11-2017).

Could it be argued, according to the ECtHR's reasoning in *Jusilla v Finland* discussed in section 3 5 3, that although competition law may be criminal law, it is at or near the less serious end of the scale of criminal offences, and therefore the protections offered by the ECHR, including legal clarity, need not be so stringent?

In *Jusilla*, the ECtHR did indeed seem to suggest that competition law was not part of "hardcore" criminal law, and therefore lower down on the scale of seriousness than the "traditional" hardcore categories of criminal law:

"Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of different weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, *competition law*, and penalties imposed by a court with jurisdiction in financial matters. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency..."²³⁵ (citations omitted, emphasis added).

In section 3 5 4 we noted certain criticisms that can be, and have been, levelled against the ECtHR's approach in ranking offences according to their degree of seriousness and varying the degree of safeguards according to the degree of seriousness of the offence. The above passage suggests, although it does not say so expressly, that competition law is not part of "traditional" criminal law, and may therefore require less stringent protection for the accused. But this view is also open to criticism nowadays, when competition law infringements generally can be subject to penalties of

²³⁵ Para 43.

up to ten per cent of a firm's annual turnover, hardcore conduct is being increasingly criminalised (with imprisonment of individuals as a potential sanction in some jurisdictions) and a great deal of stigma attaches to infringements. It should be borne in mind that this statement by the ECtHR, insofar as it referred to competition law, was *obiter*, and that the tax surcharge offence in that case, and the small penalty that was imposed, are a far cry from the stigma and stringent penalties which result from many competition law infringements.

Nevertheless, in one EU cartel case, *KME v Commission*, Advocate General Sharpston relied on the *Jusilla* passage above, in advising the European Court to reject the applicant's argument that the degree of scrutiny exerted by the General Court over the Commission's decisions was not sufficient to comply with ECtHR case law under Article 6 ECHR.²³⁶ Before the European Court handed down its judgment in this case, the General Court was faced with a similar argument in another cartel case, *Schindler v Commission*, and followed Advocate General Sharpston's approach in rejecting the argument.²³⁷ When it came to the European Court's final judgment in *KME*, the Court agreed with the Advocate General that the applicant's argument should be rejected, but did not refer to the ECtHR case law, preferring instead to state simply that the EU judicial review system was not contrary to "the requirement of effective judicial protection in Article 47 of the Charter [of Fundamental Rights of the European Union]".²³⁸

Whatever the merits of the European Courts' relaxation of the requirement for a full independent hearing at first instance (and a contrary view by the Courts would imply that the whole system of enforcement of EU competition law would have to be overhauled, with the Commission no longer being able to act as decision-maker), we argued in section 3.5.4 that such relaxation is certainly not appropriate in the case of the requirement of a high degree of clarity in criminal law- whatever the perceived degree of seriousness of the offence. Accordingly, if competition laws with punitive and deterrent penalties are to be treated as criminal (as the ECtHR and European Courts have held), a high degree of clarity is required.

²³⁶ Case C-272/09P Advocate General's Opinion paras 67-70.

²³⁷ Case T-138/07 paras 52-59.

²³⁸ Para 106. Article 47 states, in relevant part "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law".

The Court in *AC Treuhand* did not state expressly, as the previous cases cited above had done, that the mere risk of illegality was sufficient to preclude a challenge on grounds of legal certainty. We argued earlier in this section that it is inconsistent with rule of law principles to hold that the mere possibility that conduct might be deemed illegal provides sufficient clarity to comply with Article 7. There is an additional reason for setting the bar for legal clarity higher than this in the case of competition law. In economic terms, vague competition laws could have the perverse effect of deterring firms from competing vigorously for fear of breaking the law- the precise opposite of what most competition laws are intended to achieve. Clarity therefore makes sense from an economic point of view, as well as a freedom and rule of law point of view.

However, if the courts choose in future to approach the issue of the precise *degree* of legal clarity which competition laws should provide, it is submitted that there are three basic conditions which competition laws should satisfy to be sufficiently clear, according to the ECtHR principles discussed in section 3 5 2:

- The “essence” of the offence must be clear. We discussed earlier in this section what “essence” means in this context.
- Points in the law may have to be clarified through the case law.
- However, it must be possible for a business to predict, with “legal advice” (a concept which we also defined) the outcome of this clarification and its application to the business’s proposed arrangement or conduct.

We shall discuss in Chapter 4 whether the competition laws of the subject jurisdictions satisfy these conditions.

3 6 7 Implications of Treating Competition Law as Criminal- apart from High Legal Clarity

Treating competition laws as criminal does not just mean that laws have to be clear for them to be enforced or (or in some jurisdictions safe from being struck down as unconstitutional). It also raises a number of other issues that are relevant to clarity in laws. For example, if competition law is treated as criminal:

- Should the higher standard of proof which exists in many jurisdictions for criminal offences- beyond reasonable doubt- apply?
- Should the presumption of innocence principle which applies to criminal offences in many jurisdictions (for example in Article 6(2) ECHR) apply, meaning that the burden of proof lies on the prosecution?
- Should the normal requirement that *mens rea* be proved for criminal offences apply?

We deal with each of these implications in turn.

Regarding the question of standard of proof, applying the criminal standard of proof beyond reasonable doubt in competition laws is problematic in many cases. Where competition laws prohibit certain types of conduct *per se*, i.e. all that needs to be proved is that the offending act took place, it may be practicable to apply this standard. But for other infringements, where liability depends (*inter alia*) on the effects or likely effects of the arrangements or conduct on competition in the market, it may not be possible in many cases to prove such effects beyond reasonable doubt, because those effects are uncertain, and depend on an economic assessment on which views may differ.

The standard of proof issue arose in the first case on abuse of dominance under the UK Competition Act, which is closely modeled on Article 102 of the TFEU, *Napp Pharmaceuticals Limited v Director General of Fair Trading*.²³⁹ The Competition Appeal Tribunal noted that, although the proceedings were to be treated as criminal for the purposes of Article 6 of the ECHR (which sets down various procedural safeguards for accused, including the presumption of innocence requirement), the ECHR, and the UK Competition Act, were silent as to the requisite

²³⁹Case No 1001/1/1/01 Judgment of 15 January 2002.

standard of proof. The Tribunal went on to say that, because of the complex economic assessments often involved in competition law cases, Parliament was more likely to have intended the civil balance of probabilities standard to apply. Nevertheless, it said that, given the severity of the sanctions involved, strong and convincing evidence would have to be produced before an infringement could be found.²⁴⁰

This line of reasoning is hard to understand. The higher standard of proof in criminal cases is a procedural safeguard to ensure that the accused is given the benefit of any reasonable doubt. As some commentators have put it: “The more serious the offence, the more necessary it is to comply with procedural safeguards”.²⁴¹ The Tribunal itself acknowledged the severity of the sanctions and that UK competition law was to be treated as criminal for the purpose of the ECHR. Arguably the standard of proof should not be lowered just to make it easier for the prosecutor to obtain a conviction, as the Tribunal appeared to do. If successful prosecutions are difficult to bring because of the complex economic assessments required, then arguably the solution is to change the law to make it clearer, not to lower the procedural safeguards of the accused.

In Hong Kong, we noted in section 3.5.4 that its Court of Final Appeal, in the *Koon Wing Yee* case, had held that the law against insider dealing was to be treated as criminal for the purposes of the Hong Kong Bill of Rights Ordinance (which is interpreted in line with Article 7), because of the power to impose punitive and deterrent penalties for breach, even although under domestic law it was not treated as a criminal matter. It also held that, as a result, in contrast to the UK approach in *Napp*, the criminal standard of proof - beyond reasonable doubt - applied, in the absence of any express statutory provision to the contrary.

More recently, however, the Hong Kong Court of Instance (CFI), in a case involving the competition rules that applied to the telecommunications and broadcasting sectors, followed the *Napp* approach.²⁴² It held that, while the proceedings were not criminal for ECtHR purposes

²⁴⁰ Paras 101-113.

²⁴¹ Donald Slater, Sebastien Thomas, Denis Waelbroek “Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?” GCLC Working Paper 04/08 available at <http://www.gclc.coleurop.be> (accessed on 7-10-2017).

²⁴² *Television Broadcasts Ltd v Communications Authority* HCAL 176/2013 paras 281-295.

because these competition rules only applied to two specific sectors and not the economy as a whole (in other words the second *Engel* criterion was not met), even if they had been classified as criminal, the standard of proof would not have been the criminal one for the same reason given in *Napp*, i.e. the complex economic assessments involved in competition cases made such a standard inappropriate. The court said that the *Koon Wing Yee* judgment should be limited to its particular context, i.e. insider dealing. The CFI judgment has been appealed, so it remains to be seen whether it will be upheld by the higher court(s).

Under the South Africa Competition Act, the standard of proof is expressly stated to be the balance of probabilities.²⁴³ It is questionable whether this should be the appropriate standard of proof for those types of conduct that would be treated as criminal according to the ECtHR's definition, or whether a higher standard of proof should apply.

Turning to the burden of proof, Article 6(2) ECHR provides that persons accused of a criminal offence are entitled to the presumption of innocence until they are proven guilty, so that the burden of proof lies on the prosecution. This principle applies not just in the EU but also in the other subject jurisdictions. Certain commentators have questioned whether the extensive use of presumptions *against* the alleged infringer under competition law is consistent with this fundamental right.²⁴⁴ For example, in EU competition law, there is a (rebuttable) presumption that a business that has a market share of 50 per cent or more has a dominant position. In South Africa, there is an irrebuttable presumption of dominance at 45 per cent (or higher) market share and a rebuttable presumption of dominance between 35 per cent and up to below 45 per cent. These commentators have argued that the EU presumptions may not be consistent with Article 6(2) because they are effectively a shortcut to finding proof of guilt, by not having to prove that the real test of dominance is actually met.

There has been a great deal of debate about the constitutionality of section 73A(5) of the South African Competition Act. Section 73A provides that, if a director of a company is found guilty of

²⁴³ S 68.

²⁴⁴ Kristina Nordlander and Patrick Harrison "Are Rights Finally Becoming Fundamental?" *CPI Antitrust Chronicle* Feb 2012(1).

engaging in or knowingly acquiescing in one of the hardcore prohibited practices under section 4(1)(b) of the Act, such as price-fixing or bid-rigging, he or she may be subject to imprisonment for up to 10 years. Section 73A(5) provides that:

“In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b), is *prima facie* proof of the fact that the firm engaged in that conduct.”²⁴⁵

It has been argued that, by imposing a reverse burden of proof on the accused- to disprove the finding of the Court or Tribunal- this provision constitutes a violation of the accused’s right to be presumed innocent until proven guilty.²⁴⁶

The final issue in this section is *mens rea*, which is a necessary element for the prosecution to prove for most criminal offences. Under EU competition law, *mens rea* (in the form of intention or negligence) is only expressly required for a penalty to be imposed: this implies that no such *mens rea* is required to establish an infringement.²⁴⁷ In other words, breach of competition law is a matter of strict liability, even although (at least outside the category of hardcore arrangements) it involves complex economic assessments on which views may differ, on matters such as whether competition will be harmed, and whether there are benefits that outweigh such harm. It appears that the same applies to the competition laws of South Africa and Hong Kong, and at least the non-

²⁴⁵ Government Gazette Vol 530 No 32533 28 August 2009.

²⁴⁶ Andrew Smith and Mkhululi Stubbs “The Competition and Constitutional Conundrum: Cartels, Criminalisation and Complex Monopolies” *Sibergramme* 2/2009 10 September 2009, ISSN 1606-9986; Tshokofelo Letsike “The criminalisation of cartels: how effective will the new Section 73A of the Competition Amendment Act be?”, presentation at Seventh Annual Competition Law, Economics and Policy Conference, Johannesburg 5-6 September 2013. For contrary views see Louise Jordaan and Phumudzo S Munyai “The Constitutional Implications of the new Section 73A of the Competition Act 89 of 1998” (2011) 23 *SA Merc LJ* 197; Phindile Raymond Msaule “An Interpretation and Application of Section 73A(5) of the Competition Act 89 of 1998, South Africa” *Acta Universitatis Danubius Juridica*, Vol 12, No 3 (2016).

²⁴⁷ Council Regulation 1/2003 OJ L1/1 of 4.1.2003 Art 23(2).

criminalised infringements under Australian law. In Canada, however, since engaging in anti-competitive arrangements or abuse (outside the expressly-criminalised hardcore arrangements) is not in itself automatically prohibited by law, the issue of *mens rea* in establishing liability does not arise in respect of these areas of arrangements and conduct.

Under EU competition law, even relying in good faith on legal advice which turns out to be wrong is no defence to an alleged infringement. In the *Schenker* case, which concerned a price-fixing cartel amongst Austrian freight-forwarding companies, the European Court held that such reliance was not even relevant to the question of whether the business has committed the infringement intentionally or negligently, thereby justifying the imposition of a penalty.²⁴⁸ If the business “could not have been unaware of the anti-competitive nature of its conduct” (as the Court held was the case here) this was sufficient to justify a penalty, irrespective of whether it had received legal advice that the arrangement was legitimate.²⁴⁹

Although the wording of the Court’s judgment was general and not limited to the facts of this particular case, it may be that it regarded the breach as such an obvious one that legal advice could not be relied upon in those circumstances. Whether the Court would have taken the same view in a case involving complex economic assessments is not clear (although it will argued in Chapter 4 that such assessments do not constitute legal advice). If the business conducts a complex economic assessment and concludes in good faith that the proposed arrangement or conduct will comply with the law, and the authority or court subsequently disagrees, it can hardly be said that the business “could not have been unaware of the anti-competitive nature of its conduct”.

Is it fair that a business can be held guilty of an infringement or subject to a penalty if it genuinely believes that its arrangement or conduct complies with competition law, has no intention to infringe the law, and gets it wrong only because:

²⁴⁸ C-681/11 *Schenker & Co and Others* not yet reported, available at: <http://curia.europa.eu/juris/documents.jsf?num=C-681/11> (accessed on 15-10-2017).

²⁴⁹ Paras 33-43.

- its complex economic assessment does not coincide with that of the authority or courts, looking at the matter after the fact and with full evidence which was not available to the business at the time it entered into the arrangement or engaged in the conduct; and/or
- it relies in good faith on legal advice that the arrangement or conduct was permitted?

It could be argued that this is not the case, either because the law is not sufficiently clear (on the basis of the Article 7 principles which were discussed in section 3 5 2), or because the *mens rea* requirement which is normally applicable to “classic” criminal offences should also be applied to competition law, given that it is to be treated as its criminal for ECHR purposes.

3 6 8 Does Competition Law Interfere with Fundamental Rights and Freedoms?

As was noted in section 3 5 6, there is another area, apart from criminal law, where the ECHR requires laws to be clear, namely laws or regulatory action which interferes with fundamental rights and freedoms. These include the right of property guaranteed by Article 1 of the First Protocol of the ECHR. Certain aspects of competition law could impinge on the right to property, and as such would also have to be sufficiently clear to be compatible with the ECHR on this basis (although there does not appear to be any case law in which this issue has arisen).

For example, if a dominant firm refuses to license intellectual property rights, or allow access to an essential facility, this can constitute an abuse, at least under EU and South Africa competition law.²⁵⁰ By effectively requiring the business in question to grant a licence or allow access to its facility in order to comply, this rule arguably interferes with the right to property (which in Europe is guaranteed under Article 1 First Protocol of the ECHR). Under ECHR principles, the conditions under which such a refusal would constitute an abuse would have to be clear.

More generally, certain sanctions for breach of competition law, in the form of financial penalties, disgorgement of profits, damages awards, or divestment of assets, could constitute an interference with property rights, and therefore arguably would also have to be clear to be constitutionally valid.

²⁵⁰ For the EU position, see O’Donoghue and Padilla *The Law and Economics of Article 82EC* (2006) Ch 8. For the South African position see Competition Act s 8(b).

In the Hong Kong competition law, for example, one of the orders the Tribunal can make, if it finds an infringement, is an order “restraining or prohibiting a person from acquiring, disposing of or otherwise dealing with any property specified in the order.”²⁵¹ Is such a power sufficiently circumscribed in order to ensure proper protection of the right to private property (which is also guaranteed by the Hong Kong Basic Law?). It could be argued that this is not the case.

Potential interference with property rights is therefore another reason why a high standard for legal clarity should apply to competition law. Indeed we also pointed out in section 3.5.4- with reference to Hong Kong’s constitution- that arguably any public intervention against private freedom should satisfy a high degree of legal certainty.

3.7 Conclusions

In this Chapter we have looked at what “legal certainty” means, and identified clarity in laws as one facet of legal certainty. The principle that a law should be clear enough for an individual to know what legal consequences will flow from a particular act or omission is regarded as an important component of the rule of law. The reasons why such clarity is valued were examined in more detail. We then looked at the constitutional requirements for clarity in laws, taking the US and Europe as central jurisdictions, and noted that higher standards of clarity are required for criminal laws, and laws which interfere with fundamental rights and freedoms.

We then assessed whether the competition laws of the subject jurisdictions should be treated as criminal for these purposes. Using the criteria in the ECtHR case law as a benchmark, we argued that they should, with certain exceptions. Indeed EU competition law has been so treated by the European Courts. Although the *precise degree* of clarity that is required has been a matter of some controversy in the European case law, we identified from the ECtHR’s case law under Article 7 of the ECHR three basic conditions that competition laws should satisfy to be sufficiently clear to comply with the rule of law. These are that (a) the “essential ingredients” of the law should be clear, (b) any residual areas of doubt should be issues of law, and (c) the business should be able

²⁵¹ Competition Ordinance Schedule 3 Para 1(d).

to predict the application of the law to its proposed arrangements or conduct with the benefit of legal advice.

In Chapter 4 we shall examine the degree of clarity that exists in the competition laws of the subject jurisdictions, and assess whether they satisfy these three basic conditions.

4 Are Competition Laws Sufficiently Clear?

4 1 Introduction

In Chapter 2, we identified key elements that the competition laws in the subject jurisdictions share, namely:

- a prohibition of, or provisions entitling the authorities to intervene against, agreements and other types of collusion between businesses which have negative effects on competition, subject to exceptions and;
- a prohibition of, or provisions entitling the authorities to intervene against, businesses which have substantial market power (or market dominance) abusing (or in Australia, “misusing”) that position. In Canada and South Africa there are express legislative exceptions to these provisions on grounds of superior performance and economic efficiency respectively, but not in the EU, Australia, or Hong Kong. However, recent EU case law suggests that a similar exception should be read into EU law.²⁵²

In this Chapter, we look at the extent of clarity that exists within these elements in each of the subject jurisdictions’ competition laws. In the light of this analysis, we conclude by assessing whether the competition laws of the subject jurisdictions satisfy the three conditions for sufficient legal clarity that we identified in Chapter 3.²⁵³

For the purpose of the analysis it will be useful to break down the key elements into four components, namely:

- arrangements which harm competition;
- exclusions and authorisations of such arrangements;
- dominance or substantial market power; and
- abuse or misuse of dominance or substantial market power.

4 2 Arrangements Which Harm Competition

²⁵² See Case C-23/14 *Post Danmark*, not yet reported, available at <http://curia.europa.eu/juris/liste.jsf?num=C-23/14> (accessed on 15-10-2017).

²⁵³ See section 3 5 2.

4 2 1 EU

In the EU, the rules applying to arrangements between businesses are contained in Article 101 of the Treaty on the Functioning of the European Union (“TFEU”).²⁵⁴ They have remained substantively unchanged since 1957, when they were (along with the rules on abuse of dominant position under what is now Article 102 TFEU) included in the Treaty of Rome between the six original Member States of what was then called the European Economic Community, and is now the EU.

Article 101(1) and (2) provide as follows:

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.”

Article 101(3) provides that agreements can be exempted from the prohibition in Article 101(1) if they meet certain criteria- this exemption is discussed in section 4 3 1.

²⁵⁴ OJ C326/1 of 26.10.2012.

It can be seen that the prohibition in Article 101(1) is couched in very general terms: any agreement which has the “object or effect” of “preventing, restricting or distorting competition” is covered by the provision. There is no definition in the TFEU of the terms “object” or “prevention, restriction or distortion of competition”. The examples of agreements in paragraphs (a) to (e) which are particularly liable to be caught by the prohibition is non-exhaustive, so that even an agreement which falls outside these categories might be caught. Moreover, the examples themselves are not worded very clearly: for example, what is an agreement “limiting production, markets or technical development to the prejudice of consumers”?

In fact, the provisions of Articles 101 (and the rules on abuse of dominance under Article 102, dealt with in sections 4.4 and 4.5 below) were so generally-worded that there was initially doubt as to whether these provisions were intended to be legally-binding on “undertakings” (i.e. businesses) at all, or whether they were simply intended to set out objectives or guidelines which were to be implemented in more detail in subsequent legislation.²⁵⁵ This issue was clarified with the adoption, five years after the Treaty came into force, of the first regulation implementing the competition articles, namely Regulation 17/62.²⁵⁶ Article 1 of Regulation 17/62 stated that the agreements and conduct described in the competition articles “shall be prohibited, no prior decision to that effect being required”. This statement made it clear that the Article 101(1) prohibition was directly legally-binding on businesses, irrespective of the vagueness of the prohibition. The same provision is contained in Article 1 (1) of the current implementing regulation, Regulation 1/2003.²⁵⁷

²⁵⁵ Gerber *Law and Competition* 346. See also Deringer “Verordnung Nr 17/62 and Verordnung Nr 1/2003- die historische Perspektive”, presentation to the seminar “Ein Halbes Jahrhundert Europäisches Wettbewerbsrecht” Brussels 17 July 2003 available at: www.freshfields.com/publications/pdfs/practices/Verordnung.pdf (accessed on 1-10-2017).

²⁵⁶ Council Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML> (accessed on 2-10-2017).

²⁵⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 of 4.1.2003.

It was therefore left to the European Court to clarify the meaning of these provisions through the case law. Has it done so? In assessing this question we focus on the core concept of “preventing, restricting or distorting competition”.

To determine what this concept means, it is necessary to be clear about what is meant by “competition”. The meaning of the word “competition” in Article 101(1) is not self-evident from its context. Nor does the EU Treaty define “competition”, and it has never been expressly defined in the case law of the European Courts.

As we noted in Chapter 2, there are two main ways in which the notion of “competition” has been used in competition laws: competition in the sense of commercial freedom, and competition in the sense of rivalry.²⁵⁸ In the EU, it is the former interpretation that has traditionally been used in the European Courts’ case law, and that was used in the early decisions of the European Commission.²⁵⁹

The structure of Article 101 itself supports this interpretation. As will be seen in section 4.3, the effect of the agreement on the intensity of market competition, i.e. rivalry, is addressed under the question of exemption in Article 101(3), not in Article 101(1): an agreement will not qualify for exemption if it “eliminates competition in respect of a substantial part of the products in question”. It would seem illogical to make exemption dependent on sufficient residual market competition under Article 101(3), if the Article 101(1) analysis had already concluded that market competition had been appreciably reduced (or was likely to be so reduced) by the agreement. Unless, that is, there are different degrees of intensity of competition for the purposes of Article 101(1) and 101(3) respectively, Article 101(1) referring to an *appreciable* reduction and Article 101(3) to a *substantial* reduction or elimination. But if this is the case, where to draw the line between appreciable and substantial would be extremely unclear and somewhat arbitrary.

²⁵⁸ See section 2.4.

²⁵⁹ Section 2.4 above.

The difficulties of making such a distinction are illustrated by the Commission guidelines on the application of Article 101(3) of the TFEU.²⁶⁰ As we shall see, under the Commission's "more economic approach" to the application of the competition rules, the Commission interprets harm to competition as reductions in rivalry which harms consumers, in contrast to its (and the European Court's) traditional interpretation as restrictions in economic freedom. It is worth comparing two passages in these guidelines in this respect: the first dealing with the harm to competition criterion in Article 101(1), and the second dealing with the harm to competition criterion in Article 101(3).

In respect of Article 101(1) the guidelines state:

"Agreements between undertakings are caught by the prohibition rule...when they are likely to have an appreciable adverse impact on the parameters of competition on the market such as price, output, product quality, product variety and innovation."²⁶¹

In respect of Article 101(3) the guidelines state:

"In the assessment of the impact of the agreement on competition, it is also relevant to examine its influence on the various parameters of competition...If following the conclusion of the agreement the parties have implemented and maintained substantial price increases or engaged in other conduct indicative of the existence of a considerable degree of market power, it is an indication that the parties are not subject to any real competitive pressure, and that competition has been eliminated with regard to a substantial part of the products concerned".²⁶²

In other words, according to the guidelines, the tests for detecting harm to competition under Article 101(1), and the elimination of competition under Article 101(3), are very similar, and it is difficult to know where the line is to be drawn.

²⁶⁰ Guidelines on the Application of Article 81(3) [now 101(3)] of the EU Treaty OJ C101/97 of 27.4.2004.

²⁶¹ Para 16.

²⁶² Para 111.

A significant number of European Court judgments have treated restrictions on commercial freedom (either on the parties to the agreement, or on third parties) as restrictions on competition, irrespective of their effects on the market.²⁶³ For example, the European Court has regarded the following clauses in an agreement between an electrical goods manufacturer and its dealers as restrictions of competition:

- limiting the dealer's ability to deal with other manufacturers; and
- requiring non-specialist dealers to achieve a turnover comparable to specialist dealers.²⁶⁴

A similar approach has been taken in many Commission decisions and regulations under the exemption provision in Article 101(3).²⁶⁵ For example, in joint venture agreements, the fact that the parent companies, in the absence of the joint venture, would be able to compete with each other in the development of new products, and that the joint venture prevents them from doing so, has in itself been regarded as a restriction of competition under Article 101(1), irrespective of the effects of the joint venture on competition in the market.²⁶⁶ Similarly, an exclusive distribution agreement has been regarded as restricting competition in two ways: by preventing the supplier from appointing more than one distributor, and by restricting other potential distributors from purchasing and distributing the product.²⁶⁷

A good example to illustrate this approach is the *Métropole* case.²⁶⁸ Here, the European Court of First Instance (now called the General Court) upheld the Commission's decision that an obligation on the parent companies of a pay television joint venture to supply certain programmes *exclusively* to the joint venture company constituted a restriction of competition contrary to Article 101(1). This was because, by definition, the exclusivity removed the ability of the joint venture company's

²⁶³ See the discussion in Georgio Monti *EC Competition Law* (2007) 25-33.

²⁶⁴ Case 26/76 *Metro SB- Grossmaerkte v Commission* [1997] ECR 1875.

²⁶⁵ See Monti, n 263 above.

²⁶⁶ GEC-Weir Sodium Circulators OJ L327/26 of 20.12.77; Vacuum Interrupters OJ L48/32 of 19.2.77.

²⁶⁷ Joined Cases 56,58/64 *Consten and Grundig v Commission* [1966] ECR Eng Sp Ed 299.

²⁶⁸ Case T-112/99 *Metropole Television (M6) v Commission* [2001] ECR-II 2459.

competitors from gaining access to these programmes. The Court reached this conclusion in spite of the fact that the agreement was actually found to have a *positive* effect on *market* competition in pay television. This factor which was only considered relevant in justifying the grant of an exemption to the agreement under Article 101 (3). (The EU's block exemption regulation for vertical agreements was not in force at that time, and therefore the Commission's decision was in response to an application for an individual exemption decision. As will be seen later, the facility for applying for individual decisions was abolished in 2003, and the parties now have to self-assess whether the exemption criteria are satisfied.)

Freedom of commercial action for this purpose incorporates, or is allied to, the notion of independence or autonomy of action in the market place, at least as far as relationships with competitors are concerned. The European Court has held that there is a "notion inherent in the Treaty provisions on competition" that each operator must decide its commercial policy independently, and this means that an operator must not disclose to one or more competitors its decisions or intentions regarding its conduct on the market, if this leads or is likely to lead to coordination of commercial conduct between competitors, for example on prices.²⁶⁹

One advantage of treating restrictions on commercial freedom as restrictions on competition is relatively high legal clarity. It is relatively straightforward in most cases to identify restrictions of competition based on this approach. However the disadvantage is that such an approach is highly intrusive, as was noted in Chapter 2.²⁷⁰ For example, many commercial contracts, or clauses in commercial contracts, will be regarded as restricting competition in this sense, even although their effect on market competition is neutral, or even beneficial. This means that the agreement has to satisfy the criteria for exemption under Article 101(3), or the terms of a block exemption regulation, if it is to be permitted. (The concept of block exemption will be discussed in section 4 3 1 below).

²⁶⁹ Case C-8/08 *T-Mobile v NMa* [2009] ECR I-4529.

²⁷⁰ Section 2 4.

Prior to July 2003, parties to arrangements caught by Article 101(1) needed to apply for, and obtain, a decision from the European Commission confirming that the exemption criteria in Article 101(3) were satisfied, before they were allowed to implement the arrangements. (Unless, that is, the arrangement met the terms of a block exemption regulation). The need to apply to the Commission for an exemption decision, combined with the fact that the notion of restriction of competition under Article 101(1) was so wide, meant that the Commission became over-burdened with exemption applications. Perhaps as a result, the European Courts sought to limit the scope of the Article 101(1) prohibition in various ways, thereby reducing the need for exemption applications. However, in doing so, greater uncertainty has been introduced into the process of assessing whether an arrangement is caught by the prohibition in Article 101(1), as will be explained below.

One method the European Courts have used to limit the scope of Article 101(1) is to hold that certain restrictions on commercial freedom are not restrictions of competition. For example, where certain restrictions on the parties to a transaction, such as a joint venture, are “directly related” to the transaction and “necessary” for it to take place, they will be regarded as falling outside Article 101(1) if the transaction as a whole falls outside Article 101(1). This is the so-called “ancillary restraints” doctrine.²⁷¹

The ancillary restraints doctrine in EU competition law appears to have originated from a concept with the same name in US antitrust law, which in turn was derived from the US common law. According to Bork:

“For 250 years the common law has upheld and enforced agreements not to compete if they were ancillary to valid main transactions. By “ancillary” the common law meant subordinate or collateral to another transaction and necessary to make that transaction

²⁷¹ F Enrique Gonzalez Diaz “The Notion of Ancillary Restraints under EC Competition law” *Fordham International Law Journal* Vol 19 Issue 3 (1995) 951. Kayvan Hazemi Jabelli “EU Ancillary Restraints: A Reasoned Approach to Article 101(1)” available at <https://ssrn.com/abstract=2166318>, (accessed on 5-1-2018).

effective. The doctrine of ancillary restraints is commonly believed to have application to the Sherman Act”.²⁷²

However, what is considered “necessary” to a transaction has given rise to confusion, and the case law in this area seems self-contradictory, as we shall see when comparing the Court’s approach in the *Metropole* and *O2* cases below.

The genesis of the ancillary restraints doctrine in EU competition law was the early case of *Société Technique Minière*, which concerned an exclusive distribution agreement.²⁷³ The Court held that when considering whether competition was restricted:

“the competition must be understood within the actual context in which it would occur in the absence of the agreement in dispute...it may be doubted whether there is an interference with competition if the said agreement seems *really necessary* for the penetration of a new area by an undertaking.”²⁷⁴ (emphasis added).

In other words if, in the absence of exclusivity, the transaction and the extra competition it would bring about would not exist, the inclusion of an exclusivity clause cannot be said to restrict competition.

One problem with this concept is determining what “really necessary” means in practice. For example, does it mean that it would be impossible to implement the transaction without the restriction, that it would be difficult or very difficult to do so, or that it would be unprofitable to do so (and over what time should profitability for this purpose be assessed)?

In the context of mergers, the Commission has said that necessity for this purpose does not only mean that the transaction would otherwise be impossible. It can also mean that, in the absence of the restriction, the merger “could only be implemented under considerably more uncertain

²⁷² Robert H Bork “Ancillary Restraints and the Sherman Act” *American Bar Association Section of Antitrust Law* Vol 15 (1959) 211.

²⁷³ Case 56/65 *Societe Technique Miniere v Maschinenbau Ulm* ECR Eng SpEd 235.

²⁷⁴ N 273 above 250.

conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty”.²⁷⁵ (There seems to be no reason why the Commission’s view should not equally apply to commercial transactions other than mergers). Clearly these are all matters of degree and subjective judgment.

Another difficulty with the ancillary restraints doctrine, in the context of EU competition law, is that it seems to overlap with one of the criteria for exemption under Article 101(3). One of these criteria is that each restriction of competition in the agreement is “indispensable” to achieve the benefits of the arrangement (in terms of efficiency or other benefits). But if the necessity or indispensability of the restriction is already part of the analysis under Article 101(1), what is the point of the separate indispensability criterion in Article 101(3)? This difficulty can be illustrated by comparing two judgments of the European Court of First Instance, which seem to contradict each other.

In the *Métropole* case referred to above,²⁷⁶ the parties had argued that the exclusive right of access by the joint venture to certain programmes supplied by the parent companies was necessary to enable the joint venture to penetrate the French pay television market, given the dominant position of the incumbent operator, and therefore fell outside Article 101(1) as an ancillary restriction. The Court rejected this argument on the grounds that it was possible *in the abstract* to set up a pay television joint venture without an exclusive access right, and therefore the clause fell within Article 101(1).²⁷⁷ Nevertheless, the Court upheld the Commission’s decision that the clause was “indispensable” *in practice* to enable the joint venture to penetrate the market on a sustainable basis.²⁷⁸

By contrast, in *O2 (Germany)* the same Court held that the issue of whether a roaming agreement with another mobile operator was necessary to secure O2’s competitive position in the market

²⁷⁵ “Notice on restrictions directly related and necessary to concentrations” OJ C56/24 of 5.3.2005 para 13.

²⁷⁶ N 268.

²⁷⁷ Para 122.

²⁷⁸ Paras 142, 145.

should have been considered by the Commission under Article 101(1), not Article 101(3).²⁷⁹ In other words, if there was such a necessity, the agreement did not restrict competition at all, and therefore fell outside Article 101(1). The Court annulled the relevant part of the Commission's decision on that basis.

The outcome in *Métropole* seems at odds not only with the same Court's ruling in *O2(Germany)*, but also with other judgments of the European Courts, some of them referred to in *Métropole* itself.²⁸⁰ According to these judgments, the question of whether a restriction of competition exists under Article 101(1) *cannot* be decided in the abstract, but must be looked at in its legal and economic context, and in particular the situation which would have prevailed in the absence of the restriction.²⁸¹ This is also the view taken by the Commission in its various guidelines. For example, in its guidelines on Article 101(3) it states that, in determining whether or not an agreement is caught by Article 101(1), the question that must be asked is “[d]oes the agreement restrict actual or potential competition that would have existed without the agreement?”²⁸²

Apart from the ancillary restraints doctrine, another way in which the European Courts have sought to limit the ambit of the prohibition in Article 101(1) is by holding that any restrictions of competition must be “appreciable” in order to fall within the prohibition. However, the meaning of “appreciability” is not entirely clear in this context, and the concept has been used to mean different things in different cases. Another difficulty is that the facts necessary to establish appreciability may not be within a business's knowledge. These two difficulties will be discussed in turn below.

The concept of “appreciability” (sometimes referred to as the *de minimis* principle) was laid down by the European Court in 1969 in *Völk v Verwaeye*.²⁸³ In the context of a contractual dispute between a supplier and its exclusive distributor, the European Court held that an agreement falls

²⁷⁹ Case T-328/03 *O2 (Germany) v Commission* [2006] ECR II-1231.

²⁸⁰ Paras 106-127.

²⁸¹ N 268 above paras 75,76.

²⁸² N 260 above para 18.

²⁸³ Case 5/69 [1969] ECR 295.

outside Article 101(1) where it has “only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market in question”.

The agreement in question contained at least two restrictions of competition: an exclusivity obligation on the supplier (not to supply any other distributor within the territory) and an obligation on the distributor not to sell competing products. Logically, therefore, the potential effects on the market to which the Court seems to be referring are one or both of the following:

- foreclosure of other potential distributors from selling the supplier’s products: if the supplier was in a “weak” position this would mean that other potential distributors would have (at least theoretically) the possibility of selling other competing suppliers’ products;
- foreclosure of other suppliers from the territory: if the distributor was in a “weak” position, this would mean that other suppliers would have (at least theoretically) access to other potential distributors in the territory.

The Court did not attempt to define what would amount to a “weak” market position, i.e. what degree of foreclosure would be regarded as “insignificant”.

In *Delimitis*, a case which concerned exclusive purchasing agreements for beer, the European Court seemed to set conflicting thresholds of foreclosure. On the one hand, it suggested that the relevant test is whether access to the market is “denied” to other suppliers. But on the other hand, it said that access must merely be made “difficult” for them.²⁸⁴ The Advocate General had advised the Court that no specific figure could be set as a “rule of thumb”, but did indicate that there would be an appreciable restriction where 40 to 60 per cent of the market was foreclosed to rival suppliers.²⁸⁵

In the case of such “vertical” agreements, the Commission has said in its so-called *De Minimis* Notice that it will not regard agreements containing one or more restrictions of competition to be appreciable, and will not therefore take any enforcement action, where neither party’s market share

²⁸⁴ Case C-234/89 *Delimitis v Henniger Brau* [1991] ECR 935 paras 23, 24.

²⁸⁵ Para 19.

exceeds 15 per cent (except where the agreement contained hardcore restrictions such as resale price maintenance).²⁸⁶ However, as the Notice itself states, while the Commission will not initiate proceedings against parties to agreements that fall within the “safe harbour”, the Notice is subject to the views of the European Courts, and in that sense is not legally-binding:

“In cases covered by this Notice, the Commission will not institute proceedings either on a complaint or on its own initiative... This Notice is without prejudice to any interpretation of Article 101 of the Treaty which might be given by the Court of Justice of the European Union”.²⁸⁷

In addition, the Notice makes clear that there is no presumption that an agreement will restrict competition appreciably where this threshold is exceeded: this must be considered on a case-by-case basis.²⁸⁸ Parties to many vertical agreements therefore have no clear rule or guide as to when their agreements will be caught by Article 101(1), and when they will therefore require to satisfy the exemption criteria in Article 101(3), or the terms of a block exemption regulation, if they are to comply with Article 101.

In the case of “horizontal” agreements, what constitutes an appreciable restriction of competition is also unclear. In *Völk v Verwaecke*, the European Court did not distinguish between horizontal and vertical agreements in saying that agreements with insignificant effects on the market due to the weak position of the parties fell outside Article 101(1). However, it seems that foreclosure of third parties is not necessarily relevant, as it is in the case of vertical agreements. A price-fixing agreement between competitors (for example) does not in itself exclude third parties from the market: if anything the higher prices might encourage new entry into the market.

In its *De Minimis* Notice, the Commission has expressed the view that horizontal agreements do *not* appreciably restrict competition where the parties’ combined market share does not exceed 10

²⁸⁶ “Notice on Minor Agreements which do not appreciably restrict competition under Article 101(1) of the Treaty on the functioning of the European Union” OJ C291/1 of 30.8.2014 para 8.

²⁸⁷ Paras 5 and 7.

²⁸⁸ Para 3.

per cent, except in the case of hardcore arrangements such as price-fixing.²⁸⁹ However, it seems doubtful whether the Commission's view is consistent with the post- *Völk v Vervaecke* case law of the European Court, which seems to have taken a tougher stance on the application of Article 101(1) to horizontal agreements. As noted above, the European Court has stated that there is a "notion inherent in the Treaty provisions on competition" that each operator must decide its commercial policy independently, and that this "strictly preclude[s]" any direct or indirect contact between them which creates "conditions of competition which do not correspond to the normal conditions of the market". This statement has been made in the context of an exchange of information on costs between competitors,²⁹⁰ as well as an agreement between Irish beef processors to reduce industry overcapacity.²⁹¹ It appears that by "normal conditions" of the market the Court seems to mean simply the conditions which would have prevailed in the absence of the contact: in the latter case the Court implied that the agreement appreciably restricted competition because, in the absence of the agreement, the parties would have had no option but to intensify their commercial rivalry or resort to mergers. This seems to set a very low threshold for appreciability- effectively any contact between competitors which affects the operation of the market would be appreciable. In this context it would seem that even contacts or agreements between "weak" market operators could be caught. So even if the EU Commission itself does not take action against a particular agreement because it falls below the *de minimis* threshold, the parties might still be held liable in civil litigation, based on the European Court's case law.

The difficulty of assessing whether a restriction of competition is appreciable is exacerbated by at least two factors:

- The legality (or otherwise) of an agreement under Article 101 is not judged solely at the time of signing the agreement. The prohibition is against *implementing* an agreement that contravenes Article 101, not just *entering into* such an agreement. This factor, combined

²⁸⁹ Paras 8,13.

²⁹⁰ *T-Mobile* n 269 above.

²⁹¹ Case C-209/07 *Competition Authority v Beef Industry Development Society* [2008] ECR I-8637 paras 34,35.

with the fact that appreciability depends, at least to a certain extent, on economic effects, means that an agreement's compatibility with Article 101 can vary over time.²⁹²

- In assessing whether the restriction of competition is appreciable, the European Court has held that the agreement must not be considered in isolation, and that other factors might combine to mean that an agreement, which would otherwise be innocuous from a competition point of view, appreciably restricts competition. This can be called the “cumulative effects” doctrine.

We deal with each of these factors in turn.

Regarding the first difficulty (the time factor), even if a business is confident when it enters into the agreement, based on its assessment of what the relevant market is (an assessment which itself is by no means straightforward) that the parties' combined market shares are so low that the agreement falls outside Article 101(1), that position can change over time. As Whish and Bailey have put it, “an agreement can infringe Article 101(1) at some times and at other times not do so, depending on the surrounding facts: in other words it can drift into and out of voidness”.²⁹³ As we shall see, the same problem applies to the applicability of exemption under Article 101(3): an agreement that is caught by Article 101(1) may fulfil the exemption criteria at some times but not others, depending on market circumstances.

Clearly it is at best highly burdensome, and at worst impracticable, to expect parties to commercial agreements to monitor market circumstances continuously, and to amend or terminate their agreements if they fear that, due to a change in market circumstances, they may no longer comply with Article 101. The assessment of whether arrangements comply with Article 101 can be difficult enough in itself, without the added burden of having to conduct such continuous monitoring. Even if the parties conclude that amendment or termination of the agreement is necessary in the light of market circumstances to comply with the law, they may already be in breach the law, and will remain so until the agreement is amended or terminated to comply. The

²⁹² Whish and Bailey *Competition Law* 150.

²⁹³ N 292 above.

result is that a large number of parties to commercial agreements in the EU may be unknowingly breaking the law by operating agreements that infringe Article 101 (unless they happen to qualify for exemption under Article 101(3)), which is a highly unsatisfactory state of affairs.

This problem did not exist to the same extent under the pre-1 July 2003 regime, when the parties could apply to the Commission, in advance of implementing an arrangement, for a “negative clearance” (a declaration by the Commission that the agreement fell outside Article 101(1)).²⁹⁴ While a negative clearance was not strictly binding, in practice the prospect of either Commission enforcement action or third party action against an agreement benefitting from one was remote. There was therefore no risk of them being found to be in breach. However, as noted above, this system proved to be unworkable, because the wide notion of “restriction of competition” resulted in the Commission being inundated with applications. The Commission therefore resorted to giving so-called “comfort letters” in the case of agreements which, on a preliminary review were perceived not to raise significant competition problems such as to merit detailed investigation, whilst reserving the right to open an investigation if in fact competition problems did arise.

Now that businesses have to make their own self-assessments as to whether their agreements are caught by Article 101(1) (and if so whether they qualify for exemption), and given the difficulties of making this assessment, the chances of them inadvertently breaking the law, and being subject to enforcement action or third party litigation, are considerably higher than before 1 July 2003.

The second difficulty- the doctrine of cumulative effects- is arguably even more acute. In *Brasserie de Haecht*, the European Court held that, even if the impact on the market of an *individual* agreement was insignificant, and hence the agreement in isolation would fall outside Article 101 (1), if the cumulative effect of the agreement with other such agreements operated by the same *and other* suppliers in the market was to restrict competition appreciably, the individual agreement would be caught by Article 101(1).²⁹⁵

²⁹⁴ Council Regulation 19/62, n 256 above Art 2.

²⁹⁵ Case 23/67 *Brasserie de Haecht v Wilkin-Janssen* ECR Eng Sp Ed 407.

Developing this concept in the *Delimitis* case, the European Court held that a beer supply agreement is prohibited by Article 101 (1) if two cumulative conditions are met:

- it is “difficult or impossible” for new suppliers to get access to the market, taking into account *inter alia* the number of outlets tied to existing suppliers; and
- the exclusive purchasing agreements operated by the particular supplier in question make a “significant contribution” to this sealing-off effect.²⁹⁶

However, there are at least two major problems with each of these conditions. The first problem is that they are imprecise: what degree of “difficulty” of access meets the first condition, and how “significant” must the contribution of the individual suppliers’ agreements to the “sealing-off” effect be to meet the second condition? The second problem is that, even if the relevant thresholds in these conditions were clear, assessing whether they were met would require possession of information which is unavailable either to the supplier, or to any of the purchasers.

In assessing whether their prospective agreement would infringe Article 101, the supplier and customer would have to have access to at least the following information:

- the volume of beer supplies which is subject to exclusive purchasing commitments entered into by other beer suppliers;
- the number of tied licensed premises in the market as compared to untied ones;
- whether there are “concrete possibilities” for new suppliers to acquire existing breweries, or to open new ones to the minimum efficient scale;
- the duration of each beer supply agreement in the market (so that the average duration in the market can be calculated). In this respect, the Court said:

²⁹⁶ *Delimitis* n 284 above paras 15-27.

“If the duration [of the particular supplier’s agreements] is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1)”.²⁹⁷

It is doubtful whether many breweries would have access to information about the duration of other parties’ agreements, far less prospective publicans who have no less an interest in ensuring that their agreement is legally enforceable. Moreover, even if they did have access to the information, the complexities of this assessment, and the number of variables and value judgments involved, would make it very difficult for a business to predict accurately whether its view of the legality of a particular commercial agreement would be shared by a competition authority or court, examining the case with the benefit of hindsight and with full information-gathering powers. What is a “manifestly excessive” duration for an exclusive purchasing agreement (to quote the words of the European Court) is clearly a subjective assessment.

It is remarkable that the logical consequence of the Court’s judgment is that a supplier and customer wishing to enter into an exclusive purchasing commitment have to make this sort of assessment before entering an agreement, and get the right answer, to avoid breaching the law. The *Delimitis* judgment might work well as a guideline for a regulator to review market structure *ex post facto* with a view to assessing whether regulatory intervention is necessary to make an industry more competitive.²⁹⁸ However, it does not enable the parties to predict with any reasonable certainty whether their agreements will comply with the law.

A further difficulty has been added to the task of assessing whether commercial arrangements between businesses comply with Article 101. Contrary to the traditional approach of the European Courts, the European Commission, in its most recent guidelines on horizontal cooperation agreements issued in 2011, implied that a restriction of competition under Article 101(1) means a

²⁹⁷ Para 26.

²⁹⁸ The (then) UK Monopolies and Mergers Commission did precisely this in 1989 when it recommended the loosening of ties between brewers and pubs, leading to the introduction of legislation to achieve this.

reduction in *market competition*, i.e. rivalry, as opposed to the traditional interpretation as a restriction on commercial freedom:

“For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.”²⁹⁹

This approach is similar to the “substantial lessening of competition” (SLC) approach taken in Australia, Canada and South Africa, which is subject to its own uncertainties, as will be discussed below.³⁰⁰ It is not yet entirely clear whether European Courts will endorse the Commission’s new approach, and if so to what extent, given their previous case law, but there are signs from the European Court’s recent *Intel* judgment in the context of abuse of dominance that it is sympathetic to the Commission’s approach.³⁰¹ This uncertainty has added further lack of clarity in the application of Article 101.

Assuming that the European Courts do endorse the Commission’s new approach, the result is that businesses will have to conduct a more detailed economic assessment of the effects or likely effects of their arrangements on market competition before they can take a view on whether they comply with Article 101. Such economic assessments are to a large extent speculative and uncertain, since they involve (a) predicting what future effects on the market the agreement will have (b) predicting what the market would be like without the agreement (the “counterfactual”) and (c) comparing the “with and without” scenarios in (a) and (b), and taking the view whether competition will be substantially less under (a) than (b). Clearly this exercise involves considerable scope for uncertainty and conflicting views.

4 2 2 Australia

²⁹⁹ “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” OJ C11/1 of 14.1.2011 para 27.

³⁰⁰ Sections 4 2 2 to 4 2 4.

³⁰¹ The *Intel* judgment will be discussed in section 4 4 1 below.

In **Australia**, unlike under EU and (as we shall see) Hong Kong competition law, some types of arrangements are specifically prohibited because they are presumed to cause harm to competition. Broadly speaking these are: price-fixing, output-restriction, market-division, bid-rigging and “third-line forcing”. Indeed the parties which enter into them can be prosecuted criminally if the requisite *mens rea* is present.

Each of these types of arrangement is defined in relatively specific terms. For example, one of these types, price-fixing, is defined as:

- “(a) fixing, controlling or maintaining; or
- (b) providing for the fixing, controlling or maintaining of; the price for, or a discount, allowance, rebate or credit in relation to:
- (c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding.”³⁰²

Apart from these specific types of arrangements, virtually all others are subject to the test of “substantially lessening competition” (the SLC test).³⁰³

The term “substantially lessening competition” is not defined in the CCA, but it is clear that the term refers to the process of competition in a market, and not to the individual activity of competing as under EU law.³⁰⁴ It has been held that competition “expresses itself as rivalrous market behaviour” and that it is “a process rather than a situation”. Competition can be on a number of factors: price, service, quality, technology or consistency of product.³⁰⁵

³⁰² CCA s 44ZZRD.

³⁰³ CCA s 45.

³⁰⁴ CCA S 45(3).

³⁰⁵ *Queensland Cooperative Milling Association Ltd, Defiance Holdings Limited (Proposed Mergers with Barnes Milling Ltd)* (1976) 8 ALR 481, 515.

A “lessening” of competition would therefore seem to involve a situation where competition in the market becomes less intense or vigorous. As a Full Court of the Federal Court of Australia has held, “the question is whether the dynamic of competition, what might be called the competitive forces in the market, have been ‘substantially lessened’”.³⁰⁶ But how does one determine whether this is the case? For example, would the merger of two businesses with market shares of five per cent each in a market with 20 businesses be regarded as harming competition, or does one try to predict the outcome of the merger in terms of prices and service quality?

One problem which is immediately evident here is that the agreement may dampen one factor of competition, but increase competition in another factor. For example, if two competitors in a market of four players form a joint venture to develop and market a new, more advanced version of a product which both previously marketed separately, this may lessen competition between them and result in a net increase in market prices, at least in the short term. However, it may also stimulate competition in innovation in the market as a whole, by encouraging the other market players to develop rival offers. In these circumstances, how is one to determine whether the agreement lessens competition, or increases it? It is hard to avoid the conclusion that this is a rather subjective, arbitrary assessment.

A second problem is the temporal dimension: over what period of time is the effect on competition to be measured? An agreement may lessen competition in the short term, but in the longer term increase it (or vice-versa). Here, in the case of mergers, the Australian Competition and Consumer Commission (ACCC) has adopted a working rule of practice that it will look at the position over a one to two year time frame from the time the agreement takes effect.³⁰⁷ So if the merger initially has the effect of increasing prices, but within a two year period prices stabilize or decline, and competition on other factors such as innovation increase, in the eyes of the ACCC it may not be regarded as substantially lessening competition. There seems to be no reason why a similar approach would not apply to other commercial agreements: it has been held that “substantially

³⁰⁶ *O’Brien Glass Industries Ltd v Cool & Sons Pty Ltd* [1983] FCA 191 (18 August 1983).

³⁰⁷ ACCC Merger Guidelines para 3.14 available at <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF> (accessed on 8-11-2017).

lessening competition” means the same thing wherever it is used throughout the CCA, including Section 45 as well as the merger provisions.³⁰⁸ But such an exercise is a largely speculative and subjective one: no-one knows what the market will look like in one or two years, and what impact the agreement will have on the market.

By what parameters is a lessening of competition to be assessed? For example, should it be by reference to whether price competition will be reduced, resulting in higher prices? If so, how is that likely effect to be determined? It is useful to distinguish here between “horizontal” agreements and “vertical agreements”.

With horizontal agreements, such as joint ventures between competitors, a primary concern, as with horizontal mergers, is whether the agreement gives rise to a position of market power, leading to increased prices, reduced output, reduced service quality or other adverse effects on consumers. In the case of horizontal mergers, section 50 of the CCA provides a list of nine factors which are relevant to this assessment, such as the height of barriers to entry in the market, the level of concentration in the market, and whether the merger would result in the elimination of a vigorous and effective competitor. These factors must be balanced against each other. For example, the degree to which the merger increases concentration (combined with the extent of existing concentration) will be one factor indicating the degree of likelihood that the transaction may result in adverse consumer effects. But even if the merger leads to a highly concentrated market, this may not lead to market power if barriers to entry are low and any attempt to increase prices would attract new entry. As noted later, South Africa has a list of similar factors for mergers, but the list is seldom used in practice, even for mergers, let alone other transactions.³⁰⁹ Clearly, assessing whether an agreement will lead to SLC according to this “melting pot” of factors is, to a large extent, a subjective and arbitrary exercise.

In assessing SLC, the concern is not just whether the transaction will increase market power directly: the foreclosure effects on actual or potential competitors must also be considered. This is particularly so in the case of vertical agreements. For example, signing-up customers to

³⁰⁸ *Australian Gas Light Company v ACCC* [2003] FCA 1525 (19 December 2003) para 347.

³⁰⁹ Sutherland and Kemp *Competition Law of South Africa* 10.6.

exclusive purchasing contracts effectively deprives competitors of the opportunity to serve those customers, and the Australian courts have held that this may have the effect of substantially lessening competition in the market, at least in certain circumstances, as will be seen below. One difficulty of this assessment is determining what degree of market foreclosure is sufficient to constitute a substantial lessening. A possible test is whether the foreclosure leads to market power. As will be seen below in relation to Canada, the Competition Bureau there has stated that there will be SLC, in the case of both horizontal and vertical agreements, if the agreement creates, maintains or enhances market power. Another issue, taking again the example of exclusive purchasing agreements, is whether it must be practically impossible for competitors to serve the customers in question to constitute SLC, or simply more difficult? Yet another is the extent of time to which customers are tied: is six months or one year sufficient, or is three or five years necessary?

In the case of EU law, we have seen that similar issues arise in the case of vertical agreements, and the *Delimitis* judgment shows that this is to a large extent an arbitrary and subjective assessment. It seems that the same applies in Australia. In *O'Brien*,³¹⁰ one of the issues was whether a supplier's conduct in offering discounts of 45 or 50 per cent to retailers that agreed to purchase from it all, or a substantial majority, of their purchases, had the effect of substantially lessening competition. A Full Court of the Federal Court held that it did, albeit not unanimously but by a two-to-one majority. Speaking for the majority, Fox J justified the decision in the following terms:

“The tendency [of the conduct] was to lower the forces of competition in the market, by reducing the capacity of retailers to choose between sources of supply, to weaken the trading position of competitors, and to inhibit the entry of other competitors”.

He emphasised, however, that this finding was specific to the facts of the case, and the fact that the supplier held the largest share of the market (approaching 40 per cent) was particularly relevant:

³¹⁰ N 306 above.

“I do not suggest that a distinction between a discount based on percentage of total requirements and one based on quantity, or value, is necessarily critical. It all depends upon the circumstances. In the present case, O’Brien occupied in the market the position I have described, and a requirement of the former nature has an effect relative to that position. In particular circumstances, another wholesaler who makes the same requirement might not offend. On the other hand, a discount related to value could offend, if, for example, the value did represent most of the likely purchases of a sufficient number of retailers.”

So, similar to the approach of the European Court, the majority view was that the competitive forces in the market could be lowered, and a substantial lessening of competition result, merely from reducing the freedom of retailers to choose between the sources of supply, and inhibiting the entry of other potential competitors. Fox J implied that to avoid a substantial lessening of competition, a supplier had to compete “by leaving uninhibited the right of choice, or substitution, in the market”. This sounds very similar to the EU’s “economic freedom” approach to defining a restriction of competition which we discussed in Chapter 2.

However, in his dissenting judgment, Franki J stated that the fact that the conduct made it substantially more difficult for the wholesaler to sell windscreens to retailers who enjoyed an additional discount was not sufficient to constitute a substantial lessening of competition. In his view, the fact that the relevant market seemed to be no less competitive following the conduct negated any suggestion that the conduct had substantially lessened competition. Franki J believed that a substantial lessening of competition could only be demonstrated if, as a result of the conduct, the market was less competitive – presumably by reference to increased prices, lower output, lower quality, or less innovation.

As well as the question of whether an agreement lessens, or is likely to lessen competition, another difficulty is assessing whether it does so “substantially”. What does “substantially” mean? While the Australian courts have generally shied away from giving a specific meaning to the term, saying that everything depends on the circumstances, and the cases are not consistent, there seems now to be a consensus that the word in this context does not mean large or considerable.

The High Court of Australia has held that the term means “meaningful or relevant to the competitive process”,³¹¹ and in a UK case, the Competition Tribunal also adopted this definition, rejecting the argument that it meant “large”, “considerable” or “weighty”.³¹² However, this definition is unhelpful. It is, like the word “substantially” itself, inherently subjective and imprecise. It begs the question: what effect is meaningful or relevant to the competitive process? One possible interpretation of this definition is that *any* effect on price, service quality, innovation etc. is “meaningful or relevant to the competitive process”, and therefore once an effect of lessening competition is demonstrated, the qualification “substantially” is redundant.

The Australian courts have stressed the difficulties of interpreting the word “substantially” in the context of competition. Franki J acknowledged in *O’Brien* that “[t]he determination of whether conduct has the purpose or effect of substantially lessening competition is a matter of great difficulty”. He emphasized the subjectivity of the assessment, echoing Fitzgerald J’s comment in *Outboard Marine* that “...in the end, the answer in this case really depends on little more than one’s own instinctive impressions formed by weighing the various considerations in this particular market which favour one view or another”.³¹³

In *Dandy Power Equipment*, Smithers J also emphasised that what was substantial was a question of degree and judgment:

“Substantially” is a word the meaning of which in the circumstances in which it is applied must, to some extent, be of uncertain incidence and a matter of judgment.

There is no precise scale by which to measure what is substantial”.³¹⁴

Smithers J also said that the process involved looking at the “counterfactual”- what the competitive situation would have been in the absence of the agreement:

³¹¹ *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 para 114.

³¹² Case No 1214/4/8/13 *Global Radio Holdings Limited and Competition Commission* [2013] CAT 26 paras 24,25.

³¹³ *Outboard Marine (Aust) Pty Ltd v Hecar Investments (No 6) Pty Ltd* [1982] FCA 265.

³¹⁴ *Dandy Power Equipment Pty Ltd and Dandy Power Pty Ltd v Mercury Marine Pty Ltd* [1982] FCA 178.

“To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what was lost in relation to what would have been, is seen to be a substantial lessening of competition”.

If judges find these issues difficult, as they clearly do from the passages cited above, even with the benefit of hindsight and full evidence before them, it is all the more difficult for businesses and their legal advisers to predict whether their agreements will fall foul of the rules. Even although (unlike in the EU) there is a process in Australia for seeking authorisation for agreements that may substantially lessen competition, the use of a subjective and vague standard clearly poses the risk that firms may err on the side of safety and seek authorisation in case of doubt, which may not be economically efficient. We return to the issue of authorisations in Chapter 6, when looking at possible solutions to the lack of clarity problem.

4 2 3 Canada

Canada, like Australia, uses the SLC test in its Competition Act to address arrangements outside the hardcore category (which are expressly-criminalised) and abuse of dominance. Prior to amendments to the Competition Act that took effect in 2010, all anti-competitive agreements were criminalised. However, one of the amendments that took effect in 2010 was to introduce a distinction between hardcore agreements (price-fixing, market-sharing, output-restriction and bid-rigging) and other agreements. The former category remained criminal, while the latter category became subject to a new regime in section 90.1.³¹⁵ This change arose from a recommendation by the Competition Policy Review Panel, whose Final Report in 2008 stated:

³¹⁵ The Canadian competition legislation has had a long and somewhat tortuous history. Originally consisting of criminal provisions, these provisions proved to be ineffective because of the difficulty of proving cases to the criminal standard. The Government sought to make enforcement more effective by converting the legislation into civil provisions in 1919, and setting up a dedicated enforcement agency for the first time. However, the 1919 statute was found to be unconstitutional in 1921, leading to the restoration of criminal provisions in 1923.

“...criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the ‘hardcore’ cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts...”³¹⁶

As a result, there is no general prohibition of anti-competitive arrangements outside the hardcore category, or of abuses of dominant position (although, as we shall see later, the Tribunal can impose an administrative penalty for abuse of dominance). If any such arrangements or abuses take place (which are not offset by efficiencies) the Commission may intervene and investigate the matter. If no voluntary settlement is reached, it can bring the matter before the Tribunal for a determination that the arrangements or conduct meet the criteria to merit a cease-and-desist order that is issued by the Tribunal. A business does not act illegally unless and until it breaches a Tribunal order.³¹⁷

The Act does not define what SLC means. However, in its Guidelines, the Competition Bureau states that:

“A substantial lessening or prevention of competition results from agreements that are likely to create, maintain or enhance the ability of the parties to the agreement to exercise market power. For example, an agreement can lessen competition where parties to the agreement are able to sustain higher prices than would exist in the absence of the agreement by diminishing existing competition”.³¹⁸

See Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M Iacobucci *The Law and Economics of Canadian Competition Policy* (2002) 8-13.

³¹⁶ “Compete to Win” 59.

³¹⁷ Competition Act s 66.

³¹⁸ “Competitor Collaboration Guidelines” 20, available at:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html> (accessed on 10-10-2017).

The Act provides a list of eight relevant factors to be taken into account in assessing whether there is SLC. These factors are as follows:

- the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;
- the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;
- any barriers to entry into the market, including tariff and non-tariff barriers to international trade; interprovincial barriers to trade, and regulatory control over entry;
- any effect of the agreement or arrangement on the barriers referred to in the last bullet point above;
- the extent to which effective competition remains or would remain in the market;
- any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;
- the nature and extent of change and innovation in any relevant market;
- any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.³¹⁹

While the above factors may be a useful checklist for the enforcement authority or courts in assessing whether there is SLC, they are of very limited benefit to businesses in assessing in advance whether there is likely to be SLC, since there is no indication of how these factors are to be weighed against each other in reaching a conclusion as to whether there is SLC.

As under Australian law, it is clear under Canadian law that SLC refers to lessening of competition in a market, rather than a restriction of commercial freedom, its counterpart under previous EU case law. The Act also provides a useful clarification. In assessing whether there is an SLC, it states that the Tribunal must not make the finding solely on the basis of evidence of concentration

³¹⁹ S 90.1(2).

or market share.³²⁰ This statement re-inforces the message that it is the degree to which the intensity of competition has been lessened which matters. However, the problems of what degree of lessening is to be considered substantial, and how to measure this, still remain.

The Canadian Federal Court of Appeal commented on how to approach the assessment of SLC in the *Canada Pipe* case.³²¹ Although this was an abuse of dominance case, the SLC test in Canada also applies in this context, and there is no reason for supposing that the SLC test would be applied in a different way in assessing agreements. The Court held that, as in Australia, assessing SLC involves a comparative assessment of the state of competition in the market with and without the transaction. Did (or would, if the question is the likely effect of the conduct in future) the practice in question “result in a prevention or lessening of competition as compared to the conditions governing in the absence of the practice, and was this lessening of a degree sufficient to be considered substantial?”³²²

The Court held that this exercise involves the comparison of an actual situation (if the conduct is current or in the past) with a hypothetical situation (the market situation without the conduct, i.e. the “counterfactual”). In the case of a likely future effect of conduct, it would even involve the comparison of two hypothetical situations: the likely market situation with the agreement, and the likely market situation without the agreement. The Court acknowledged the complexity of the task, and said that an economist was more competent than a judge to advise on this. It criticised the Tribunal for not having conducted such a comparison, and gave some examples of the issues the Tribunal should have considered:

“Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the [rebate scheme]; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the

³²⁰ S 90.1(3).

³²¹ *Canada (Commissioner of Competition) v Canada Pipe Co* 2006 FCA 233.

³²² Paras 37-48.

occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient.”³²³

Clearly, therefore, the exercise of assessing whether an agreement causes SLC involves similar difficulties and subjectivity in Canada as under Australian law. As noted above, however, agreements that cause SLC are not prohibited by law in Canada (as they are in Australia). If, therefore, a business enters into an agreement which causes SLC, it has not acted illegally by doing so. The Competition Bureau may only bring proceedings in the Tribunal under section 90.1 of the Competition Act, applying for an order against the business requiring it to take certain steps to remove the SLC, such as amending or terminating the agreement. Alternatively, the business may enter into a consent agreement with the Competition Bureau for the same purpose, thereby avoiding the need for proceedings in the Tribunal (except that the consent agreement has to be endorsed by the Tribunal).³²⁴ A breach by the business of a Tribunal order or Tribunal-endorsed consent agreement is a criminal offence, punishable by a fine or imprisonment.³²⁵

So far, there have been no cases in which the Tribunal has made an order under section 90.1. In the two cases that have been brought by the Commissioner so far under Section 90.1, the Commissioner entered into consent agreements with the relevant parties, thereby averting the need for the cases to be heard by the Tribunal.

In the first case, the Commissioner had concluded that a joint venture between three airlines (Air Canada, United Airlines and Continental Airlines) would prevent or substantially lessen competition on certain routes covered by the joint venture.³²⁶ Under the terms of the consent agreement, they were required to amend their joint venture agreement to exclude those routes from the agreement. It appears that the parties have complied with the terms of the consent agreement, since no further enforcement action has been brought against the parties since the consent agreement was entered into in 2012.

³²³ Para 58.

³²⁴ S 105.

³²⁵ S 66.

³²⁶ Case CT-2012-001 *Air Canada* available at www.ct-tc.gc.ca, accessed on 25-09-2017).

The second case concerned arrangements between four publishers of e-books, and e-book retailers, imposing restrictions on the retailers' ability to set the retail price (resale price maintenance or RPM clauses) and "most-favoured nation" (MFN) clauses, whereby the price for one retailer was set by reference to the price charged to other retailers.³²⁷ Under the consent agreement, the publishers agreed not to impose RPM clauses, and to take steps to amend any agreements which contained RPM and MFN clauses. Again, like the airlines' case, the actions required to be taken under the consent agreement were defined in specific terms.

4 2 4 South Africa

In South Africa, the Competition Act prohibits certain hardcore arrangements without the need to show SLC, subject to the possibility of an exemption on certain public interest grounds (these grounds will be discussed in section 4 3 4).³²⁸ These arrangements are:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;
- collusive tendering;
- minimum resale price maintenance.

For other arrangements between businesses, the Competition Act uses a similar SLC test as in Australia and Canada: "substantially preventing or lessening competition in a market" (again subject to a possible exemption on certain public interest grounds).³²⁹ As in Canada, the Act does not define this term. However, the same competition test is used for assessing mergers, and therefore any guidance provided by the statute or case law on mergers should also be relevant to other agreements. In the context of mergers, the Act requires the Commission and Tribunal to

³²⁷ Case CT-2014-001 *Hachette Book Group Canada Ltd et al* available at www.ct-tc.gc.ca, (accessed on 25-09-2017).

³²⁸ Competition Act s 4(1)(b).

³²⁹ Competition Act s 4(1)(a).

“assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor which is relevant to competition in that market...” The Act then provides a non-exhaustive list of eight relevant factors, which is broadly similar to the equivalent list in Canada. The list is as follows:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion, in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.³³⁰

As in Canada, there is no explicit guidance on how these factors are to be weighed against each other in reaching a conclusion as to whether there is SLC. Sutherland and Kemp make the following criticisms of these criteria:

“...(1) their impact in evaluating mergers is complex, all of these factors are not weighed in the same manner; (2) some of the factors in the list bundle together issues that should be kept apart; (3) the list is not a *numerus clausus*; and (4) a competition authority will not have to refer expressly to the list or any factor in it as the type of issues mentioned will merely have to be taken into account in so far as they are relevant”.³³¹

³³⁰ S 12A(2).

³³¹ *Competition Law of South Africa* 10.6

It seems clear that in South Africa, as in Australia and Canada, it is the degree to which the intensity of competition in the market place has been or is likely to be lessened which matters in determining whether there is SLC. However, similar difficulties apply in assessing whether competition will be lessened, what degree of lessening is to be regarded as substantial, and how this is to be measured: these are ultimately, to a large extent, matters of subjective judgment in each case.

Most enforcement proceedings that the Commission has initiated against anti-competitive arrangements have involved hardcore arrangements, and not agreements subject to the SLC test.³³² There is therefore little guidance available on how the Commission or the Tribunal interpret SLC in practice. In fact, there appear to be only two published cases so far in which the SLC test has been applied, both involving, in a broad sense, agreements between competitors which had the effect (or at least the perceived effect) of excluding actual or potential competitors from the market.

The first case, *UIPDA*, was settled through a consent order and therefore, perhaps for that reason, the published analysis is relatively brief.³³³ This case concerned a local managed health care scheme operated by an association of medical practitioners, dentists and optometrists. One doctor was expelled from the association because he had agreed to deal with another managed health scheme, allegedly in breach of the first scheme's rules.

The Commission took the view that the exclusivity restriction, as well as certain geographical restrictions on where the members of the scheme could practise, had the effect of substantially preventing or lessening competition from competing medical schemes contrary to the Act, and were unnecessary to carry out the goals of the organisation.³³⁴

It is not clear from the text of the consent order what the relevant markets were in which the Commission thought competition had been substantially lessened. This gives the impression that

³³² "Unleashing Rivalry: 10 Years of Enforcement by the South African Competition Authorities" 42 (2009) available at <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf> (accessed on 5-10-2017).

³³³ *Competition Commission v UDIPA* 58/CR/Aug02.

³³⁴ Par 5.2.

the Commission was more concerned by the perceived unreasonableness or lack of justification for the restrictions than the impact on competition itself, similar to the earlier traditional EU approach to analysing restrictions of competition under Article 101 TFEU. This may be a reflection of the fact that the South African law has a broader range of objectives than competition, consumer welfare, or economic efficiency.

The competition assessment in the second case, *Netstar*, took place in the context of a contested case.³³⁵ The Tribunal found that a group of three vehicle tracking companies, and the industry association of which the three companies were members (VESA), had entered into an arrangement causing SLC in breach of the Act, by setting certain standards for entry to the association which new entrants to the industry could effectively not meet. The Tribunal held that this practice had the effect of blocking entry to the market for stolen vehicle recovery (“SVR”) services, since the customers for those services, namely insurance companies, would effectively deal only with service providers which had been approved by the trade association. The Tribunal reached this decision after a detailed review of the evidence, including examination of witnesses. The fact that the relevant market for the purpose of assessing whether there was SLC was the SVR market appears to have been uncontroversial.

However, on appeal to the Competition Appeal Court, the Court took a different view.³³⁶ The Court stated that there are three elements in assessing whether an arrangement leads to SLC in breach of the Act:

- What is the relevant market? (The arrangement only breaches the Act if it leads to SLC in a relevant market).
- Is there SLC in the relevant market? The Court held that “substantial” for this purpose meant that the prevention or lessening of competition must not be “speculative or trivial” but could be “notional or hypothetical”.

³³⁵ *Competition Commission v Netstar (Pty) Ltd & Others* 17/CR/Mar05.

³³⁶ *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May10.

- Did the agreement or concerted practice *cause* the SLC. The Court recognised that there could be cases, such as this one, where the agreement or concerted practice may be one cause of the SLC, but there may also be other causes. In these situations, the Court held that it is only if the agreement or practice is the “primary or substantial” cause of the SLC, or in other words “plays the dominant role” in the SLC, that it will breach the Act. In this case, the Court held, in respect of the third element, that the predominant cause of the SLC was not the standards of the association, but the requirements of the South African Insurance Association and its members, which decided to use VESA accreditation in giving reduced or discounted premiums.³³⁷ The Court therefore overturned the Tribunal’s decision.

The test of whether the agreement is the “primary or substantial cause” of the SLC seems relatively unusual by international standards. It is not reflected in the competition laws of Canada and Australia, where the approach, as we have seen above, is to look at the counterfactual, i.e. to compare the situation with and without the agreement, to assess whether there is SLC. This amounts to a “but for” test: if competition would not have been substantially lessened “but for” the agreement, the SLC test will be satisfied. In the EU, we saw that an agreement which would not in itself materially restrict competition may be held to do so, if it is part of a group of similar agreements which in combination materially restrict competition.

4 2 5 Hong Kong

In Hong Kong, the competition test is exactly the same as under EU competition law: “prevent, restrict or distort competition”.³³⁸ The extent to which the Hong Kong courts will be guided by EU case law remains to be seen: the Hong Kong law took effect on 14 December 2015 and there have so far been no substantive judgments by the Competition Tribunal interpreting this term. While the UK and Jersey competition laws (which also use the EU test) contain express provisions stating that the courts must interpret the law insofar as possible consistently with EU case law,³³⁹ the Hong Kong law contains no such provision. The result is that there is even greater lack of

³³⁷ Pars 66-71.

³³⁸ Competition Ordinance s 6.

³³⁹ Competition Act 1998 s 60 and Competition (Jersey) Law s 60, respectively.

clarity in Hong Kong competition law than in EU competition law as to what the term “prevent, restrict or distort competition” means.

4 3 Exemption or authorisation of arrangements

4 3 1 EU

In the EU, Article 101(3) provides for an exemption from the prohibition of anti-competitive arrangements in Article 101(1) if certain conditions are satisfied. Article 101(3) provides as follows:

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

As was mentioned in section 4 2, before 1 July 2003, Article 101(3) was not directly applicable, and the only way the parties could obtain exemption was to apply to the Commission for an individual exemption decision, unless the agreement fell within a “block exemption” regulation. Since many vertical agreements satisfied the conditions of block exemptions, or could be structured so that they did, in practice it was mostly horizontal agreements such as joint ventures that were notified.

With the ability of the parties to obtain the Commission's decision on the agreement (one way or the other) prior to its being implemented, there was little risk, at least in theory, of the parties committing an infringement, if they applied for a decision. In practice, exemption decisions took a long time to obtain, because of the Commission being overburdened with exemption applications (one of the reasons why the process was abolished). Many parties were therefore prepared either to settle for informal, non-legally binding "comfort letters", or to implement the agreement and rely on the fact that notification protected them from the risk of fines, if not a finding of breach, if exemption was subsequently refused. This meant that the vagueness in the terms of Article 101(3), which had never been defined clearly by the European Courts- such as the exact scope of the benefits which are relevant, what constitutes a "fair share" of benefits for consumers, and what a "substantial part of the products in question" means- were not a great source of concern for businesses. In fact, if anything, the vagueness was a benefit: it enabled the parties to bring more arguments into play in their exemption applications.

However, on 1 July 2003, the notification system was abolished, and Article 101(3) became directly applicable.³⁴⁰ Since then, businesses have had to assess for themselves not only whether their agreement is caught by Article 101(1), but also, if it is, whether it satisfies the exemption criteria in Article 101(3). Making the wrong assessment could mean that they commit an infringement. The vagueness in Article 101(3) has therefore become a major concern for businesses. Even although, nowadays, most enforcement by the European Commission is directed at "hardcore" collusion such as price-fixing, businesses still need to ensure that they comply with the law in entering into other arrangements. Removing any mechanism for gaining clearance or comfort from the Commission has therefore made the compliance task more burdensome for businesses and their legal advisers than it was before.³⁴¹

³⁴⁰ Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 of 4.1.2003.

³⁴¹ For legal practitioners' confirmation of this point, see Stephen Kinsella and Anouck Meier "Decentralisation, or the Law of Unintended Consequences" *Competition Policy International* 29 October 2008, available at: <https://www.competitionpolicyinternational.com/decentralization-or-the-law-of-unintended-consequences/> (accessed on 5-6-2017).

Conscious of this fact, shortly after Article 101(3) became directly applicable, the Commission issued guidelines on its application.³⁴² However, it is doubtful whether these guidelines have achieved the Commission's objective of creating greater clarity for businesses, enforcers, and courts. If anything they may have increased the lack of clarity. This is for two main reasons. The first is that it is not clear whether the Commission's views are consistent with the terms of the TFEU, or the views of the European Courts. The second is that, even if the guidelines are legally correct, the methodology that the Commission sets out in the guidelines for assessing whether the exemption criteria are satisfied is so complex that it does not enable businesses to predict with confidence whether their agreement is exempt. These reasons are explained in turn below.

Regarding consistency with the TFEU and the Courts' case law, uncertainty arises from at least the following:

- As noted in section 4 2, the Commission now defines an appreciable restriction of competition under Article 101(1) as one which adversely affects consumers (in terms of prices, innovation, quality, etc). However, the European Courts have held that the effects on consumers are only relevant under Article 101(3), not 101(1).³⁴³ Moreover, as also noted in section 4 2, the Courts' judgments themselves are to some extent inconsistent with each other.
- The Commission defines the relevant benefits of the agreement for the purpose of the first exemption criterion under Article 101(3) strictly in terms of its *economic* benefits (for consumers), whereas in previous cases the European Court has indicated that other public interest benefits, such as improving employment levels, may also be taken into account. The scope of the benefits which may be taken into account is therefore unclear. As Jones and Sufrin state: "...the Commission, in adopting the consumer welfare standard, has eschewed the use of competition law to protect or advance other interests, but the case law

³⁴² "Guidelines on the application of Article 101(3) of the Treaty" OJ C101/1 of 27.4.2004.

³⁴³ Cases C-501/06 P etc *GlaxoSmithKline v Commission* [2008] ECR I-9291.

of the EU Courts, and the decisional practice of the Commission in the past, is not so clear”.³⁴⁴

- In assessing what constitutes a “fair share” of benefits to consumers, the wording of the Treaty suggests that this involves an assessment of the extent to which the benefits of the agreement- economic or otherwise- are passed on to consumers and an assessment of whether the amount of benefits passed on is “fair” (clearly a very subjective assessment). The Treaty does not state that any weighing of benefits against harm to competition is required. Indeed, the Commission previously interpreted the term “fair share” in this way in its exemption decisions.³⁴⁵ However, the guidelines set out a different methodology, involving a quantification of the harm to consumers resulting from the restriction of competition under Article 101(1), and a quantification (where possible) of the benefits to consumers from the agreement. A “fair share”, according to the Commission guidelines, is one where the latter exceeds the former.³⁴⁶ This novel approach to the application of Article 101 was no doubt driven by the Commission’s desire to align its approach under Article 101 with the “more economic” approach it had adopted in respect of mergers, where the test is whether the merger is likely to result in net harm to consumers. It is not yet clear, however, whether this approach will be endorsed by the European Courts.

Turning to the complexity of the methodology, even if the Commission’s new approach to assessing what constitutes a “fair share” of benefits for consumers is endorsed by the European Courts, it clearly involves considerable complexities, making it difficult for businesses to predict whether their agreement will be exempt. Quantification of future consumer harm and future consumer benefits is not something that most businesses or their legal advisers are qualified to do, and in any event is a largely subjective assessment. One article comments that, for such a “consumer welfare balancing” test to work satisfactorily:

³⁴⁴ *EU Competition Law* 41.

³⁴⁵ For example *GEC/Weir Sodium Circulators* OJ L327/26 of 20.12.1977; *Vacuum Interrupters* OJ L383/1 of 31.12.1980; *Mitchell Cotts/Sofiftra* OJ L41/31 of 11.2.1987.

³⁴⁶ Guidelines on Article 101(3) n 299 above para 85.

“...our courts and competition authorities would have to be populated by enlightened economists born and bred in the arcane business of balancing pro- and anti-competitive effects- a sort of philosopher King, like those whom Plato would have ruling his Republic.”³⁴⁷

It is an arbitrary and subjective exercise because what counts as a benefit is not objectively verifiable, and in any event may not be quantifiable. For example, where two competitors set up a joint venture to manufacture a more expensive and technologically-advanced new product to replace the cheaper older products which each of them were previously producing, how is one to determine whether the higher price is worth paying to have a more advanced product? Different people may reach different views on such an issue. In the case of such “qualitative efficiencies” the Commission itself concedes that this “necessarily requires a value judgment”.³⁴⁸

As Armentano comments:

“...the problem with these calculations is that they cannot actually be made, because individual costs and benefits are ultimately subjective and personal: they cannot simply be added up or subtracted to determine net social efficiency or welfare.”³⁴⁹

Indeed, recent empirical evidence suggests that the consumer benefits traditionally recognised in competition law- lower prices, higher quality and greater choice- may be an incomplete or inaccurate measure of consumer preferences. A survey by the global market research firm AC Nielsen in 2016 found that “[n]early 75% of global respondents, on average, say that a brand’s

³⁴⁷ Christian Ahlborn and A Jorge Padilla “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law” 12th Annual Competition Law and Policy Workshop, Florence 8-9 June 2007 42.

³⁴⁸ Guidelines on Article 101(3) n 299 above para 103.

³⁴⁹ *Antitrust: The Case for Repeal* 102.

country of origin is as important as or more important than nine other purchasing drivers, including selection/choice, price, function and quality”.³⁵⁰

4 3 2 Australia

In Australia, the ACCC may authorise businesses to engage in anti-competitive agreements or conduct (other than misuse of market power) if it is satisfied that there is a benefit to the public from the agreements or conduct which outweighs any public detriment caused by any lessening of competition.³⁵¹ An application for this purpose must be made to the ACCC.

The CCA gives only two examples of public benefits, but these are non-exhaustive, namely that the agreements or conduct lead to:

- a significant increase in the real value of exports; and
- a significant substitution of domestic products for imported goods.

Other public benefits that have been held to outweigh the harm to competition include increases in productive efficiency;³⁵² environmental benefits and promoting growth in jobs;³⁵³ redressing the bargaining power of small and medium-sized entities;³⁵⁴ and savings in transaction costs.³⁵⁵ In these cases the reasoning is relatively brief: on the negative side of the balance the Commission simply said that the public detriment arising from the SLC was not significant. So the assessment was largely qualitative rather than quantitative. Where the benefit consisted of productive efficiencies, no attempt appears to have been made to quantify the efficiencies, or the public

³⁵⁰ See <http://www.nielsen.com/bd/en/press-room/2016/the-global-battleground-for-consumer-goods-new-nielsen-research-finds-75-percent-of-consumers-say-brand-origin.print.html> (accessed on 8-2-2018).

³⁵¹ CCA s 90.

³⁵² *DP World Australia Ltd & Patrick Stevedores Pty Ltd* A91238-A91240.

³⁵³ *Gladstone Ports Corporation & Ors* A91208.

³⁵⁴ *Liquor Stax Australia Pty Ltd* A9123.

³⁵⁵ N 310 above.

detriment, and weigh them against each other. The ACCC has denied authorisation where it was satisfied that the alleged benefits could be achieved in a way that did not involve SLC.³⁵⁶

In its “Guide to Authorisation”, the ACCC distinguishes between “economic benefits” and “non-economic benefits”, defining the former in terms of efficiencies, i.e. productive, allocative and dynamic efficiencies.³⁵⁷ If the efficiencies outweigh the public detriment caused by the SLC, authorisation will be granted. The Australian Competition Tribunal has described this as a “form of the total welfare standard”.³⁵⁸ Under the total welfare standard the efficiencies which the agreement brings about are weighed against the “deadweight loss” caused from the reduction of competition, and if the former is greater than the latter, the transaction is allowed. As was explained in Chapter 2,³⁵⁹ the deadweight loss is essentially the loss of allocative inefficiency resulting from the fact that some customers who would have bought the product at the competitive price have ceased to buy the product altogether, because of the higher prices resulting from the reduction of competition, and will spend their money on products they value less. The fact that the other customers are buying the product at a higher price is considered irrelevant under the total welfare test: the wealth transfer from consumers to producers is considered neutral because those resources are not lost to society.³⁶⁰ This contrasts with the EU Commission’s approach under EU competition law, where higher prices to any consumers are regarded as negative under the net consumer welfare test.

The ACCC makes it clear that the assessment is not simply a matter of whether the numerical value of the benefits exceeds that of the detriment (in any case quantification may not always be possible) but weightings have to be applied.³⁶¹ So it is not clear, for example, whether a “merger-to-monopoly” would be authorised, even if the productive efficiencies substantially exceeded the deadweight loss caused by consumers ceasing to buy the products.

³⁵⁶ See for example *Brisbane Marine Pilots Pty Ltd* A91235; *Maquarie Generation & Ors* A91198 and A91199.

³⁵⁷ ACCC December 2010 para 5.15, available at www.accc.gov.au.

³⁵⁸ *Re Qantas Airways Ltd* [2004] ACompT 9.

³⁵⁹ Section 2.5.

³⁶⁰ Paras 5.21-5.32.

³⁶¹ Paras 5.28-5.30.

In addition to the facility for applying for authorisation on grounds of countervailing public benefits, Australia also has a system of notification for exclusive dealing agreements.³⁶² Exclusive dealing can be summarised as a situation where “one trader [imposes] restrictions on another freedom to choose with whom, in what, or where it deals”.³⁶³ Exclusive dealing is generally only prohibited if it has, or is likely to have, the effect of substantially lessening competition (“the SLC test”). However, in the case of one form of exclusive dealing, namely “third line forcing”, it is prohibited outright. Third line forcing “involves the supply of goods or services on condition that the purchaser acquires goods or services from a particular party or third party, or a refusal to supply because the purchaser will not agree to that condition”.³⁶⁴

Notification gives the parties immunity from prosecution until such time (if ever) that the ACCC decides to revoke the immunity, which it is entitled to do after serving notice on the parties, if it is satisfied that the likely public benefit from the conduct will not outweigh the detriment to the public. In the case of third line forcing, the immunity will commence 14 days after notification, unless the ACCC has issued a draft notification within that period. In the case of other forms of exclusive dealing, the immunity will commence upon notification. The ACCC may consult interested parties when assessing a notification, and a copy of the notification is placed on a public register.³⁶⁵

4 3 3 Canada

In Canada, unlike in the EU and Australia, no exemption or authorization is possible for hardcore arrangements. Non-hardcore arrangements that satisfy the SLC test are assessed under a form of the total welfare standard, as in Australia. The Tribunal may not make an order in respect of an arrangement if it finds that it: “has brought about or is likely to bring about gains in efficiency that

³⁶² CCA s 93 in conjunction with s47(2)-(9).

³⁶³ ACCC “Guide to Exclusive Dealing Notifications” 2011 p 1.

³⁶⁴ N 365 above.

³⁶⁵ CCA s 95.

will be greater than, and will offset, the effects of any prevention or lessening of competition that will result” from the agreement and that “the gains in efficiency would not have been attained if the order had been made”.³⁶⁶ Unlike Australia, however, there is no formal process for applying for exemption or authorisation of agreements, or provision allowing public interest benefits other than efficiency to be taken into account.

The Bureau’s Guidelines give examples of relevant efficiencies: reductions in costs due to rationalisation of sales and advertising functions; improved utilisation of distribution and warehousing; increased specialisation in distribution, sales and marketing functions; more intensive use of a network infrastructure; and improvements in product quality.³⁶⁷ Gains that are merely redistribution of income, such as cost savings from extracting lower prices from suppliers, are expressly excluded.³⁶⁸

Although the total welfare standard appears on its face to be more objective than the European Commission’s “net consumer welfare” test, the analysis of whether an arrangement increases total welfare is complex, since efficiencies are not always easily quantifiable, and the calculation of deadweight loss is far from straightforward. These difficulties are illustrated by the leading Canadian case on this subject, *Superior Propane*, which concerned a merger.³⁶⁹

This case highlights three additional factors that complicate the assessment in Canada of whether the efficiency gains outweigh the anti-competitive harm:

- The Court held that the wealth transfer from consumers to producers should not always be regarded as neutral. It had to be determined whether any part of the transfer was “socially adverse”, and therefore should weigh more heavily in the balance than the interests of shareholders of the merged firm. If so, a weight should be assigned to that portion and the amount should be added to the deadweight loss in assessing whether efficiencies were

³⁶⁶ S 90.1(4).

³⁶⁷ “Competitor Collaboration Guidelines” s 3.5.1.

³⁶⁸ S 90.1(5).

³⁶⁹ *Canada (Commissioner for Competition) v Superior Propane Inc* 2003 FCA 53 (Jan 31 2003).

greater than the anti-competitive effects. The Court accepted the Competition Tribunal's finding that the only part of the transfer that was socially adverse was the extra revenue from the estimated price increase for low-income households that used propane for essential purposes and had no good alternatives.³⁷⁰ The Tribunal had no evidence on the record as to what weight should be attributed to that portion, but even if it was doubled, found that when this amount was added to the deadweight loss, the efficiencies still were substantially greater. On this basis the merger was allowed, even although it created a monopoly in certain parts of Canada. One commentator has pointed out that such a weighing exercise:

“...places a hugely onerous burden on the Commissioner to present a precise socio-economic profile of consumers and shareholders of producers in order to measure the impact of socially adverse redistributive effects”.³⁷¹

- The Court held that, since one of the objectives of the Competition Act was “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy”, whether the merger denied SMEs that opportunity was one of the factors that would weigh negatively in the balance. Although it was found that the merger did not do so in this case,³⁷² this factor illustrates the complications that can arise when competition laws have conflicting objectives, as we discussed in Chapter 2.³⁷³ The conventional view, at least in the US and EU, is that competition law is about protecting the competitive process, not individual competitors, and in principle firms which are more efficient (even through the fact that they are bigger) should be allowed, and indeed encouraged, to succeed. It has been argued that if SMEs are to be protected, this should be done through methods other than competition law.³⁷⁴ By contrast, the competition laws of Canada and South Africa list as one of their objectives ensuring that SMEs have “an

³⁷⁰ Para 33.

³⁷¹ William Rosenfeld “*Superior Propane: the case that broke the law*” *GCR* Vol 6 Issue 4 Oct 2003.

³⁷² Paras 39-45.

³⁷³ Section 2 6.

³⁷⁴ Michal Gal *Competition Policy for Small Market Economies* (2003) 48.

equitable opportunity to participate in the economy”. The assessment of whether the opportunity that a transaction might deny to SMEs is an “equitable” one is clearly a matter of subjective judgment and therefore unclear as a matter of law.

- The requirement in the Act is not just that the efficiencies are greater than the effects of the lessening of competition, but also that they offset them. The Tribunal held that this meant that the excess of efficiencies over the negative effects had to be “substantial”.³⁷⁵ It is not clear how big the gap between efficiencies and negative effects has to be in order to be regarded as substantial- again this is a matter of subjective judgment in each case. (We noted in section 4.2 the subjectivity which is also involved in assessing what whether a lessening of competition is “substantial”).

If these matters are difficult for the authorities and courts, assessing the matter with the benefits of full evidence and expert testimony, and often after the effects of the commercial transaction have been witnessed, it is clearly even more difficult and burdensome for businesses to assess in advance of entering into the commercial arrangement, without such benefits, whether the arrangement would qualify for this exclusion.

4.3.4 South Africa

In South Africa, arrangements that cause SLC will not lead to liability where a party to the arrangement can prove that “any technological, efficiency or other pro-competitive gain resulting from it outweighs that [SLC] effect”.³⁷⁶ As in Australia and Canada, this appears to be a form of the total welfare standard. For mergers, the wording of the exclusion is slightly different: instead of “outweigh”, the wording is “greater than, and offset”, which is identical to the Canadian wording. It is not clear whether these differences are inadvertent or whether they are intended to convey different meanings. There does not seem to be any logical reason to have different standards for mergers and agreements, and in Canada the same standard is used for both.

³⁷⁵ *Canada (Commissioner for Competition) v Superior Propane Inc* 2002 Comp Trib 16 paras 172-173.

³⁷⁶ S 4(1)(a).

The Tribunal considered the meaning of this exclusion, in the context of mergers, in its *Trident Steel* judgment.³⁷⁷ The reasoning in the judgment is somewhat obscure, and does not seem to sit entirely consistently with the wording of the Act.

The Tribunal found that the merger would cause SLC in the market for processed steel panels for the outer body of motor vehicles. The merged entity would be the only domestic producer of these products, and neither competition from imports nor countervailing bargaining power would prevent it from exercising market power.³⁷⁸

The Tribunal next considered whether the exclusion on grounds of economic efficiency applied. The Tribunal noted that this exclusion was derived from the equivalent one in Canada, where it had been interpreted in essence as constituting a total welfare (or total surplus) standard. (At that time the *Superior Propane* judgment in Canada, and the qualifications it made to the total welfare standard under the Competition Act there, had not yet been issued). The Tribunal surveyed the arguments in the economic literature for and against the total welfare standard, but noted that the question was not whether the standard was desirable (as it was already contained in the statute) but how it should be interpreted.³⁷⁹

Regarding the issue of what efficiencies should be considered on the positive side of the equation, the Tribunal held that only “real” efficiencies or economies should be taken into account, such as new products or processes, and production efficiencies. Mere pecuniary efficiencies such as negotiating better terms from suppliers should not be taken into account, since these do not relate to a saving of society’s resources.³⁸⁰ The Tribunal appeared to suggest that mere proof of real efficiencies was sufficient on the efficiency side of the equation, without the need to quantify these efficiencies. But as Sutherland has pointed out, this conflicts with the statutory criterion that the

³⁷⁷ *Trident Steel (Pty) Ltd and Dorbyl Ltd* 89/LMOct00.

³⁷⁸ Para 40.

³⁷⁹ Para 48.

³⁸⁰ Para 81.

efficiency is “greater than” and “offsets” the anti-competitive effects of the merger, implying that some quantification of the efficiency is required.³⁸¹

So far, the reasoning was relatively unsurprising. What was surprising was that the Tribunal then expressed the view that the extent to which efficiencies were passed on to consumers was relevant under the Act, even though there is no express provision for this in the Act itself, and this issue is not relevant to the total welfare approach that the Tribunal appeared to have accepted. The Tribunal proposed a sliding scale: the greater and more compelling the efficiencies, the less need there is to show that these are passed on to consumers, and vice-versa. The Tribunal recognized the uncertainty embodied in this approach, but disposed of this concern in the following terms:

“Whilst this approach might be criticised for giving the competition authority too much discretion at the expense of business certainty, the alternative, which is to interpret this section as a mathematical comparison of two areas on a Williamson diagram, permits an approach so clinical and rigid that it would reduce the proper exercise of a discretion to a matter of calculus.”³⁸²

The Tribunal in this case did not feel compelled to assess what proportion of efficiencies should be passed on to consumers, since it found that “the efficiencies claimed are so overwhelming...that they will dwarf the anti-competitive effects”.³⁸³ The anti-competitive effects appear to have been regarded as, at most, the revenue from the price increase that the merged entity could sustain before customers resorted to imports, which was not much higher than the market price. The Tribunal in practice therefore did not fully apply the total welfare standard: under that standard the price increase up to the level of the import parity price would have been regarded as neutral. The end result, therefore, as in Canada, seems to be a “compromise” between the total welfare and the consumer welfare approach.

³⁸¹ Philip Sutherland “Steel and Propane: the Efficiency Defence and Horizontal Mergers” 125 *S African LJ* 331 (2008).

³⁸² Para 82.

³⁸³ Para 91.

In the context of a merger approval process, as in *Trident*, the parties await clearance from the authority proceeding with a transaction, and therefore do not have to rely on their own self-assessment of whether the efficiency gains outweigh the harm to competition before proceeding to implement the merger. It is a different matter for other commercial arrangements, where the parties do have to rely on their own self-assessment. As noted in relation to Canada, even a “simple” total welfare assessment, i.e. one that does not include an assessment of the extent to which the efficiencies are passed on to consumers, is beyond the capacity of businesses and judges, and even economists who have the available analytical tools may reach different conclusions. In South Africa, if a business’s assessment is that it can implement the arrangement because the exclusion applies, and the Commission subsequently disagrees, the business is not only exposed to the prospect of proceedings by the authority with a view to requiring the parties to amend or terminate the agreement, as in Canada. It may already have broken the law by implementing the agreement. As we will discuss later, this is a matter of great concern from a rule of law point of view.

In the *Netstar* case,³⁸⁴ no such assessment was appropriate because no reasonable efficiency arguments were available, but in a joint venture or other type of cooperation agreement between competitors falling short of a merger, such an assessment may well be required.

Apart from minimum resale price maintenance, all vertical agreements can also benefit from the economic efficiency exclusion if they satisfy the test. This provision appears to have been applied in only one case, *Hibiscus Coast Municipality*,³⁸⁵ but this case appears to have been settled by a consent order, and it remains to be seen what kind of analysis will be applied in dealing with competition and efficiency issues arising from vertical agreements.

Any agreement, horizontal or vertical, which might otherwise be prohibited may also be eligible for an exemption on other grounds of public policy, if an application is made to the Commission, and the Commission is satisfied that it contributes to any of the following objectives:

³⁸⁴ This case was discussed in section 4.2.4.

³⁸⁵ “Unleashing Rivalry” 42.

- maintenance or promotion of exports;
- promotion of the ability of small businesses, or those controlled or owned by historically disadvantaged persons, to become competitive;
- change in productive capacity necessary to stop decline in an industry; or
- the economic stability of any industry designated by the Minister of Trade and Industry, after consultation with the Minister responsible for the industry in question.³⁸⁶

The Commission must also be satisfied that any restriction on the parties is required to attain the relevant objective.

4 3 5 Hong Kong

For arrangements which have the “object or effect” of preventing, restricting or distorting competition, an exclusion is available in identical terms to Article 101(3) of the TFEU under EU law, requiring that the arrangements satisfy four criteria to qualify for the exclusion (improvements in production or distribution, fair share of the benefits passed on to consumers, etc.).³⁸⁷

We noted in section 4 3 1 the uncertainties that have arisen under EU law regarding the Commission’s “re-interpretation” of this provision (and whether the European Courts will follow it), as well as the types of benefits which qualify for the exclusion: are these only economic benefits, or do they include non-economic benefits such as promoting employment or environmental protection? So far there is no Tribunal judgment on these issues. Similar uncertainties have effectively been “imported” into Hong Kong law from the EU.

Unlike the EU, a facility is available whereby the parties can apply to the Commission for a decision as to whether the exclusion applies to a particular agreement, but the Commission is only required to give a decision if certain conditions are satisfied, notably if the application “poses novel or unresolved questions of wider importance or public interest” and “there is no clarification in

³⁸⁶ S 10. For a discussion of how these criteria are likely to be applied in practice, see Sutherland and Kemp *Competition Law of South Africa* 5.10.1.

³⁸⁷ Competition Ordinance s 30 and Sch1 para 1.

existing case law or decisions of the Commission”.³⁸⁸ No decisions have yet been issued under this provision.

4 4 Dominance / Substantial Market Power

4 4 1 Introduction: the problem of market definition

To assess whether a firm has a dominant position or substantial market power in a market, one needs to know what the market is. In all of the subject jurisdictions, the starting point for determining whether a firm has a dominant position or substantial market power is therefore the definition of the relevant market. The relevant market is also usually defined in the context of assessing whether an arrangement substantially lessens competition in a market, and the South African courts have stated that this is a necessary step in the analysis.³⁸⁹ However, market definition tends to be regarded as an even more critical element in the case of abuse or misuse of market power, because of the extra obligations which firms incur if they are found to be dominant or have substantial market power.

The concept of the relevant market is not defined in the competition legislation of any of the subject jurisdictions apart from Australia, where the legislation states that “market means a market in Australia and, when used in relation to any goods services, includes a market for those goods and services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.”³⁹⁰

The relevant market is essentially a hypothetical construct (as indeed are the concepts of dominant position and substantial market power, as we shall see later). It has both a product dimension, and a geographical dimension, and involves looking at both demand-side substitutability and supply-side substitutability. The test that is normally used is commonly-known as the SSNIP (small significant non-transitory increase in price) test. Starting with the product which the business in

³⁸⁸ S 9(2).

³⁸⁹ See *Netstar* section 4 2 4 above.

³⁹⁰ CCA s 4E.

question is producing, if a hypothetical monopolist in the supply of that product applied a small (five to ten per cent) non-transitory (i.e. lasting) increase in price, would customers switch to other products, or producers in other geographical locations? If so, those other products and locations are included in the “candidate” relevant product market and “candidate” relevant geographical market respectively. The process is then repeated (and if necessary repeated again) until the answer is “no” to both the product market and geographical market. The resulting markets are then the relevant product market and relevant geographical market. A fuller description of the market definition process can be found in any standard competition law textbook.³⁹¹

It may be that in certain situations the definition of the relevant product/service market or geographical market is obvious. For example, as regards the product/service market, for the international transport of certain goods such as vehicles, there may be no substitute for shipping lines: airlines would not be a substitute, as transporting vehicles by air would be impracticable. Similarly, regarding the geographical market, consumers requiring the services of a mobile telecommunications operator are generally restricted to dealing with operators which have licences within the jurisdiction in question, so the relevant market for mobile services would be national.

However, it can readily be seen that in many cases, the answer will be unclear and a matter of judgment, that is, subjective. For example, if the price of cola drinks increased by five to ten per cent, would consumers switch to other soft drinks? Some may do so and some may not. And if the price of chicken in a local supermarket went up by five to ten per cent, would consumers travel further afield to buy chicken, and if so how far? Where a shopper has a choice of buying cheese in a local farmers’ market or in a supermarket ten minutes’ walk away, are they in the same relevant market? The digital, internet age complicates matters further. To what extent is Amazon a substitute for the local bookstore, for example? Many products can be bought online as well as in local shops. In determining the geographical market from a customer point of view, is it only physical forms of buying the product (going into a shop) which is to be taken into account (in which case the relevant geographical market may be local) or should online distribution be taken into account (in which case the relevant geographical market may be much wider)? Are “over-the-

³⁹¹ For example Whish and Bailey *Competition Law* 27-43.

top” (i.e. internet-based) phone calls substitutable for telephone calls via fixed or mobile networks? And what if there is no price for the product at all, at least for the initial, basic version of a service, which is the model for many internet services – how can one hypothesise about the effects of a notional increase in price when there is no price?

Whish and Bailey comment on the difficulty of the market definition process as follows:

“Conceptually, the idea that the relevant market consists of goods and services that are interchangeable with each other is simple enough. In practice, however, the measurement of interchangeability can give rise to considerable problems for a variety of reasons: for example there may be no data on the issue, or the data that exist may be unreliable, incomplete or deficient in some other way. A further problem is that, in many cases, the data will be open to (at least) two interpretations. It is often the case therefore that market definition is extremely difficult: this is why the EU Courts have recognised that the Commission has a ‘margin of assessment’ in economic matters such as market definition”.³⁹²

In other words, a firm’s liability under competition law may depend on information that is not within its possession, and is in any event ambiguous. Moreover, the courts themselves have expressly recognised that the Commission has a discretion as to how to interpret this information and define the market, thereby potentially triggering a business’s liability under competition law. This is extremely troubling from a rule of law standpoint.

Once the relevant market has been identified (or, given the hypothetical and arbitrary nature of the exercise, “selected” is probably a more appropriate word) the next issue is whether the business in question has a dominant position or substantial market power. As we shall see, these concepts, like the concept of relevant market, are to a large extent subjective.

4 4 2 EU

³⁹² *Competition Law* 30-31.

The EU uses the concept of “dominant position”. However here, there appears to be an inherent contradiction in Article 102 of the EU Treaty, as interpreted by the European Courts. Dominant position has been identified as:

“...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.³⁹³

However, the ability to act independently seems incompatible with the concept of exclusionary abuses. Why would a firm that was independent- i.e. free from competitive constraints - need to take steps to exclude competitors? To take an example from the case law, why did British Airways need to offer travel agents *increased* commission in the form of the special bonus scheme in that case (which the European Courts decided was abusive since it tied travel agents to BA at the expense of its competitors) if it was genuinely capable of acting independently from its competitors?³⁹⁴ If the latter was the case, could it not have actually *reduced* its commission rates, in the knowledge that travel agents would still have to sell as many BA tickets as possible to maximize their profits, and that travel agents would not switch to competitors (in the same way that, conversely, a dominant firm can charge higher prices to customers without fear of losing customers to such an extent as to make it unprofitable to do so). So although a statutory monopoly may be able to act independently in the market, because by definition it has no competitors, it seems that independence *per se* cannot be the appropriate test for dominant position.

There are two possible answers to this question, both arising from the seminal definition of “dominant position” by the European Court in the *United Brands* case cited above.

³⁹³ Case 27/76 *United Brands v Commission* [1978] ECR 207.

³⁹⁴ Case 95/04-P *British Airways v Commission* [2007] ECR I-2331.

The first answer is that the word “independently” is qualified by the words “to an appreciable extent”. Independence does not therefore mean total independence but only “appreciable” independence. However, as with an “appreciable” restriction of competition under Article 101, the European Courts have never defined what constitutes “appreciable” independence for the purpose of the concept of “dominant position”. In a “Guidance” notice published early in 2009, the Commission stated that an undertaking which is capable of profitably increasing its prices above the competitive level for a significant period of time can generally be regarded as dominant.³⁹⁵ However, independence in terms of the ability to raise prices does not seem necessary for dominance either. For example, in a previously-monopolised telecommunications market which is in the early stages of competition, the incumbent operator might have its prices capped by the regulator, but few would doubt its market power in terms of the ability to make life difficult for new competitors, and even exclude them from the market, in various ways.

Perhaps, then, the key concept in the *United Brands* definition is not the independence criterion, but the ability to prevent effective competition on the market. However, there are also problems with using this criterion, one conceptual and one definitional. The conceptual difficulty is that, if it is accepted that Article 102 prohibits exclusionary abuses (as the European Courts has held is the case), exclusionary abuses by definition are a manifestation of “the power to prevent effective competition being maintained”, and therefore the concept of dominant position is redundant. The definitional difficulty concerns the question of what constitutes the “prevention of effective competition”. We shall look at this issue in more detail in section 4.5, in the context of abuse.

The European Court has held that there is a presumption of dominance with a market share of 50 per cent or above, but a business wishing to rebut this presumption needs to know what facts it has to prove to rebut it, i.e. what the definition of dominant position actually is.³⁹⁶ What businesses have been left with under the case law and the Commission guidance is a list of relevant factors in

³⁹⁵ “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” OJ C45/7 of 24.2.2009 para 11.

³⁹⁶ Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 para 60.

assessing whether they are in a dominant position.³⁹⁷ These include primarily market shares, and barriers to entry (such barriers meaning the obstacles that a potential competitor would face in entering the market). If the business has a high market share that has been sustained or increased over time, or if barriers to entry are high, or both, a dominant position is more likely to be found. However, there is no indication of how high market shares or barriers of entry have to be, or what “mix” of them would need to be present, to trigger a finding of dominance. As the European Court itself put it in *United Brands*: “In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative”.³⁹⁸ In other words, this is an arbitrary and subjective assessment.

4 4 3 Australia

In Australia, the test is “substantial degree of power in a market” as opposed to “dominant position”.³⁹⁹ However, it appears that there is not a great deal of difference between the two concepts, and the CCA shares with EU law similar uncertainty as to what the test means.

The CCA states that, in determining the degree of market power a business has, the court must have regard to the extent to which the business is constrained by the conduct of competitors, potential competitors or customers.⁴⁰⁰ However, the CCA makes it clear that absolute freedom from constraint is not necessary.⁴⁰¹ This test is similar to the “independence” component of the test for “dominant position” under EU competition law.

In *Boral*, the majority in the High Court indicated that assessing substantial market power requires an examination of the actual conduct of the company, as well as its competitors and customers, on the basis that this is “the best evidence of the state of the market and the best indication of the extent of [the company’s] power”.⁴⁰² The High Court supported the trial judge’s conclusion that

³⁹⁷ N 395 above paras 9-18.

³⁹⁸ N 393 above para 66.

³⁹⁹ CCA s 46.

⁴⁰⁰ S 46(3).

⁴⁰¹ S 46(3)(c).

⁴⁰² Para 140.

a finding of substantial market power was inconsistent with the evidence in the case, which showed that the market was intensely competitive.

While the courts have an *obligation* to have regard to the degree of constraints, if any, from competitors (actual and potential) and customers, it has a *discretion* to look at other matters in determining the degree of market power that a business has. These include contractual arrangements or understandings, actual or proposed, with other parties; the number, size and strength of competitors; and the stability or volatility of demand.⁴⁰³

It therefore appears that, while (according to *Boral*) conduct in the market may provide the best evidence of whether any business has a substantial degree of market power, the latter can be inferred, without such evidence, from other factors, notably very large market shares (or a monopoly in the market) combined with high barriers to entry. Countervailing bargaining power by purchasers may also be relevant in assessing whether they can impose a constraint on market power. However, the presumption of a dominant position at a market share of 50 per cent or above, which as noted above exists in the EU, does not appear to have any counterpart in Australia.

Clearly, all of these factors are questions of degree and assessment on a case-by-case basis. So far, most of the cases in which the High Court has been called upon to assess the issue have left little room for controversy as to whether a substantial degree of market power existed, either because the parties conceded that this was the case, or because of the existence of very high (or monopoly) market shares combined with high barriers to entry. Only in *Boral* did the High Court find no substantial degree of market power, because an examination of the conduct of market operators demonstrated that the market was highly competitive.

4 4 4 Canada

In Canada, the relevant test is “dominant position”, as in the EU. The Competition Act defines dominant position as a situation where “one or more persons substantially or completely control,

⁴⁰³ Ss 46(3A) and 46(3B).

throughout Canada or any area thereof, a class or species of business”.⁴⁰⁴ In *Commissioner of Competition v Toronto Real Estate Board and Canada Real Estate Association* (“TREB”) the Competition Tribunal held that the term “class or species of business” is equivalent to the concept of the relevant market, which we discussed in section 4 4 1 above.⁴⁰⁵ The Tribunal recognised that firms often have market power, and that the market power for the purpose of the abuse provisions must be “substantial”, i.e. “more than moderate”- a higher threshold than that used to determine whether a given agreement or practice causes SLC.⁴⁰⁶ It defined a substantial degree of market power as “a degree of market power that confers upon the entity considerable latitude to determine or influence price or non- price dimensions of competition in a market, including the terms upon which it or others carry on business in the market”.⁴⁰⁷ What constitutes “considerable latitude” or “influence” for this purpose will clearly be a matter of debate in many cases, and to a large extent a subjective assessment. While the Tribunal said that this concept “roughly approximates” that of dominant position under EU law, this does not take us very far, given the lack of clarity as to the meaning of this concept under EU law, as we discussed in section 4 4 2 above.

The Competition Bureau has issued guidelines that explain in detail how it approaches the abuse of dominance provisions, including the assessment of dominance.⁴⁰⁸ Both the definition of the relevant market, and the assessment of dominance, seem to be broadly similar to the approach adopted in Australian law to substantial market power. Market power is defined as the power to maintain prices above the competitive level for a significant period of time. Alternatively, even if pricing power is absent, market power can be defined as an ability to reduce product quality, choice, service, innovation, or any other feature that buyers value.⁴⁰⁹

⁴⁰⁴ S 79(1)(a).

⁴⁰⁵ CT-2011-003 para 164.

⁴⁰⁶ Paras 166-174.

⁴⁰⁷ Para 174.

⁴⁰⁸ “The Abuse of Dominance Provisions” available at:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html> (accessed on 10-10-2017).

⁴⁰⁹ N 408 above section 2.3.

As with EU and Australian law, because direct evidence of these matters is often unavailable, the authorities may rely on indirect indicators of market power. The Tribunal has supported these views. In *TREB*, it said that market power can be measured either directly- by looking at the level of profits (a substantial level of profits being indicative of market power) or indirectly, through indicia such as market share, entry barriers, or countervailing bargaining power of customers. A market share of above 50 per cent creates a rebuttable presumption of dominance, as in the EU.⁴¹⁰

4 4 5 South Africa

In South Africa, a dominant position is presumed conclusively if a business has a market share of at least 45 per cent. While this presumption gives considerably more clarity than the laws of the other subject jurisdictions, in that they do not have irrebuttable presumptions of dominance at a certain level, it does come at a certain cost. A firm with this level of market share (or even above) could still be operating in a highly competitive market (i.e. not in fact be dominant), and imposing on that firm the extra obligations which a finding of dominance triggers could therefore actually distort competition in the market. There is a rebuttable presumption of dominance between 35 per cent and 45 per cent (the presumption is rebuttable by showing no market power) and no dominance below 35 per cent unless the business has market power.⁴¹¹ The definition of market power is vague – “the power of a firm to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers”.⁴¹² This definition appears to have been derived from a combination of US law and EU law. Sutherland and Kemp note that the first two criteria appear to have been taken from the US concept of “monopoly power” established by the Supreme Court.⁴¹³ The second and third criteria are also used in EU competition law, as noted earlier.⁴¹⁴ So the same comments which were made about the lack of clarity and potential conflicts in this area under EU law apply to South Africa.

⁴¹⁰ N 405 above paras 191-196.

⁴¹¹ § 7.

⁴¹² S 1.(1)(xiii).

⁴¹³ *Competition Law of South Africa* 7.7.6.2.

⁴¹⁴ Section 4 4 2. For a discussion of the meaning of these three criteria in South Africa see n above at 7.7.6.1- 7.7.6.4.

4 4 6 Hong Kong

In Hong Kong, the wording of the test is essentially the same as in Australia: whether the business has a “substantial degree of market power”.⁴¹⁵ The Competition Ordinance lists non-exhaustively a series of factors that may be taken into account for this purpose, namely the business’s market share, its power to make pricing and other decisions, and barriers to entry.⁴¹⁶ In its “Guideline on the Second Conduct Rule”, the Competition Commission defines “substantial degree of market power” as “the ability profitably to charge prices above competitive levels or to restrict output or quality below competitive levels, for a sustained period of time”.⁴¹⁷ It states that a sustained period would normally be two years, but gives no indication of what it means by “competitive levels”.⁴¹⁸

4 5 Abuse (Misuse) of Dominance / Substantial Market Power

4 5 1 EU

In the EU, the concept of “abuse” is addressed in Article 102 of the TFEU. Article 102 reads as follows:

⁴¹⁵ Competition Ordinance s 21.

⁴¹⁶ S 21(3).

⁴¹⁷ Available at

https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/second_conduct_rule.html (accessed on 1-10-2017).

⁴¹⁸ Para 3.2

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

The concept of “abuse” (like “dominant position”) is not defined in Article 102, or elsewhere in the TFEU. Moreover, the list of examples in Article 102 is non-exhaustive, and the examples themselves are imprecise and could be subject to arbitrary, subjective judgments. For example, what is an “unfair” purchase price, selling price or trading condition?

Gerber reports that the lack of certainty in Article 102 (Article 86 as it then was) meant that during the first decade of EU competition law, it was seldom enforced:

“The concept of abuse was vague, and the civil law – trained officials of the Commission and judges of the European Court were reluctant to apply vague legal concepts. Moreover the Commission did not wish to risk losing cases because of the Court’s probable reluctance in this regard, and the lack of any well-accepted sense of how the provision should be applied made enforcement by a politically weak Commission highly risky”.⁴¹⁹

⁴¹⁹ *Law and Competition* 356.

The fact that the EC Council of Ministers was prepared to make or declare the competition provisions of the Treaty directly applicable to businesses in Regulation 17/62 (as noted in section 4.2.1), and to empower the Commission in the same regulation to impose fines of up to ten per cent of worldwide turnover, at a time when even the basic principles of the abuse of dominance provision had not been worked out and there was no case law to offer guidance, seems to constitute a remarkable disregard of the rule of law. It is not surprising therefore that the Commission was nervous about enforcing the provision.

In 1970 Rene Joliet, a law professor who later became a judge at the European Court, examined the list of examples in the provision, and argued that it only applied to conduct by a dominant firm which exploited its position by imposing unfair prices or other terms on customers or suppliers (so-called “exploitative” abuse), as opposed to conduct which affected competitors or market structure.⁴²⁰ This argument was supported by the French and German versions of the Treaty, where the equivalents of the term “abuse of dominant position” seem to restrict the concept to exploitative abuse.

However, the view that the concept of abuse was restricted to exploitative abuse was rejected by the European Court in its very first case on Article 102 (then Article 86), namely *Continental Can*.⁴²¹ The issue there was whether Article 102 could apply to an acquisition by a dominant firm of another firm in the same market, which had the effect of virtually eliminating competition in the relevant market. The Court held that the abuse concept was not limited to exploitative abuse, and that it also captured conduct which harmed consumers indirectly, by excluding competitors and thereby damaging the competitive structure of the market.⁴²² (Such conduct is commonly called “exclusionary” abuse as distinct from “exploitative” abuse).

⁴²⁰ Pinar Akman “Searching for the Long-Lost Soul of Article 82EC” (2009) *Oxford J Legal Studies* 267, 271 n21.

⁴²¹ Case 6/72 *Continental Can v Commission* [1973] ECR 215.

⁴²² N 421 above para 26.

Another issue that arose in *Continental Can* was whether the dominant position had to be *used* to cause the harm to competition. The Commission accepted that Continental Can's ability to implement the acquisition did not arise from its dominant position, in other words, that it did not *use* its dominant position to conduct the acquisition. But the Commission argued that such a causal link between the dominant position and the alleged abuse was unnecessary. Advocate General Roemer, advising the Court, disagreed. In his Opinion, the Advocate General Roemer considered the natural, literal meaning of the term "abuse of dominant position", which he said "appears to hint that its application can be considered only if the position on the market is used as an instrument and is used in an objectionable manner". (This is consistent with the dictionary meaning of the term: the Oxford English Dictionary, for example, defines the verb "abuse" as "to use something to a bad effect or for a bad purpose".)⁴²³ The Advocate General produced a number of other plausible arguments against the application of Article 102 to mergers and acquisitions.

However, in spite of the Advocate General's detailed rebuttal of the Commission's arguments, the European Court upheld the Commission's view that Article 102 could apply to acquisitions. Its reasoning was peremptory: it paid no attention to the literal meaning of the word "abuse", but based its view on its analysis of the Treaty objectives, that is, it applied a teleological interpretation. In essence, its view was that, since one of the Community's activities was the institution of a system ensuring that competition is not distorted, "it requires *a fortiori* that competition must not be eliminated". It went on to reason that any other interpretation would create a major lacuna in the Treaty: it would be pointless prohibiting agreements which restricted competition if businesses could avoid this prohibition, and indeed eliminate competition between them completely, by merging with or acquiring one another.⁴²⁴

Under EU law, the concepts of exploitative and exclusionary abuse have both given rise to problems of legal certainty.

⁴²³ <https://en.oxforddictionaries.com/definition/abuse> (accessed on 6-10-2017).

⁴²⁴ Paras 23-25.

Starting with exploitative abuse, the difficulties in assessing what constitutes unfairly high (or excessive) prices are notorious, and there is little EU case law on how the Commission and Courts have approached this issue, or the issue of unfair trading terms generally. A price that is intended to cover costs can hardly be regarded as excessive. It is generally accepted that a firm which has achieved a monopoly through competing successfully should be able to charge a higher price to increase its profits- indeed this prospect is a strong incentive to compete vigorously. So how much higher than cost does a price have to be, to be classified as excessive? This is largely a subjective assessment, as there is no clear legal standard as to what is excessive. Moreover, in many industries (such as pharmaceuticals), businesses have to incur significant losses in the early stages of developing a new product or service, in the expectation or hope that it will recover those losses later. This may lead to pricing which is many times higher than the marginal costs of manufacture or provision. How is “excessive” to be judged in these circumstances?

Perhaps because of these difficulties, the Commission appears to have shown little appetite for enforcing exploitative abuse of dominance, and has more or less conceded as much.⁴²⁵ This means that case law has been sparse.⁴²⁶ The difficulties in predicting what constitutes an exploitative abuse of dominance have been covered extensively elsewhere,⁴²⁷ and there is unlikely to be

⁴²⁵ In her speech at Fordham in 2005, the then EU Commissioner for Competition Neelie Kroes said “it is sound for our enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers”. Available at [http://europa.eu/rapid/press-release SPEECH-05-537_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en) (accessed on 6-10-2017).

⁴²⁶ A rare example is the investigation into the pricing practices of the Russian gas supplier Gazprom, where the Commission accused Gazprom of charging wholesalers in five EU Member States- Bulgaria, Estonia, Latvia, Lithuania and Poland- prices that were “significantly higher than competitive western European gas prices”. See Communication from the Commission in Case AT.39816 “Upstream gas supplies in Central and Eastern Europe” OJ C81/9 of 16.3.2017. As a result, Gazprom gave commitments to the Commission to address its concerns: see Commission Press Release IP/18/3921 of 24 May 2018 “Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets”. There are further recent signs that the traditional reluctance to challenge excessive pricing may be starting to change, at least in the pharmaceutical sector: see n 536, 537 below.

⁴²⁷ For example, Robert O’Donoghue and A Jorge Padilla *The Law and Economics of Article 82 EC* (2006) Chapters 12 and 13.

resistance to the proposition that the rules in this area are highly uncertain. Perhaps it is at least partly for this reason that some jurisdictions, such as the US and Singapore, do not use competition law to tackle exploitative abuse at all.

As regards “exclusionary” abuse, legal uncertainty exists at several major levels. We shall deal with four of them here. There may be others, but the four levels we discuss should be sufficient to show for the purpose of this Chapter that substantial legal uncertainty permeates the law on abuse under EU law, and that it is not sufficiently certain to comply with the benchmark laid down by the ECtHR. The four levels are as follows:

- The type of conduct that may be categorised as abusive, if it satisfies the other criteria (such as harming competition). Vigorous competition can drive out competitors and result in a monopoly, so harm to competition is not a sufficient test for abuse: there must be something in the nature of the conduct itself which makes it potentially abusive (if the other criteria are satisfied).
- How firm does the causal link between the conduct and the harm to competition have to be? The European Court’s judgment in *Intel v Commission* in 2017 seemed to suggest that the conduct just needs to be “capable” of harming competition (as opposed to “likely” to harm competition).⁴²⁸ But as we shall see, it is not clear what capability means for this purpose.
- How harmful to competition must the conduct be? It seems that it is not necessary for competitors to actually be driven out of the market, and that weakening their ability to compete is enough, but how many competitors have to be weakened. And what does weakening mean?
- Having established that the conduct is of a type that is potentially abusive, and that it is capable of causing sufficient harm to competition, how can a firm accurately assess whether its conduct will be saved by the efficiency defence?

⁴²⁸ Case C-413/14 P, paras 138-142, available at <http://curia.europa.eu/juris/liste.jsf?num=C-413/14> (accessed on 15-5-2018).

We deal with each of these levels of uncertainty in turn. We emphasise that our objective is not to advance the debate on any of these issues or to suggest answers to them, and therefore a comprehensive analysis of them is outside the scope of this dissertation. The *Intel* case in itself has generated a great deal of literature on at least some aspects of them.⁴²⁹ Our objective is only to demonstrate the substantial degree of legal uncertainty that surrounds each of them, and to argue later that this degree of uncertainty does not comply with the ECtHR's benchmark, as well as causing many other problems which we shall discuss in Chapter 5.

As regards the first issue- what type or types of conduct are potentially abusive- the European Court first attempted a definition of this concept in its *Hoffman- la Roche* judgment, in 1979:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.⁴³⁰

However the notion of what constitutes “methods different from those which condition normal competition” has never been defined by the European Courts. The same applies to the phrase “competition on the merits”, which is often used by the European Commission and the European Courts (including in *Intel*). They have in several cases concluded that the conduct was not

⁴²⁹ See, for example, Richard Whish “Intel v Commission: Keep Calm and Carry On!” *Journal of International Competition Law and Practice* Vol 6 Issue 1 (Jan 2015) 1; Wouter J Wils “The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance” (2014) 37 *World Competition* 405; Patrick Rey and James S Venit “An Effects-Based Approach to Article 102: a Response to Wouter Wils (2015) 38 *World Competition* 3; Pablo Ibanez Colomo “Intel and Article 102 TFEU: Making Sense of a Perpetual Controversy” LSE Law, Society and Economy Working Papers 29/2014, available at <https://ssrn.com/abstract=2530878>, accessed on 29.1.18; Nicolas Petit “Intel, Leveraging Rebates and the Goals of Article 102 TFEU” (2015) 11 *European Competition Law Journal* 25.

⁴³⁰ Case 85/76 *Hoffman-la Roche v Commission* [1979] ECR 461 para 91.

“competition on the merits” but have never explained what the term means.⁴³¹ The Courts instead have decided on a case-by-case basis that particular types of conduct fall within this category, in some cases by analogy with previous cases.

It can be noted that the Court in *Hoffman- la Roche* defined exclusionary abuse as conduct that comprises two elements:

- it does not “condition normal competition”; and
- it “has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.

In other words, as we discussed above, hindering, restricting or eliminating competition is not in itself objectionable – there must also be something objectionable about the conduct in itself. Businesses can eliminate competitors and therefore competition simply by competing effectively, and being more efficient than their competitors, and this is something competition law is supposed to encourage, not discourage. As Gerber has put it:

“Competition assumes, by definition, that enterprises attempt to ‘win’ the battle of the marketplace – that is, to cause economic harm to competitors. The facts that conduct is intended to cause such harm and that such harm results cannot, therefore, be the criterion for abusive conduct; that criterion must be sought in the characteristics of the conduct or in its other effects”.⁴³²

The difficulty has been in defining the objectionable feature or features of conduct regarded as abusive, and thereby finding a common definition that applies across different types of conduct.

There are also significant gaps in the case law. For example, the circumstances in which above-cost price-cutting constitutes an abuse are still unclear.⁴³³

⁴³¹ OECD Policy Brief “What is Competition on the Merits?” (June 2006).

⁴³² *Law and Competition* 313.

⁴³³ See Whish and Bailey *Competition Law* 789-794.

One article points out that the equivalent of the term “normal competition” in the original German text of the European Court’s judgment in *Hoffman- la Roche* is *Dienstleistungswettbewerb*.⁴³⁴ The article traces this term back to a distinction made by the Ordoliberals in Germany between *Leistungswettbewerb* (or “performance” competition) and *Behinderungswettbewerb* (“impediment” or “hindrance” competition). The latter included predatory pricing and loyalty rebates, which are amongst the practices which the European Commission and Courts have prohibited. Gerber notes that this test was developed further under German competition law in the 1970s, when the courts added a further limb to the test of abuse: the conduct must not only constitute “impediment competition”, it must also restrict the competition remaining in the market.⁴³⁵ The similarity between this two-part test and the one in *Hoffman-la Roche* is striking, and it is hard to avoid the conclusion that the *Hoffman- la Roche* test was derived from this concept of abuse in German competition law.

Various tests have been developed by academics and practitioners in an attempt to distinguish abusive behaviour from competitive behaviour, but all of these tests are recognized to have pitfalls, and not to be appropriate to cover all types of abusive conduct.⁴³⁶ For example, the “as-efficient competitor” test – whereby a dominant firm’s prices do not constitute an abuse if an equally – efficient competitor could match them and make a profit – might work for pricing abuses such as predatory pricing, or margin squeezes. With predatory pricing, for example, if the dominant firm is pricing above its own average variable costs, the pricing would not normally be regarded as abusive, even if a smaller competitor with higher costs could not match the dominant firm’s price.⁴³⁷ However, this test would not be relevant to non-pricing abuses such as an abusive refusal

⁴³⁴ Kallaugher and Sher “Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82” [2004] *ECLR* 263.

⁴³⁵ *Law and Competition* 346.

⁴³⁶ For a summary of them, see Vickers “Abuse of Market Power”, Speech to the 31st Conference of the European Association of Industrial Economics, Berlin 3 September 2004. See also E. Elhauge “Defining better Monopolisation Standards” (2003) 54 *Stanford Law Review* 253.

⁴³⁷ There has been considerable debate about whether this test is suitable for loyalty or exclusivity rebates. Wils and Whish have argued that it is not, because the harm that such rebates cause to competition stems from the exclusivity or quasi-exclusivity, not the net price

to supply. Moreover, even with pricing abuses, it has been argued that where barriers to entry are high, above-cost pricing could also be anti-competitive in some situations, by effectively excluding potential competitors which might become efficient and present an effective competitive force in the future.⁴³⁸

Another approach, one that has been advocated by Ahlborn and Padilla, is to apply to the allegedly abusive conduct either a “structured rule of reason” test or a “qualified *per se* legality test”.⁴³⁹ Essentially the structured rule of reason test would involve weighing the net effects of the conduct on consumer welfare only after the conduct passed through a series of initial screens designed to ensure that this “weighing” exercise was restricted to conduct which is most likely to cause net consumer harm. The qualified *per se* legality test would regard the conduct as presumptively legal unless certain exceptional circumstances applied, the overall objective being again to capture conduct that is in net terms harmful to consumers. The choice of which of these tests to apply to what conduct would depend on which test would minimise the costs of “error” (false convictions and false acquittals) when applied to the conduct in question. The concept of “error” in this context pre-supposes an understanding of what objective the law is seeking to achieve: an error would be a failure of the law to achieve its objective. In EU competition law, for example, the policy objective, at least according to the European Commission, is consumer welfare. A false conviction would be wrongly condemning conduct which is beneficial to consumers; a false acquittal would be wrongly allowing conduct harmful to consumers to escape punishment.

These Ahlborn and Padilla tests are more an approach to designing rules than a test for what constitutes an abuse, and (as noted above) they pre-suppose that net consumer welfare is the ultimate objective of Article 102. However, the European Court has made it clear that under Article 102, as well as 101, its main concern is with protecting competition *per se*, as opposed to consumers. As Advocate General Kokott put it in her Opinion in *British Airways v Commission*:

levels, they create., See the articles by Wils and Whish cited at n 429 above. However, The European Court appears to have endorsed the Commission’s use of the test for the rebates in *Intel*: see n 450 below.

⁴³⁸ See Vickers n 387 above 19-20.

⁴³⁹ N 304 above.

“Article 82EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution)...”⁴⁴⁰

The EU Commission’s own efforts to develop a satisfactory definition of abuse have met with little success. The Commission published a detailed discussion paper on exclusionary abuse in December 2005.⁴⁴¹ This paper did not set out a clear definition of abuse which could be applied in all situations, but rather methodologies for determining whether various types of potentially abusive conduct (refusals to supply, predatory pricing, loyalty rebates etc.) were actually abusive. However, this paper was undermined by the subsequent European Court judgment in *British Airways*, which determined that BA’s loyalty bonuses to travel agents were abusive, largely by analogy with previous case law, not by applying the Commission’s proposed methodology.⁴⁴²

Presumably as a result of this judgment, the discussion paper was transformed from interpretative guidance on the abuse of dominance provision to a statement of the Commission’s methodologies for assessing its “enforcement priorities”, which was published in early 2009.⁴⁴³ While this statement may give businesses an indication of the circumstances in which the Commission might take enforcement action, it does not provide them with definitive guidance on what type of conduct would constitute a potential abuse. Many firms wish to avoid breaching the law, even if it is a breach that does not feature amongst the Commission’s enforcement priorities.

This paper does contain an attempted definition of potentially abusive conduct, but regrettably one that does not clarify matters. Effectively, what the Commission calls “anti-competitive

⁴⁴⁰ Case C-95/04 P [2007] ECR I-2331 para 68.

⁴⁴¹ Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses” December 2005, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (accessed on 25-09-2017).

⁴⁴² N 440 above.

⁴⁴³ N 455 below.

foreclosure” would, in the Commission’s view, create a presumption of abuse, which the firm in question could rebut by showing that the conduct was “objectively necessary” (e.g. for health and safety reasons) or by showing that it produced efficiencies resulting in benefits to consumers which outweighed the harm to them caused by the anti-competitive foreclosure. The Commission defines anti-competitive foreclosure as:

“a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers”.⁴⁴⁴

However, it is submitted that this does not work as a definition of the types of conduct which are potentially abusive. The requisite effects could be triggered by vigorous competitive behaviour (such as being quicker or more innovative than competitors) which should not- as acknowledged by the Commission and the European Courts- be treated as an abuse. These tests would therefore be tantamount to classifying all conduct that forecloses competitors as presumptively abusive, requiring the dominant firm to bear the burden of relying on the efficiency defence to justify its conduct. Since it is generally accepted that even dominant firms should be encouraged to compete (within limits) and in doing so exclude competitors, this approach would be counter-productive in policy terms, and arguably an even more intrusive standard than *Hoffman- la Roche*, which is presumably not the intention.

The need to find an appropriate definition or test for potentially abusive conduct might not be so critical, if the types of abuse (even if having no common criteria or dominator) had been exhaustively defined by the European Courts, However, this is not the case, and new types of abuse, or novel applications of the existing categories of abuse (which as we have seen are very broadly defined) arise in the case law from time to time.

⁴⁴⁴ Para 19.

For example, in 2012, the European Court held for the first time, in *AstraZeneca v Commission*, that using regulatory procedures strategically to impede the entry of competitors was an abuse.⁴⁴⁵

In addition, several commentators have argued that in its decision in June 2017, the Commission penalised Google (at a current record of 2.42 billion euros) for conduct that the company could not have predicted was abusive.⁴⁴⁶ The Commission defined the conduct as:

“...the more favourable positioning and display, in Google’s general search results pages, of Google's own comparison shopping service compared to competing comparison shopping services”.⁴⁴⁷

This leaves interesting questions for the future over what further so-called “self-preference activities” might be held abusive. For example, if a dominant firm uses its profits in its dominant business to cross-subsidise operations in a market where it is not dominant, would this be an abuse? If it uses its customer database in the dominant business to cross-sell products in another market, would this be an abuse?

Akman states that it is impossible to fit the facts of the Google case within existing case law.⁴⁴⁸ Eben also argues that the outcome was difficult to predict on the basis of previous case law.⁴⁴⁹ The case is now on appeal: it remains to be seen what view the General Court will take on the Commission’s decision.

⁴⁴⁵ Case C-457/10 P, available from the Court’s website at: <http://curia.europa.eu/juris/liste.jsf?num=C-457/10>, last accessed on 10.10.2017. See also Neil Mackenzie and Stephen Langbridge “Expanding the Frontiers of Abuse of Dominance- the AstraZeneca case and its Implications for South Africa” available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Astrazeneca-Conference-Paper-FINAL.pdf>, last accessed on 10.4.2018.

⁴⁴⁶ Commission Decision AT.39740- Google Search (Shopping) 27.6.2017.

⁴⁴⁷ Para 341.

⁴⁴⁸ Pinar Akman “A Preliminary Assessment of the European Commission’s Google Search Decision” (September 18, 2017) *Antitrust Chronicle, Competition Policy International*, 2017. Available at SSRN: <https://ssrn.com/abstract=3078652>.

⁴⁴⁹ Magali Eben “Fining Google: a Missed Opportunity for Legal Certainty?” *European Competition Law Journal* Vol 14 Issue 1 (2018).

Accordingly, under EU competition law, the critical and elusive element of “bad” conduct is still missing, and in the absence of this component, abuse remains without a clear or satisfactory definition.

Turning to the second issue, the strength of the causal link between the conduct and the harm to competition, the European Court in *Intel* used the term “capable” (repeating the word several times), implying that it was sufficient that the conduct was capable of causing the relevant harm to competition.⁴⁵⁰ (The word has also been used in previous cases such as *BA v Commission*).⁴⁵¹ But it is not clear what this means.⁴⁵² Ibanez Colomo disagrees with Advocate General Wahl’s Opinion in the case that it is equivalent to “likely” and that it is a lower standard, but how low is not clear- he suggests it may be equivalent to “plausible”.

The European Court gave some indication of the factors that would be relevant in assessing capability:

“...first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; [the Commission] is also required to assess the possible existence of a strategy aiming to exclude competitors that are as least as efficient as the dominant company from the market”.⁴⁵³

⁴⁵⁰ Paras 138-142. The Court agreed with the Commission that rebates conditional on the purchaser purchasing all or most of its requirements from the dominant supplier would be presumed to be capable of harming competition, but, in what it called a clarification of existing case law, said that the firm could seek to rebut that presumption by showing with supporting evidence that the rebates were not capable in the particular market circumstances of harming competition. If it did so, the Commission would have to engage with those submissions before making a decision. This and the many other interesting aspects of the case are outside the scope of this dissertation: the aspect of *Intel* we focus on is the meaning of “capability”.

⁴⁵¹ Case C-95/04 para 77 “capable of producing an exclusionary effect”.

⁴⁵² Mark Taylor and Jurgen Schindler “*Intel*: Clarification or Contradiction?” *The Antitrust Source* Dec 2017; Pablo Ibanez Colomo “The Future of Article 102 TFEU after *Intel*” *Journal of European Law and Practice* Vol 9 Issue 5 (May 2018) 293.

⁴⁵³ Para 139.

Clearly these factors are, to a greater or lesser extent, matters of degree and therefore subjective. It is not clear what mix of the factors in what amounts will mean that the conduct is capable of causing the requisite harm to competition, and therefore it is very difficult for a firm planning its conduct to know whether it will cross that line.

The Court's last point- excluding competitors which are at least as efficient from the market- leads to our third issue: the degree of harm to competition which will trigger an abuse. In other words, the conduct's capability to do what? The Court in *Intel* mentioned exclusion of "as efficient" competitors from the market, but it seems unlikely in the light of previous case law that total exclusion from the market would be necessary. For example, in *Hoffman la Roche* the relevant foreclosure test was stopping competitors' growth, while in *British Airways* slowing the rate of competitors' growth was held to be sufficient. (A problem with the *British Airways* test is that it is difficult to predict whether a given practice will slow down competitors' growth, because that involves assessing how fast competitors would have grown in the absence of the practice, something which is outside the dominant firm's knowledge and control).⁴⁵⁴ According to the Commission, an abuse will be committed only where competition in the market is "foreclosed".⁴⁵⁵ This means that competitors must be excluded from the market, or at least be weakened to such an extent that they are prevented from competing "effectively". The Commission also equates this to "hampering" or "eliminating" competitors' "effective access" to markets.⁴⁵⁶ Again, these terms are all matters of degree and subjective, making it very difficult for a firm to know in advance whether its conduct will be found to be abusive.

The final issue of legal uncertainty can be dealt with very briefly. The Court confirmed in *Intel* (in line with previous case law) that, even although the conduct is capable of causing sufficient harm to competition, it can still be "saved" if the harm to competition is "counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer". This seems

⁴⁵⁴ See Ahlborn and Padilla "Fairness to Welfare" n 347 above at 29.

⁴⁵⁵ "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" OJ C45/7 of 24.2.2009 paras 19, 20.

⁴⁵⁶ N 455 above.

similar to the “net consumer harm” test which the Commission applies in assessing arrangements under Article 101. As we noted earlier in relation to arrangements, the net consumer harm test is not sufficiently clear to enable businesses to predict with confidence whether their conduct will be regarded as abusive. Similar uncertainties are involved in applying this exclusion to conduct which would otherwise be found to be abusive. Again, it is very difficult for a firm to know in advance whether its conduct (assuming it is capable of causing sufficient harm to competition- which is also a difficult assessment, as discussed above) will qualify for the efficiency defence.⁴⁵⁷

4 5 2 Australia

In Australia, until recently, the law provided that a firm with substantial market power (SMP) “misused” its SMP if it took advantage of that position for the purpose of eliminating or substantially damaging a competitor, preventing a person from entering a market, or deterring or preventing a person from engaging in competitive conduct in a market.⁴⁵⁸

The courts recognised that these purposes are part of a vigorous competitive process, and therefore the purpose element is usually present in any competitive market. The key question was therefore whether the business had “taken advantage” of its SMP to achieve one of the proscribed purposes. As two of the High Court judges said in *Boral*:

“the purposes proscribed by section 46 include the purpose of eliminating or damaging a competitor. If the objective is achieved, competitors will necessarily be damaged. If it is achieved to a sufficient extent, one or more of them may be eliminated. That is inherent in the competitive process. The purpose of the statute is to promote competition; and successful competition is bound to cause damage to some competitors”.⁴⁵⁹

The judges could have added that vigorous competition may also be consistent with the two other proscribed purposes – preventing entry of a person into a market, or deterring or preventing a

⁴⁵⁷ See the discussion in section 4 3 1.

⁴⁵⁸ S 46.

⁴⁵⁹ Para 122.

person from engaging in competitive conduct in a market. The High Court made it clear that it is a normal part of the competitive process for businesses to try to “see off” their rivals, including potential rivals. So if a business priced at a lower level (even below cost) in order to retain its customers, and thereby deterred a potential competitor from entering the market, that was, in the court’s view, perfectly normal competition. This raised the fundamental issue that we looked at in Chapter 2, namely the extent to which vigorous competitive conduct by dominant firms should be constrained in order to assist smaller rivals. The Act was subsequently amended to prohibit pricing below cost for a sustained period for one of the purposes proscribed by section 46.⁴⁶⁰

In *Queensland Wire Industries* the High Court held that “take advantage” simply meant “use”.⁴⁶¹ (As noted above, in the EU, by contrast, it is not necessary to show that the dominant position has been *used* to cause the harm to competition).⁴⁶² In applying the “take advantage” concept, the High Court held that it was necessary to take the hypothetical scenario where the business had no SMP (the counterfactual) and ask whether the conduct could, or would have taken place. There were inconsistencies in the High Court’s case law on whether the correct test was that the firm *could* have engaged in the conduct in question without SMP, or that it *would* have (or be likely to have) done so. The latest High Court judgment on this issue seemed to suggest that the latter was the correct test.⁴⁶³ This does not seem entirely logical. Given that “take advantage of” was held to mean “use”, this suggested that the SMP must be the tool which *enabled* the requisite purpose to be achieved: whether the business would have the *incentive* to use that tool in a competitive market would seem to be irrelevant. In practice, “could” and “would” might amount to the same thing, if “could” is used in the sense of being financially realistic, rather than just technically possible.

In any event, these issues have now become academic in the light of amendments to the CCA that took effect in 2010 and 2017. These amendments were made in response to criticisms that the way in which the courts had interpreted the “taking advantage” requirement was so restrictive as to make it very difficult for the ACCC to bring successful misuse of SMP cases.

⁴⁶⁰ S 46(1AA).

⁴⁶¹ [1989] HCA 6.

⁴⁶² Section 45 1 above.

⁴⁶³ *NT Power Generation v Power and Water Authority* [2004] HCA 48.

The 2010 amendments gave the court a wide discretion as to the factors it could take into account in assessing whether the “take advantage” criterion is satisfied.⁴⁶⁴ They provided a non-exhaustive list of factors, namely:

- whether the conduct was materially facilitated by the corporation’s SMP;
- whether the corporation engaged in the conduct in reliance on its SMP;
- whether it is likely that the corporation would have engaged in the conduct if it did not have SMP; and
- whether the conduct is otherwise related to the corporation’s SMP.

While this provision made it easier for the ACCC to bring successful misuse of SMP cases, it came at the cost of less predictability and certainty for businesses as to whether their conduct was prohibited.

Further uncertainty is likely to be introduced by recent amendments to section 46 which came into force on 6 November 2017. These amendments abolish the concept of “misuse” completely, and introduce a new “effects test” as an alternative to purpose. The key part of the new provision reads:

“A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market”.⁴⁶⁵

Since the concept of “misuse” will be removed, and even vigorous competition can lessen substantially competition in the market (*in extremis* creating at least a temporary monopoly) it is not clear under this proposed provision where the line would be drawn between legitimate and illegitimate conduct. Indeed, this lack of clarity has attracted much criticism from the legal profession, including the following comments:

⁴⁶⁴ S 46(6A).

⁴⁶⁵ New s 46(1).

- “There is a risk that the proposed...effects test could be used by the ACCC as a ‘catch-all’ provision for targeting big businesses’ conduct, rather than focusing on what is more universally considered to be an abuse of dominant position”.
- “...the ACCC open themselves up to the criticism that the new section will be used as a catch-all section to right the ACCC’s perceived wrongs of cases that they have lost in the past”.
- “Businesses should be entitled to have certainty as to the analytical basis of types of misuse of market power conduct that will be viewed by the ACCC as a breach of the new section”.
- “As the law stands, that ‘taking advantage’ requirement means a company with market power is not prevented from conducting itself, even aggressively, in the same way as any firm without market power would. Under the new law a company with market power may be so prohibited”.⁴⁶⁶

4 5 3 Canada

In Canada, the Competition Act lists (non-exhaustively) a number of “anti-competitive acts” which will be regarded as an abuse if they have had, are having, or are likely to have, the effect of SLC. These acts are as follows:

- squeezing, by a vertically integrated supplier, of the margin available to a non-vertically integrated customer which competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;
- acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
- freight equalization on the part of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

⁴⁶⁶ See “ACCC consults on ‘root and branch’ reform” *GCR6* September 2016.

- use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- buying up of products to prevent the erosion of existing price levels;
- adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent its entry into, or to eliminate it from, a market;
- requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.⁴⁶⁷

It can be noted that, as in Australian law, but unlike EU law, the purpose of the conduct is a crucial element for most of these types of conduct, although in Canada (unlike Australia) the effect or likely effect is also a necessary component for all abuses.

The abuse provisions were interpreted by Canada's Federal Court of Appeal in *Canada Pipe*, which concerned a fidelity rebate scheme operated by a company which was alleged to be dominant in the relevant Canadian markets for the supply of cast-iron drain, waste and vent products.⁴⁶⁸

The Court distinguished between the concepts "anti-competitive act" and SLC, stating that these meant two different things. As regards "anti-competitive act", the Court held that the concept was to be defined according to its purpose. Purpose in this sense, according to the Court, does not mean subjective intention, although this may be relevant in establishing purpose. If the reasonably foreseeable consequence of the act is a negative effect on a competitor, it will be presumed that this was the purpose of the act. This presumption can be rebutted if the firm can provide a valid

⁴⁶⁷ S 78(1).

⁴⁶⁸ *Canada (Commissioner for Competition) v Canada Pipe Co.* 2006 FCA 233.

business justification for the act, which the Court defined as “a credible efficiency or pro-competitive rationale for the conduct in question, attributable to [the firm in question] which relates to and counterbalances the anti-competitive effects and/or the subjective intent of the acts”. It also had to be shown that the purpose of the act was a “negative effect on a competitor that is predatory, exclusionary, or disciplinary” (the anti-competitive element).⁴⁶⁹

The Bureau states in its guidelines that anti-competitive acts fall into two broad categories: exclusionary conduct that raises rivals’ costs, or reduces rivals’ revenues artificially, and predatory conduct – essentially selling at a loss in order to eliminate competitors or deter potential entrants.

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The Bureau gives some examples of possible business justifications in the guidelines, including minimising the costs of production or operation (provided this does not result from the negative effect on a rival) or activities that improve a firm’s product, service or some other aspect of the firm’s business.⁴⁷¹ Looking through the list of examples of anti-competitive acts above, in practice it would seem that a valid business justification of this kind would generally be hard to establish. A possible exception is that a short-term clearance sale, or promotion of a new product to generate demand, could be a valid justification for pricing below cost. In *Canada Pipe*, the firm’s purported business justifications for its fidelity rebate scheme were rejected.⁴⁷² However, even if a valid business justification could be produced, according to the Court this is not sufficient: it must “counter-balance” the anti-competitive effects and/or the subjective intent of the acts (although the Bureau’s guidelines do not mention this additional step).⁴⁷³ It is not clear how this balancing exercise is to be conducted.

⁴⁶⁹ Para 73.

⁴⁷⁰ “The Abuse of Dominance Provisions” sections 3.2.1 and 3.2.2.

⁴⁷¹ Section 3.2.2.

⁴⁷² Paras 84-92.

⁴⁷³ Para 88.

In *TREB* the Tribunal provided further guidance on the concept of legitimate business justifications, and how they are to be weighed against the negative effects on one or more competitors. It stated:

“...a business justification for an impugned practice must not only provide a credible pro-competitive rationale for the practice, it must also be linked to the respondent...For efficiencies to be linked to the respondent, there must be persuasive evidence that the impugned practice would likely result in the attainment of efficiencies *by the respondent*”.⁴⁷⁴

On the weighing exercise, the Tribunal stated:

“In conducting the balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence exists that the respondent was motivated more by subjective ant-competitive intent rather than by efficiency or pro-competitive considerations”.⁴⁷⁵

Clearly, it may be very difficult for a dominant business to assess, in advance of engaging in conduct, what view a court is likely to take on these matters after the event, and if the business gets the assessment wrong, it could be subject to a substantial administrative penalty.⁴⁷⁶

The Court in *Canada Pipe* also interpreted the other requisite element of the abuse provisions, namely SLC. The Court held that this involved a comparative assessment of the state of competition in the market with and without the conduct. Did (or would, if the question is the likely effect of the conduct in future) the practice in question “result in a prevention or lessening of competition as compared to the conditions governing in the absence of the practice, and was this

⁴⁷⁴ N 405 above paras 302-303.

⁴⁷⁵ Para 293.

⁴⁷⁶ Under s 79 (3.1) of the Act.

lessening of a degree sufficient to be considered substantial?”⁴⁷⁷ As in the *Superior Propane* merger case, which was discussed in section 4.3.3, this involves the construction of a detailed hypothetical model as to the state of the market without the conduct, and possibly another such model as to the future state of the market with the conduct (if the case concerned the likely future effects of the conduct) so that a proper comparison can be made.⁴⁷⁸

The Court’s approach in *Canada Pipe* can be contrasted with that of the European Courts in the *British Airways/Virgin* case.⁴⁷⁹ While the European Courts acknowledged that exclusionary effect (actual or potential) on competitors was an essential component for abuse, and that one such effect might be to slow down competitors’ growth, no detailed hypothetical models as to the state of the market without the conduct were considered necessary for this purpose, as they were in *Canada Pipe*. The exclusionary effect could be assumed from the fact that rival airlines would have to offer very large incentives to travel agents if they were to persuade them to sell their tickets, to compensate them for the loss of rebate they would otherwise suffer by switching from BA. However, as noted in section 4.5.1 above, it will be interesting to see whether the approach of the EU Commission and European Courts will change in future, given the European Court’s judgment in *Intel*, holding that if the firm puts forward economic arguments to the General Court challenging the Commission’s competition analysis of competitive effects and efficiencies, the General Court has to consider in detail whether these arguments are valid.

In assessing whether a practice has the relevant adverse effect on competition, the Act directs the Tribunal to “consider whether the practice is a result of superior competitive performance”.⁴⁸⁰ The fact that the Tribunal’s only duty is to *consider* whether the conduct falls within this category suggests that even if it does, the Tribunal might still be entitled to prohibit it. This is particularly relevant given that one of the Act’s objectives is to ensure that SMEs have “an equitable opportunity to participate in the economy”. Could it be argued, for example, that a lessening of competition arises even if it is due to the fact that the dominant firm is more efficient than its SME

⁴⁷⁷ N 468 above para 58.

⁴⁷⁸ N 368 above para 37.

⁴⁷⁹ N 440 above.

⁴⁸⁰ S 79(4).

rivals? If this SME objective is relevant in the context of the competition effects of a merger or other type of arrangement, and can justify an anti-competitive transaction (as was held to be the case in *Superior Propane*) why would it not be relevant in the context of a dominant firm's conduct? The Federal Court indicated in *Canada Pipe* that this objective may indeed be relevant in abuse cases, stating that whatever methodology the Commission adopted for comparing the market with and without the conduct should be "reflective of the different objectives of the Act".⁴⁸¹

It appears that the concept of "superior economic performance" has not been considered or defined in the case law, and it is not addressed in the Bureau's guidelines. Perhaps this is because the question of superior economic performance is relevant to whether there is a valid business justification for the conduct, which is part of the assessment of whether there is an "anti-competitive act" in the first place, as noted above.

In assessing SLC in the context of abuse, the Bureau has said that the test is whether the conduct "creates, preserves or enhances market power".⁴⁸² The reference to "creates" seems difficult to reconcile with the text of the Act itself, which suggests that control must already exist before the abuse provisions can apply. The Commission uses a "but for" test – "but for" the practice in question, would there be substantially greater competition?

In assessing what "greater competition" consists of, the guidelines list a number of factors, such as whether, in the absence of the conduct, effective competitors might emerge within a reasonable period (regarded as being two years) to challenge the incumbent's dominance.⁴⁸³ Other factors include whether consumer prices might be substantially lower, or product quality, innovation or choice might be substantially greater, in the absence of the conduct.

As was noted in Chapter 2, unlike in the other subject jurisdictions, abuse of a dominant position in Canada under the Competition Act is not in itself prohibited. Abuse can be the subject of a consent agreement or cease-and-desist order, as with "non-hardcore" anti-competitive

⁴⁸¹ Para 47.

⁴⁸² Section 4.

⁴⁸³ N 482 above.

arrangements, and a breach of a Tribunal-endorsed consent agreement or Tribunal order is illegal. However, under amendments to the Competition Act that took effect in March 2010, the Tribunal can now also impose financial penalties in abuse cases. Some lawyers have argued that the power to impose penalties where there has been no breach of any law may not be compatible with the Canadian constitution.⁴⁸⁴

Most cases of alleged abuse, including *Canada Pipe* itself, have been resolved by consent agreements between the Commission and the relevant parties. For example, the Commissioner filed an application with the Competition Tribunal against certain rules of the Canadian Real Estate Association that, in the Commissioner's view, limited consumer choice and prevented innovation in the market for real estate brokerage services to home sellers in Canada. Before the Tribunal had an opportunity to resolve the case, the Commissioner and the Association entered into a consent agreement whereby the Association undertook to amend its rules to remove the provisions in question.⁴⁸⁵

The Competition Act lists a number of other types of conduct that are not prohibited, but can be reviewed, without classifying them either under the agreements provision or under the abuse provision. These are refusals to deal, inducing a supplier to refuse to supply a third party, price maintenance, exclusive purchasing, requiring a reseller to supply only in a particular market, and tying the supply of one product to the supply of another.⁴⁸⁶ All of these types of conduct require an adverse effect on competition in the market before the Tribunal can make an order. In the case of the first three, the requirement is simply an "adverse effect" on competition, whereas in the case of the last three it is the narrower concept of SLC.

4 5 4 South Africa

⁴⁸⁴ See for example "Government passes Major Amendments to the Competition Act and Investment Canada Act" 13 March 2009 available at www.casselsbrock.com; George Addy, John Bodrug, Charles Tingley "Abuse of Dominance in Canada: 25 years of Section 79 Enforcement" *Canadian Competition Law Review* Vol 25 no 2 (2012) 276, 302.

⁴⁸⁵ *Commissioner for Competition v Canada Real Estate Association* CT-2010-002 (25.10.2010).

⁴⁸⁶ Ss 75-77.

In the South African law, an explicit efficiency defence (which will be considered later) is available for all types of abuse apart from two: excessive pricing, and refusal to supply access to an essential facility.⁴⁸⁷

An “excessive price” is one that bears no reasonable relation to, and is higher than, the economic value of the good or service.⁴⁸⁸ As under EU law, the South African courts have struggled to assess how the economic value of the good or service for this purpose is to be determined. In the *Mittal Steel* case, the Competition Appeal Court, overturning a decision of the Competition Tribunal, acknowledged that assessing what constituted an excessive price was a complex task, and said that it involved the following steps:

- determination of the actual price which is alleged to be excessive;
- determination of the economic value of the good or service in question;
- if the actual price is higher than the economic value, is the difference reasonable?
- Is the charging of the excessive price to the detriment of the customer?⁴⁸⁹

The Court remitted the case to the Tribunal to conduct this assessment, but this remittal was pre-empted by an out-of-court settlement between the parties.

The difficulties in determining what constitutes an excessive price were highlighted again in the *Sasol* case.⁴⁹⁰ Sasol had argued before the Tribunal that, in the economic value of the product, its lower input costs due to the fact that the input was supplied by an affiliated company should be ignored, and that the higher costs which would be charged to hypothetical producers under conditions of long-run competitive equilibrium should be used as the benchmark. The Tribunal disagreed, found that Sasol had engaged in excessive pricing, and imposed on it a penalty of ZAR534 million. However, on appeal, the Competition Appeal Court overturned the Tribunal’s decision. Although it rejected Sasol’s argument about how the input costs should be calculated and

⁴⁸⁷ S 8(a) and (b).

⁴⁸⁸ Competition Act s 1(1)(vii).

⁴⁸⁹ *Mittal Steel South Africa Ltd v Harmony Gold Mining Co Ltd* 70/CAC/Apr07 par 32.

⁴⁹⁰ *Sasol Chemical Industries Ltd v Competition Commission* 131/CAC/Jun14.

held it should be the actual price charged by the affiliated company, it upheld Sasol's arguments regarding the valuation of capital assets, rate of return on capital, and allocation of intra-group costs. On that basis it held that the price-cost mark-up was 12-14 per cent. The Court held that this difference was not unreasonable. It stated that "a price which is significantly less than 20 per cent of the figure employed to determine economic value falls short of justifying judicial interference in this complex area".⁴⁹¹

As mentioned earlier in this Chapter, excessive pricing, and exploitative abuse generally, is notoriously unclear in the EU as well, and perhaps at least partly for this reason not all jurisdictions prohibit such conduct in their competition laws, although they may do so by other means such as sector-specific regulation or consumer protection legislation.

"Essential facility" is defined as "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers".⁴⁹²

Refusal to grant access to an essential facility, as well as excessive pricing, were at issue in a case against the pharmaceutical companies GlaxoSmithKline and Boehringer Ingelheim. The Commission alleged that the firms had infringed the Competition Act by refusing to license their patents in anti-retroviral drugs to generic manufacturers in return for a reasonable royalty. The cases were settled without a referral by the Commission to the Tribunal.⁴⁹³ However, in *Telkom*, the Commission did bring the case to the Tribunal, alleging that Telkom, the monopoly fixed line service provider at the time, had abused its dominant position by refusing to supply essential facilities to its downstream competitors for value added network services, and inducing their customers not to deal with them. The Tribunal agreed with these aspects of the Commission's case, and imposed a penalty of ZAR449 million on Telkom.⁴⁹⁴

⁴⁹¹ Par 175. For a more detailed discussion of the South African cases on excessive pricing see Sutherland and Kemp *Competition Law of South Africa* section 7.9.

⁴⁹² S 1.(1)(vi).

⁴⁹³ Competition Commission "GSK and BI issue anti-retroviral licences" Competition News 15 March 2004.

⁴⁹⁴ *Competition Commission v Telkom SA Ltd* 11/CR/Feb04.

By international standards, the rule against refusal to supply, whether it concerns access to an “essential facility” or otherwise, is unusual as it does not explicitly require proof that competition has been reduced (although the requirements for an essential facility will to a considerable extent ensure that only anti-competitive acts are covered). In the US, Areeda argued that “[c]ompulsory access, if it exists at all, is and should be very exceptional” and that “denial of access is never per se unlawful”.⁴⁹⁵ Citing his views with approval, the US Supreme Court has pointed out that an antitrust duty to deal conflicts with the general principle of freedom of contract, and also with public policy:

“Compelling firms [with monopoly power] to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing- a role for which they are ill-suited. Moreover, compelling negotiation may facilitate the supreme evil of antitrust: collusion”.⁴⁹⁶

EU competition law also recognises the principle of freedom of contract, even for dominant firms, and the potentially adverse public policy consequences of interfering with this right. As Advocate General Jacobs put it:

“...it is apparent that the right to choose one’s trading partners and freely to dispose of one’s property are generally recognized principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification...if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities...Moreover, the incentive for a dominant undertaking to invest in efficient

⁴⁹⁵ Philip Areeda “Essential Facilities: an Epithet in need of Limiting Principles” 58 *Antitrust LJ* 841 (1989-1990).

⁴⁹⁶ *Verizon Communications Inc v Law Offices of Curtis V Trinko* 540 US 398 (2004).

facilities would be reduced if its competitors were, upon request, able to share the benefits ”.⁴⁹⁷

As noted in Chapter 2, the Competition Act in section 8(c) also prohibits dominant firms from engaging in “exclusionary acts”, subject to the same exception which applies in the case of “non-hardcore” arrangements, i.e. where the efficiency gains of the conduct outweigh its anti-competitive effects. “Exclusionary act” is defined as “an act that impedes or prevents a firm entering into, or expanding within, a market”.⁴⁹⁸

Some exclusionary acts are expressly listed in section 8(d) of the Act: these are deemed to be exclusionary acts, and therefore there is no need to show that they impede or prevent a firm from entering into, or expanding within, a market. As Sutherland and Kemp explain, another difference between section 8(c) and 8(d) lies in the burden of proof.⁴⁹⁹ Under section 8(c), once the Commission shows that the respondent has committed an exclusionary act, and that it has anti-competitive effect, the evidential burden is on the respondent to show that the act produced technological, efficiency or other pro-competitive gains. But it is still for the Commission to prove that the anti-competitive effect outweighed the relevant gains. Under section 8(d), however, once the Commission proves that the respondent committed one of the specific acts listed and that it has an anti-competitive effect, it is for the respondent to prove that the act produces relevant gains and that those gains outweigh the anti-competitive effect. Clearly then, a similar difficulty exists in South Africa as with the EU Commission’s “new economic approach” and in Canada – how is this weighing exercise to be conducted? As Sutherland and Kemp comment:

“These gains and effects will most often be conceptual rather than directly quantifiable: it is always difficult to establish just how much of a financial effect is attributable to a certain act”.⁵⁰⁰

The exclusionary acts specifically listed in section 8(d) are as follows:

⁴⁹⁷ Opinion in Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791 paras 56, 57.

⁴⁹⁸ S 1.(1)(viii).

⁴⁹⁹ *Competition Law of South Africa* (looseleaf) section 7.11.2.

⁵⁰⁰ N 499 above section 7.11.5.

- requiring or inducing a supplier or customer to not deal with a competitor;
- refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- selling goods or services below their marginal or average variable cost;
- buying-up a scarce supply of intermediate goods or resources required by a competitor.

The Competition Tribunal has emphasised that the concept of “exclusionary act” is distinct from “anti-competitive effects”, and that it is not necessary to consider whether the efficiency exception applies unless the exclusionary act has anti-competitive effects. Otherwise there would be no anti-competitive effects against which to balance the efficiencies.⁵⁰¹ The Tribunal held in *South African Airways I* that, for this purpose, anti-competitive effects can mean either actual harm to consumer welfare, or harm to the market structure i.e. foreclosing (or potentially foreclosing) the market to rivals, to a substantial extent.⁵⁰² This case, and its sequel *South African Airways II*,⁵⁰³ concerned incentive schemes that the airline operated for travel agents, entitling them to bonuses where they which reached certain targets for sales of its tickets. The Tribunal ruled that the schemes constituted an exclusionary act (requiring or inducing a supplier or customer not to deal with a competitor), that they had the anti-competitive effect of hampering rivals’ growth in the market (since rivals could not match those incentives), and that the airline could not produce any valid efficiency justification for the schemes. They therefore infringed the Act. As in the *British Airways/Virgin* case in the EU,⁵⁰⁴ it was held that substantial foreclosure does not necessarily mean that rivals are completely foreclosed from entering or accessing a market or segment of a market; it is sufficient that they are prevented or impeded from expanding in the market.

⁵⁰¹ *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 para 110.

⁵⁰² N 501 above para 132.

⁵⁰³ *Nationwide Airlines (Pty) Ltd and Comair Ltd v South African Airways (Pty) Ltd* 80/CR/Sept06.

⁵⁰⁴ Section 4 5 1 above.

In the *Senwes* case, the Tribunal found that Senwes, a vertically-integrated firm which was both a grain storage provider and grain trader, had engaged in an exclusionary that was not specifically listed in section 8(d) but was caught by section 8(c).⁵⁰⁵ The act consisted of a margin squeeze, i.e. pricing its storage services (of which it was the dominant provider) to other traders at such a level that, had it charged its own downstream trading arm at the same level, the latter could not maintain its current prices and make a profit. The Tribunal also found that the practice had anti-competitive effects. Although there is an efficiency defence and (unlike under Section 8(d)) the onus is on the Commission to prove that it does not apply, the Tribunal held that the defendant still had to put forward its purported defence, as the defendant was better-placed than the Commission to know what efficiency justifications might be available. Since Senwes had not done so, it was held to have breached Section 8(c).⁵⁰⁶

This was the first, and so far only, case in South Africa of margin squeeze abuse. The Tribunal itself conceded that the concept of margin squeeze was relatively novel, even in the EU, but this did not stop it from holding that Senwes had committed an abuse, largely by reference to EU case law and commentary. Its decision was essentially upheld in substance on appeal.⁵⁰⁷

One remarkable aspect of this case was that the consent agreement that settled further procedural disputes between the Commission and Senwes included a relatively severe remedy, namely a requirement for Senwes to separate its grain trading and storage operations into separate firms, albeit under the same ownership, presumably to make its pricing more transparent and ensure that it was not discriminating on price between its own trading division and other traders.⁵⁰⁸ This remedy has not been imposed in any EU margin squeeze case. However, no penalty was imposed: under section 8(c) (unlike section 8(d)) a penalty can only be imposed if the conduct is a repeat of conduct that the Tribunal had previously found to be prohibited.⁵⁰⁹

⁵⁰⁵ *Competition Commission v Senwes Ltd* 110/CR/Dec06.

⁵⁰⁶ Par 206.

⁵⁰⁷ *Senwes Ltd v Competition Commission* 87/CAC/Feb09.

⁵⁰⁸ *Competition Commission v Senwes Ltd* 110/CR/Dec06 15/05/2013.

⁵⁰⁹ Competition Act s 61.(1)(b).

4 5 5 Hong Kong

In Hong Kong, the concept of abuse is qualified by a competition test: “An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.”⁵¹⁰ The “prevent, restrict, distort” test echoes the test for anti-competitive agreements which exists in EU law and Hong Kong law, but unlike the EU, Hong Kong has also adopted the test for abuse of dominance. It is not clear why it has done so, but the test would seem to limit the abuse concept to exclusionary abuse (by targeting conduct which harms competition) as opposed to exploitative abuse.

As noted, in the EU there is no satisfactory definition of, or test for, abuse, and the same uncertainties also seem to apply in Hong Kong. Two examples of abuse are given in the statute itself, both of which are vague and undefined:

- “predatory behaviour towards competitors”; and
- “limiting production, markets or technical development to the prejudice of consumers”.⁵¹¹

It may be that the Hong Kong courts will follow EU case law on abuse, but this is not yet certain. The statute does not state that its concepts are to be interpreted according to EU case law, as the UK and Jersey competition laws do.⁵¹² The Competition Ordinance only entered into force on 12 December 2015, and there is as yet no case law from the Tribunal from which to draw guidance on the meaning of “abuse”.

The Hong Kong Competition Commission’s guideline on the abuse provision gives five examples of abusive conduct, which seem to have been drawn from EU case law, namely:

- predatory pricing;

⁵¹⁰ Competition Ordinance s 21.

⁵¹¹ S 21(2).

⁵¹² Competition Act 1998 s 60; Competition (Jersey) Law s 60.

- tying and bundling;
- margin squeeze;
- refusals to deal; and
- exclusive dealing.⁵¹³

It is clear that the list of potentially abusive conduct is non-exhaustive. The guideline states: “Abusive conduct is potentially any conduct which has the object or effect of harming competition in Hong Kong.”⁵¹⁴ However, as we have already observed, a business can harm competition, in the sense of driving out competitors, merely by competing successfully. So this will not do as a definition of abuse.

4 6 Summary of Lack of Clarity in Competition Laws

In this Chapter, we have seen that there are significant areas where the competition laws of the subject jurisdictions are unclear, in each of the four key components of these laws, namely arrangements that harm competition, exclusion of such arrangements, assessment of dominance or SMP, and abuse of dominance or SMP. We summarise these areas of lack of clarity below, taking each of these four components in turn.

4 6 1 Arrangements which harm competition

In the EU a key question of law remains unresolved, namely whether the European Courts will endorse the European Commission’s move away from the traditional economic freedom approach to defining competition and harm to competition, to the more market-based approach of examining whether the arrangement will lead to SLC, as in Australia, Canada and South Africa (the SLC test).

⁵¹³ “Guideline on the Second Conduct Rule” section 5, available at:

https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf (accessed on 29-11-2017).

⁵¹⁴ Para 4.1.

If the European Courts retain their traditional economic freedom approach, we noted in Section 4.2.1 the potentially overly-intrusive nature of this approach (all contracts restrict commercial freedom). The European Courts' attempts to limit this intrusiveness by stating that the restriction has to be "appreciable", and that for this purpose the cumulative effects of similar agreements have to be taken into account, have led to considerable uncertainty for businesses in trying to predict whether their arrangements will be regarded as harming competition. This is because (a) it is not clear how significant the restriction must be for it to be considered "appreciable", and (b) the doctrine of cumulative effects, and the fact that the effects can be appreciable at some times but not others during the period of the agreement, makes legal liability dependent on facts of which the parties to the agreement have no knowledge, and therefore prevents them from assessing whether the arrangement is legal or illegal.

In Hong Kong, the wording of the relevant competition test ("prevent, restrict or distort competition") is identical to the EU test, and it may be that the Hong Kong courts will interpret this concept in accordance with EU case law. However, this is not yet certain: there is as yet no case law of the Competition Tribunal from which to draw guidance, and the Competition Ordinance does not state that the law is to be interpreted according to EU competition law. This adds a further layer of uncertainty for Hong Kong businesses in trying to plan their arrangements. Even if Hong Kong does follow EU case law, the same uncertainties will be "imported" into the Hong Kong law, including whether the courts will ultimately endorse the Commission's "more economic" SLC approach.

However, the SLC test which is currently used in Australia, Canada and South Africa for "non-hardcore" arrangements, and to which the Commission wishes to move in the EU, is also fraught with uncertainty. The uncertainties can be summarised as follows:

- The concept of "lessening competition" is vague, and it is in many cases open to debate whether an arrangement has this effect, particularly where it may have adverse effects on one parameter of competition (such as price) but positive effects on others (such as service quality or innovation). In other words, a great deal of subjectivity is often involved in assessing whether an arrangement lessens competition, or is likely to do so in the future.

- Whether an arrangement lessens or is likely to lessen competition “substantially” is an even more subjective assessment, in many cases.
- Whether the arrangement causes SLC may vary over time, and depend on factors of which the parties have no knowledge or control. They are therefore not in a position to take pre-emptive action to avoid breaching the law or being subject to enforcement proceedings.
- It is commonly-accepted in the subject jurisdictions that the application of the SLC test involves constructing hypothetical situations. Where the question is whether the arrangement is causing or has caused SLC, the hypothesis is what the market would be like without the arrangement (the “counter-factual”). Two questions are then asked (both largely subjective in many cases as noted above): would competition be greater without the arrangement than it is with the arrangement, and would the difference be substantial? Where the question is whether the arrangement will cause SLC in future, two hypothetical situations have to be constructed: the future states of the market with and without the arrangement respectively. The same two questions are then asked. Competition authorities and economists may have the analytical tools to construct such hypotheses, but businesses that are trying to assess in “real time” whether their arrangement will be regarded as substantially lessening competition do not. Moreover, even with such tools, hypothesising about the market situation without an agreement, and especially the future market situations with and without an agreement, are inherently speculative exercises. No-one really knows what the future holds and how market circumstances might change. For example, unknown extraneous factors may affect the market impact that an arrangement may have.

Without the analytical tools (or time) to construct such hypotheses before entering into commercial arrangements, businesses and their legal advisers tend to look at matters of market structure such as market shares (where available), numbers of competitors and barriers to entry, in assessing whether the arrangement is likely to cause SLC. There may be some situations where it might seem instinctively obvious to businesses or their legal advisers that an arrangement will lead to SLC, such as where there are two competitors in a market with high barriers to entry that decide to merge, or to form a marketing and sales joint venture. Equally, where either of these transactions involves two out of 30 competitors in a market with low barriers to entry, it may seem instinctively obvious that there will be no SLC. But these cases are at the extreme. There are many more cases

that are less obvious, such as where two competitors in a market of six, seven or eight players enter into similar transactions. And in the case of vertical arrangements, what if a supplier with an estimated market share of 25 per cent appoints an exclusive reseller for a particular country for a period of five years, even where there are other resellers which wish to sell the product but are excluded by the agreement from doing so? Would it make any difference whether the supplier's market share was 20 or 30 per cent, or that the duration of the exclusivity was for three years, not five?

4 6 2 Exclusion of Arrangements

As regards EU competition law, we have noted that it is unclear whether the European Courts will endorse the EU Commission's "net consumer benefits" test for assessing whether agreements are excluded from the prohibition of anti-competitive agreements, not least because the test does not sit comfortably with the text of Article 101(3) TFEU itself. Assuming the Courts do so, the application of the test itself involves severe difficulties, including the following:

- As with assessing whether an arrangement will "lessen competition", assessing whether it will produce net benefits for consumers is a subjective and arbitrary exercise- indeed even more so. Take the example of an arrangement between businesses whereby they develop a new, better quality but more expensive product than the two products they were each supplying previously. Many consumers prefer to pay a higher price to get a better product: have they been harmed in these circumstances? Equally, other consumers might prefer a lower price, even if it means a poorer quality product: have they been harmed? Equally, and conversely, what constitutes a consumer benefit is subjective: certain consumers may consider something as a benefit while others may not.
- Even assuming that what constitutes consumer benefit and consumer harm could be defined objectively, quantifying them with any degree of precision is virtually impossible. Indeed, the European Commission has recognised that consumer benefits may be qualitative rather than quantitative.⁵¹⁵ how can both qualitative and quantitative benefits

⁵¹⁵ Section 4 3 1 above.

feature in the same weighing exercise and produce any kind of objective result? Whether consumers will benefit in net terms from a particular agreement is therefore clearly a subjective and arbitrary assessment.

In Hong Kong, as with the test for harm to competition, the wording of the exclusion replicates the wording of EU competition law. The same question as to whether the Hong Kong courts will follow the EU case law applies, and it is not clear (as under EU law) whether they will apply the Commission's net consumer welfare test.

The total welfare-type standard that is used in Australia, Canada and South Africa may have the appearance of being more objective and scientific than the net consumer welfare standard. However, whether an arrangement will have any "technological, efficiency or other pro-competitive gain" that will outweigh the harm to competition is an extremely complex assessment, has severe difficulties of definition and quantification, and therefore involves a large degree of subjectivity. Businesses and their legal advisers are not in a position to predict in many cases whether the arrangement will qualify for the exclusion, and even economists may disagree on this issue if the arrangement is subsequently challenged. The assessment is further complicated, and made even more subjective, in South Africa and Canada by the fact that the other objectives of the competition laws, including promoting the interests of particular groups such as SMEs, also have to be taken into account in making the assessment.

In Australia, South Africa and Hong Kong, the difficulties of assessing whether the exclusion applies are mitigated by the fact that, unlike in the other subject jurisdictions, businesses (and their legal advisers) do not have to rely only on their own assessment of the issue, and do not risk proceedings being taken against them if they get the assessment wrong. Unlike the position under EU competition law where parties have to self-assess whether the exclusion criteria apply, the parties can apply for a ruling from the authority on whether the exclusion applies before implementing the arrangement.⁵¹⁶ In Australia, for exclusive dealing and private disclosure of pricing information to competitors, the business may notify the arrangements to the Commission

⁵¹⁶ Although in Hong Kong the Commission is legally-required to deal with the application in only limited circumstances: section 4 3 5 above.

and implement them, unless and until the Commission objects to them.⁵¹⁷ The same issue of predicting of legality or illegality does not therefore arise: a business will act legally provided that it applies for authorisation (or in Australia, notifies arrangements which are covered by the notification system) and complies with whatever ruling the authority makes. However, the facility to apply for authorisation or to notify raises different problems, which are examined in Chapter 5.

4 6 3 Dominance / Substantial Market Power

The starting point in all of the subject jurisdictions for assessing dominance or substantial market power is defining what the relevant market is. We have seen that although in some cases it may be clear what the relevant product or geographical market is, there are many cases where this is unclear. This is because the concept of relevant market is essentially a hypothetical one and involves predicting something that is unknown – how customers would respond to a five to ten percent price increase (the so-called “SSNIP” test). And in cases where the SSNIP test is irrelevant, such as where there is no price because the products or services in question are free of charge, it is unclear what test is to be applied.

Regarding dominant position or substantial market power, there is a great deal of uncertainty about what these concepts mean. The EU case law has adopted a definition of dominant position that is both internally inconsistent (the ability to act in the market to an appreciable extent independently versus the ability to prevent effective competition being maintained) and vague. In South Africa the definition is also vague, at least at levels of market share below 45 per cent (at 45 per cent market share or above there is, as we have seen, an irrebuttable presumption of dominant position). Below 45 per cent, whether a dominant position exists depends on whether there is “market power”. “Market power” is defined as existing if a firm is either able to “control prices” or to “exclude competition” or to “behave to an appreciable extent independently of its competitors, customers or suppliers”. But it is not clear what any of these concepts mean. In one sense, any business whose price cuts are matched by competitors controls prices. We have noted above the

⁵¹⁷ CCA s 93.

EU conflict between the notions of acting independently, and at the same time excluding competitors or competition.

The vagueness in South Africa (and in some respects the EU) has been mitigated to a certain extent by market share presumptions, but it is not clear what needs to be shown to rebut the presumptions (where they are rebuttable). Moreover, in the EU, and in South Africa where the firm has a market share below 45 per cent, it is not clear what mix of factors in what degrees will constitute dominance.

Similar problems of definition arise with the concept of dominant position in Canada, and substantial market power in Australia. As Hong Kong also uses the concept of substantial market power, similar problems are also likely to arise there. The extent to which a business is constrained by the conduct of competitors, potential competitors or customers, and whether that extent is “substantial”, is essentially a subjective assessment, and one on which reasonable people may take different views. As with the concepts of SLC and the “relevant market”, although there may be some cases where a business or its legal advisers could be confident that substantial market power exists (such as where there are only one or two suppliers in a market with high barriers to entry), there will be many cases where they can have no such confidence.

4 6 4 Abuse (Misuse) of Dominance / Substantial Market Power

In the EU, as with the assessment of arrangements that harm competition and whether they qualify for exclusion, it is not yet clear whether, and if so to what extent, the European Courts will follow the European Commission’s “more economic approach”, its emphasis on the effects of conduct rather than its form. The European Court’s recent *Intel* approach suggests that the Courts will have to look at arguments regarding the economic effects of conduct and whether any harm the conduct causes to competition is outweighed by efficiencies, but it remains to be seen from future cases how this will play out in practice. As with restrictive arrangements, there is uncertainty as to the extent to which the Courts will follow the Commission’s approach.

In Canada and South Africa, broadly speaking the same SLC test applies to abuses of dominance and agreements which harm competition, and therefore the same uncertainties apply, due to the speculative and subjective assessments that need be made as to whether the courts would find that the SLC test was satisfied. Moreover, in South Africa, as the *Senwes* case showed, the law on what constitutes an abuse in South Africa under section 8(c) of the Competition Act is still in the early stages of development.

In Hong Kong, and in contrast to the EU, the same “prevent, restrict or distort” language is used for abuse as for arrangements. As regards the latter, although the legal position in the EU is unclear, at least there is a body of case law to which reference can be made for how this term has been interpreted in the EU. No such reference can be made under the Hong Kong abuse provision, because this term is not used in the EU abuse provision, Article 102. It is highly unfortunate, particularly for businesses in Hong Kong, as well as the courts which have to interpret the law, that Hong Kong will start off with a competition law which is so obscure.

In the case of unilateral conduct, we have seen that an adverse effect on competition (however that effect is defined) is not sufficient, since vigorous competitive conduct can exclude competitors. There must be something in the nature of the conduct to qualify the conduct as an abuse. As we have seen, strenuous efforts have been made to develop a common test for abuse, so far to no avail. This would not matter so much for businesses if there was a list of clearly defined types of conduct which constitute an abuse, even if they have no common theme. Non-exhaustive lists that have been set out in the Canadian and South African laws certainly help in narrowing the uncertainty, as they are relatively specific and lengthy. Nevertheless, there can still be uncertainty as to the meaning of the types conduct listed. For example, in South Africa one of the specific types of conduct listed is pricing below marginal or average variable cost, but as the *Media 24* case showed, it is unclear what needs to be proved to meet these tests.⁵¹⁸ The EU list is much shorter and vaguer, (with four examples) and the Hong Kong one even shorter and vaguer (with only two examples).

⁵¹⁸ *Competition Commission v Media 24 (pty) Ltd* 92/CR/Oct11.

Through the EU case law, categories of conduct that are commonly regarded, at least potentially, as abuses have emerged. The categories include exclusive dealing, fidelity rebates, tying and bundling, predatory pricing, margin squeeze and refusal to supply. The application of some of these categories in particular cases can be difficult, such as precisely what costs are relevant in predatory pricing and margin squeeze cases, and in what precise circumstances a refusal to supply constitutes an abuse. It remains to be seen whether Hong Kong will follow the EU's approach. The Commission, in its guidelines, seems to follow the EU approach, but ultimately it will be a decision for the Competition Tribunal.

We have left Australia till last because it has until very recently taken markedly different approach to the concept of abuse (in Australia "misuse") of SMP. It is the only one of the subject jurisdictions where the legislation stated that the *purpose* of the conduct was a determining factor, not its *effect*. But purpose is not enough: as with the other jurisdictions, there must be something in the nature of the conduct itself that distinguishes it from legitimate competitive conduct. In Australia, we have seen that this has in the past been interpreted essentially as a "but for" test: but for having SMP, would (or could) the business have been able to engage in the relevant conduct? (Put another way, the business must act "as if" it did not have substantial market power). This involves, like the assessment of SLC, the construction of a hypothetical situation, in this case whether the business could or would have engaged in the conduct without SMP. This is to a large extent a speculative exercise. There would seem to be few types of conduct that could only be engaged in by businesses with SMP (whatever SMP means – we have noted the clarity problems with this concept). The lack of clarity was been made even worse by the 2010 amendments to the CCA, which provided a non-exhaustive list of four, relatively vague, factors which could be taken into account in determining whether a business has taken advantage of its position of substantial market power. In many cases a business would have found it difficult to assess whether its proposed conduct is "materially facilitated" by, or (even vaguer) "otherwise related to", its SMP. The recent abolition of the concept of "misuse", as we have seen, can be expected to lead to even greater legal uncertainty.⁵¹⁹

4 7 Failure to Learn from the US Experience

⁵¹⁹ Section 4 5 2 above.

In fact, the uncertainties that we have described in this Chapter are very similar to those that have been experienced in US antitrust law. Most types of arrangement and conduct in US antitrust law are now assessed under the so-called “rule of reason”. This rule involves assessing all of the economic costs and benefits of a particular arrangement or conduct before the court decides whether or not to prohibit it. As we have seen, a similar exercise has to be conducted under the competition laws of the subject jurisdictions, to determine whether a particular agreement or (in the case of abuse) course of conduct complies with the law. But as Easterbrook has said:

“The welfare implications of most forms of business conduct are beyond our ken. If we assembled twelve economists and gave them all the available data about a business practice, plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers’ welfare or economic efficiency more broadly defined. They would discover some gaps in the data, some avenues requiring further exploration. Someone would invoke the principle of second best, claiming that monopoly could be a beneficial offset to distortions elsewhere. At least one of the economists would construct a new model showing how the practice *could* reduce efficiency if certain things (unknowable from the data) were present. A global inquiry invites no answer; it puts too many things in issue”.⁵²⁰

The same can be said of the competition laws in the subject jurisdictions. The root cause of this lack of clarity is that liability (or other legal consequences) under the competition laws we have examined depends on economic assessments, which by definition are vague and subjective. As two commentators have said, in the context of EU law:

⁵²⁰ Frank H Easterbrook “The Limits of Antitrust” 63 *Tex L Rev* 1, 6 (1984).

“The more economics-oriented an approach to Articles 81 and 82 (e.g. involving market share and market power analyses) the more uncertainty one must accept in order to have an economically coherent application of the rules.”⁵²¹

Ironically, the European Commission actually thought that moving towards a more economic approach would make the application of the competition rules clearer, rather than the opposite. Gerber reports as follows:

“There was concern among Commission officials and others that if many competition authorities were now included in the European Union, this could increase uncertainty and lead to major divergences between and among competition laws of the Member States. The normative use of economics was seen as a means of avoiding or at least significantly reducing this potential for diversity and uncertainty. Economics, it was claimed, was a clear conceptual framework for competition law. If, therefore, every Member State followed the economic approach, there would be little basis for divergence and its resulting uncertainties”.⁵²²

What is perhaps most remarkable about this view is that it should have been obvious from the US’s experience with the rule of reason that the use of economics creates more uncertainty, not less. This apparent failure of the EU to learn from the US experience goes back a long way- not just at the level of the enforcement authorities, but also in terms of legal scholarship. A striking example of this was that in 1984, the same year that the ex-US judge and academic Frank Easterbrook was criticising the uncertainty caused by the use of economics under the US rule of reason in the passage quoted above, two EU practitioners were advocating the introduction of a US-style rule of reason in EU competition law (albeit with the laudable motive of avoiding the problem of mitigating the need to notify so many commercial agreements to the Commission for clearance):

⁵²¹ Barry E Hawk and Nathalie Denaijer “The Development of Articles 81 and 82 EC Treaty: Legal Certainty” in *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* Claus-Dieter Ehlermann and Isabela Atanasiu eds (2001) 130.

⁵²² David J Gerber “Searching for a Modernised Voice: Economics, Institutions and Predictability in European Competition Law” *Fordham Int LJ* Vol 37 1421, 1436.

“As regards legal certainty, such an approach [a rule of reason] entails the realistic acceptance of a substantial but tolerable level of uncertainty- a level with which many businessmen are perfectly willing to live. These practices tend to go in the direction of a system which is functionally somewhat like that of the ‘rule of reason’ in the United States”.⁵²³

The authors do not make clear what they mean by “substantial but tolerable”, or whether they had empirical support for the suggested toleration of legal uncertainty by many businesses. It is the submission of this thesis that the substantial uncertainty arising from the use of economic assessments to trigger legal liability is not tolerable from a rule of law standpoint.

Some of the root causes of the current legal uncertainty which bedevils competition laws, as exemplified by the subject jurisdictions, were even identified in the US as long ago as the start of the 20th century, in some of the early US cases concerning competition law and economic regulation. A brief overview of those cases may illustrate the point.

In *International Harvester Co of America v Kentucky*, the Supreme Court struck down as void for vagueness a Kentucky law which allowed competitors to agree prices, unless the agreement had the purpose or effect of fixing a price that was greater or less than the “real value” of the product.⁵²⁴ The Court’s concern was that the legality of the conduct depended on what the price for the product would be in the absence of the agreement- what economists nowadays would call the “counterfactual”- and that this was a matter of speculation. The Court said:

“Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also

⁵²³ Ian Forrester and Christopher Norall “The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law is and could be Applied” (1984) *CMLRev* Vol 21(1) 11, 17.

⁵²⁴ 276 US (1914).

of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that *the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind*. The very community, the intensity of whose wish relatively to its other competing desires determines the precise value that it would give, has to be supposed differently organized and subject to other influences under which it acts. In our opinion [the law] cannot stand” (emphasis added).

The Court went on to say that “to compel [men] to guess, on peril of indictment, what the community would have given for [the goods] if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.”

As we have seen in this Chapter, this criticism could be levied at competition laws even today. The assessment of arrangements and conduct under the subject jurisdictions’ competition laws involves, as a standard component, the construction of a hypothetical “counterfactual”, i.e. what the situation would have been without the arrangement or conduct in question, the very approach which the Supreme Court condemned as being unfair and unconstitutional.

In 1921, the Supreme Court held in *United States v L Cohen Grocery Co* that an economic regulation prohibiting the charging of an “unjust or unreasonable rate or charge” for necessities was void for vagueness, on the grounds that the criterion for liability “leaves open... the widest conceivable enquiry, the scope of which no-one can foresee and the result of which no-one can foreshadow or adequately guard against.”⁵²⁵

⁵²⁵ 255 US 81, 89 (1921).

Similarly, in 1927, the Supreme Court ruled in *Cline v Frink Dairy Co* that a Colorado antitrust statute was unconstitutionally vague in providing a safe harbour for agreements, the object and purposes of which were to provide for the parties a “reasonable profit”.⁵²⁶ The Court held that:

“[s]uch an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalise and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make a reasonable profit, but not otherwise”.⁵²⁷

The Court went on to say:

“...it will not do to hold average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.”⁵²⁸

The uncertainties of interpreting concepts such as “unjust”, “unreasonable” and “reasonable” also exist in some of the competition laws we have examined. For example, we have seen that one example of abuse under EU competition law which is given in the TFEU is imposing an “unfair” purchase price, selling price or other trading condition”. But what is unfair in this context? This is a subjective assessment which is open to conflicting interpretations when applied to the facts of a given case. We saw earlier in this Chapter how the European and South African courts have struggled with defining the notion of an “excessive” selling price. And in the South African statute, an “essential facility” is defined as: “an infrastructure or resource that cannot *reasonably* be duplicated, and without access to which competitors cannot *reasonably* provide to their customers”.⁵²⁹ Again, “excessive” and “reasonable” require subjective

⁵²⁶ 274 US 445 (1927).

⁵²⁷ 457-458.

⁵²⁸ 465.

⁵²⁹ Competition Act s 1(1)(viii).

assessments which are open to dispute in particular cases. The same could be said for concepts such as “substantially” lessening competition and “substantial” market power.

In summary, where these US statutes on competition or economic regulation were struck down as void for vagueness, the vagueness can be divided into two categories. In *International Harvester*, the vagueness stemmed primarily from the fact that, in order to assess whether the arrangement was legal or illegal, the parties had to hypothesise about what the situation would be in the absence of the agreement in question (the counterfactual). The Court effectively said that this did not give the parties fair warning or notice as to what was illegal, because what the situation would be in the absence of the agreement was unknown to anyone, and therefore entirely speculative. In the *Cohen* and *Cline* cases, on the other hand, the vagueness stemmed from the subjectivity of the descriptors triggering liability, namely “unjust”, “unreasonable”, and “reasonable”, there being no objective criterion in the law against which to assess whether the conduct in question fell foul of the law. Both categories of vagueness exist in the competition laws of the subject jurisdictions, as we have seen in this Chapter.

The uncertainties in US antitrust law, particularly in applying the “rule of reason” led Maurice Stucke to answer his question “Does the Rule of Reason Violate the Rule of Law?” in the affirmative.⁵³⁰ They also led Connolly to the conclusion that the Sherman Act is so vague as to be unconstitutional as a criminal statute.⁵³¹ We conclude this Chapter by examining whether similar criticisms could be levelled at the competition laws of the subject jurisdictions.

4 8 Conclusions: are Competition Laws sufficiently clear?

In Chapter 3 we selected a benchmark for assessing whether the competition laws are sufficiently clear, namely the principles that have emerged from the case law of the ECtHR under Article 7 of the ECHR regarding the requirement for legal clarity in criminal law. This requirement is a

⁵³⁰ N 9 above.

⁵³¹ Robert Connolly “The Sherman Act is Unconstitutional as a Criminal Statute (Part I)” available at <http://cartelcapers.com/blog/sherman-act-unconstitutional-criminal-statute-part-1/> (accessed on 1-12-2017).

component of the rule of law concept. These principles, and the reasons why they are considered to be an appropriate benchmark for clarity in competition laws, were also examined in Chapter 3.

From the Article 7 principles we derived three criteria with which laws have to comply to be sufficiently clear, namely:

- the essential ingredients of the “offence”, i.e. what elements need to be established as a matter of fact to prove that an infringement has taken place, must be clear;
- any residual issues in the law that need to be clarified through the case law are by definition points of law (such as the type of conduct which may constitute an infringement, or the scope of the persons to which it applies) not fact or economic assessment;
- it must be possible for a legal adviser to reasonably foresee the outcome of the clarification.

This Chapter has demonstrated that the competition laws in all of the subject jurisdictions, to a large extent, do not comply with these principles. The reasons are as follows:

- The essential ingredients of a breach of competition law are to a large extent unclear, in the sense that it is not clear what actions will trigger liability. In the EU and Hong Kong law, it is unclear what the appropriate standard is for assessing whether an arrangement between firms is prohibited or permitted: whether it is SLC or a restriction of commercial freedom. In the case of abuse or misuse of market power, none of the subject jurisdictions have established a satisfactory definition of the concept of abuse/misuse, and it is unclear what circumstances will justify conduct which would otherwise constitute an abuse or misuse;
- While there are points of competition law such as the above that remain to be clarified, the biggest area of doubt concerns not the law itself, but the assessment of the actual or likely economic effects of particular arrangements or conduct. For example, whether an agreement will cause a “substantial lessening of competition”, what constitutes the relevant market, and whether a business has a dominant position or substantial market power in that market are matters of economic assessment, and as such to a large extent arbitrary and subjective, not law. They involve “crystal ball- gazing” and speculation as to the future

effects of particular arrangements or conduct. In addition, whether the criteria for permitting an agreement or conduct that harms competition are satisfied, on the basis of either a consumer welfare or a total welfare standard, is largely a matter of arbitrary and subjective judgment.

- Lawyers are not qualified to advise on such economic effects. Except at the two extremes where there is obvious illegality or legality (or in the case of Canada, grounds for enforcement action, or no such grounds) a firm cannot predict the legal outcome of its conduct with sufficient certainty, even with legal advice. This is because of the complex and subjective economic assessments involved. As noted above, it is not a matter of predicting what view the courts will take on points of law, on which lawyers are qualified to advise, but predicting which view the enforcement authorities and courts will take on economic assessments, on which they are not qualified to advise, and which often conflict with each other.
- Finding firms liable for competition law infringements, on the basis that the enforcement authorities or courts reach a different conclusion on the basis of their economic assessments after the event than the firms reached before the event, offends the rule of law principle, as reflected in Article 7 ECHR.⁵³² In particular, the imposition of penalties in such cases offends this principle.

⁵³² For concurring views see Peter Whelan “Legal Cartel Criminalisation within the EU Member States” (2012) *Cambridge Law Journal* 71(3) 677, 682; Nordlander & Harrison n 234 above 9.

5 Practical Implications of Lack of Clarity in Competition Laws

5 1 Introduction

Chapter 4 showed how the competition laws in the five subject jurisdictions do not provide businesses with clear rules as to what arrangements and conduct are legitimate or may be subject to enforcement action. In this Chapter, we look at what the practical implications of this lack of legal clarity are. It will be seen that the lack of legal clarity has a number of serious adverse effects in terms of costs to businesses and the economy, fairness, access to justice, and the credibility and enforceability of competition laws. In Chapter 6, we look at possible solutions to mitigate these problems.

We would like to make two preliminary points.

First, it might be argued by some that the scale of the problem lack of clarity in the competition laws we discussed in Chapter 4 is not as great as it may seem. After all (the argument might run), most enforcement these days is against hardcore cartels, the rules against price-fixing and other hardcore arrangements are sufficiently clear, there is comparatively little enforcement against other horizontal arrangements and vertical arrangements, enforcement against unilateral conduct is also comparatively rare, and mergers for the most part are subject to compulsory prior

notification based on clear financial thresholds. We would disagree with this argument, for the following reasons which will be expanded upon in Chapter 6:

- A vague law against anti-competitive arrangements and unilateral conduct has many harmful consequences that will be described in this Chapter, even if it is only enforced in practice against cartels (in the case of the former) and in what are considered by the enforcement authority to be the most egregious conduct (in the case of the latter). For example, businesses still need to ensure that they are compliant with the law and incur the costs of doing so, and forbearance in enforcement does not protect them from private legal actions, in jurisdictions where standalone private actions are allowed. Selective enforcement against the most serious arrangements and conduct is therefore not an adequate solution to the problem of legal uncertainty, as we shall argue in Chapter 6.
- The definition of a cartel is not as clear as it may seem in many cases, as will be explained in Chapter 7, and an appropriate definition of abuse (or in the US monopolisation) has never been found, as was discussed in Chapter 4.
- The relatively low level of enforcement against non-cartel horizontal arrangements should not be interpreted as a sign that they are uncommon, or that the parties to proposed transactions of this kind do not face compliance problems. A survey by the international accountancy firm PwC in 2016 found that on average 49 percent of global Chief Executive Officers were expecting to make a strategic alliance (as opposed to a merger) that year. In the US the figure was 59 per cent and in China it was 63 per cent. “Strategic alliance” was defined as “an agreement between two or more organizations to share resources or knowledge to pursue mutually beneficial objectives while remaining independent organizations”.⁵³³
- Vertical arrangements are even more common: virtually every business has suppliers and customers. While Singapore has excluded vertical agreements from the scope of its competition law, and the EU has issued a block exemption for them, many jurisdictions (such as the other subject jurisdictions examined in this dissertation) have no such

⁵³³ “Joint Ventures and Strategic Alliances: Examining the Keys to Success”, available at <https://www.pwc.com/us/en/deals/publications/joint-ventures-strategic-alliances.html> (accessed on 8-2-2018).

exclusion or exemption, and even the application of the EU block exemption is complicated by the fact that it is only available up to certain market share thresholds,⁵³⁴ with the difficulty of defining markets which we discussed in Chapter 4.⁵³⁵

- A vague law covering a wide range of arrangements and conduct gives scope for the authority to change its enforcement policy over time, and what is a not a priority at one stage in time may become a priority later. A good example is the recent clampdown by the European Commission on resale price maintenance, where it took action against this practice for the first time in 15 years,⁵³⁶ and the recent increase in enforcement of competition law by the EU and UK competition authorities against excessive pricing (at least in the pharmaceutical sector)- a type of conduct that these competition authorities have traditionally been loathe to tackle, even although their competition laws prohibit excessive pricing).⁵³⁷

The second preliminary point is that some of the adverse effects of legal uncertainty that we deal with in this Chapter concern the unfairness and costs it creates for businesses. We are aware that, in the area of criminal law, there have been criticisms that businesses have tried to cast themselves as victims in order to influence policy debates around law, order and crime prevention. In addition, it has been argued that businesses are not worthy of protection as a policy matter, because they are just as likely to be offenders rather than victims and are able to take care of their own security needs.⁵³⁸ Does this mean that we should not be concerned about whether businesses have sufficient legal certainty under competition laws? Although businesses

⁵³⁴ See section 4 3 1.

⁵³⁵ See section 4 4 1.

⁵³⁶ "EU issues first RPM fines in 15 years" *Global Competition Review* 24 July 2018 (accessed on 25-7-2018).

⁵³⁷ "European Commission Launches Excessive Pricing Investigation in Pharma Sector" <https://www.sidley.com/en/insights/newsupdates/2017/05/european-commission-launches-excessive-pricing-investigation-in-pharma-sector> (accessed on 15-8-2018); "Excessive pricing enforcement action on the rise: a new enforcement trend?" <https://www.bakermckenzie.com/en/insight/publications/2017/08/excessive-pricing-enforcement-action>(accessed on 15-8-2018).

⁵³⁸ Matt Hopkins "Business, victimisation and victimology: Reflections on contemporary patterns of commercial victimisation and the concept of businesses as 'ideal victims'" *International Review of Victimology* 2016, Vol 22(2) 161.

sometimes unnecessarily cry foul, we would argue that we should indeed be concerned, for the following reasons:

- Businesses are just as entitled to legal certainty as individuals under the rule of law principle, and their rights to sufficient legal certainty are guaranteed constitutionally in many jurisdictions, include those that are parties to the ECHR.
- Imposing extra unnecessary costs on businesses through unclear competition laws is not just a problem for businesses, it is a problem for society as a whole. It creates economic inefficiency, and may also harm consumers as the extra costs may ultimately have to be borne by them.

5 2 Compliance Costs

Faced with such unclear rules, a business which wants to avoid the severe adverse consequences of breaching competition law (as most businesses probably do, for the reasons explained in Section 5 6 below) has no choice but to engage specialist competition lawyers for advice on their proposed arrangements and conduct. This is notwithstanding the fact that, for the reasons explained in Chapter 4, the lawyer will only be able to give reasonably definitive advice in a minority of cases on the margins as to whether a proposal arrangement or course of conduct will be legal or may be subject to enforcement action. Even if it is unable to obtain definitive advice as to whether its conduct will be legal or illegal, a business still needs to assess the risks of breaking the law, and being subject to sanctions – i.e. is the risk low, medium or high? It will usually instruct a legal adviser to conduct this analysis, with the inevitable costs involved.

This is not to say businesses never need to seek legal advice on what they are proposing to do – clearly they do. But the lack of clarity in competition laws means that the legal assessment is a much more complex (and therefore costly) task than it would be if the laws were clear. The move towards a “more economic” approach to the enforcement policy of the competition authorities – in the EU at least (as observed in Chapter 4) has led to a commensurate increase in the depth of the analysis that needs to be carried out beforehand, to assess what views the national authorities or courts are likely to take on the particular transaction or conduct, in order assess the compliance

risks. These costs may be multiplied, if the transaction or conduct spans national borders, as many do: advice in other jurisdictions may also be required. Specialist economists may also need to be engaged for this purpose, further increasing the costs.

5 3 Enforcement and Litigation Costs

If the business does decide to take the risk and go ahead with the proposed arrangement or course of conduct, the lack of legal certainty in competition law increases the likelihood of having to defend lengthy regulatory enquiries and investigations, and even litigation. The investigation or litigation could be initiated by the competition authority, either on its own initiative or following receipt of a complaint from a third party. In jurisdictions which allow standalone private actions such as the EU and Australia, litigation could also be initiated by a private party.

Many of the key competition concepts such as “relevant market”, “substantially lessen competition”, “dominant position”, “substantial market power” and “abuse” are drafted in a very broad and vague way, as explained in Chapter 4. This means that there is a much greater ability and incentive for disgruntled competitors to bring commercially-motivated complaints to the regulator, or litigation before the courts, if the arrangement or conduct does go ahead, arguing that it is in breach of the competition rules. The vaguer the law, the more scope there is for arguing that the arrangement or conduct is anti-competitive. The vagueness of these concepts also increases the complexity and costs of the proceedings, as teams of lawyers and economists on either side will typically present opposing arguments on each of them.

The cost of dealing with such enquiries, investigations and litigation can be enormous, involving not just various teams of lawyers but also economists and other experts, and result in considerable disruption to business affairs, including diversion of management time. Given these costs, and the uncertainty as to what decision the court will make, the defendant in a private action may have an incentive to reach a settlement with the plaintiff, which leads to unfairness- another adverse consequence of lack of clarity which is discussed in section 5 4.

Litigation costs arising from vague concepts in competition law have long been a concern in the US. As we shall see in Chapter 6, it was in large part the reason (along with increasing clarity for businesses) why the US Supreme Court introduced *per se* rules for certain types of conduct such as price-fixing- although the pendulum has now swung back in favour of a full “rule of reason” analysis for most types of conduct. One prominent US academic and ex-judge Easterbrook described how the vagueness of the US rule of reason increases litigation costs as follows:

“When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder’s contemplation...Faced with a list of such imponderables, lawyers must engage in ceaseless discovery. (They might find something bearing on a factor, and the factor might be dispositive). The higher the stakes, the more firms are willing to spend on discovery and litigation. The marginal week of discovery or trial just might mean saving a few millions or tens of millions of dollars. *Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason*” (emphasis added).⁵³⁹

The degree of exposure to the risk of litigation depends very much on whether the jurisdiction in question allows “standalone” actions or only “follow-on” actions. Where standalone actions are allowed, a private party does not have to await a finding of infringement by a court or authority before initiating an action. The business may therefore be exposed to the risk of litigation by a private party even if there is no prior finding of infringement by a competition authority or adjudicating body. Where only follow-on actions are allowed, on the other hand, if there is no finding of infringement, private actions cannot be brought. (It should be noted in this context, however, that in South Africa, even if the Competition Commission decides not to prosecute a case against certain conduct before the Tribunal, a private complainant can still bring the case before the Tribunal directly and seek a declaration of infringement. If the complainant is successful, the Tribunal’s declaration may provide the basis for a private damages claim.⁵⁴⁰ Standalone actions

⁵³⁹ Frank H Easterbrook “The Limits of Antitrust” (1984) *Tex L Rev* 1, 12.

⁵⁴⁰ Competition Act s 51(1).

are allowed in the US, EU and Australia, whereas only follow-on actions can be brought in Canada, South Africa and Hong Kong.

The degree of exposure to litigation also depends on the financial incentive to litigate. For example, under US law, successful plaintiffs in an antitrust litigation can receive damages awards covering not just the value of the harm caused, but three times that value (so-called “treble damages”), which increases the incentive to resort to litigation.⁵⁴¹

A good example of the costs and disruption that competition litigation causes is the “C7” case in Australia, which was a standalone private action.⁵⁴² A pay television company brought an action alleging that its rivals had acted in breach of competition law by obtaining exclusive rights to broadcast certain sporting events, and refusing to sub-license those rights to it. The trial judge, Justice Ronald Sackville, estimated that the parties had spent approximately 200 million Australian dollars on legal costs alone up to the date he issued his judgment, and this was even before the case went to appeal. He commented as follows:

“It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous”.⁵⁴³

While both the trial judge and the appeal court rejected the applicant’s case, the costs of having to defend an action of this kind are unlikely to be fully covered in an award of costs, not least because of the huge amount of disruption and management time involved.

⁵⁴¹ Section 4 of the Clayton Act (1914) provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover *threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney's fee” (emphasis added).

⁵⁴² *Seven Network Limited v News Limited* [2007] FAC 1062.

⁵⁴³ N 554 above para 10.

Even in jurisdictions which do not allow standalone damages actions, the costs of having to defend a competition investigation or litigation initiated by a competition authority, as opposed to a private litigant, can in itself be very high, as the business has to try its utmost to defend itself against the adverse reputational and financial consequences of being found in breach of the law.

In spite of these problems, and against advice based on the US experience,⁵⁴⁴ the EU has proceeded with its policy to make private actions for damages in respect of competition law infringements easier (albeit stopping short of introducing US-style treble damages). It issued a directive to its 28 Member States in 2014,⁵⁴⁵ requiring them to ensure that certain steps are in place by 27 December 2016 that will, in the words of the European Commission “make it a lot easier for victims of antitrust violations to claim compensation”.⁵⁴⁶

One of these steps is to ensure that courts can (subject to certain conditions) order disclosure of documents by the defendant to the plaintiff where the latter “has made a plausible assertion, on the basis of facts which are reasonably available to [the plaintiff] that [the plaintiff] has suffered harm that was caused by the defendant”.⁵⁴⁷ On the face of it, this could enable plaintiffs in abuse of dominance cases to obtain disclosure merely on showing that the defendant may be dominant and that its conduct has caused harm to the plaintiff. But as we saw in Chapter 4, successful competition causes harm, so this is arguably too low a threshold.

Another step required by the Directive is to introduce a rebuttable presumption that “cartel infringements cause harm”.⁵⁴⁸ But the definition of cartel is vague and broad:

⁵⁴⁴ John H Beisner and Charles E Borden “On the Road to Litigation Abuse: the Continuing Export of US Class Action and Antitrust Law” US Chamber Institute for Legal Reform October 2006.

⁵⁴⁵ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1 of 5.12.2014.

⁵⁴⁶ European Commission Competition Policy Brief “The Damages Directive- towards more effective enforcement of the EU competition rules” January 2015.

⁵⁴⁷ Directive 2014/104/EU n 302 above recital 16.

⁵⁴⁸ Article 17(2).

“ ‘cartel’ means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, *but not limited to*, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets or customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors”.⁵⁴⁹ (emphasis added).

This definition seems wide enough to include virtually any arrangement between competitors. The effect could be that, for a wide range of such arrangements, the burden will be on the parties to show that the arrangement did *not* cause harm to the plaintiff- the exact opposite to the normal burden of proof, and one which might prove difficult for many defendants to rebut.

5 4 Unfairness

Whether an action to pursue an alleged infringement of competition law is initiated by the enforcement authority, or by a private party claiming damages, such an action can lead to unfairness, where the business or businesses targeted could not predict that the conduct or arrangement would be legal or illegal.

First, quite apart from the cost issues discussed in Section 5 3, there is the potential reputational damage that such an action can cause, even if the business or businesses are ultimately acquitted of any wrongdoing. Being subject to an investigation or a court action for an alleged breach of competition law can result in unwelcome media reports and cast doubts over whether the business is a good corporate citizen or has good corporate governance.⁵⁵⁰ It can also have an impact on its share price. For example, in May 2016, it was reported that the South African packaging group Mpack’s share price fell by five per cent after it confirmed that the Competition Commission had

⁵⁴⁹ Article 2(14).

⁵⁵⁰ See Chapter 3 section 3 6 2.

raided its premises.⁵⁵¹ Conversely, in September 2017, when Intel won its case against the European Commission (which had imposed a fine on Intel of USD 1.26 billion)- in the sense that the European Court remitted the case back to the (lower) EU General Court for further economic analysis, it was reported that Intel's share price had its biggest increase in a month.⁵⁵²

While it might be argued that there is no unfairness if the alleged arrangement or conduct constitutes a clear or blatant breach of the law, the media headlines are not likely to make a distinction between such alleged breaches and those that are less clear and involve complex economic assessments. Even if the business successfully defends the case, the reputational damage may already have been done.

Secondly, vague and unclear laws give rise to the prospect that litigation or complaints to the competition authority, or the threat of it, is used as a strategic weapon by a competitor to obtain a commercial advantage, even where that competitor's case has little or no merit. In the US, for example, it has been said that:

“Antitrust law is most subject to strategic misuse by rent-seeking competitors when it is framed as an amorphous standard. A growing literature shows that firms can strategically misuse antitrust to coerce or induce their competitors to forego engaging in practices that are efficient but disadvantage the plaintiff...Such rent-seeking behaviour is more likely to be successful when the governing law is presented as a standard rather than a rule because a standard creates more adjudicatory uncertainty, and risk-averse defendants may desist from an efficient practice even if it is likely to be vindicated through litigation”.⁵⁵³

⁵⁵¹ “Mpack's share price falls after Competition Commission raid” *Competition Policy International* 26 May 2016.

⁵⁵² “Intel wins round in fight over \$1.26 billion Antitrust Fine”, Bloomberg Technology 6 September 2017.

⁵⁵³ Daniel A. Crane “Rules versus Standards in Antitrust Adjudication” (2007) 64 *Wash. & Lee L Rev* 49. See also A Neil Campbell, J William Rowley QC “Proposals for Evolving the Patchwork of Domestic Monopolisation and Dominance Laws” 12 No. 1 *Bus L Int'l* 5 (January 2011).

Certain academics have questioned the argument that antitrust law can be used strategically to extract settlements from defendants in cases which lack merit, arguing that defendants tend to have “deeper pockets” than plaintiffs and that “[t]heir wealth allows them to retain effective counsel, pay the costs of litigation, and tolerate risk”.⁵⁵⁴ However, it is questionable whether most businesses would want to defend to the end the protracted and expensive litigation that competition cases involve, especially when the vagueness of competition laws means that the outcome is unpredictable, and an early settlement may be a preferable option even for wealthy businesses. In any event, the key issue is not so much whether defendants have to settle unmeritorious cases, but whether a clear law would leave less room for argument as to whether or not there was a breach of the law, and therefore less scope for such strategic use of competition law. It is submitted that it would.

Thirdly, whereas in investigations or litigation initiated by the competition authority, it can act as a “gatekeeper” to ensure appropriate forbearance where the law is unclear, there is no such filter in the case of standalone private actions (in jurisdictions where they are permitted). This means that in private standalone actions, lack of clarity in the law will not be a bar to a finding of infringement and damages liability. Lande and Davis argue in the US context that private enforcement law plays an important role in deterring anti-competitive conduct, complementing enforcement by competition authorities which, in itself, provides an insufficient deterrent. They support their argument in part by the fact that the competition authorities may be reluctant to prosecute cases where the application of the law is unclear.⁵⁵⁵ But if it is unfair that a defendant should be held liable in a public enforcement action where the application of the law is unclear, the same should surely apply in a private enforcement action. Admittedly, a public enforcement action that may result in a severe penalty, which is the case in most of the subject jurisdictions, may be treated as a criminal proceeding under the ECHR, as we saw in Chapter 3, and attract more stigma than a finding of liability in damages in a private action. Nevertheless, it is still arguably

⁵⁵⁴ Joshua P Davis, Robert H Lande “Defying Conventional Wisdom: the Case for Private Antitrust Enforcement” (2013) 48 *G L Rev* 1.

⁵⁵⁵ Robert H Lande, Joshua P Davis “Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws” 2011 *BYU L Rev* 315, 349 (2011).

unfair that liability in damages could result from a finding of infringement of a law which is so unclear that the defendant did not know what it had to do to comply with it.

In the case of investigations or litigation by the competition authority, it does not need to initiate an action at all where it is unclear whether the arrangement or conduct is illegal. If it does, and the action is “successful”, the authority or court can take the level of legal clarity into account in deciding whether to progress the case to a definitive decision or judgment, or to settle the case informally. If there is a formal finding of infringement, the level of clarity can theoretically be taken into account in deciding whether any sanctions should be imposed, and if so how severe they should be. (Although in the case of penalties, we saw in Chapter 3 that the European Commission and Courts at least have shown little leniency in their fining policy where lack of clarity in the law has been pleaded. And in any event, leniency in penalties would do little to mitigate the adverse effects of lack of clarity in the law, as will be seen in Chapter 6).

In standalone private civil actions for damages, there are no such filters. Once the action is brought (and unless the parties reach a settlement) the court must make a decision on liability- either infringement or no infringement. The court is unlikely to refuse to make such a finding because the law is unclear. The court sees it as its role to interpret and apply the law to the facts of the case. If liability is established, the only question then becomes the quantum of loss the applicant has suffered: the lack of clarity in the law is irrelevant to the quantum. The defendant’s only remedy is to engage in further litigation, by appealing the decision, either on the merits of the competition arguments, or on legal certainty grounds, or both, thereby incurring further costs and disruption.

A fourth way in which the lack of clarity produces unfairness could be called “inequality of arms”, or to put it more precisely, information asymmetry.

It is true that in the case of secret cartels such as price-fixing, the secrecy may make it difficult for the enforcement authority to detect the infringement, and therefore the asymmetry lies in favour of the infringer. Indeed, this is one of the main reasons that many competition authorities have introduced leniency policies, to encourage cartel participants to disclose the relevant facts about

the cartel to the authority and thereby (in the case of the first to disclose) gain immunity from penalties. For example, the European Commission states:

“In essence, the leniency policy offers companies involved in a cartel - which self-report and hand over evidence - either total immunity from fines or a reduction of fines which the Commission would have otherwise imposed on them. It also benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.”⁵⁵⁶

However, with other competition infringements, where the question of infringement depends on the effects or likely effects of the arrangements or conduct on competition in the market, the asymmetry is in favour of the enforcement authority or court. Whereas, in investigating or assessing whether there is an infringement, the authority or court will usually be reviewing the matter *ex post*, on the basis of known or ascertainable facts about the effects of the arrangement or conduct, a business engaging in an agreement or conduct has to *predict* the likely impact of the agreement or conduct, which is a much more difficult and uncertain task. Secondly, whereas an authority or court usually has the power to *require* any person to provide evidence which may be relevant to the case (such as competitors, suppliers, customers and industry bodies), to enable it to analyse (for example) the impact of the arrangement or conduct on the market, a firm, trying to predict whether its agreement or conduct will fall foul of the law, has no such power. Admittedly, larger firms may have the financial resources to engage expert competition lawyers and economists to put forward sophisticated arguments and extensive evidence to challenge the authority's findings (resources which may not be available to smaller firms) but this does not remove or offset the significant advantage which the authority or court has, as described above, and it is only a relatively small number of firms in the market that have such resources.

⁵⁵⁶ <http://ec.europa.eu/competition/cartels/leniency/leniency.html> (accessed on 11-12-2017).

In summary, where businesses engage in conduct or arrangements which they could not predict result in adverse legal consequences, it can set in train a series of adverse effects which are, it is submitted, unfair. In fact, because of these potentially serious adverse consequences, businesses may choose to refrain from engaging in the arrangements on conduct at all, which can lead to adverse consequences of a different kind, as explained in Section 5 6.

5 5 Access to Justice

The lengthy and complex litigation which is frequently involved in competition cases, due to the vague nature of many competition laws, may put immense strain on the judicial system and slow down access to justice for other parties. In the “C7” case referred to in section 5 3 above, some of the other statistics in the case (not just the legal costs) were striking. Excluding the appeal, for example:

- The case lasted for five years, and took up 120 hearing days.
- It involved 85,653 documents comprising 589,392 pages.
- The closing submissions alone amounted to at least 1,556 pages for the Applicant and 2,594 pages for the Respondents.
- Witness statements amounted to 1,613 pages and expert reports 2,041 pages, excluding appendices, calculations, etc.
- The transcript of the trial amounted to 9,530 pages.⁵⁵⁷

Justice Sackville commented that what he called “mega-litigation” of this kind “imposes great burdens on the judicial system and on individual judges unfortunate enough to be allocated such cases”.⁵⁵⁸

⁵⁵⁷ N 542 above paras 4-6.

⁵⁵⁸ Justice Ronald Sackville “Mega-litigation: towards a new approach” (FCA) [2007] *FedJSchol* 13 para 2.

Similarly, in the *Senwes* case in South Africa discussed in Chapter 4, it was seven years between the initiation of the proceedings in 2006 and the ultimate resolution of the case through a consent agreement in 2013.⁵⁵⁹ There were three appeals in-between, albeit largely on issues of process rather than substance.

Also in South Africa, in the *ANSAC* case, it was nine years between the submission of the complaint to the Competition Commission in 1999, and the ultimate settlement agreement between the Commission and the parties in 2008. The Tribunal commented on the case as follows:

“If there ever was a Methuselah of proceedings of the Competition Tribunal, this is it. This application is directly connected to a complaint against American Natural Soda Ash Corporation and CHC Global (Pty) Ltd (ANSAC and CHC Global respectively, but collectively referred to as the applicants) (the complaint) that was referred to the Tribunal by the Competition Commission (the Commission) as far back as 23 March 2000. The Commission decided to withdraw its complaint referral after Anzac had filed an application to request further particulars. The commission filed a fresh referral on 14 April 2000. In fact, the complaint against the applicants is the first ever complaint to be referred to the Tribunal by the Commission. That complaint is still live and a hearing on the merits commenced before another panel of the Tribunal only on 23 July 2008, two days after this application was heard.”⁵⁶⁰

Unless courts’ resources are expanded to deal with the increased workload that such complex competition cases require (with the additional costs to the public that this involves) the risk is that access to justice is slowed down. In other words, whether or not resources are increased, there is harm to the public interest. This is likely to be a particular issue in developing countries where resources are more limited.

⁵⁵⁹ N 505 above.

⁵⁶⁰ *America Natural Soda Ash Corporation v Competition Commission* 49/CR/Apr00 13/08/2008 par 1.

5 6 Deterring Beneficial Conduct

In fact, there are a number of reasons why a business faced with anything other than a “low risk” analysis from its legal advisers may decide not to go ahead with a particular arrangement or conduct, for fear of an adverse ruling by a regulator or court. These reasons include the following:

- The potential costs of becoming involved in protracted regulatory or litigation proceedings (as noted above) are enormous.
- The adverse financial consequences of making a decision that subsequently proves to be wrong are increasing in severity. Regulatory penalties for infringements have increased over time, and are likely to continue to increase. In all of the subject jurisdictions, civil actions for damages are available, either on a standalone basis (as in the EU, Australia, and- for hardcore arrangements- Canada) or on a follow-on basis (as in South Africa and Hong Kong). Competition authorities such as the European Commission are (as noted above) encouraging private actions for damages for breach of the competition rules, including via class actions, since their own resources to enforce the rules are stretched.⁵⁶¹
- The indirect costs of breaching the rules are also increasing, such as reputational damage. This is not just damage to reputation in the eyes of customers or consumers, but also in the eyes of investors and other “market-watchers” including regulators themselves. Pressure has been increasing on companies, especially listed companies, to improve corporate governance, and having a good compliance record and compliance systems in place – for any law, not just competition law – is part of this process. So a perceived failure in those systems can cause substantial reputational damage.
- Competition regulators have actively sought to stigmatise certain types of conduct found to infringe the competition rules, by comparing it to criminal conduct, even when it is not categorised as criminal. This further increases the potential reputational damage arising

⁵⁶¹ “Commission recommends Member States to have collective redress mechanisms in place to ensure effective access to justice” 11 June 2013, available at http://europa.eu/rapid/press-release_IP-13-524_en.htm (accessed on 1-10-2017).

from a finding of infringement. The most notable illustration of this point is in the area of hardcore arrangements such as price-fixing.⁵⁶²

Because of the lack of clarity in the rules, businesses may therefore hold back from engaging in agreements or conduct which would produce benefits that the competition law in question is intended to achieve, such as economic efficiency or consumer welfare (so-called “chilling effects”). In other words, the lack of clarity in competition law is self-defeating. An empirical survey of business attitudes towards compliance and appetites for non-compliance risk is beyond the scope of this thesis, but it can reasonably be surmised that businesses have become more, rather than less, averse to regulatory risk, given the increase in regulatory enforcement activity and sanctions not just in competition law, but also in areas such as anti-bribery and financial services regulation.

In the context of US antitrust law, one author has commented as follows in relation to the “rule of reason”:

“A risk—averse and well-counselled company, having no basis for predicting how much or what sort of analysis a court might someday apply to evaluate the lawfulness of its conduct, will tend to steer clear of conduct that has anti-competitive elements but which a court might or might not find to produce net competitive benefits”.⁵⁶³

Similarly, in the context of Article 102 (formerly 82) of the EU Treaty (on abuse of dominance), one commentary states:

“...our practical experience in counseling firms is that the application of Article 82EC is unclear in material respects. Firms with 40 per cent market shares often unnecessarily worry that they are, or may be, dominant, with the significant consequences that this entails for their commercial practices. The welfare cost of this lack of clarity and excessive

⁵⁶² See Chapter 3 section 3.6.2.

⁵⁶³ Jesse W Markham Jr “Sailing a Sea of Doubt: A Critique of the Rule of Reason in US Antitrust Law” (2012) 17 *Fordham J Corp & Fin L* 591, 621.

caution must be enormous to the EU economy as a whole – something the EU can ill-afford given its lack of competitiveness relative to other international blocs and the stated objectives of the Lisbon Agenda in this regard”.⁵⁶⁴

The problem is particularly acute in the case of unilateral conduct, where the borderline between conduct which is deemed to be efficient and beneficial to consumers (and therefore legal), on the one hand, and conduct which is deemed to be economically harmful and abusive (on the other), is very narrow, and may depend on which side’s economists present the most persuasive case to the adjudicating body.

Take the recent *Intel* judgment of the European Court, for example.⁵⁶⁵ This case concerned a rebate scheme which Intel offered to customers for obtaining all or more of their requirements of semiconductors from it. This was clearly beneficial to Intel’s customers, but the European Court had traditionally held such schemes to be abusive as they made it more difficult for the dominant company’s rivals to compete. When the European Commission assessed the scheme, it applied its “as efficient competitor test”: if the evidence showed that a competitor with the same costs as the dominant company could not profitably compete with it on price because of the scheme, it was an abuse. The Commission found in 2009 that this was the case, and fined Intel the equivalent of USD 1.45 billion (a then record penalty for abuse).

Intel appealed against the decision to the European General Court, presenting economic arguments challenging the Commission’s analysis. The General Court rejected the appeal, taking the view that it did not have to consider these arguments, since previous case law had held that this sort of rebate scheme by its very nature was an abuse.⁵⁶⁶ However, on appeal to the European Court of Justice, the ECJ referred the case back to the General Court, stating that when the applicant raises arguments to challenge the Commission’s economic analysis, the General Court is obliged to consider them.⁵⁶⁷ So it appears that whether Intel’s USD 1.45 billion penalty

⁵⁶⁴ Robert O’Donoghue and A Jorge Padilla *The Law and Economics of Article 82 EC* (2006) xi.

⁵⁶⁵ Section 4 5 1 above.

⁵⁶⁶ Section 4 5 1 above.

⁵⁶⁷ Section 4 5 1 above.

will be annulled will depend on which side's economists and lawyers will prevail before the court.

Faced with the prospect of such a high penalty and the costs and disruption of having to go through a lengthy Commission investigation, followed by at least two sets of court proceedings to challenge it, it would not be surprising if many firms take the view that it is simply not worth offering such rebates to customers. By therefore raising customers' costs, it could be argued that deterring such practices adversely affects efficiency and perhaps ultimately consumers.

5 7 Harm to the Enforceability and Credibility of Competition Laws

As we saw in Chapter 3, in some jurisdictions, such as the US, unclear statutes can be declared void on the basis that they are unconstitutional. It was noted that the US Supreme Court has indeed struck down several US state antitrust (competition) laws on this basis.

In other jurisdictions such as the EU, there have been no successful attempts to persuade courts to strike down competition laws themselves as being unconstitutionally vague. As far as EU competition law is concerned, this is impossible, because the competition law is embodied in the TFEU itself, which has a constitutional status in that all EU Member States must comply with it.

What is a more definite and realistic concern in these jurisdictions is that individual enforcement actions under unclear competition laws can be invalidated because of lack of legal certainty. We discussed above the dilemma which faces businesses in dealing with unclear competition laws: do they take the risk of engaging in conduct that may result in lengthy and costly enforcement and litigation, or do they adopt a low risk strategy and refrain from conduct which may actually be beneficial in economic terms? Both courses of action are costly and wasteful, in different ways. A similar dilemma faces enforcement authorities in deciding whether to prosecute competition cases. Faced with cases where the law is unclear, do they take the risk of prosecuting and being defeated, or do they choose to prosecute only the clearest or most obvious cases? As with the business dilemma, either course of action has potential costs.

Many enforcement authorities may feel pressure to pursue the latter course and only prosecute the clearest and most obvious cases, such as industry-wide price-fixing cartels in which a “whistle-blower” has given the authority full evidence of the facts. This is particularly the case where they are short of resources, and have to prioritise enforcement action rigorously to make what is perceived to be the best use of their resources. Commenting in 2013 on the enforcement record of the Australian and New Zealand competition authorities, Fox and Trebilcock state:

“The agencies’ recent enforcement record suggests that cartels are their first priority- in part because they are viewed as the most egregious infringement of competition law, but likely also because they constitute low-hanging fruit for an agency with limited resources...Both agencies have had mixed experience with monopolization cases...while there have been a number of very high profile monopolization cases, the agencies will assess very carefully the facts of the complaint, the importance of the industry, and the likelihood of achieving either a successful litigation outcome (or at least a valuable precedent) before proceeding with a monopolization case.”⁵⁶⁸

The facts appear to support this emphasis on cartels. According to statistics published by the European Commission, the vast majority of infringement decisions made by national competition authorities in the EU concerned the prohibition of anti-competitive agreements, as opposed to abuse of dominance: 69 per cent versus 24 per cent in 2015.⁵⁶⁹ Although no breakdown of the former category is provided, it is fair to surmise that most if not all of the 69 per cent concerned cartels, for the reasons given above. In addition, the wide availability of leniency (amnesty) programmes for cartels in the EU makes the authorities’ fact-finding task relatively straightforward in many cases. Most cases that the EU Commission itself pursues concern cartels – there are relatively few cases on other types of anti-competitive arrangements or abuse of dominance.

Moreover, enforcement authorities do not like to lose cases: it is bad for their reputation. Outside the clear cases such as the price-fixing example cited above, competition cases can be extremely

⁵⁶⁸ Eleanor M Fox and Michael J Trebilcock *The Design of Competition Law Institutions: Global Norms, Local Choices* (2013) 79.

⁵⁶⁹ <http://ec.europa.eu/competition/ecn/statistics.html> (accessed on 5-10-2017).

complex, lengthy and costly. To pursue such a case then lose, especially if it happens repeatedly, can attract political and public criticism about waste of resources. The greater the uncertainty, the more likely it is that the authority will lose the case. As we have seen in Chapter 4, showing that an agreement harms competition to the requisite degree and that it does not improve total welfare or net consumer welfare are extremely complex exercises in which a lot of subjective assessments are involved. The chances of losing cases which are not clear or obvious are therefore high.

Not only is there the possibility that the enforcement authorities might lose the case on the competition law arguments themselves. They may also lose on the constitutional argument which is the theme of this thesis, namely that the alleged infringement was not sufficiently predictable, i.e. lack of legal certainty. As we saw in Chapter 3, the European Courts have recognised that the ECHR rules on legal certainty apply to EU competition law, and that European Commission competition law infringement decisions can be struck down if they are not sufficiently predictable. There has been at least one case in the EU where a finding of infringement by the European Commission was challenged, in that case unsuccessfully, on the basis that it was not sufficiently predictable, contrary to the ECHR.⁵⁷⁰ We also saw that several challenges have been made to the imposition, or size, of fines on this basis. If the courts are prepared to start applying the ECHR principles on legal clarity more actively, this will further increase the risk of enforcement actions being successfully challenged.

The result is that the more difficult cases may either not be prosecuted at all, or be settled before proceeding to a final decision. But this has a major public interest disadvantage. In either case, this perpetuates the legal uncertainty, as there are few (if any) decisions available in these (already uncertain) areas on which businesses can draw for guidance, leading to large “grey areas” in the law. Although such concepts as “relevant market”, “substantial market power” and “substantial lessening of competition” are largely subjective and case-specific, a larger body of published decisions would at least give businesses a greater “feel” for the approach of the authorities and courts to these issues.

⁵⁷⁰ Case C-194/14P *AC-Treuhand v Commission*, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-194/14%20P> (accessed on 25-6-17).

Whether the enforcement authority decides to take action and loses, or refrains from taking action, the credibility of the enforcement regime and the law is likely to suffer. An authority which loses cases on a regular basis will lose credibility, as will a law which is rarely enforced and has large grey areas.

Another risk to the credibility of a competition regime is that vague laws lead to the risk of inconsistent decisions, and decisions which may be politically influenced, at least in part. A broad law, combined with conduct by a dominant company which attracts major public opprobrium, may make it very difficult for enforcement authorities not to intervene, in circumstances where it would not otherwise be inclined to intervene. But responding to public pressure in this way is a recipe for inconsistency, in turn exposing the enforcement authorities to further criticism.

Finally, vague laws are susceptible to being enforced inconsistently over time, leading to further uncertainty for businesses: note for example, the speculation that typically abounds as to how US antitrust enforcement will change when there is a change in the Administration from Democrat to Republican and vice-versa, or how EU competition law enforcement might change with a change in the identity of the EU Commissioner for Competition.⁵⁷¹

5 8 Conclusions

In this Chapter we have seen that the lack of legal certainty in competition laws has severe adverse consequences. It imposes extra, wasteful costs on businesses and the economy; it creates unfair consequences for businesses; it harms the public (by increasing the burden on the judicial system); and it damages the enforceability and credibility of competition laws themselves. It is submitted that these consequences need to be addressed as a matter of priority, if the credibility of competition law is to be restored, and the economic waste resulting from this uncertainty is to be

⁵⁷¹ See for example “Concerns surface over Trump antitrust picks and policies”, *GCR* 25 January 2017.

avoided. In Chapter 6 we look at why the methods that have been used thus far to address this legal uncertainty have not solved the problem. In Chapter 7 we propose a new way forward.

6 Methods of addressing Legal Uncertainty: why they have not worked

6 1 Introduction

In Chapter 4, we mentioned a number of tools that have been used to reduce the uncertainty in the competition laws of the subject jurisdictions, such as guidelines and lists of examples of anti-competitive arrangements and abuses- and yet concluded that substantial uncertainty still remains. In this Chapter, we analyse in more detail the tools that have been used to increase legal certainty, and to mitigate the effects the lack of uncertainty, to understand why they have been ineffective, and therefore why a new approach is required.

6 2 Methods for increasing clarity in competition laws

6 2 1 Introduction

We demonstrated In Chapter 4 that the lack of clarity in the competition laws of the subject jurisdictions stems from a number of factors, notably the use of vague notions such as the relevant market, substantially lessening competition, net consumer benefit, substantial market power, dominance and abuse. The subject jurisdictions (and others) have used a variety of techniques in an attempt to clarify these concepts. In this section, three methods will be examined in turn: statutory examples, indicative assessment factors (such as market shares and barriers to entry), and guidelines.

6 2 1 Statutory examples

Competition laws commonly contain lists of illustrative statutory examples of agreements and conduct which may infringe the prohibitions. For example:

- Regarding arrangements between businesses, under EU competition law, Article 101(1) TFEU contains a non-exhaustive list of five types of agreement that may have the object or effect of preventing, restricting or distorting competition.
- Regarding abuse of dominant position, the competition laws of the EU, Canada and South Africa all contain non-exhaustive lists of types of conduct that may constitute an abuse.

This technique does not increase clarity in the subject jurisdictions' competition laws to any material extent, for the following reasons:

- The EU list of types of arrangement that might infringe Article 101(1) is drafted in very vague terms. For example, what does “limit or control production, markets, technical development, or investment” mean? The same applies to the list of types of conduct that might constitute an abuse under Article 102. There is a tendency to draft such lists in fairly broad terms to avoid missing agreements or conduct that the enforcer may wish to catch subsequently, even where the lists are non-exhaustive.
- Apart from hardcore arrangements such as price-fixing, market-sharing and output restriction, the types of arrangement listed in Article 101(1) are still subject to the same vague competition test that applies to any other type of arrangement: “prevent, restrict or distort competition”. In addition, the harm to competition still has to be “appreciable” for the prohibition to apply. We discussed in Chapter 4 the vagueness surrounding this concept. Moreover, arrangements which harm competition (even, in principle at least, hardcore arrangements) may still benefit from an exclusion under Article 101(3), the criteria for which are also vague. The vagueness is compounded by the legal uncertainty surrounding the issue of whether, and if so to what extent, the European Courts will follow the Commission’s “more economic” approach to assessing harm to competition, including its “net consumer benefit” test for exclusion. Such an approach would further exacerbate the vagueness, given the subjectivity of the assessments involved.

- Similarly, in Canada and South Africa, if a business with a dominant position engages in one of the acts listed as an “anti-competitive act” or “exclusionary act” (respectively), this is not in itself an abuse. In Canada, it must still be shown that the anti-competitive act causes or is likely to cause SLC: a vague and subjective notion as discussed in Chapter 4. Even if it does, the anti-competitive act may qualify for exclusion on grounds of economic efficiency or superior performance. In South Africa, anti-competitive acts have to be shown, and a similar exclusion may be available for exclusionary acts. The difficulties involved in assessing these matters were discussed in Chapter 4.
- One of the commonly accepted “canons” of statutory construction is the *eiusdem generis* rule.⁵⁷² This means that if a statute gives a non-exhaustive list of examples of generally-worded conduct which the law addresses, the court will try to identify a common link between them in assessing what other types of conduct will be included within the general concept. However, this rule is of no help with the examples of abuse in EU law and “anti-competitive acts” in Canadian law, since these concepts are not defined and the examples have little in common with each other. For example, in the Canadian list, it is difficult to see any common link between withholding scarce resources and facilities from a competitor and margin squeeze. A mere negative effect on a competitor cannot be the common link, because vigorous and legitimate competitive conduct also has that effect, as we discussed in Chapter 2.

6 2 2 Relevant Assessment Factors

Another common method of seeking to make the competition law assessment clearer and more transparent is for the statute to provide lists of relevant assessment factors. These are factors that the authority will take into account in assessing whether, for example, a business has a substantial degree of market power or dominance, or whether there is a substantial lessening of competition.

⁵⁷² Alec Samuels “The *Eiusdem Generis* Rule in Statutory Interpretation” *Statute Law Review* Vol 5 Issue 1 (Oct 1984) 180.

For example, as we noted in Chapter 4,⁵⁷³ the Australian CCA lists a series of relevant factors in assessing whether a business has a substantial degree of market power, and whether (if it does) it had misused that market power.⁵⁷⁴ In each case the list was non-exhaustive. In its *Intel* judgment in 2017, the European Court listed a series of indicative factors in assessing whether a dominant firm's conduct is "capable" of harming competition, as we saw in section 4 5 1 above.

More commonly, relevant assessment factors are listed in guidelines rather than statute or case law. For example, the European Commission's guidelines on abuse of dominance list relevant factors in assessing whether a business has a dominant position in the market, such as market share, the degree of concentration in the market, and barriers to market entry.⁵⁷⁵ We shall look at the role of guidelines below. For now, we shall consider the lists that are commonly found in guidelines.

These lists may provide useful checklists for competition authorities and courts to assess *ex post facto* whether an arrangement or conduct has breached the rules. They may also be helpful to some extent in helping businesses and their advisers to conduct risk assessments as to the likelihood of a proposed arrangement or course of conduct infringing the rules. For example, where all factors point in one direction (including high barriers to entry, high sustained market share and high levels of concentration) it may be concluded that there is likely to be a substantial degree of market power or dominance. But in reality, matters may not be as clear-cut. What if a firm enjoys a very high market share, but there are many other competitors and moderately-high barriers to entry? The problem is that such lists do not and cannot indicate what mixture of factors in which amounts is determinative, especially when the lists themselves are non-exhaustive. Moreover, the chances of a business predicting wrongly what view the authority or court might take are compounded by the following factors:

- It is not just one economic assessment but a number of economic assessments that have to be conducted to determine whether an arrangement or conduct is likely to breach the rules.

⁵⁷³ Sections 4 4 3 and 4 5 2.

⁵⁷⁴ S 46.

⁵⁷⁵ "Guidelines on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" OJ C45/7 of 24.2.2009.

For example, in the case of abuse of dominance, the assessments include what the relevant market is, whether there is dominance or a substantial degree of market power in that market, and whether there is a substantial lessening of competition or foreclosure of competitors.

- There is a large degree of subjectivity involved in making these assessments.
- The assessments may vary over the lifetime of a particular arrangement or course of conduct, and depend on facts that may not be within the knowledge or control of the business or businesses involved.

6 2 3 Guidelines

A third method of seeking to increase clarity in competition laws is by issuing guidelines on how the law would apply to certain real life situations. The guidelines could be either statutory, that is included within the competition law itself, or administrative, that is issued by the competition authority. (Guidelines in practice are not issued by the courts because their role is to interpret the law on a case-by-case basis and not to issue general statements on how it may apply the law in future cases that come before it). Statutory guidelines carry more weight than administrative ones because they are legally-binding, whereas administrative guidelines are not. However, statutory guidelines suffer from the disadvantage that they cannot be readily changed to cater for changes in enforcement policy, academic thinking, or market circumstances: amendments have to be made through the formal legislative process, which is usually cumbersome. Administrative guidelines are therefore the norm.

The EU Commission is particularly keen on issuing guidelines. For example, it has issued guidelines on horizontal agreements,⁵⁷⁶ vertical agreements,⁵⁷⁷ the application of the exemption criteria in Article 101(3) TFEU,⁵⁷⁸ and abuse of dominance.⁵⁷⁹ Similarly, in Australia, the ACCC

⁵⁷⁶ “Guidelines on the Applicability of Article 101 TFEU to horizontal cooperation agreements” OJ C11/1 of 14.1.2011.

⁵⁷⁷ “Guidelines on Vertical Restraints” OJ C130/1 of 19.5.2010.

⁵⁷⁸ “Guidelines on the application of Article 81(3) of the Treaty” OJ C101/97 of 27.4.2004

⁵⁷⁹ “Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” OJ C45/7 of 24.2.2009.

has issued guidelines on cartels, refusals to deal and mergers (amongst others).⁵⁸⁰ In Hong Kong, the substantive (as opposed to procedural) guidelines cover anti-competitive arrangements, abuse of substantial market power and mergers.⁵⁸¹ In South Africa, the Competition Commission issues from time to time “Practitioner Updates” giving guidance on how it approaches the enforcement of the Competition Act in particular areas such as joint ventures and mergers.⁵⁸²

Guidelines tend to fall into two categories: substantive (how the law will apply to particular types of agreement and conduct, often by reference to hypothetical examples of “real life” situations) and procedural (dealing with matters such as how the authority will handle investigations and complaints or applications for clearance of particular agreements and conduct- if such a clearance facility is available- and the authority’s enforcement priorities as to the types of agreement or conduct it will prosecute).

As regards substantive guidelines, there are three main factors that limit their utility:

- they cannot bind the court or other adjudicating body when it applies the law to the facts of a particular case;
- whether an individual agreement or practice is prohibited depends very much on the facts of each case- guidelines are often too general to be of much practical value; and
- the methodology set out in many sets of guidelines is too complex, and the concepts too subjective in their application, to be useful to businesses in planning their arrangements and conduct.

We deal with each of these factors in turn.

⁵⁸⁰ Available at <https://www.accc.gov.au/publications/browse-publications> (accessed on 6-11-2017).

⁵⁸¹ Available at: https://www.compcomm.hk/en/legislation_guidance/guidance/guidance.html (accessed on 6-11-2017).

⁵⁸² Available at <http://www.compcom.co.za/practice-notes/> (accessed on 6-11-2017).

Regarding the first factor, although administrative guidelines cannot bind a court or other adjudicating body, they may still carry some weight. The weight they carry depends on whether a judicial or administrative model of enforcement is chosen. Under the administrative model, the competition authority makes the substantive decision on whether the law has been breached, subject to judicial review (as in the EU), whereas under the judicial model it is a court or tribunal which makes that decision (as in Australia, Canada, South Africa and Hong Kong).

Substantive guidelines by the competition authority under the administrative model are potentially capable of providing more reliable guidance than under the judicial model. This is because, under the administrative model, the competition authority's view on the application of the law to particular cases is less susceptible to successful challenge in, or otherwise being contradicted by, the views of a court or tribunal than under the judicial model. Under the judicial model, on the other hand, because it is the court or tribunal that makes substantive decisions in particular cases, not the competition authority, any substantive guidelines issued by the competition authority are less authoritative.

But even under the administrative model, the EU's experience of guidelines is salutary. The European Court has shown that it is prepared to overrule the Commission's guidelines on judicial review if they do not reflect the Court's case law. For example, in December 2005, the Commission issued a long-awaited paper containing substantive guidelines on the application of the abuse of dominance provision, in response to criticisms that the law on abuse lacked clarity and was not sufficiently reflective of consumer welfare, which the Commission stated was EU competition law's main objective. In her opinion for the European Court in the *British Airways/Virgin* case, Advocate General Kokott pointed out that compliance with the Commission's guidelines could not be used as a defence in the context of assessing whether British Airways' fidelity bonus scheme was abusive:

“... it is immaterial how the Commission intends to define its competition policy with regard to Article 82 for the future. Any reorientation in the application of Article 82 can be of relevance only for future decisions of the Commission, not for the legal assessment of a decision. Moreover, even if its administrative practice were to change, the

Commission would still have to act within the framework prescribed for it by Article 82 EC as interpreted by the Court of Justice”.⁵⁸³

Possibly because of these comments, the Commission amended and re-positioned this document as *procedural* guidance on the Commission’s enforcement priorities in applying Article 82, not *substantive* guidance on how the law would apply to certain factual situations.⁵⁸⁴ We shall look at guidelines on enforcement priorities later in this section.

Regarding the second factor, substantive guidelines by nature are cast in general terms, and while they may provide examples of how the law might apply in certain hypothetical situations, competition cases are very fact-specific. For example, Advocate General Kokott, again in *British Airways*, stated:

“In the area of rebates and bonuses it is particularly clear that, in individual cases, it is difficult to draw the line between legitimate conduct and the prohibited abuse of a dominant market position”.⁵⁸⁵

This means that substantive guidelines will rarely enable parties to predict with confidence the views of the enforcement authority, court or other adjudicating body on a particular factual situation.

As regards the third problem, as we noted in Chapter 4, the tendency now is for competition authorities, at least in Europe, to use increasingly sophisticated methods to assess the economic impact of commercial practices, *ex post*, probably at least in part to minimise the prospects of their decisions being overturned on judicial review (in an administrative system) or to maximise the prospects of bringing a case successfully (in a judicial system). This means that, conversely, the compliance task for businesses is made more complicated, and it is more difficult for them to

⁵⁸³ Opinion delivered on 23 February 2006 in Case C-95/04P *British Airways v Commission* [2007] ECR I-2331 para 28.

⁵⁸⁴ See Section 4.5.1 above.

⁵⁸⁵ N 583 above para 25.

predict whether a given arrangement or course of conduct will infringe the law. The more complicated the economic assessment undertaken by the competition authority, or required by a court or other adjudicating body, the more chance there is of a business making a wrong assessment- or at least one which is different from that made by the competition authorities or courts *ex post facto*. Guidelines often focus on explaining these analytical methods. However, far from assisting businesses to comply with the rules, they tend to emphasise the complexity of the analysis (which in any event is to a large degree subjective, as noted above).

To take an example, for an agreement to qualify for exclusion from the prohibition against anti-competitive agreements under EU law, the Commission guidelines state that the business must quantify the harm to competition, quantify the efficiencies from the agreement, assess how much of those efficiencies will be passed on to consumers and then assess whether that portion of the efficiencies will outweigh the harm to competition.⁵⁸⁶ Clearly this assessment would be difficult enough (and the chances of reaching a different view from the Commission and courts great enough) if those matters were accurately quantifiable (which they are not). However, added to this difficulty is the fact that the Commission has stated that even efficiencies of a qualitative rather than quantitative nature, such as technological advances, are relevant to the assessment. How can one objectively assess whether technological advances are more important than the adverse effects on consumers stemming from a reduction in competition? This is clearly a matter of subjective opinion. The Commission itself has said that where qualitative efficiencies are involved, such as new or better products, a “value judgment” is required.⁵⁸⁷

We turn now to procedural guidelines. One example of procedural guidelines are those in which the enforcement authority (under an administrative enforcement model) gives guidance on the calculation of penalties for infringements, such as those issued by the EU Commission.⁵⁸⁸ These are of limited binding effect. In *Dansk Rorindustrie v Commission*, the European Court held, in respect of the Commission’s guidelines on the calculation of penalties, that “although those

⁵⁸⁶ “Guidelines on the application of Article 81(3) of the Treaty” OJ C101/97 of 27.4.2004 sections 3.2 and 3.4.

⁵⁸⁷ N 586 above para 103.

⁵⁸⁸ “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” OJ C210/2 of 1.9.2006.

measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment”.⁵⁸⁹

As noted above, under both the administrative and judicial models, procedural guidelines could also include guidelines on the types of agreements and conduct which the enforcement authority will choose to prosecute, i.e. its enforcement priorities (as opposed to guidance on what the law means). An example is the EU Commission’s guidelines on abuse of dominant position which we mentioned above.⁵⁹⁰

The utility of such guidelines depends to a large extent on whether the jurisdiction in question allows private actions for damages for breach of competition law, and if so whether only follow-on actions (i.e. actions only after a determination of breach by the authority or court) are allowed, or whether standalone actions (actions which can be brought without a prior finding of breach) are allowed.

If no private actions are allowed, or only “follow-on” actions are allowed (as in Hong Kong), as discussed previously, the fact that the Commission decides not to prosecute a case (whether under the administrative or judicial model) will normally rule out the prospect of the business incurring any liability, either through such a prosecution or in a private action.⁵⁹¹ (However, it should be borne in mind that in South Africa, a complainant can, without necessarily claiming damages, bring a case to the Tribunal to force a decision, even although the Commission chooses not to prosecute).⁵⁹² A business can therefore usually be confident that, if its proposed agreement or conduct would not merit enforcement action under the guidelines, it can proceed with such agreement or conduct without concern about possible enforcement action or any liability for infringement or damages.

⁵⁸⁹ Case C-189/02 P para 209.

⁵⁹⁰ “Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” OJ C45/7 of 24.2.2009.

⁵⁹¹ See Section 5.3 above.

⁵⁹² Competition Act section 51.

However, if standalone actions are allowed (as in the EU), the fact that the Commission chooses not to prosecute a case will not preclude a business from incurring liability, since the court may still find the business liable if a private damages action is brought. Indeed, the EU and the US have put in place incentives for parties to bring private damages claims for competition law violations. In 2014, the EU issued a directive to its Member States requiring them to ensure by 27 December 2016 that they had adequate measures to ensure that private damages actions for breach of EU competition law are available.⁵⁹³ The EU Commission had already, in 2013, recommended that Member States that had not already done so introduce class actions for breach of directly effective EU legal rights, including their right to seek redress in the EU national courts for breach of EU competition law.⁵⁹⁴ And in the US, treble damages awards (damages awards of three times the amount of harm actually suffered) and class actions have been in place for antitrust law violations for many years. Such incentives may benefit victims of competition law violations, but the more competition law cases are pushed to the courts and away from the public enforcement authorities, the greater the legal uncertainty for businesses.

Even where no private actions, or only follow-on actions, are allowed, such guidelines on enforcement priorities are usually not legally binding on the competition authority. Although we saw, in the case of guidance of penalties, that these were to some extent held to be binding on the EU Commission, in the sense that it could not depart from them without giving reasons,⁵⁹⁵ this is not the case with guidelines on how the authority will use its “prosecutorial discretion”. Akman commented in 2016 that the Commission had made “little or no use” of the its Guidelines on enforcement priorities under Article 102 TFEU in the Article 102 decisions it had taken since issuing the guidelines in 2009, half of which were decisions accepting commitments.⁵⁹⁶

⁵⁹³ Directive 2014/104/EU on Antitrust Damages Actions OJ L349/1 of 5.12.2014.

⁵⁹⁴ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under EU law, OJ L201/60 of 26.7.2013.

⁵⁹⁵ N 589 above.

⁵⁹⁶ Pinar Akman “The Reform of the Application of Article 102 TFEU: Mission Accomplished?” *Antitrust LJ* Vol 81 (2016) 146.

Gerardin points out the discrepancy between the “more economic” approach in the guidelines, and the European Court’s traditional, more formalistic (or *per se*) approach and questions whether the Commission will adhere to the former, or in some cases still be tempted to apply the latter: “it remains to be seen to what extent the Commission will apply these principles [in the guidelines] when the case-law of the ECJ provides it with an easy win”.⁵⁹⁷

Gerardin made this statement before the European Court’s judgment in the *Intel* case, in which, as we saw in Chapter 4, the Court appeared to endorse the Commission’s “more economic” approach, and in particular its use of the “as efficient competitor” test in assessing loyalty rebates, at least where the firm under investigation submitted with supporting evidence that the rebate scheme was not capable of excluding “as efficient” competitors. This may make it more difficult for the Commission to look for an “easy win” (even it was tempted to) and to avoid conducting a thorough economic analysis.

Nevertheless, both Gerardin and Akman point to the extensive use of exceptions and qualifications in the guidelines, which limit their usefulness. But perhaps the most important point for the purpose of this thesis is that, as the Commission guidance itself shows, it can still be a very complex task even to work out whether a proposed course of conduct falls within the authority’s enforcement priorities.⁵⁹⁸ Gerardin comments:

“...while the test proposed by the Commission is conceptually correct, and certainly more in line with economics than a *per se* prohibition, such as the one found in the case law, it is very hard to implement in practice and offers very little, if any, guidance to dominant firms wishing to grant rebates to, or asked to grant rebates by, their customers”.⁵⁹⁹

⁵⁹⁷ Damien Gerardin “Is the Guidance Paper on the Commission’s Enforcement Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?”¹⁴. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502 (accessed on 24-11-17).

⁵⁹⁸ See for example the complexity of the analyses contained in the EU Commission’s guidelines- Section 4.3.1 above.

⁵⁹⁹ N 597 above at 10. Further contributions on this issue include Daniel A Crane “Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: a Comparative Perspective” 81 *Antitrust LJ* 209 (2016); Jorge Padilla “Whither Article 102 TFEU: a Comment on Akman and Crane” 81 *Antitrust LJ* 223 (2016); Derek Ridyard The Commission’s Article 82 Guidelines: Some

In conclusion, both substantive and procedural guidelines have been of limited value in increasing the level of certainty in competition law.

6 2 4 Conclusion

In this section 6 2 we have shown that the methods that have been used to introduce greater clarity in competition laws- statutory examples, lists of relevant assessment factors and guidelines- have all failed to solve the problem of the lack of clarity in the laws of the subject jurisdictions.

6 3 Methods for mitigating the effects of lack of clarity

As well as seeking to provide greater clarity in competition laws in the ways described in section 6 2, governments and competition authorities can and have tried to *mitigate the effects* of the lack of clarity on businesses in various ways. Four of them will be examined here, namely presumptions, safe harbours, approvals and notifications, and regulatory forbearance. The first two of these can be termed substantive methods for mitigating the effects of legal certainty, and the second two can be termed procedural methods for doing so.

6 3 1 Presumptions

Presumptions are used quite extensively in competition laws. These are applied at broadly two levels, which can be called Level 1 and Level 2. At Level 1, the presumption applies to a given type of agreement or conduct: it is presumed either legal or illegal. At Level 2, it applies to certain criteria determining legality or illegality. At both levels, the presumptions can be either irrebuttable or rebuttable.

Reflections on the Economic Issues” 30(5) *ECLR* 230 (2009); Martin A Gravengaard and Niels Kjaersgaard “The EU Commission Guidance on Exclusionary Abuse of Dominance- and its Consequences in Practice” 31(7) *ECLR* 285 (2010); and Axel Gutermuth “Article 82 Guidance: a Closer Look at the Analytical Framework and the Paper’s Likely Impact on European Enforcement Practice” *Global Competition Policy* Winter 2009 Vol2 No 1 at 7 (2009).

In the context of US antitrust law, Markham suggested that, at Level 1, in order to achieve greater clarity, the rule of reason be replaced by a set of irrebuttable and rebuttable presumptions, into which particular types of arrangement and conduct would be placed.⁶⁰⁰ He distinguished conduct that is:

- Irrebuttably presumed illegal. This category would include “naked” horizontal restraints on price, output, innovation and market access.
- Rebuttably presumed illegal. He suggested this category should include horizontal restraints in the context of joint ventures, league sports and professional associations.
- Rebuttably presumed legal. This would include, for example, standard setting, patent licensing and collaborative research and development.
- Irrebuttably presumed legal. Following Posner,⁶⁰¹ and consistently with the approach in Singapore, he suggested that vertical restraints could be placed in this category.

US law indeed *irrebuttably* presumes that horizontal “naked” price-fixing and market allocation are illegal. These are called *per se* rules of illegality because these arrangements are illegal merely by virtue of the fact that they have taken place: whether they actually cause harm to competition or produce economic or other public policy benefits is irrelevant. At the other end of the spectrum, there is an *irrebuttable* presumption in Singapore that vertical agreements are legal: this presumption takes the form of an exclusion or “carve-out” of vertical agreements from the competition law, and could be called a *per se* rule of legality for vertical agreements.⁶⁰² So these types of presumption are really no different from rules that determine that certain types of practices are *per se* legal or *per se* illegal, without reference to their effects on competition. We shall look at *per se* rules in more detail in sections 6 5 and 6 6.

It is doubtful whether the *rebuttable* presumptions at Level 1 that Markham put forward improve legal certainty to any material extent.

⁶⁰⁰ “Sailing a Sea of Doubt” 658-660.

⁶⁰¹ Richard A Posner “The Next Step in the Antitrust Treatment of Restricted Distribution: *Per Se* Legality” 48 *U Chi L Rev* 6 (1981).

⁶⁰² Competition Act Third Schedule para 8(2).

As regards Markham's rebuttable presumption of illegality for joint ventures containing horizontal restraints, it is questionable whether this does anything more than shift the burden of undertaking a complex economic assessment from the plaintiff to the defendant. If this is the case, it does nothing to alleviate the legal uncertainties of such an assessment, and actually makes things worse for the defendants since they have to carry this burden. Markham himself seems to suggest that this is the case: "[t]hese restraints are rebuttably presumed to be anticompetitive, *subject to defendants' proffering sufficient, non-pretextual justifications to show net precompetitive effects*". (emphasis added).⁶⁰³ If, on the other hand, it merely means that the defendant has to produce enough evidence to show that the transaction does not involve "naked" restraints justifying *per se* treatment, and should be subject to a rule of reason analysis, this would seem to be no different from the current legal position.

Equally, a rebuttable presumption that research and developments are legal would seem to reflect the normal rule that it is for the plaintiff to prove net anticompetitive effects, and do nothing to improve legal clarity.

Turning to Level 2, under EU competition law, for example, hardcore arrangements such as price-fixing, market-sharing and output-restriction are presumed *irrebuttably* to satisfy one criterion for liability- appreciable harm to competition.⁶⁰⁴ However, a further criterion also has to be satisfied for the arrangement to be illegal: the business must fail to demonstrate that the arrangement qualifies for exclusion under Article 101(3) TFEU.⁶⁰⁵ In South Africa, there is an *irrebuttable* presumption of dominance with a market share of at least 45 per cent, and a *rebuttable* presumption of dominance with a market share of between 35 and up to below 45 per cent.

Where presumptions are *irrebuttable* and operate at Level 2, they may mitigate the effects of the lack of clarity, by narrowing the issues that need to be subject to economic assessment. The extent to which they do so depends on the extent to which they are used. At Level 2, the greater the use that is made of irrebuttable presumptions in respect of criteria within the rule applying to a

⁶⁰³ N 600 above.

⁶⁰⁴ Whish and Bailey *Competition Law* 148.

⁶⁰⁵ See section 4 2 1 above.

particular type of arrangement, the closer the rule approximates to a *per se* one. In competition laws that are primarily aimed at addressing the anti-competitive effects of arrangements and conduct on a case-by-case (as opposed to *per se*) basis, the use that can be made of irrebuttable presumptions at Level 2 must, by definition, be limited. This is because, for arrangements and conduct that are not subject to *per se* rules, either the anti-competitive effects or the countervailing benefits (or both) have to be proved- they cannot be presumed to exist. Bailey argues that “[t]here should be no conclusive [i.e. irrebuttable] substantive or evidential presumptions in EU competition law”.⁶⁰⁶

Moreover, while irrebuttable presumptions, in principle, would seem reduce the scope of uncertainty by reducing the range of matters over which there is room for economic argument and subjectivity, on closer analysis they do so only to a limited extent. For example, even with an irrebuttable presumption of dominance at a certain market share level, there is still room for argument in many cases as to what the relevant market (and therefore market share) is. And as we saw in Chapter 4, the difficulties of determining what constitutes an “excessive” price are notorious.⁶⁰⁷

Rebuttable presumptions, at Level 2 as well as Level 1, serve only to shift the burden of proof from one party to the other. In competition laws, most rebuttable presumptions shift the burden of proof from the competition authority to the defendant. Far from mitigating the effect of the lack of clarity in the law, a rebuttable presumption (as at Level 1) makes matters worse for the firm concerned, by placing the onus on the firm to prove something which cannot be proved objectively (because it is a matter of largely subjective assessment, as we saw in Chapter 4), and failing to carry that burden is one step on the road to liability.

In EU competition law, for instance, there is a rebuttable presumption at Level 2 that a firm with a market share of 50 per cent or more has a dominant position.⁶⁰⁸ In South Africa, a firm is rebuttably presumed to be dominant if it has a market share of 35 per cent to below 45 per cent.

⁶⁰⁶ David Bailey “Presumptions in EU Competition Law” 2010 *ECLR* Issue 9 at 20.

⁶⁰⁷ Section 4 5 4.

⁶⁰⁸ Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 para 60.

The firm would then have to show that it is not dominant.⁶⁰⁹ However, it is unclear what a firm with these market shares would have to demonstrate to rebut the presumption that it has a dominant position. In Europe, the Commission's guidelines set out indicative factors (including barriers to entry and persistently high market share) which can be taken into account in assessing whether there is a dominant position, but (as we saw above) the problem with these lists of indicative factors is that it is unclear what mix of factors in what amounts would be sufficient to rebut the presumption.⁶¹⁰

6 3 2 Safe Harbours

Safe harbours are thresholds, usually expressed in terms of market share or turnover, below which agreements or conduct will be excluded from the scope of the law, or the parties immunised from enforcement action. For example, the Hong Kong Competition Ordinance excludes any arrangement between parties whose combined turnover does not exceed a certain level from the scope of the prohibition against anti-competitive agreements (except for "hardcore" conduct),⁶¹¹ and any business whose turnover does not exceed a certain level from the abuse of dominance provision.⁶¹² The OECD proposed in its model competition law a safe harbour under which a business with a market share of no more than 35 per cent would not be considered dominant.⁶¹³

⁶⁰⁹ For exclusionary acts, in terms of the Competition Act sections 8(c) and 8(d) we saw that an additional exemption is effectively available if the practice has technology, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of the conduct. In terms of 8(d) the firm has to show that these pro-competitive gains exist. This can be described as a rebuttable presumption that the conduct should be prohibited. In terms of 8(c) it is the Commission or other accuser that has to show that there are no such benefits. However, it has been accepted that the firm has an evidentiary burden in these circumstances which comes very close to a rebuttable presumption in favour of the Commission. *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 par 99; Sutherland and Kemp *Competition Law of South Africa* section 7 11 2.

⁶¹⁰ "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" OJ C45/7 of 24.2.2009 paras 12-18.

⁶¹¹ Sch 1 para 5.

⁶¹² Sch 1 para 6.

⁶¹³ OECD "A Framework for the design and implementation of Competition Law and Policy" Nov 1998 142, 143.

Under EU competition law, there is a safe harbour for vertical agreements where neither the supplier nor the purchaser has a market share exceeding 30 per cent, provide the agreement does not contain any “black-listed” provisions, and certain other conditions are satisfied.⁶¹⁴ In addition, the Commission has issued guidelines stating that it will not take action in respect of agreements where the parties’ combined market share does not exceed certain levels.⁶¹⁵ In South Africa, the abuse of dominance provisions do not apply to a firm if its annual turnover in, into or from South Africa is below ZAR 5 million and its assets in South Africa are valued at less than ZAR 5 million. However, as Sutherland and Kemp note, these are very low thresholds and will save only very small firms dominant in very narrow markets.⁶¹⁶

In the US, Crane strongly advocated the use of safe harbours to reduce the scope of arrangements and conduct that were subject to economic assessment (and therefore uncertainty) under US antitrust law:

“The solution, though imperfect, is to use bright-line rules as immunizing devices for broad swathes of industrial behaviour, while preserving a role for standards in determining liability for conduct falling outside of the safe harbours created by the rules”.⁶¹⁷

(By “standards” Crane meant, in his words, “*ex post* multi-factor liability determinants” such as market power, efficiency, and consumer harm/benefit, i.e. precisely the kind of issues that have caused lack of clarity in the competition laws of the subject jurisdictions, as we saw in Chapter 4).

As an example of such a safe harbour, he suggested that a business should not be liable for tying the sale of one product to the sale of another unless it has at least a 50 per cent market share in the “tying” market. In the subject jurisdictions, the concept of “dominant position” or SMP is

⁶¹⁴ Commission Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices OJ L102/1 of 23.4.2010.

⁶¹⁵ Notice on Agreements of Minor Importance OJ C291/1 of 30.8.2014.

⁶¹⁶ *Competition Law of South Africa* 7.6.

⁶¹⁷ Daniel A Crane “Rules versus Standards in Antitrust Adjudication” (2007) 64 *Wash. & Lee L Rev* 49, 84.

effectively a safe harbour for unilateral conduct: a business cannot be liable for unilateral conduct unless it has a dominant position or SMP.

Safe harbours based on turnover give more clarity than those based on market share since they are more objective: they avoid the need to define the relevant market (a largely subjective assessment as we have seen) or to calculate market share. However, both involve the difficulty of deciding on the appropriate level at which the safe harbour should be set. This decision implies an economic assessment as to the level below which perceived competition problems are unlikely, but the decision is, as the OECD has recognised, a somewhat arbitrary one.⁶¹⁸

Whatever level safe harbours are set at, they operate to narrow the scope of the law's application, but do not address the issue of lack of clarity in respect of the large categories of arrangements and conduct that remain within the law's scope.

Related to safe harbours are proposals for *filters or screens* through which arrangements or conduct would have to pass before a full economic assessment is required. The objective again is to narrow the scope of arrangements or conduct that are subject to economic assessment, thereby reducing costs and increasing certainty. In the US context, Easterbrook proposed a series of five sequential filters through which conduct would have to pass before a full rule of reason analysis would be merited.⁶¹⁹ For example, the first two filters were:

- Does the business have market power? If no, that should end the enquiry. If yes:
- Is the conduct capable of enriching the defendant by harming consumers?

But as Crane pointed out these filters “can be every bit as vague as the rule of reason. How does one know whether a firm has market power without defining a relevant market? How does one know whether the defendant's practices are capable of enriching the defendant by harming consumers without analyzing the actual effects of the conduct on prices and output levels?”⁶²⁰

⁶¹⁸ N 613 above.

⁶¹⁹ Frank H Easterbrook “The Limits of Antitrust” (1984) 63 *Tex L Rev* 1, 17-39.

⁶²⁰ N 617 above.

Markovits has also argued that Easterbrook's proposals (and those of others) assume that economic efficiency is the goal of US antitrust law, and that this is incorrect.⁶²¹

More recently, as we noted in Chapter 4, in a European context Ahlborn and Padilla proposed a simpler series of filters to Easterbrook's in determining whether conduct constitutes an abuse of a dominant position under Article 102 TFEU.⁶²² Essentially they suggested just two filters under their so-called "structured rule of reason", which were similar to the two Easterbrook filters mentioned above. However they suffer from similar difficulties as those identified by Crane, such as the vagueness involved in identifying whether the firm has market power.

6 3 3 Approvals and notifications

Turning to procedural methods of mitigating the effects of lack of clarity, the law might provide a facility whereby businesses could, in case of doubt about the legality of a particular arrangement or course of conduct, seek *prior approval* from the competition authority or tribunal before proceeding (assuming an approval decision was legally binding). In that way, provided that the business awaits the decision before proceeding, and does not proceed if the decision is negative, there will be no risk of the business inadvertently breaching, or attracting other adverse consequences under, the law.

There is a distinction here between two types of prior approval. The first type (which is the one we are referring to here) is effectively a decision as to whether or not a proposed agreement or course of conduct harms competition, and if so, whether it benefits from an exclusion. The EU used to have such a facility for agreements, but abandoned it in 2003, as we saw in Chapter 4.

⁶²¹ Richard S Markovits "The Limits to Simplifying the Application of US Antitrust Law" University of Texas School of Law, Law and Economics Research Paper no 177 19 January 2010, 8.

⁶²² Christian Ahlborn and A Jorge Padilla "From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law" 12th Annual Competition Law and Policy Workshop, Florence 8-9 June 2007.

Canada has a facility whereby, on application by the firm “the Commissioner may provide a written opinion for the applicant's guidance”: such an opinion “remains binding for so long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed.”⁶²³

The second type is where the business implicitly or explicitly accepts that the agreement or conduct would breach the law if implemented without approval, but the law provides that an authorisation can be sought from the Commission or Tribunal on certain public interest grounds. The Australian and South African laws contain such provisions.⁶²⁴ In Hong Kong, a firm can apply for a decision from the Commission as to whether an agreement or conduct is excluded from the application of the law “as a result of” one of the statutory exclusions in the law.⁶²⁵ It is not yet clear whether this would enable a firm to obtain a decision that the agreement or conduct did not harm competition at all (and therefore no exclusion was needed).

While both types of approval mitigate the effects of the lack of clarity, by protecting the business from inadvertently breaching an unclear law (and from sustaining many of the consequent adverse effects we discussed in Chapter 5), the first type has a significant advantage over the second type for businesses. Under the first type, the business does not have to concede that the agreement or conduct harms competition and has the opportunity to argue that it does not. This enables a firm to have “two bites at the cherry”: it can present arguments as to why the agreement or conduct does not harm competition at all. But if these arguments are unsuccessful, it can argue in the alternative that it should benefit from an exclusion. Under the second type, however, the firm has already conceded that the arrangement or conduct harms competition by making its application, and accepts that its only “escape route” is to obtain an authorisation on grounds of countervailing public benefit. Businesses would therefore have to consider the risks carefully before applying for an exclusion.

However, the first type still has a number of significant disadvantages:

⁶²³ Competition Act s 124.1.

⁶²⁴ Respectively, CCA s 88, Competition Act s 10.

⁶²⁵ Competition Ordinance ss 9 and 24.

First, when combined with broad prohibitions, difficult economic assessments, and potentially severe sanctions for breach, such a facility is likely to mean in practice that businesses feel that they have to seek advance clearance for many- perhaps even most- transactions (or conduct, in the case of businesses with dominance or SMP). This conflicts with the idea of a free market economy, where regulatory scrutiny and intervention is usually regarded as the exception rather than the norm. More, generally, it is inconsistent with the notion of a free society, in which the principle is that everything is permitted unless it is specifically prohibited, not the other way round.

Secondly, the same uncertainty factor means, conversely, that in practice the authority or Tribunal is likely to be inundated with applications. This in turn means that, for approvals to be given within a commercially realistic timeframe, either more public resources have to be allocated to the task of reviewing the applications, or the administrative costs of this work have to be passed on to the businesses or the public.

Experience with this kind of clearance facility has borne out these problems. As we observed in Chapter 4, the EU abandoned its notification process in 2003 because the large volume of applications meant that its resources were being diverted away from dealing with the most serious cases, such as hardcore cartels. Similarly, the UK competition authority, the Office of Fair Trading (as it then was) also abandoned the process, except for mergers. Hong Kong seems to have tried to anticipate the problem of excessive applications, by providing in the Competition Ordinance that the Commission is not required to give a decision on an exclusion application, except in very limited circumstances.⁶²⁶ Since the facility is not available as of right, its utility is debatable.

A prior approval process is therefore only likely to be practicable if it is restricted to a minority of agreements and practices, for example by excluding vertical agreements (which vastly outnumber horizontal arrangements) from the scope of the competition law, an issue which will be discussed in Chapter 7.

⁶²⁶ Ss 10(2), 24(2).

A third problem is confidentiality. The Commission or Tribunal may not wish to give a decision without consulting third parties such as competitors or customers, but the business or businesses concerned may prefer to keep the arrangements or conduct confidential. In the case of arrangements, parties may take the view that the arrangement may become a matter of public knowledge anyway, and that some loss of confidentiality is a price worth paying for the comfort and security of having official approval. However, with unilateral conduct that might be subject to the abuse provisions, confidentiality is more critical. In engaging in the conduct, the business may be trying to gain a market advantage over its competitors, and this objective could be defeated if its commercial strategy is publicly disclosed. So businesses may be reluctant to use the facility in these circumstances, and be faced with the choice of either taking the risk and proceeding with the conduct, or refraining from embarking on it for fear of breaching the rules, neither of which is satisfactory.

A fourth problem is that, when coupled with a competition law which regulates agreements and conduct based on their economic effects (as the competition laws of the subject jurisdictions to a large extent do), it is an imperfect solution from the public policy perspective. This is because the economic effects of commercial agreements and conduct can vary over time, whereas a decision to authorise an arrangement is based on a “snapshot” of the agreement or conduct at a particular point in time, combined perhaps with an assessment of the likely future effects of the agreement or conduct, which may not prove to be accurate. An authorisation once given cannot be retracted, unless there are conditions allowing the authority to retract the authorisation if the economic circumstances, or the balance between harm to competition and public benefit change. For example, the Hong Kong competition law enables the Commission to rescind its decision that the agreement or conduct is excluded from the prohibition if there has been “a material change of circumstances since the decision was made”.⁶²⁷ But such conditions defeat the legal certainty which the prior approval process is designed to secure.

Admittedly, a system of prior approvals has been commonly-accepted by businesses and authorities worldwide for one category of commercial transaction, namely mergers and

⁶²⁷ Competition Ordinance ss 14(1)(a) and 29(1)(a).

acquisitions. More than 130 countries have competition laws, and the vast majority of those- 110- have some form of merger control, in many cases taking the form of voluntary or compulsory applications for prior approval with suspensory effect (i.e. the deal cannot be implemented unless it is cleared by the authority).⁶²⁸ There are a number of reasons why this type of transaction merits a system of prior approval which do not apply to other agreements and conduct. In particular:

- They can result in lasting harm to competition, particularly in the case of horizontal transactions which involve the loss of a competitor from the market. Authorities typically wish to review these transactions carefully, before they are completed, to assess whether they harm competition, and if so whether there are efficiencies or other public benefits which outweigh the that harm.
- Businesses wish to obtain advance certainty that there is no risk that the authority will challenge the transaction after it is completed and require them to unwind it since this can be a very costly and disruptive process.

A variation on the system for seeking prior approval for proposed arrangements or conduct is the Australian system of notification which applies to private disclosure of price information and exclusive dealing arrangements, as discussed in Chapter 4.⁶²⁹

One advantage of such a notification system is that the parties can get on with implementing the agreement or conduct without having to wait for the authority's approval decision, which might take months to obtain. Another advantage of the notification system in Australia is that it does just give the parties immunity from prosecution by the ACCC: the conduct will also be deemed to comply with the CCA until such time as the immunity is revoked.⁶³⁰ This is important, since

⁶²⁸ Whish & Bailey *Competition Law* 856.

⁶²⁹ Section 4 3 2. The system is explained by the ACCC in its "Guide to Exclusive Dealing Notifications" ("the Guide"), available at: <https://www.accc.gov.au/system/files/Guide%20to%20exclusive%20dealing%20notification.pdf> (accessed on 7-11-2017).

⁶³⁰ For example, s 93(7)(b) states "...the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall not be taken, for the purposes of section 47, to have the purpose, or have or be likely to have the effect, of substantially lessening competition".

otherwise immunity from prosecution by the ACCC would not protect the parties from third party actions under section 82 of the CCA.

Nevertheless, the system still has drawbacks, particularly for exclusive dealing agreements other than third line forcing. Because the former only infringe the CCA if they satisfy the SLC test, the parties may prefer to take their own view on whether this is the case (with the uncertainties involved in that assessment that we discussed in Chapter 4), rather than expose the agreement to the potential attention of the authority (and third parties), and potential adverse action which might not otherwise have happened. This may account for why “[t]he ACCC receives only a few notifications each year involving exclusive dealing conduct other than third line forcing”.⁶³¹

With third line forcing, the notification process is more useful because this type of conduct is a *per se* breach of the CCA, unless notification is made, or an approval on grounds of public benefit is obtained. However, as with other forms of exclusive dealing, there is still a degree of uncertainty as to whether the ACCC will intervene against the conduct, especially if a complaint is made (notifications being a matter of public record), and if so whether the conduct will be permitted on the grounds that the public benefits will be deemed to outweigh the public detriment from the arrangements. So the rule against third line forcing is at most a qualified *per se* one. And in any event this type of conduct- like mergers- is likely to form a relatively small proportion of commercial arrangements as a whole.

6 3 4 Forbearance to Accommodate Uncertainty

Governments and competition authorities can, and sometimes do, try to acknowledge the legal uncertainties businesses face in complying with general prohibitions in competition laws, by treating them leniently in the event that they inadvertently breach the rules (an approach we shall hereafter refer to as “forbearance”). Forbearance, as we shall see, may be written into the law itself, or it may be a matter of the competition authority’s enforcement practice. Following the chronology of a typical competition case, forbearance can take place at four stages:

⁶³¹ The Guide p 17.

- the competition authority decides to initiate enforcement proceedings only where there is a clear and obvious breach which the businesses should have been aware of (“Stage 1”);
- after having initiated enforcement proceedings, the competition authority, in recognition of the lack of clarity, makes a settlement with the business(es) instead of proceeding to a decision (where the administrative model is used) or bringing proceedings to the court or other adjudicating body (where the judicial model is used) (“Stage 2”);
- at the stage of the authority’s decision or the adjudicating body’s judgment, forbearance could be shown by holding that there is no infringement because the law was not sufficiently clear (“Stage 3”);
- assuming an infringement is established, forbearance could be shown by imposing no penalty, or a lower penalty, on grounds of the lack of clarity (“Stage 4”).

Regarding Stage 1, the competition authorities in all of the subject jurisdictions have a discretion to decide which cases to investigate and prosecute, subject to having a sufficient basis for at least suspecting a possible infringement. They could therefore, at least in theory, choose to investigate and pursue only those cases where there is a clear and obvious breach. A major problem with this approach, however, is that what may be clear and obvious to the authority may not be clear and obvious to the business concerned, because of the wider range of information and evidence which is accessible to the authority, and of which the business may be unaware. The business’s lawyers have a similar information deficit, and therefore legal advice is unlikely to solve this problem. It is likely therefore that there will be a consensus on what a clear and obvious breach is only at the extreme. A commitment by the authority only to take action in clear and obvious cases is likely therefore to be of limited assistance to a business in planning its conduct. Businesses cannot be entirely sure that the authority will never prosecute cases that fall within what they see as “grey areas”.

In any event, as we noted in Chapter 5, many businesses wish to avoid breaching the law even if the authority chooses not to prosecute the breach. Moreover, in jurisdictions where standalone private actions are allowed, or follow-on actions can be established without the intervention of the competition authority, a decision by the authority not to prosecute the breach would not preclude

the possibility of the business being sued in a private action. For these reasons, we take issue with one author's argument that "[i]f...a cartel case did indeed arise involving uncertainty as to unlawfulness, any consequent doubt concerning criminal liability could be resolved through the exercise of prosecutorial discretion: one could ensure that only civil or administrative proceedings result".⁶³² This thesis argues that businesses should not be subject to vague competition laws, whether the consequences of breaching those laws are civil or criminal.

Regarding Stage 2, facilities for settlement instead of a formal decision or court proceedings exist in all of the subject jurisdictions' competition laws. In the EU, for example, the Commission can accept a commitment from the business concerned to take certain steps to eliminate the harm to competition as an alternative to proceeding to a formal decision.⁶³³ In Canada and South Africa, the competition authority can enter into a consent agreement with the business or businesses concerned, whereby they agree to take certain steps to rectify the harm to competition, instead of the case going through full proceedings and a judgment (in both jurisdictions, adjudicatory bodies have to endorse the consent agreement, and it is illegal to breach the terms of the consent agreement).⁶³⁴

Of all the subject jurisdictions, Hong Kong has perhaps the most sophisticated settlement system, in terms of the range of options available. First, the Competition Commission may accept a commitment from a person to take action, or refrain from taking action, to address concerns about a possible infringement.⁶³⁵ Secondly, for hardcore infringements and abuse of dominance, it may issue an infringement notice offering not to bring proceedings in the Tribunal, provided that the business or businesses commits to taking specific steps to rectify the alleged infringement.⁶³⁶ Thirdly, for non-hardcore arrangements, it *must* issue a warning notice requiring the business to

⁶³² Peter Whelan "Legal Certainty and Cartel Criminalisation within the EU Member States" (2012) 71 *The Cambridge Law Journal* 677, 686.

⁶³³ Article 9 of Regulation 1/2003 OJ L1/1 of 4.1.2003.

⁶³⁴ Sections 4 2 3 and 4 2 4 above.

⁶³⁵ Competition Ordinance ss 60-65.

⁶³⁶ Competition Ordinance ss 67-76.

take certain steps to rectify the alleged infringement within a certain period: if the business complies with the notice the Commission cannot bring proceedings before the Tribunal.⁶³⁷

Whereas in the EU, Canada and South Africa it is up to the discretion of the enforcement authority whether to enter a settlement, in Hong Kong the Commission (as noted above) has no discretion when it comes to issuing warning notices for non-hardcore arrangements: it must give the business(es) the opportunity to rectify the breach, and thereby avoid Tribunal proceedings and a possible penalty.⁶³⁸ Non-hardcore arrangements is precisely the area (along with abuse of dominance) where there is the greatest lack of clarity in competition law. In fact, the concept of the warning notice was introduced during the passage of the Bill through the legislative process, expressly to allay businesses' concerns that they might otherwise be prosecuted for infringements of which they were not aware, due to the vagueness of the prohibition. The Government stated:

“The proposed warning notice would enable the Commission to take swift action to halt non-hardcore activities while at the same time address the concern that businesses, particularly SMEs, might unknowingly engage in non-hardcore activities.”⁶³⁹

As we shall see later in this section, South Africa's competition law also treats inadvertent breaches more leniently. But the difference is that, whereas in Hong Kong the inadvertent breach (for arrangements as opposed to abuse) would escape any finding of liability, in South Africa the leniency does not exonerate the business from a finding of infringement, only from the imposition of a penalty. Nevertheless, in Hong Kong, a prior warning notice is not available for abuse of dominance, which as discussed in Chapter 4 is an area of major uncertainty.

To what extent would forbearance at Stages 1 and 2 mitigate the adverse effects of lack of clarity identified in Chapter 5?

⁶³⁷ Competition Ordinance s 82(1).

⁶³⁸ Competition Ordinance s 82.

⁶³⁹ CB (1) 91/11-12 (01) available at <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121025cb1-91-1-e.pdf> (accessed on 7-11-2017).

As noted in Chapter 5, one of the major problems of lack of clarity is the cost and disruption caused by lengthy and complex investigations and litigation. Forbearance at Stages 1 and 2 would mitigate these effects by pre-empting and avoiding such investigations and litigation *by the authority* (less so in the case of Stage 2 as the investigation would already have started). A consequential effect of the lengthy and complex investigations due to lack of clarity is the slowing down of access to justice or increasing demand on public resources, so forbearance at Stages 1 and 2 also mitigates these effects. By reducing the pressure on the judicial system it would have the effect of improving overall access to justice and saving public resources.

The extent of mitigation of these effects would be less in the EU because it permits, and even encourages, standalone private actions. So even if the authority decides not to investigate, or offers to settle, this would not preclude the possibility of private actions being brought. Even where only “follow-on” actions are allowed, the degree of protection from private claims which settlement at Stage 2 provides depends on the precise trigger point for private rights of action to arise: is it only a judgment of the adjudicating body, or could it be an earlier event? In Canada, outside the area of criminalised hardcore arrangements, an action can only be brought if an order by the Tribunal (including one endorsing a consent agreement) is breached.⁶⁴⁰ So entering into a consent agreement should protect the business from any private damages actions, provided that the business complies with its terms. In South Africa, the court can include an award of damages in an order endorsing a consent agreement. If it does so, that will protect the business from any subsequent claim for damages.⁶⁴¹ If it does not do so, the complainant can bring a private action for damages following a Tribunal judgment finding an infringement.⁶⁴² In Hong Kong, a private action can be brought not only following a Tribunal judgment, but also following an admission of liability contained in commitments given following the issue of an infringement notice in respect of hardcore arrangements (an admission of liability being a legal condition of such commitments being accepted).⁶⁴³

⁶⁴⁰ Competition Act s 36.

⁶⁴¹ Competition Act s 49D(4)(b). See *Premier Foods v Manoim NO* (20147/2014) [2015] ZASCA 159 (4 November 2015) par 11.

⁶⁴² Competition Act s 65(6)(b).

⁶⁴³ Competition Ordinance s 67(3)(b).

Forbearance at Stage 1 would avoid damage to reputation arising from inadvertent breaches of unclear laws- one of the elements of unfairness that results from unclear laws- since such breaches would not become a matter of public knowledge. However, this would not necessarily be the case at Stage 2. First, news that an investigation has been opened can leak, and if it does, the ensuing damage to reputation can be costly.⁶⁴⁴ Secondly, settlements are normally published, and there can be a human tendency to suspect that there was wrongdoing, even if the matter does not proceed to a formal decision or judgment. This is especially the case where the authority will agree to a settlement only if the business admits guilt. This appears to be the usual practice in South Africa, although the law does not require it. Moreover, it also appears to be the usual practice for the business to agree to pay an administrative penalty as a condition of reaching a settlement.⁶⁴⁵ In South Africa, therefore, settlements, as well as Tribunal judgments following full proceedings, can cause substantial reputational damage. In the other subject jurisdictions, no admission of guilt is required (except in the case of hardcore arrangements in Hong Kong which the businesses take steps to stop), enabling the business to publish its own media statement emphasising the fact that no infringement has been found or admitted.

One of the elements of unfairness arising from the lack of clarity that we identified in Chapter 5 was “inequality of arms”: the fact that a business can be found guilty of an infringement on the basis of facts to which it has no knowledge and cannot access.⁶⁴⁶ While this element of unfairness is not an issue at Stage 1, because no investigation has been opened, it could be an issue at Stage 2. Through an informal settlement, the competition authority can obtain a “quick win”, on the basis of facts that may be unknown to the business concerned, without having to go all the way through a protracted investigation and litigation. Even if the business has a good defence, it may feel pressurised into settling quickly to avoid the cost, disruption, and greater reputational risk involved in formal proceedings and a possible adverse decision or judgment. This is arguably unfair.

⁶⁴⁴ Section 5 4.

⁶⁴⁵ Magalie Masamba “Competition law consent agreements: the pros and cons of a quick settlement” 9 Oct 2012 available at <http://www.bowmanslaw.com/insights/competition-law-consent-agreements/> (accessed on 7-11-2017).

⁶⁴⁶ Section 5 4.

In terms of deterring (or “chilling”) beneficial arrangements and conduct- one of the other major adverse effects of unclear laws- whether this is an issue at Stage 1 depends, firstly, on how confident the business is that the authority will only investigate and prosecute what the business sees as clear and obvious breaches. We explained above that the authority’s view of what is clear and obvious may differ from that of the business concerned. Secondly, even if the views of the business and the authority were to coincide on this point, if the jurisdiction in question permits standalone private actions, or follow-on actions can be established without the intervention of the competition authority, the business cannot be sure that a court or other adjudicating body will not find an infringement. As noted in Chapter 5, a court sees it as its role to make a decision on whether there is liability or not. It is therefore unlikely that a court would refrain from finding liability just because the law as applied to the facts in question is unclear. The possibility of private actions may still cause a business to “pull its competitive punches” where the application of the law is unclear. Whether this is the case may depend on how likely it is in practice that such actions would be brought (depending on the “litigation culture” in the jurisdiction concerned, businesses may not pursue standalone actions even if they are allowed) and on the business’s own appetite for defending litigation.

Forbearance at Stage 2, on the other hand, may not prevent chilling effects for risk-averse firms that do not wish to take the risk of being subject to investigations and potential reputational damage. This is especially so where the authority has only a discretion, not an obligation, to enter into informal settlements- which is the case in all of the subject jurisdictions, apart from Hong Kong in the case of non- hardcore arrangements.

As regards the other adverse effects of lack of clarity that we identified in Chapter 5, forbearance at neither Stage 1 nor Stage 2 mitigates these effects:

- It does not reduce the high costs of compliance.
- It does not reduce the greater scope for strategic use of complaints and litigation, and the costs of dealing with them.
- In jurisdictions that allow standalone actions, or where follow-on actions can be established without the intervention of the competition authority, it does not remove the prospect of a

court finding an infringement in respect of an arrangement or conduct that the business could not reasonably predict, even with legal advice, was illegal.

- It does not serve to clarify the law, and therefore perpetuates the lack of clarity in competition law. It is only by prosecuting the less obvious cases to the stage of a final decision or judgment that the authority or court (respectively) has an opportunity to provide greater clarity in the application of the law. One commentator states in the EU context: “[p]erhaps the strongest criticism levied against the Commission's practice of adopting commitment decisions is that they fail to sufficiently elucidate the law in novel and complex competition cases. This is due to the lack of a formal finding of infringement in commitment decisions coupled with the fact that they provide limited opportunity for the solution adopted to be challenged before the General Court and the Court of Justice. While a commitment decision may offer ‘legal comfort’ to its addressee and rapidly restore competition in a given instance, it may provide less clarity and thus legal certainty for other actors than infringement decisions, which provide a more effective legal road map”.⁶⁴⁷

Another commentator argues that there is “a vicious circle in that the less clarity there is in one particular area, the more likely commitments will be to all sides involved, leading to an even greater lack of guidance and clarity in that area”.⁶⁴⁸ In Canada and South Africa, consent agreements typically do not contain anything more than a superficial legal or economic analysis.

Assuming that the case proceeds to Stage 3- a decision whether or not an infringement has been committed- forbearance could be exercised by finding no infringement, on the grounds that the law is insufficiently clear. In Canada, such forbearance is embodied in the competition law itself when it comes to as non-hardcore arrangements. As we saw in Chapter 4, it is not illegal to engage in such an arrangement which causes SLC and has no countervailing efficiency justification. The most that can happen is that the Tribunal makes an order requiring the parties to alter or terminate their agreement to eliminate the SLC. (It is illegal to breach the terms of such an order). Although

⁶⁴⁷ Melchior Wathelet “Commitment Decisions and the Paucity of Precedent” *Journal of European Competition Law and Practice* Vol 6 Issue 8 (Oct 2015) 553.

⁶⁴⁸ Pinar Akman “The Reform of the Application of Article 102 TFEU: Mission Accomplished?” 81 *Antitrust LJ* 145 (2016).

the decision to treat non-hardcore arrangements in this way was expressly rationalised on the basis that such arrangements often have efficiencies which outweigh the harm to competition, it could equally have been justified on the grounds of lack of clarity: it is not appropriate to prohibit arrangements on the basis of such an economic assessment, which the parties are not in a position to make when they enter into the arrangement. In the other subject jurisdictions, there is no such leniency: the authority or the court at Stage 3 will see it as its role to decide whether or not there is an infringement, irrespective of whether the application of the law to the arrangement or conduct was unclear. For example, in the one EU case where a business has challenged the finding of an infringement under Article 7 ECHR on the grounds of *nulla crimen sine lege*, the European Court rejected the challenge, holding that the business, with legal advice, should have reasonably foreseen that its conduct (acting as a facilitator for a price-fixing cartel) would constitute an infringement⁶⁴⁹

Forbearance at Stage 3 would limit the reputational damage and unfairness arising from being found guilty of a competition law infringement, and being subject to penalties for arrangements or conduct that the business could not reasonably have predicted was illegal. We noted in Chapter 3 that the Canadian model in respect of non-hardcore arrangements would be unlikely to be classified as a criminal offence were the ECtHR's criteria to be applied, with the more stringent requirements of legal clarity that such classification would entail. However, being involved in a competition authority investigation, even if it cannot lead to a finding of illegality, might still adversely affect reputation. Investigations can be kept confidential while they are being carried out, but will be revealed once the consent agreement or Tribunal proceedings become publicly known. Nor is forbearance at Stage 3 likely to mitigate any of the other adverse effects of lack of clarity to any great extent. First, a Canadian business might still feel obliged to incur the costs of legal advice on the prospect of the authority issuing a cease-and-desist order against an arrangement or conduct, even if it is not illegal. Secondly, it may be deterred from engaging in the arrangement or conduct if the legal advice is not sufficiently robust. (An empirical study on whether the Canadian regime for non-hardcore arrangements means that Canadian businesses are less "risk-averse" in these two respects than their counterparts in other jurisdictions would be

⁶⁴⁹ Section 3.6.5 above.

useful, but is outside the scope of this thesis). Thirdly, it may still have incurred costs in investing in a particular business, which it cannot recover if it is later prevented from continuing with it. As for the other adverse effects of lack of certainty, the potentially heavy costs of the litigation required to get to Stage 3 would not be mitigated, with the implications for access to justice that this entails.

Finally, at Stage 4, assuming a finding of infringement has been made, forbearance could be shown in whether sanctions should be imposed, and if so how severe they should be.

In Canada and South Africa, such forbearance has been formalised in the competition laws themselves. In Canada, outside the expressly-criminalised hardcore category of arrangements, no penalty can be imposed for entering into or implementing an arrangement which causes SLC and does not qualify for the efficiency exclusion. Nor (as noted above) does a business act illegally by doing so. Since the assessment of non-hardcore arrangements involves a much greater lack of clarity than the assessment of hardcore arrangements, treating them more leniently in this way could be seen as a fair reflection of this lack of clarity. However, the same does not apply to abuse of dominance, which also involves a great lack of clarity, and yet the Tribunal can still impose an administrative penalty.⁶⁵⁰ In South Africa, forbearance is demonstrated by the fact that, for arrangements and exclusionary acts which are not specifically identified in the Competition Act, a penalty can only be imposed if the arrangement or conduct is a repeat of conduct that has previously been declared to be an infringement, thereby recognising that a “first offender” may have committed the breach inadvertently due to lack of legal certainty.⁶⁵¹

Outside of these areas in Canada and South Africa, and in the subject jurisdictions where such mechanisms are not included in the competition laws themselves, that is, the EU, Hong Kong and Australia, the competition authority or adjudicating body could still take account of the lack of clarity in the law by deciding that no penalty should be imposed, or by imposing a lower penalty than would otherwise be imposed. However, the EU Commission has rarely regarded lack of clarity in the law as justifying a lower penalty, or no penalty at all. An exception occurred in 2001,

⁶⁵⁰ S 79(3.1-3.3).

⁶⁵¹ S 59.

when the Commission issued a decision finding that a firm had abused its dominant position, but decided not to impose a fine on the following basis:

“The Commission recognises that DSD could not easily assess, on the basis of previous decisions of the Commission or the European Court of Justice, the compatibility of its behaviour with the competition rules of the Treaty. Following the clarifications given in this decision, the Commission will not hesitate in the future to bring proceedings in similar cases and, insofar as necessary, to impose fines.”⁶⁵²

The Commission’s guidelines on the methodology for setting penalties for infringements make no mention of lack of legal clarity as a factor justifying a lower penalty, or no penalty at all.⁶⁵³ This reticence in showing forbearance on grounds of lack of clarity is perhaps understandable, given the European Court’s acceptance that the Article 7 ECHR principles on legal clarity apply to competition law. A decision by the Commission that no penalty should be imposed for an infringement on grounds of lack of clarity might call into question whether any finding of infringement at all was justified under Article 7, and invite legal challenge on that basis. Similarly, a decision that lack of clarity justified a lower penalty might call into question not only the finding of infringement, but also the imposition of any penalty.

In its appeal against the EU Commission’s decision that it had abused its dominant position by favouring its own comparative shopping service, it is reported that Google has argued that the penalty of 2.42 billion euros was not warranted *inter alia* “because the Commission advanced a novel theory” as a basis for liability.⁶⁵⁴ It remains to be seen whether the European General Court will be sympathetic to this argument.

⁶⁵² See Commission Press Release IP/01/584 of 20 April 2001 “Commission acts against Duales System Deutschland AG (Green Dot) for the abuse of a dominant position”.

⁶⁵³ “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” OJ C210/2 of 1.9.2006.

⁶⁵⁴ OJ C 369/37 of 30.10.2017.

If forbearance on grounds of lack of clarity was to be exercised at Stage 4, in the form of a finding of no penalty, or a lower penalty, it might help to mitigate to some extent the reputational damage a business may suffer from being involved in an investigation and held to have committed a breach of competition law. The degree to which it would do so would probably be highest if no penalty was imposed at all, and lowest if only a very small reduction in the penalty was made. But forbearance at Stage 4 would not mitigate any of the other adverse effects of lack of clarity identified in Chapter 5.

6 4 Conclusion

In conclusion, this Chapter has explained why:

- none of the methods for improving clarity in competition laws that we have examined- statutory examples, relevant assessment factors and guidelines, have proved effective in doing so: and
- none of the methods for mitigating the adverse effects of lack of clarity in competition laws that we have examined- presumptions, safe harbours and filters, prior approvals and regulatory forbearance- have done so to any material extent, and each of them are subject to drawbacks.

This is not to say that one or more of these methods might be a useful supplement to a competition law that *itself* provides greater legal certainty. What we have argued is that they have not been successful in providing greater legal certainty under the general prohibition approach which permeates most of our current competition laws. Chapter 7 describes a proposed way forward.

7 A Way Forward

7 1 Introduction

Since none of the existing tools we examined in Chapter 6 have adequately resolved the problem of legal uncertainty in competition laws, a different approach is required. This assumes that we need competition laws at all: clearly the ultimate solution to the problem of legal uncertainty in competition laws would be to abolish them. We start by explaining why this is generally not a realistic option.

Having concluded that competition laws addressing business arrangements and conduct are here to stay for the foreseeable future, we then look at whether the need to engage in economic assessments (relevant market, substantial lessening of competition, substantial market power etc.)- i.e. the primary cause of the legal uncertainty that we identified in Chapter 4- can be removed, or at least substantially reduced.

As regards agreements, we consider first the possibility of whether there are any categories of agreement which could be excluded from the scope of competition laws completely, thereby reducing the volume of agreements in respect of which any economic assessment is needed. In particular, we look at the possibility of removing vertical agreements from the scope of the prohibition on anti-competitive agreements. (Although the EU has a “block exemption” for vertical agreements, this approach has major limitations, as we shall see). Given that vertical agreements vastly outnumber horizontal agreements in the market place, a “carve-out” of vertical agreements from the competition laws that currently apply to them would drastically reduce the number of agreements that would need to be subject to any kind of economic assessment, and thereby greatly reduce the compliance burden on businesses.

We then look at how legal certainty can be improved with respect to horizontal agreements, including the possibility of introducing or extending the use of *per se* prohibitions for particular types of commercial arrangements, i.e. rules that prohibit specific types of arrangements, regardless of their economic effects. In principle, *per se* prohibitions should again remove the need for economic assessments.

To the extent that an exclusion of vertical arrangements and *per se* rules for certain horizontal agreements (assuming both were feasible) would not cover all types of arrangements, we then look

at how legal certainty could be increased for the other types. Finally, we look at whether, and if so how, the uncertainties in addressing abuse of dominance or substantial market power can be resolved.

7 2 Do we need Competition Laws?

In general, new laws are adopted to remedy or prevent harm to society that would result from their absence. In the case of competition laws, their “raison d’être” is that, in their absence, businesses would have the ability and incentive to harm the competitive process, thereby defeating one or more objectives that are intended to be achieved through this process, such as economic efficiency or consumer welfare. But is it the case in every jurisdiction that businesses have this ability and incentive? There are many cases which show that this ability and incentive still exists.

Many hardcore arrangements such as price-fixing have occurred, even until recently, in spite of ever-higher penalties designed to deter them, suggesting a strong incentive to subvert the competitive process through collusion.⁶⁵⁵ There is a wide consensus that “naked” price-fixing (i.e. price-fixing which is designed only to maintain or increase profits) and other hardcore arrangements such as output restriction (to increase price) and bid-rigging should be prohibited because they have no economic value to justify the economic harm they cause. For example, the International Competition Network (ICN), a network of competition authorities across the world, has a working group on cartels, the mission statement of which says:

“The mandate of the Cartel Working Group is to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct. At the heart of antitrust enforcement is the battle against hard core cartels directed at price-fixing, bid-rigging, market-allocation and output-restriction”⁶⁵⁶

⁶⁵⁵ See for example the EU Commission’s decision of 27 September 2017 to impose a fine of 880 million euros on the truck producer Scania for participating in a price-fixing cartel with other truck producers for 14 years: Commission Statement 17/3509.

⁶⁵⁶ <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx> (accessed on 8-11-2017).

It may be the case that in some jurisdictions, there are fewer industries that are prone to collusion than others, because the economic conditions for effective cartelisation (homogeneous products or services, few suppliers, high barriers to entry) may not be present. But even in these jurisdictions, trade and professional associations can, and have, set uniform prices and other conditions for their members to adopt, thereby restricting competition between them. The early cases in some smaller jurisdictions such as Singapore, Jersey and Hong Kong, have concerned precisely these sorts of practices.⁶⁵⁷ If there is to be a law to prevent these practices which is to be accepted as fair, it cannot be selective as to the industries to which it applies.

Moreover, even if it could be established that a jurisdiction's own *internal* economic circumstances did not necessitate a competition law, there are strong *international* pressures to adopt one:

- It is a standard practice in free trade agreements (“FTAs”) between governments not only to provide for the elimination of trade barriers, but also to agree to adopt or maintain competition laws. A 2015 study of a sample of 216 FTAs on the database of the World Trade Organisation (WTO) found that 88 per cent of them addressed competition issues (up from 60 per cent in 1990) and that 37 per cent of them included provisions requiring the contracting parties to adopt, maintain or apply regulatory measures against anti-competitive conduct.⁶⁵⁸ The EU, as the world's largest trading bloc, has been instrumental in “exporting” competition law to other countries wishing to do free trade deals with it. A condition of the typical free trade agreement requires that each party has rules in place to deal, *inter alia*, with anti-competitive agreements and abuses of dominance. For example, the free trade agreement between the EU and Vietnam signed in 2016 contains the following provision:

⁶⁵⁷ See the websites of the relevant competition authorities: (respectively) www.ccs.gov.sg; www.cicra.gg; www.compcomm.hk (accessed on 8-11-2017).

⁶⁵⁸ Francois Charles Laprevote, Sven Frisch and Burcu Can “Competition Policy within the Context of Free Trade Agreements” E15 Expert Group on Competition Policy and the Trade System September 2015.

“(1) The Parties shall adopt or maintain comprehensive competition legislation that proscribes anticompetitive conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

(2) The respective competition laws shall effectively address in their respective territories:

a) agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

b) abuses by one or more enterprises of a dominant position, and

c) concentrations between enterprises which would significantly impede effective competition.”⁶⁵⁹

- In addition, even without such pressures, a country which depends on, or wants to attract, inbound investment from overseas businesses (commonly referred to as “foreign direct investment” or “FDI”) may wish to re-assure potential investors that they will be able to compete “on a level playing field” with local businesses through the existence and enforcement of a competition law. There is empirical evidence to suggest a positive correlation between competition law and its enforcement, on the one hand, and the level of FDI on the other.⁶⁶⁰
- Regional economic groupings of countries often agree on, or seek to encourage the introduction of, competition laws. The EU is one obvious example. Another is the Association of South East Asian Nations (ASEAN), comprising ten countries in the region which “have committed to introduce national competition law by 2015”.⁶⁶¹ As part of this initiative, for example, the Philippines’ new competition law took effect in July 2015, and Myanmar’s in February 2017.

⁶⁵⁹ Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (accessed on 8-11-2017).

⁶⁶⁰ Julian L Clarke “Competition Policy and Foreign Direct Investment” World Trade Institute 2003, available at <http://www.etsg.org/ETSG2003/papers/clarke.pdf> (accessed on 8-11-2017).

⁶⁶¹ See www.asean-competition.org/aegc (accessed on 9-11-2017).

- Related to the last point, peer pressure through organisations like the World Trade Organisation and Organisation for Economic Cooperation and Development, which regard having a competition law as international best practice, encourages member countries to have them, and to have regular discussions about issues of competition law and policy. For example, Gerber states that in the case of China, “foreign institutional pressure...was applied not only to encourage China to enact a competition law, but also to influence decisions regarding its contents.” He specifically mentions the WTO and OECD in this context.⁶⁶²
- Moreover, there is a general perception that introducing competition law merely reflects the international norm, and that this in itself is sufficient justification. Hence, the introduction of such a law represents the desire not to be an international “pariah”, and to be fashionable. The establishment of competition law as an international norm has been facilitated not only by the influence of FTAs and the efforts of bodies such as the WTO and OECD (as described above) but also by the creation of the ICN. In April 2016 it was reported that the ICN had a membership of 132 competition authorities from 120 jurisdictions.⁶⁶³ There are estimated to be approximately 194 countries in the world,⁶⁶⁴ (i.e. 62 per cent of countries have competition laws). This represents considerable peer pressure, particularly amongst so-called developed countries where competition laws are virtually ubiquitous. It is likely effectively to place a burden on a country to justify internationally why it does not need a competition law: it is a much easier task diplomatically to simply “join the club”.

Taking all of the factors discussed in this section into account, it is submitted that most jurisdictions would conclude that they should have a competition law which as a minimum contains (a) provisions for preventing or acting against anti-competitive agreements between businesses, especially hardcore arrangements and (b) provisions for preventing or acting against unilateral conduct by businesses with substantial market power or dominance. This is the case, it is

⁶⁶² *Global Competition* 232.

⁶⁶³ See “International Competition Network Marks its Fifteenth Annual Conference promoting International Convergence and Cooperation” 29 April 2016 available at <https://www.ftc.gov/news-events/press-releases/2016/04/international-competition-network-marks-its-fifteenth-annual> (accessed on 9-11-2017).

⁶⁶⁴ <http://www.worldatlas.com/nations.htm> (accessed on 9-11-2017).

submitted, whether the main benefit they see from the law is economic efficiency, consumer welfare, and/or other public interest benefits.

7 3 Are Vague Competition Law Prohibitions Inevitable?

We have seen in Chapter 4 that the current system of intervention under competition laws, which involves to a large extent prohibitions based on economic assessments, does not provide sufficient legal certainty for the businesses that have to comply with them. We have also seen in Chapter 6 why the various methods which have so far been used to provide greater certainty under such prohibitions, or mitigate the effects of the lack of it, have been unsuccessful. The question now is whether competition laws can be designed in a way which provides sufficient legal certainty.

Previous literature has acknowledged the uncertainty in competition laws, but appears to assume that uncertainty is inherent in the design and drafting of competition laws, and that the challenge is to make their *application and enforcement* (by courts and enforcement authorities) clearer and more predictable. For example, Stucke has argued that US antitrust law's "rule of reason" not only contravenes the rule of law's principle of clarity,⁶⁶⁵ but that it is inherently susceptible to the pursuit of multiple conflicting objectives (presumably because of this lack of clarity).⁶⁶⁶ He suggests that instead of choosing a single objective at the expense of others, antitrust should adopt a "blended goal" approach. By this approach he appears to mean prohibiting (or at least prioritising enforcement action against) arrangements or conduct that is contrary to all of the various possible objectives. This, he argues, should be combined with clearly- defined "rules". He stops short of suggesting what these rules might be. He does not question whether the underlying statute (the Sherman Act) could be amended to provide greater legal certainty. This would be virtually inconceivable in any event, given that the Sherman Act has remained unchanged since its adoption in 1898, and its interpretation and application have been shaped by the US courts' case law. So,

⁶⁶⁵ Maurice E Stucke "Does the Rule of Reason Violate the Rule of Law?" *UC Davis L Rev* Vol 42 No 5 (June 2009) 1375.

⁶⁶⁶ "Reconsidering Antitrust's Goals" *BCLR* Vol 53 No 2 (2012) 551.

by “rules” he presumably means the approaches the courts should adopt in future, in their application of the Sherman Act through the case law.

Ezrachi also appears to assume that uncertainty is inherent in competition law itself, in part because of the economic analysis that is involved. He uses two metaphors in describing competition laws: “sponge” and “membrane”.⁶⁶⁷ Competition law is like a sponge, he argues, because of its “susceptibility [i.e. porousness] to national peculiarities originating in its design and evident in its application, and its exposure to intellectual and regulatory capture”. Although economic analysis has been welded as a membrane onto the sponge in an effort to achieve greater certainty and consistency across jurisdictions, the certainty created by the membrane is illusory because the national peculiarities will continue to influence practical outcomes, and economic analysis in itself is imprecise. He concludes:

“The key to effective competition law enforcement is not in the pretence of purity [from economic analysis], but in the understanding of the interface between the ‘sponge’, ‘membrane’ and the domestic environment, and in *a credible move to enhance its transparency, limit its susceptibility, and promote a workable rule of law*”. (emphasis added).

He does not identify what would constitute a “credible move” in this direction.

Steuer is somewhat more specific in describing how the enforcement of competition law could be changed to provide greater clarity.⁶⁶⁸ He essentially argues that enforcement should be targeted only against exclusionary monopolistic conduct (its EU equivalent would be exclusionary abuse of a dominant position) and cartels: what he calls “bullying” and “ganging up” respectively. In other words, non-cartel horizontal agreements and vertical agreements should not be targets for enforcement, because they are generally justified by efficiencies, and vertical problems only arise

⁶⁶⁷ Ariel Ezrachi “Sponge” *Journal of Antitrust Enforcement* Vol 5 Issue 1 (April 2017) 49.

⁶⁶⁸ Richard M Steuer “The Simplicity of Antitrust Law” *University of Pennsylvania Journal of Business Law* Vol 14 No 2 (Winter 2012) 543.

if there is market power anyway, so are sufficiently covered by the monopolisation provision (section 2 of the Sherman Act).

On this basis, Steuer argues that “antitrust is simpler than it seems. Properly applied, antitrust focuses simply, and entirely, on combating two of the most innate proclivities in human nature—bullying and ganging-up—when such conduct harms competition. Once this is understood, the concerns about irrationality and disharmony begin to disappear”.

Steuer concludes:

“If judges, enforcement officials, and lawyers confine their focus to unilateral and collective activity that threatens serious harm to competition, the proper application of the legal and economic principles and tools will become clearer. Antitrust is not that complicated. Once this is appreciated, both the direction and value of antitrust becomes easier to comprehend, apply and explain: Don’t put up with bullies who stifle competition. Don’t permit ganging-up to diminish competition”.⁶⁶⁹

There are a few issues with this analysis. First, whether a firm has the power to control prices, or a strong likelihood of achieving such power, are matters of great uncertainty in many cases, as we have seen in Chapter 4. Secondly, there is no sufficiently precise definition of “bullying”. As we discussed earlier in Chapter 4, even dominant companies are allowed to compete vigorously, and an abuse (or monopolization under US antitrust law) cannot consist merely of excluding competitors through vigorous competition. The dividing line between acceptable and unacceptable unilateral conduct therefore still remains unclear. Thirdly, Steuer appears to require that both bullying and ganging-up have some kind of adverse effect on competition for them to be prohibited (in his words “stifle” or “diminish” or “threaten serious harm to” competition). But as we have seen in Chapter 4, whether agreements or conduct will harm competition, and if so to such an extent as to be illegal, are matters that are often unclear and difficult to assess in many cases.

⁶⁶⁹ 557.

Steuer's thesis is, however, compelling in arguing for a reduction in the scope of the enforcement of competition laws, in particular by arguing for non-enforcement against non-cartel horizontal agreements and vertical agreements. A question that this dissertation will now examine is whether any exclusions from enforcement, and the uncertainties involved in Steuer's concepts of "bullying" and "ganging-up", can be addressed in the design of competition laws themselves, i.e. competition legislation. If achievable, this would clearly be preferable, from the legal certainty point of view, to leaving enforcement to administrative discretion under vague legislation. As we have argued earlier, vague competition laws and reliance upon economic assessments allow for arbitrary and subjective judgment calls, and to enforcement approaches that vary over time, depending on the priorities of whoever is in charge of enforcement and public pressures, leading to a great deal of uncertainty.

We will argue later in this Chapter that these exclusions and uncertainties can indeed be addressed in the design and drafting of the competition law itself: in other words (to answer the question in the heading of this section) vague competition law prohibitions are not inevitable.

We recognise that two of the oldest and most influential systems of competition law, US and EU law, are not likely to be re-designed in the foreseeable future. As noted above, the US Sherman Act has remained unchanged since 1898, and the tradition of interpretation and application by the courts is well-entrenched. Likewise, the EU competition rules have remain unchanged since they were incorporated in the 1957 Treaty of Rome, and there is a considerable body of case law interpreting and applying them. In the EU there is the added complication that an amendment to the competition provisions would require an agreement between its 28 Member States (or 27 if the UK leaves the EU, as is its government's current plan). Most Member States' national competition laws are also closely modeled on the EU provisions, and are also unlikely to be materially re-designed in the foreseeable future. It is perhaps for these reasons that previous literature (as noted above) has tended to take uncertainty in competition legislation as "a given", and to focus more on achieving greater certainty in the enforcement and application of competition laws.

Nevertheless this leaves many other jurisdictions that do not have such constraints, and that are free to amend their competition legislation to provide greater legal certainty. Of the subject

jurisdictions covered in this dissertation alone, Australia, Canada and South Africa have, on numerous occasions, made major amendments to their competition laws since they were adopted, and Hong Kong is reported to be launching a major review of its competition law by the end of 2018, even although it has only been fully in force since 2015.⁶⁷⁰ For those jurisdictions like Vietnam which are subject to free trade agreements (FTAs) requiring them to have competition laws in place, the FTAs (as we saw in section 7.2) leave them considerable discretion as to how those laws should be modeled. So this dissertation's thesis will be relevant to many jurisdictions. Even for the US and the EU, it is hoped that will be informative as to what can be achieved with a "clean slate", in illustrating the shortfalls in legal certainty at present, and in providing a benchmark for seeking to minimise (if not eliminate) the problems of legal uncertainty we discussed in Chapter 5.

In the following sections of this Chapter, we look first at the extent to which certain types of agreement or conduct could be *per se* excluded (in clear enough terms) from competition laws. This would at least serve to narrow the scope (and hence the volume) of agreements and conduct that would need to be subject to any kind of economic assessment. Secondly, and conversely, we look at whether there are any types of agreement or conduct which might be suitable for clear *per se* rules of prohibition, i.e. rules that prohibit specific types of agreements or conduct in themselves, regardless of their effects (economic or otherwise). Thirdly, to the extent that there may be other agreements or conduct that are considered economically harmful, we look at how they should be addressed.

7.4 Exclusions from the scope of Competition Laws

In considering whether there are any categories of arrangement which can be excluded from the scope of the prohibition of anti-competitive arrangements, vertical agreements seem to be an

⁶⁷⁰ Comments by the Chief Executive Officer of the Hong Kong Competition Commission at a meeting of the Hong Kong Legislative Council's Panel on Economic Development dated 26 March 2018, para 49 of the minutes, available at <http://www.legco.gov.hk/yr17-18/english/panels/edev/minutes/edev20180326.pdf> (accessed on 5-4-2018).

obvious “candidate”.⁶⁷¹ There are two reasons for this. The first is the view that vertical restraints are only potentially problematic in terms of economic efficiency or consumer welfare if one of the parties has substantial market power or dominance, in which case the rules on abuse should be sufficient to deal with any competition problems. The second is that vertical restraints are more likely than not to generate efficiencies which outweigh any harm to competition. As the EU Commission has stated:

“For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.”⁶⁷²

Expanding on this point, it has also stated:

“Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels. The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement”.⁶⁷³

Singapore has excluded vertical agreements from the scope of its competition law: this could be called a rule of *per se* legality for vertical agreements.⁶⁷⁴ The ex-Chief Economist of the Singapore Competition Commission stated that this exclusion reflected the view that “vertical agreements are normally pro-competitive and those that are not are often limited by international competition

⁶⁷¹ As noted above, Steuer argued that both vertical and (non-cartel) horizontal agreements should not be a focus for enforcement- see n 668 above.

⁶⁷² Guidelines on Vertical Restraints OJ C130/1 of 19.5.2010 para 6.

⁶⁷³ N 672 above recitals 6 and 7.

⁶⁷⁴ Singapore Competition Act Third Schedule para 8.

or are difficult or costly to evaluate- an important factor in a small economy with limited administrative resources”.⁶⁷⁵ In other words, it was thought that the cost of letting a minority of harmful agreements escape the law was outweighed by the benefits of the exclusion in terms of savings in administration costs.

The emphasis on weighing economic costs and benefits is consistent with the fact that Singapore has adopted a total welfare approach where it is net economic benefits that matter, as opposed to net consumer benefits, to the evaluation of arrangements under the competition law.⁶⁷⁶ As we saw in Chapter 4, Australia, Canada and South Africa also, broadly speaking, apply a total welfare standard, but have not excluded vertical agreements from the scope of the law.

The issue of whether to exclude any category of agreements from the scope of competition law, and if so which, is complicated in Canada and South Africa by the fact that, as we saw in Chapter 4, their competition laws have multiple (and at times inconsistent) objectives. They do not only seek to promote economic efficiency. Presumably these other objectives would also have to be taken into account in making the decision as to what category or categories (if any) should be excluded from the law’s scope.

As was noted in Chapter 6, it has also been suggested in the US context that a rule of *per se* legality for vertical agreements may be one way of reducing the scope of the rule of reason in US antitrust law and thereby making the law clearer.⁶⁷⁷

The EU has taken a more cautious approach to vertical agreements than Singapore. The EU Commission has issued a “block exemption regulation” for vertical agreements, under which they

⁶⁷⁵ R Ian McEwin “Competition Law in Singapore” 17 March 2011 available at <http://www.globaleconomicsgroup.com/publication/competition-law-in-singapore/> (accessed on 9-11-2017).

⁶⁷⁶ N 675 above.

⁶⁷⁷ Section 6 3 1 above.

will be excluded from Article 101(1) TFEU provided that certain criteria are satisfied.⁶⁷⁸ For example, the exemption does not apply if the market share of the supplier or purchaser exceeds 30 per cent, or if the agreement contains resale price restrictions. In effect, therefore, it operates more like a safe harbour for certain vertical agreements than a rule of *per se* legality, and involves the uncertainties of defining markets that we identified in Chapter 4. An outright exclusion would be preferable in terms of legal certainty. Moreover, given that the reason for the market share limit is a concern about market power, it is not clear why the EU Commission felt such a limit was necessary, given the availability of the abuse of dominance provisions to deal with any such problems. The benefits of catching any problems which might slip the net because of a shortfall between the 30 per cent market share limit and dominance would arguably be outweighed by the costs savings of a clear exclusion.

A Singapore-style exclusion of vertical agreements from the prohibition of anti-competitive agreements would reduce dramatically the *scope* of the lack of clarity in competition law, in the sense that the vast majority of commercial agreements are vertical agreements (a firm has many more contracts with its suppliers and customers than with its competitors). To remove vertical agreements from the need for scrutiny under this prohibition would therefore make life a lot easier for many businesses by substantially reducing their compliance costs: they would only have to be concerned about vertical restraints if they were dominant or has substantial market power. It would also free up enforcement authorities' resources to tackle more serious anti-competitive arrangements or conduct.

In Singapore, as noted above, the decision to exclude vertical agreements was taken on the basis of a cost-benefit assessment and the fact that overall economic efficiency (in the sense of total welfare) was the law's objective. In other jurisdictions, it is conceivable that the view might be taken that a vertical agreements exclusion would not be justified. But given the potentially huge savings in compliance costs for businesses and administration costs for the authorities, such an exclusion at least merits serious consideration.

⁶⁷⁸ "Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices" OJ L102/1 of 23.4.2010.

It seems that the definition of “vertical agreements” would not pose a major problem, in terms of clarity, for the purpose of drafting an exclusion. The Singapore Competition Act, for example, defines a vertical agreement as:

“any agreement entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers.”⁶⁷⁹

A key phrase in the above passage is “for the purposes of the agreement”. This phrase implicitly recognises that the parties may be in a vertical arrangement for the purposes of the agreement in question, but for other purposes they may not be, and indeed may be competitors. A good example of this is in the telecommunications industry. Telecommunications operators have to enter into reciprocal interconnection agreements with each other to ensure that customers of one operator can connect with customers of the other. Under these agreements, each operator purchases interconnection services from the other (a vertical arrangement) even although the operators compete with each other at the retail level.

There is one possible exception to an exclusion of vertical agreements. While in Singapore, the exclusion of vertical agreements from the prohibition of anti-competitive agreements will apply irrespective of whether the agreement contains resale price maintenance (RPM), many jurisdictions are concerned about RPM, at least where the RPM consists of the supplier imposing *minimum* or *fixed* resale prices on a dealer, as opposed to *maximum* resale prices. For example, in the EU, the imposition of minimum or fixed prices will deny the agreement the benefit of the block exemption, and in Hong Kong the Commission has even said that in some cases it may amount to

⁶⁷⁹ N 674 above para 8(2).

“serious anti-competitive conduct”.⁶⁸⁰ South Africa goes as far as to have a *per se* prohibition against minimum resale price maintenance, whereas in the US the *per se* approach to RPM was abandoned by the Supreme Court in the *Leegin* case.⁶⁸¹ This dissertation takes no view on how RPM should be treated. Our only point here is that, from the point of view of increasing legal certainty, there could be an exclusion of vertical agreements with the exception of RPM, and RPM could be dealt with as described in 7.6 below.

Turning to horizontal agreements, clearly excluding all horizontal agreements as well as vertical agreements would be unwise, as hardcore conduct such as industry-wide price-fixing is almost universally-condemned as harmful economically, and an exclusion would fail to meet the international standards we described at 7.2 above. Moreover, it is difficult to identify any *type* of horizontal agreement which, by its very nature, can be identified as generally economically efficient, or to produce public benefits that outweigh the harm to competition, such as to be suitable for a definitive exclusion from the prohibition against anti-competitive arrangements in competition law. For example, although the EU Commission has said that cooperation between actual or potential competitors limited to research and development “rarely gives rise to restrictive effects on competition within the meaning of Article 101(1)”, this does not apply where the parties have “market power” (a nebulous concept as we discussed in Chapter 4).⁶⁸² Likewise, it is difficult to identify any type of unilateral conduct by firms with a dominant position or substantial market power that, by its very nature, has these properties. For example, whereas pricing above costs is generally regarded as being lawful, in the EU even above-cost pricing has been condemned in certain circumstances.⁶⁸³ (There is also the difficulty of assessing costs for the purpose of whether determining whether prices are above costs, as shown by the excessive pricing cases that we discussed in Chapter 4).⁶⁸⁴ Similarly, although in the US a refusal to supply is generally regarded

⁶⁸⁰ “Guideline on the First Conduct Rule” para 5.6, available at https://www.compcomm.hk/en/legislation_guidance/guidance/guidance.html (accessed on 9-11-2017).

⁶⁸¹ Competition Act s 5(2).

⁶⁸² “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements” OJ C11/1 of 14.1.2011 para 132.

⁶⁸³ See, for example, Case C-395/96 *Compagnie Maritime Belge Transport v Commission* [2001] ECR I-1365.

⁶⁸⁴ See section 4.5.1 regarding the EU and section 4.5.4 regarding South Africa.

as lawful, there are exceptions,⁶⁸⁵ and the EU takes a somewhat stricter approach. As we saw, South Africa even regards refusal to supply access to an essential facility as a *per se* infringement.

Looking at the opposite end of the spectrum, are there any categories of agreement or conduct that can be identified as generally inefficient, or to harm competition to an extent that is not justified by any public benefit, and as such be suitable for *specific prohibition*, as opposed to a *specific exclusion*? We deal with this question next.

7 5 *Per se* rules of Illegality

7 5 1 Potential benefits of *per se* rules of illegality

Given that the general concepts for determining liability under the competition laws of the subject jurisdictions provide insufficient clarity, a natural question to ask is whether rules prohibiting specific types of agreement, irrespective of their effects (i.e. *per se* rules) would mitigate the adverse consequences of lack of clarity that we identified in Chapter 5. These are often called *per se* rules of illegality since the arrangement is prohibited *in itself*, that is, without the need to show any harm to competition, or that the harm to competition outweighs any public interest benefits such as efficiency.

Per se rules of illegality should certainly improve legal clarity *in theory*, since liability or other legal consequences would depend only on questions of fact, i.e. whether the parties entered into an arrangement of a type specifically identified in the law, and not on economic assessments. A business would (at least in theory) know just from looking at the law what arrangements would be prohibited, or have other legal consequences, thereby reducing compliance costs, and the administration costs of the competition regime would be reduced by avoiding the need for lengthy and complex investigations. *Per se* rules might also reduce litigation costs: as argued in Chapter

⁶⁸⁵Philip Areeda “Essential Facilities: an Epithet in need of Limiting Principles” 58 *Antitrust LJ* 841 (1989-1990).

5, the vagueness of concepts such as SLC increases the complexity, and therefore the costs, of litigation.⁶⁸⁶

The US experience with *per se* rules of illegality is instructive. As we saw in Chapter 2, section 1 of the US Sherman Act is drafted in very wide terms, stating that “every” contract, combination or conspiracy in restraint of trade or commerce is unlawful. The US Supreme Court realised that this section could not be applied literally, since every contract to some extent restrains trade, so it introduced the qualification that the restriction had to unduly restrict competition or obstruct trade, contrary to the public interest – the so-called “rule of reason”.⁶⁸⁷

Around the same time or shortly thereafter, however, the Supreme Court recognized that there were some types of arrangement, such as price-fixing, which by their very nature could not be justified under the “rule of reason” and therefore no inquiry into their potential benefits or effects was necessary: they were *per se* illegal. Apart from price-fixing, arrangements that were prohibited *per se* included vertical price and territorial restraints, and horizontal market-sharing (of territories or customers).⁶⁸⁸

The Supreme Court highlighted the benefits of *per se* rules as being increased certainty, and efficiency in the administration of justice:

“This principle of *per se* unreasonableness not only makes the type of restraints which are prescribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity of a prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether

⁶⁸⁶ In Chapter 3, we dealt with Raban’s arguments that vague rules may be more predictable, and argued that even if those views are valid in respect of some areas of law, they do not apply to competition laws.

⁶⁸⁷ Jesse W Markham Jr “Sailing a Sea of Doubt: a Critique of the Rule of Reason in US Antitrust Law” 17 *Fordham J Corp & Fin L* 591, 600-606 (2012).

⁶⁸⁸ N 687 above 606-607.

a particular restraint has been unreasonable – an inquiry so often fruitless when undertaken”.⁶⁸⁹

Similarly:

“Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”⁶⁹⁰

However, from the 1970s, *per se* rules started to fall out of favour. As Gerber explains, this was largely due to the emergence and influence of the Chicago School of law and economics.⁶⁹¹ As noted in Chapter 2, according to this school, economics should provide the basis for antitrust (competition) law, and the main objective of antitrust law should be economic efficiency. This emphasis on economics drove the elimination of most *per se* rules because, according to Gerber:

“[e]conomists have demonstrated effectively that in most areas of antitrust law it is difficult to predict in a precise way the effects of particular conduct without extensive knowledge of the economic context in which it occurs. They have argued, therefore, that *per se* rules should be eliminated, except perhaps in those few areas where economic science can have a high degree of confidence in predicting the competitive impact of such conduct...”⁶⁹²

⁶⁸⁹ *National Pacific Railway Co v US* 356 US 1, 5 (1958).

⁶⁹⁰ *United States v Topco Assocs* 405 US 596, 610 (1972).

⁶⁹¹ Gerber *Global Competition* 145. See also Jonathan B Baker “Per se rules in the Analysis of Horizontal Restraints” *The Antitrust Bulletin* (Winter 1991) 773; William C Wood “Costs and benefits of per se rules in Antitrust Enforcement” *Antitrust Bulletin* (Winter 1993) 887; David I. Gelfand and Linden Bernhardt “Vertical Restraints: Evolution from *Per Se* to Rule of Reason Analysis” paper submitted for the November 16, 2017 ABA Antitrust Section Fall Forum.

⁶⁹² Gerber N 601 above.

Accepting these views, the courts responded by gradually eliminating the *per se* categories, leaving almost all arrangements subject to rule of reason analysis.⁶⁹³ Now, the only *per se* rules that exist apply to horizontal arrangements on price and market allocation, and (as we shall see below) on a qualified basis, tying the sale of one product or service to the supply of another: *per se* rules against all other vertical restraints have been eliminated, including most recently resale price maintenance in 2007.⁶⁹⁴ However, as we saw in Chapters 4 and 5, the rule of reason has attracted much criticism in the US for its lack of certainty- the reason for introducing *per se* rules in the first place. The tide is now therefore turning back in favour of bringing back more clarity into US antitrust law, using methods which are less blunt and more subtle than *per se* rules, as we saw in section 6.3.

From the enforcer's perspective, a general prohibition of the type which exists in most of the subject jurisdictions would be broad enough to allow them to take enforcement action against types of arrangements and conduct that are generally regarded as socially undesirable, such as price-fixing between competitors. *Per se* rules would not be necessary for this purpose from the enforcer's perspective. However, a general prohibition is less suitable than a *per se* prohibition because (a) it is usually subject to a threshold of "substantially" or "appreciably" harming competition, giving the firms concerned the opportunity to argue that the prohibition should not apply in their case because the harm to competition is not sufficiently serious; (b) even if the harm to competition is sufficiently serious, the effect on competition test is qualified in all of the subject jurisdictions by an exclusion on grounds of efficiency or other public benefits, giving the firm or firms concerned another potential set of arguments as to why the prohibition should not apply; and (c) from a business's perspective, a general prohibition leaves uncertainty about how agreements and conduct outside cartels will be treated by the enforcement authorities and courts. In other words, the "general prohibition with possible exclusion" approach sends mixed messages to businesses engaging in arrangements which are always going to be stopped by the enforcement authorities or courts, assuming they are detected, and causes considerable uncertainty to businesses engaging in other types of agreement and conduct.

⁶⁹³ Gerber N 601 above.

⁶⁹⁴ *Leegin Creative Leather Products Inc v PSKS Inc* (2007) 551 US 877.

So are there any types of agreements which are suitable for *per se* prohibition? If so, what are they? We deal with this issue next.

7 5 2 *Per se* rules prohibiting which types of agreement or conduct?

There seems to be a broad international consensus that hardcore arrangements, whereby competitors coordinate their pricing, reduce supply to maintain or increase prices, or share markets or customers are always objectionable- at least where they involve all or most of the operators in an industry. These practices are commonly-called price-fixing, output-restriction and market-sharing (or market-allocation). Secret collusion between competitors to manipulate the outcome of tender processes which are intended to be competitive (otherwise known as bid-rigging or collusive tendering) is also widely-condemned, at least where it concerns the *supply* of products or services (bid-rigging for the *purchase* of products or services can reduce costs, thereby increasing efficiency, and the cost-savings might be passed onto consumers, if there is sufficient competition between the operators in the downstream market. Of course it may be objectionable for other reasons, such as where fraud or misrepresentation is involved, as will be discussed below).

In the case of industry-wide secret price-fixing cartels, economists have found empirically that they are on balance inefficient for the economy,⁶⁹⁵ (although they can only be sustained if certain economic conditions are present).⁶⁹⁶

As noted above, the ICN has said “At the heart antitrust enforcement is the battle against hard core cartels directed at price fixing, bid rigging, market allocation and output restriction.”⁶⁹⁷ The OECD has also said:

⁶⁹⁵ Andrea Guenster, Martin Carree and Mathijs A. van Dijk “Do Cartels Undermine Economic Efficiency?” December 2011 available at: www.aeaweb.org/conference (accessed on 9-11-17).

⁶⁹⁶ Margaret C Levenstein, Valerie Y Suslow “What Determines Cartel Success?” *Journal of Economic Literature* Vol XLIV (March 2006) 43.

⁶⁹⁷ Section 7 2 above.

“Hard core cartels, or agreements among competitors fixing prices, rigging bids (collusive tenders), restricting output or dividing markets, are the most serious and harmful violations of competition law. They *injure consumers* by raising prices and restricting supply. They create market power, waste and *inefficiency* in countries whose markets would otherwise be competitive”.⁶⁹⁸ (emphasis added).

Regarding the OECD’s statement, it is questionable (as noted above) whether bid-rigging in *purchases* reduces efficiency and harms consumers. And although price-fixing may have no (or little) efficiency justification, whether it harms consumers depends on the level of the distribution chain at which it takes place. If price-fixing takes place in the supply of raw materials for a particular product, this may have little adverse effect on consumers if the downstream market for the finished product is highly competitive and the suppliers of the final product absorb the costs of the inflated raw material prices instead of passing them on to consumers. So it seems that the public policy justification for an unqualified prohibition against (non-purchasing) cartels is that they involve collaboration between competitors which has no efficiency justification and which (in the case of sales to end consumers) harms consumers, or (in the case of sales to intermediate businesses in the supply chain) may harm consumers.

The public policy hostility to the four “cardinal sins” of price-fixing, output- restriction, market-sharing and bid-rigging is manifested for the most part expressly in the competition laws of most of the subject jurisdictions:

- Under EU law, the examples of agreements which may be prohibited under Article 101(1) TFEU include those which “fix purchase or selling prices”, “limit or control production” or “share markets or sources of supply”. Although bid-rigging is not expressly-mentioned, it would usually involve one or more of these three practices in any case, and would therefore be covered by these examples. However, it is still at least theoretically possible

⁶⁹⁸ OECD “Hardcore Cartels- Harm and Effective Sanctions” Policy Brief May 2002 1, available at <http://www.oecd.org/competition/cartels/21552797.pdf> (accessed on 10-11-2017).

for these arrangements to be qualify for exclusion under Article 101(3) TFEU, if the four criteria in this Article are met.⁶⁹⁹

- In Hong Kong, the four types of arrangement are expressly described in the statute as “serious anti-competitive conduct” which entitles the Commission to bring proceedings against the parties directly in the Tribunal, as opposed to first issuing a Warning Notice (which it is obliged to do for other arrangements), giving the parties a chance to rectify the breach and thereby avoid proceedings in the Tribunal.⁷⁰⁰
- Australia and South Africa have *per se* rules against such arrangements, except that in South Africa output- restriction is not specifically mentioned.⁷⁰¹ Nevertheless, it is still possible in these jurisdictions to apply for an authorisation on grounds of public benefits.
- Canada is the only one of the subject jurisdictions which has unqualified *per se* rules against the four types of practices, in the sense that they are prohibited without any possibility exception: indeed engaging in any of them constitutes a criminal offence.⁷⁰²

The noxious effects of these types of arrangements to which the OECD referred in the statement above (raising prices and restricting supply) would not necessarily apply in all cases. For example, if two small operators in a market of 20 fixed their prices, this may have no impact on the market price. In an ideal world, one would not want to prohibit arrangements that cause no harm. Since price-fixing, output restriction and market-sharing only appear to be problematic where they involve market power, could a rule prohibiting these types of conduct be qualified by some kind of market power test? The problem with this approach is that the rule would then no longer be a *per se* one, and since the assessment of SMP is one of the reasons why competition laws are so unclear, as we discussed in Chapter 4, such a rule would not solve the clarity problem. For clarity to be provided through a *per se* rule, there can be no qualification to the rule on nebulous grounds such as lack of market power: the law has to identify the conduct which is targeted, without qualification. In other words, “all or nothing”. Provided that, *in aggregate*, more harm is caused by the existence of the arrangements and conduct than benefits- in other words the cost of catching

⁶⁹⁹ Chapter 4, section 4 3 1.

⁷⁰⁰ Competition Ordinance s 82(1)(b).

⁷⁰¹ Chapter 4 sections 4 2 2 and 4 2 4.

⁷⁰² Chapter 4 section 4 2 3.

some “innocent” parties (“Type I errors”), plus the costs of compliance and enforcement, are exceeded by the benefits of catching all of the harmful ones- a *per se* prohibition would be justified in economic terms. Hovenkamp put it this way:

“...it might be justifiable to spend a great deal of societal resources prosecuting a particular violation whose social cost is rather small, such as a cartel that is not working very well anyway, and whose sales involve a very small market, in order to discourage such behavior in potential cartel organizers. The social cost of the current violation can never be recovered. The only effective purpose of the prosecution is to deter future violations”.⁷⁰³

In the interests of legal clarity it would be preferable if there were no exceptions to the prohibition of the four types of arrangement rule on grounds of economic efficiency or other public benefits. Under EU law, as noted above, any of these four types of arrangement may at least theoretically be excluded if the four criteria in Article 101(3) are satisfied: a matter which it is for the parties to self-assess as there is no facility to seek prior approval. But since there is a consensus that they are rarely, if ever, beneficial in terms of efficiency or consumer welfare, consideration should be given to ruling out the possibility of exclusion to create greater clarity and avoid sending mixed messages. The same applies to the possibility of authorisation or exemption in Australia and South Africa, although legal uncertainty is less there than under EU law, because the parties do not have to self- assess whether the public benefit objective applies, and can seek prior approval.

One problem that arises with *per se* rules is that arrangements such as price-fixing or market-sharing do not always exist in isolation, and may form part of a wider arrangement which may be economically efficient. For example, competitors might agree to set up a joint sales venture, which may create efficiencies but (by definition) involve price-fixing, because the parties will be selling at a common price. The challenge is therefore how to separate those where the parties’ only object is to reduce competition (what in the US are called “naked restraints”) from those which might have a valid economic justification or benefit. This is sometimes called the “characterization”

⁷⁰³ Herbert Hovenkamp “Antitrust’s Protected Classes” 88 *Mich. L Rev* 1 (1989).

problem. We deal with this, and other challenges of drafting *per se* prohibitions, in section 7 4 3 below.

While there is a broad consensus that certain types of commercial arrangement (as described above) should always be prohibited, the same consensus does not exist in respect of unilateral conduct by firms with a dominant position or SMP. Such conduct may or may not be harmful, depending on the circumstances.

Alone amongst the subject jurisdictions, South Africa has sought to categorise certain types of unilateral conduct by dominant firms as *per se* unlawful, namely “excessive” pricing, and “unreasonable” refusal to provide access to an essential facility. But we saw in Chapter 4 the difficulties in determining what an “excessive” price is, and “excessive” and “unreasonable” are both subjective concepts.⁷⁰⁴ One of the potential advantages of *per se* rules is that they should be free of value judgments of this kind, and therefore be easy and clear to apply. The *per se* prohibition regarding essential facilities also sits uncomfortably with the constitutional right to protection of private property that exists in many jurisdictions.

We therefore believe that other means need to be found to address the problem of legal certainty in respect of unilateral conduct. We deal with this issue in section 7 7 below.

7 5 3 Challenges of drafting *per se* rules

A good way of illustrating the characterisation difficulty involved in drafting *per se* rules is by contrasting the different outcomes when the European Commission and South African courts respectively had to decide on the legality of the American Soda Ash Corporation (ANSAC) export cartel under their competition laws.

In the EU, under the pre-2003 regime where parties could apply for clearance or exemption from the competition rules to the European Commission, ANSAC had made such an application.

⁷⁰⁴ Section 4 5 4.

However, in its 1990 decision, the Commission took the view that the cartel had both the object and effect of restricting competition within the EU contrary to Article 85(1) (as it then was), and did not satisfy the criteria for exemption under 85(3).⁷⁰⁵ There being no *per se* rules of illegality under EU competition law, the Commission applied the normal approach which applies to all agreements, namely whether the agreement has the object or effect of preventing, restricting or distorting competition, and if it does, whether it satisfies the criteria for exemption.

By contrast, when the legality of this export cartel under the South African competition law fell to be assessed some 15 years later, one of the legal issues which arose was whether this arrangement constituted “an agreement directly or indirectly fixing a purchase or selling price of any other trading condition” within the meaning of Section 4(1)(b) of the Competition Act.

The South African Supreme Court of Appeal drew a distinction between (a) an arrangement whereby competitors form a separate jointly owned entity which purports to set the price for the parents’ products but is in reality just a facade to hide the reality that the parents are fixing the prices through the jointly-owned company;⁷⁰⁶ and (b) “a *bona fide* joint venture that is embarked upon by competitors for a legitimate purpose, through the vehicle of a separate entity, which must necessarily set a price for the goods that it supplies (emanating from the competitors) merely as an incident to the pursuit of the joint venture”.⁷⁰⁷ The Court held that, in the latter case, there was “no *a priori* reason to assume that such an arrangement constitutes prohibited price-fixing as contemplated by s 4(1)(b)” and that it may well fall under the general prohibition under s 4(1)(a), requiring an assessment of economic effects and justification.⁷⁰⁸ The Court did not make a definitive decision on this point because the Tribunal had not yet ruled on it. But the Court did say evidence apart from the agreement itself might be necessary to establish whether the joint venture was in truth “a single entity supplying its own goods to the market” or “merely a cloak for what is

⁷⁰⁵ Commission Decision of 19 December 1990 (Ansa) OJ L 152/1 of 15.6.1991.

⁷⁰⁶ Par 53.

⁷⁰⁷ Par 54.

⁷⁰⁸ Par 55.

in truth collusive action designed to ensure that the goods of competitors are supplied to the market at non-competitive prices”.⁷⁰⁹

The Supreme Court of Appeal declined to rule on what evidence might be relevant in determining the issue, but if the Court was right to suggest that certain joint selling arrangements may fall within Section 4(1)(a) rather than Section 4(1)(b), it would seem that evidence pointing to the purpose or purposes of the arrangement would be relevant. In fact, as noted above, the Court stated that there could be a “*bona fide* joint venture that is embarked upon by competitors *for a legitimate purpose*” (emphasis added). It would not be too challenging for competitors to advance arguments that the purpose of such an arrangement was to achieve efficiencies at the sales level, but is the purpose still legitimate if the parties know that those efficiencies fall well short of offsetting the harm to competition which results from the arrangement?

Another illustration of the difficulty of interpreting Article 4(1)(b) was the case of *Competition Commission v South African Breweries*, where the Tribunal held that, although strictly speaking the arrangements between a beer supplier and its exclusive distributors of beer involved “dividing markets”, on a literal reading of that Article, the distributors were not sufficiently independent of the supplier to be competitors of each other for the purposes of the *per se* prohibition against market division between competitors in that Article.⁷¹⁰ Although this case concerned the *per se* prohibition on market division, the same reason would equally seem to apply if pricing restrictions had been agreed between them via their supplier, instead of market division. The Tribunal warned against a literal interpretation of Article 4(1)(b) and said that the reality of the situation had to be examined.⁷¹¹

Canada has sought to address the characterisation issue expressly in its competition law. Under the Canadian Competition Act it is a defence to an allegation of a breach of the *per se* prohibitions on price-fixing, market-sharing and output restriction for the accused to show, on a balance of probabilities, that the price-fixing element is (a) ancillary to a broader or separate arrangement that

⁷⁰⁹ Par 58.

⁷¹⁰ 134/CR/Dec07 24/03/2014 pars 89, 90.

⁷¹¹ Pars 69-80.

includes the same parties, (b) is directly related to and reasonably necessary for giving effect to that broader or separate arrangement and (c) the broader or separate arrangement would not otherwise breach the *per se* prohibitions.⁷¹² This is similar to ancillary restraints doctrine in EU competition law, which we examined in Chapter 4. The Competition Bureau has said in its guidelines that “if the alleged ancillary restraint is merely part of a broader price-fixing, market allocation or output restriction cartel, the defence is unavailable”.⁷¹³ So it would seem that a joint selling venture, which is primarily designed to achieve efficiencies in sales or distribution even though it involves the joint venture selling at a single price, would qualify for this defence, and fall to be addressed (if at all) under the general provision for addressing agreements, namely section 90.1.

Further examples of how the characterisation problem has been addressed can be found in the US case law, where the question has arisen as to whether the arrangement was to be treated as caught by the *per se* rule against price-fixing, or should instead be subject to a rule of reason analysis.

One case, *Broadcast Music Inc v CBS Inc*, concerned the establishment of common licence fees for copyrighted music by the Society of Composers, Authors and Publishers, and Broadcast Music Inc. (BMI). The Court took the view that, although this was price-fixing in a literal sense, a rule of reason analysis, not *per se* treatment, should be applied because the collaboration resulted in the supply of a product which none of the participants could have supplied individually.⁷¹⁴

Another case, *NCAA v Board of Regents*, involved an arrangement between US colleges controlling the number of college football games available for broadcast, and limiting price competition in bidding for television contract arrangements. Although the Court struck down these restrictions as anti-competitive, again it did not apply a *per se* analysis. As in the BMI case, it took the view that these restraints were necessary if the product was to be made available at all.⁷¹⁵

⁷¹² S 45(4).

⁷¹³ “Competitor Collaboration Guidelines” para 2.5.4 available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html> (accessed on 10-11-2017).

⁷¹⁴ 441 US 1 (1979).

⁷¹⁵ 468 US 85 (1984).

Similarly, in *Californian Dental Association v FTC*, the issue was whether the Association's guidelines, which restricted members from advertising prices and quality of services, merited more than the cursory "quick-look" which the judge at first instance had taken in concluding that the restrictions were unlawful. The Supreme Court held that they did:

"Where any anti-competitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints, rather than the abbreviated analysis the Ninth Circuit performed in this case... This case fails to present a situation in which the likelihood of anticompetitive effects is comparatively obvious, for the CDA's advertising restrictions might plausibly be thought to have a net precompetitive effect or possibly no effect at all on competition".⁷¹⁶

As regards output-restriction, the EU Commission has recognised that there is a distinction between this practice in its "naked" form, where it has no objective other than to maintain or increase prices, and other forms where it may have an efficiency objective. If two competitors agreed to rationalise their production facilities and reduce their output due to over-supply, this might save resources and therefore be economically efficient. The EU Commission has recognised the efficiency benefits of at least some forms of jointly-agreed output restrictions, by issuing a block exemption regulation for so-called "specialisation agreements".⁷¹⁷ These are agreements

⁷¹⁶ 526 US 756 (1999) 757.

⁷¹⁷ Commission Regulation 1218/2010 OJ L335/43 of 18.12.2010. For discussions of this block exemption regulation see Moritz Lorenz *An Introduction to EU Competition Law* (2013) 146-149; Richard Whish and David Bailey *Competition Law* 8ed (2015) 637-640. The European Court has held that an agreement between Irish beef processors, whereby some of them would leave the industry to reduce overcapacity in return for compensation by the others, was a restriction of competition "by object" (i.e. no actual harm to competition had to be proved). (see Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I- 8637). However, as the Commission pointed out in its media release commenting on the judgment, "the ECJ did not expressly exclude that a reduction of overcapacity could result in economies of scale among processors which stay in the industry. It was for the defendant to prove under Article 81(3) of the EC Treaty that these positive effects outweigh the negative effects associated with reductions of capacity". See MEMO/08/728 of 20 November 2008.

whereby one or both parties agree to cease production of certain products and buy them only from the other party. These agreements are excluded from the scope of the competition law, if certain criteria are satisfied.⁷¹⁸

As regards bid-rigging in the *supply* of products or services, such as construction materials or building maintenance services, the characterisation problem does not arise: it is hard to see any economic justification for or merit in secretly and collusively manipulating the outcome of a tender process which is meant to be competitive. Such collusion has the effect of artificially inflating prices to customers and perhaps ultimately consumers. However bid-rigging in the *purchase* of goods or services such as land, broadcasting rights, or radio spectrum for mobile communications, may reduce the cost of inputs, cost savings from which customers may ultimately benefit in the form of competitive prices. And yet the *per se* rule against bid-rigging in Canada makes no distinction between bid-rigging in sales and bid-rigging in purchases.⁷¹⁹ Of course, bid-rigging for purchases might be prohibited for other reasons, for example if it involves fraud or misrepresentation, or a breach of tendering rules, but these matters should not be relevant to competition laws, if the purpose is to design rules which are economically-efficient and coherent, as well as clear. It is questionable therefore whether bid-rigging in purchases is suitable for inclusion in a *per se* prohibition.

Apart from the characterisation problem, which applies to three out of four of the types of arrangement that may be suitable for *per se* prohibitions as discussed above, a *per se* rule against price-fixing raises further drafting challenges, in terms of definition. These are:

- What constitutes collusion on price?
- How specific does the subject matter of the collusion have to be?
- What exactly does “price” for this purpose mean?

We deal with these three issues in turn.

⁷¹⁸ N 717 above.

⁷¹⁹ Competition Act s 47(1).

First, price-fixing implies that the parties have colluded with each other in some way, but what constitutes collusion? Clearly a formal agreement between competitors to raise prices would do so- but few, if any, businesses which wished to fix prices without being caught would be unwise enough to commit themselves to a formal agreement. So competition laws in many jurisdictions (including the subject ones) do not require there to be a formal agreement regarding price to be in force, and a lesser form of collusion - what the EU calls a “concerted practice”- is sufficient for the prohibition to apply. But how loose can this collusion be? Does there have to be some kind of mutual understanding, or is it sufficient for one competitor to disclose their future pricing intentions to the other?

Under EU law, it seems that the unilateral disclosure of commercially sensitive information by one competitor to another, which the latter acts upon or does not distance itself from, is sufficient,⁷²⁰ and the Hong Kong competition authority seems to take a similar approach⁷²¹. The EU Commission’s guidelines state:

“A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, e-mails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour or whether all participating undertakings inform each other of the respective deliberations and intentions”.⁷²²

The examples of anti-competitive arrangements and conduct in the competition provisions of the EU Treaty do not refer to the giving of information – either mutual or unilateral- and it is not obvious from a literal reading of those provisions that one-way information provision would be classified as an “agreement” or “concerted practice”. There has been considerable case law from the European Courts’ case law as to the circumstances in which information exchange or disclosure

⁷²⁰ N 722 below.

⁷²¹ “Guideline on the First Conduct Rule” para 2.28.

⁷²² “Guidelines on the Applicability of Article 101 TFEU to horizontal cooperation agreements” OJ C11/1 of 14.1.2011 para 62.

will be deemed unlawful.⁷²³ However, from the perspective of a jurisdiction which is drafting a new competition law or reviewing its existing competition law (the perspective adopted in this thesis), it is clearly preferable that these circumstances, or clear criteria to assess these circumstances, are set out in the legislation itself.

It is submitted that if a *per se* rule against price-fixing were to be put in place, it should not extend to mere disclosure or exchange of commercially-sensitive information *in itself*. There may be valid reasons to disclose or exchange commercially-sensitive information, such as if the firms involved are contemplating a merger and need to know certain commercially-sensitive information to decide whether to proceed, or if the exchange is ancillary to a transaction which is economically beneficial and legitimate under competition law (we discussed the ancillary restraints doctrine in Chapter 4).⁷²⁴ Admittedly, there may be situations where this is not the case, and the purpose of the disclosure or exchange is to facilitate the fixing of prices or engage in other hardcore cartel conduct, but as we shall see such conduct would be caught anyway under a *per se* rule against price-fixing. The information disclosure or exchange may constitute evidence in establishing the existence of hardcore arrangements, but it should not in itself be subject to a *per se* prohibition.

Including a *one-way* disclosure in a *per se* rule of illegality would also be problematic for the following reasons:

- The essence of the rule against anti-competitive arrangements is a mutual cooperation or understanding, whether tacit or express, secret or open. In the vernacular, “it takes two to tango”, and both or all parties are liable if infringement is found.
- It would conflict with the traditional rule and practice that unilateral conduct is only problematic if there is an abuse of dominance or substantial market power (or in the case

⁷²³ See the case law cited in footnotes 41-73 of the Guidelines referred to in n 733 above. See also Andreas Scordamaglia “Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees” *The Competition Law Review* Vol 7 Issue 1 (2010) 5 at 21-35.

⁷²⁴ Section 4 2 1.

of the US, monopolization), and that otherwise competition laws only intervene if there is collusion between two or more parties;

- It would seem excessive and disproportionate for the recipient of the information in particular to be held liable or penalised, merely because it had involuntarily received information that it had acted upon (it cannot expunge from its consciousness information that it has received, and pretend it does not exist) or had not adequately “distanced itself” from it (whatever steps that might involve, which is not clear).

Secondly, how specific does the subject matter of the collusion have to be? For example, is a vague discussion or agreement about a future intention to raise prices sufficient, or does the amount and timing of the proposed price increase need to be discussed or agreed? Again, EU case law seems to take a fairly broad approach to this issue.⁷²⁵ In a case involving two banks in the UK- Barclays and Royal Bank of Scotland (RBS)- the UK competition authority decided in January 2011 that the communication of such general information about future intentions was sufficient to constitute an infringement of the UK Competition Act, and imposed a penalty of GBP 28.6 million on RBS. The case only came to light because Barclays, the recipient of the information, “blew the whistle” to the authority.⁷²⁶ Clearly it would be more satisfactory, in the interests of legal certainty, for the legislation itself to clarify what level of specificity of the information is sufficient to trigger the prohibition. If such general information is to be caught by the rule, it would have to be drafted in broad enough terms to include it. However, a broadly drafted rule such as this, especially when combined with the prospect of high penalties and whistleblowing, might deter the provision or exchange of information between competitors in certain contexts that are actually beneficial, such as research and development cooperation.

Thirdly, what constitutes “price” involves potentially difficulties of interpretation and drafting. It is clear under EU law, for example, that prohibited price-fixing is not limited to the actual price charged to the customer. It could include agreements on maximum discounts (or not to discount

⁷²⁵ See section 2 of the EU Commission’s “Guidelines on the Application of Article 101(1) to Horizontal Cooperation Agreements” OJ C11/1 of 14.1.2001.

⁷²⁶ Decision no. CA98/01/2011 of 20 January 2011, available at www.webarchive.nationalarchives.gov.uk (accessed on 10-11-2017).

from publish prices), agreements on surcharges to be applied, agreements to pass on certain cost inputs to customers, and so on. So the wording of a *per se* prohibition would need to be wide enough to encompass all of these things, if no loopholes are to be left. For the purpose of its criminal offence of price-fixing, the Canada Competition Act defines “price” as including “any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product”.⁷²⁷ But it does not expressly refer to price surcharges, which were the subject of the air freight cartel case in the EU.⁷²⁸

It is submitted that neither the characterisation problem, nor any of the other drafting issues identified above, would be insurmountable in drafting a *per se* rule against price-fixing. The characterisation problem could be addressed by the concept of the “primary” or “predominant” purpose of the collusion. If the “primary” (“predominant”) purpose of the collusion is, directly or indirectly, to influence the price of the competitors’ products (or services), this would distinguish “naked” price collusion from other arrangements where price might be fixed as an ancillary consequence of arrangements which have another primary purpose, such as joint selling arrangements of which the primary purpose is to achieve efficiencies. The concept of the predominant purpose would also render it unnecessary to define how specific the information has to be (if too vague it could not reasonably be expected to influence the price) and it would not be necessary to set out expressly the various forms in which price could be influenced (discounts, rebates, surcharges, etc). We have addressed the remaining issue- what constitutes collusion- by arguing that mere disclosure or exchange of information in itself should not be the subject of a *per se* rule.

Indeed, the same solution may work for market-sharing and output-restriction, since it would seem that these practices, in their “naked” forms have has their predominant purpose to influence price, directly or indirectly. And with bid-rigging in the sale of products or services, the characterisation problem does not arise, and the drafting would be straightforward.

⁷²⁷ S 45(8).

⁷²⁸ “Commission re-adopts decision and fines air cargo carriers €776 million for price-fixing cartel” EU Commission Press Release IP/17/661 of 17 March 2017.

The test of the predominant or primary purpose of the arrangement would be consistent with the judgment of South Africa's Supreme Court of Appeal in the *ANSAC* case. As we saw above, the Court held that the key factor in determining whether price-fixing through a joint venture should be addressed under the *per se* rule of section 4(1)(b), or subject to a rule of reason analysis under section 4(1)(a), was whether the joint venture had been embarked upon for a "legitimate purpose". If it was thought appropriate the primary/predominant purpose test could be buttressed by an ancillary restraint exception of the type that exists under the Canadian statute, as discussed above.

It cannot be ruled out that in some cases economics will play a role in determining the primary purpose of the collusion. For example, the parties may put forward efficiency arguments in an attempt to argue that the primary purpose of the collusion was to reduce costs and not to influence price. It will then be up to the authority or adjudicating body to decide this issue on the basis of the submissions put forward to it. This may not be a straightforward exercise, as the Supreme Court of South Africa in the *ANSAC* case highlighted.⁷²⁹ But this should not be as onerous, complex or subjective a task as the ones that exist currently in defining the relevant market, assessing whether a firm has substantial market power or dominance, or predicting whether an agreement or course of conduct will substantially lessen competition, and if so whether it would produce net consumer or other public benefits. The enforcement would need to have a reasonable suspicion of hardcore arrangements before commencing an investigation, and would need to be confident, on the basis of the evidence it had gathered, that the primary purpose test was satisfied before commencing proceedings for infringement- otherwise it could resort to the mechanism described in section 7 6 below for non-hardcore arrangements.

Could these *per se* rules against "price-fixing" be drafted with sufficient clarity to comply with the ECHR principles we discussed in Chapter 3? It is submitted that they could, as explained below.

We noted that the first criterion that the law must fulfil under the ECtHR principles is that the "essential ingredients" of the infringement must be clear. The first ingredient is relatively

⁷²⁹ N 706 above. See also Philip Sutherland "The Anzac Saga and the Enforcement of Per Se Prohibited Horizontal Restrictive Practices in South Africa" in Barry J Rodger (ed) *Landmark Cases in Competition Law: Around the World in Fourteen Stories* (2013) 255.

straightforward: there must be “collusion”. This is a well-recognised concept, and is a matter of fact and evidence. Secondly, the collusion must be between two or more actual or potential competitors. Whether one business competes, or potentially competes, with another will in most cases be relatively straightforward to establish, after a factual inquiry. The third criterion should focus on the primary purpose of the collusion, defined objectively. (As we noted in Chapter 3, this would also be consistent with the fact that criminal offences normally require a *mens rea* element, and competition laws that include punitive and deterrent penalties for infringement are likely to be treated as criminal for ECHR purposes). If the evidence demonstrates to the requisite standard that the primary purpose of the collusion was to raise or maintain the price of the products or services, the third ingredient would be satisfied. In other words, if all three ingredients are satisfied, the *per se* rule will have been breached.

If the rule is framed in this way, the second and third basic criteria for legal clarity we identified from the Article 7 ECHR case law should also be relatively straightforward to satisfy. Since the need for any complex assessment of economic effects has been eliminated (by definition) from the *per se* rule, any residual points that may need to be clarified are likely to be points of law (second criterion) and a legal adviser should be able to predict the outcome on the basis of his or her legal knowledge and skills, not on the basis of a speculative economic assessment (third criterion).

In conclusion, *per se* rules would substantially reduce the problems of lack of clarity discussed in Chapter 5, by eliminating the root causes of the lack of clarity identified in Chapter 4, namely the vagueness of concepts such as relevant market, SLC, total welfare, and net consumer benefit. It is also possible for a *per se* law (taking price-fixing as an example) to be drafted with sufficient precision to satisfy the ECtHR’s basic criteria for clarity.

Before leaving the subject of *per se* rules for certain arrangements, it should be noted that South Africa has a *per se* prohibition against minimum resale price maintenance (RPM), unlike the other subject jurisdictions.⁷³⁰ As noted above,⁷³¹ the US abolished the *per se* rule against RPM and it is now subject to a rule of reason analysis. The subject jurisdictions other than South Africa do not

⁷³⁰ Competition Act s 5(2).

⁷³¹ Section 7 5 1.

have *per se* rules against RPM, although in the EU its inclusion in an agreement will deny it the benefit of the block exemption for vertical agreements.⁷³² Whether RPM should be subject to a *per se* rule, or dealt with other tools as discussed in the next section, is a matter of public policy preference in each jurisdiction. We do not comment on the economic merits or otherwise of RPM in this thesis.

7 6 How should we deal with arrangements that are not *per se* prohibited?

Non-hardcore arrangements such as research and development, production or selling joint ventures, and other forms of cooperation agreements, are unsuitable for *per se* prohibition, because in many cases they are economically efficient or bring other public benefits. So how should they be addressed by competition laws, if at all?

We submit that countries have a choice of two options. First, they may simply leave them outside the scope of the law completely. We have seen in section 7 4 that this is the approach that Singapore has taken with respect to vertical agreements. Other countries might also take a similar approach not just to vertical agreements, but also to non-hardcore horizontal agreements. A jurisdiction that has *per se* rules prohibiting hardcore cartel conduct, and a merger control system, could quite reasonably take the view that this is sufficient to capture most arrangements that are potentially harmful, that other transactions are just as likely to be economically beneficial (in terms of economic efficiency or consumer welfare) as detrimental, and on that basis they should be left outside the scope of the law. In the US context, we saw in section 7 3 that Steuer has argued that they should not be a focus of antitrust enforcement, and that enforcement should be directed only at monopolisation and cartels. An exclusion of vertical agreements and non-hardcore horizontal agreements from the scope of the law would clearly be the preferred approach from the legal certainty perspective.

⁷³² Section 7 4.

However, most jurisdictions would probably wish to have some mechanism in place to deal with non-hardcore horizontal arrangements. They may not be convinced that the predominant purpose of the arrangement is to influence prices directly or indirectly, and therefore that it is caught by the *per se* rule against these arrangements that we proposed in section 7.5. But they may still wish to have the opportunity to examine them, and put a stop to them if they believe that any harm they cause to competition is not justified by efficiency or other public benefits. What sort of mechanism (if any) would be compatible with the need for legal certainty?

We argued in Chapters 4 and 5 that a *prohibition* of agreements based on whether they substantially harm competition, and if so whether they are justified on grounds of economic efficiency or consumer benefits, is unacceptable on legal certainty grounds. This is in spite of the efforts that have been made to introduce greater clarity, or mitigate the lack of clarity, in such a prohibition, as described in Chapter 6.

One approach would be to follow the Canadian model of enforcement for such agreements, whereby they are not prohibited or subject to penalties, but the authority can intervene to stop an arrangement which harms competition and is not justified by efficiency (or other countervailing benefits in the jurisdiction concerned such as consumer welfare).⁷³³ As we saw in Chapter 6, it would limit, albeit not eliminate, the reputational damage and unfairness arising from being found guilty of a competition law infringement, and being subject to penalties and potential damages claims for arrangements or conduct that the business could not reasonably have predicted was illegal.⁷³⁴

The Canadian model of enforcement is by no means a panacea for legal uncertainty in competition laws. As noted in Chapter 6, a firm might still have to incur legal costs in obtaining advice on the prospect of regulatory intervention in the future, and it may have incurred costs in investing in a particular investment which it cannot recover if the enforcement authority intervenes against the arrangement.

⁷³³ Competition Act s 90.1.

⁷³⁴ Section 6.3.4.

These costs could be reduced by having a facility for prior authorisation of agreements, where a firm could apply for an advance ruling from the authority on whether a proposed agreement is likely to be problematic. We noted in Chapter 6 that such a facility may not be workable unless a significant category of agreements are excluded (such as vertical agreements, as we discussed in section 7.4), and that it has a number of other limitations.⁷³⁵ However, provided notification was not compulsory for the firms concerned, it could be a usual supplement to the Canadian enforcement model in terms of providing extra legal clarity for firms who wished to take this step before deciding whether to implement their arrangements.

The authority could further increase clarity by issuing guidelines on the circumstances in which it would exercise its enforcement powers. Since standalone private actions are by definition ruled out under the Canadian model of enforcement- because there is no prohibition against non-hardcore arrangements- such guidelines are likely to carry more weight: there is less risk of the adjudicating body contradicting the enforcement authority's decision. Indeed, as we have seen, Canada also has a facility for seeking a prior opinion from the Commissioner on proposed arrangements or conduct, and the Commission has issued enforcement guidelines.

In summary, we believe the Canadian model of enforcement for non-hardcore arrangements, combined with a facility for prior authorisation (if feasible) and enforcement guidelines, would represent a fair compromise between the public policy need to have some control over non-hardcore arrangements, on the one hand, and to limit the harm from legal uncertainty described in Chapter 5, on the other.

7.7 How should we deal with Unilateral Conduct?

As we saw earlier in this Chapter, a *per se* prohibition against hardcore conduct, such as price-fixing and bid-rigging in the supply of products or services, can be justified on the basis that, in aggregate, they harm competition, raise prices (and therefore costs) for intermediaries in the supply

⁷³⁵ Section 6.3.3.

chain and (directly, or potentially indirectly) for final consumers, and have no countervailing economic benefits.

It is difficult to identify any types of unilateral conduct where this conclusion can be drawn. In the past, the EU Courts and Commission (for example) had been criticised for taking a formalistic (or *per se*) approach to certain types of conduct such as loyalty rebates, resulting in conduct being prohibited in some cases that had no harmful effects on competition or consumers.⁷³⁶ Whish and Bailey state that there is now a “fair degree of consensus” that “the economics of abuse are sufficiently complex that this is not an area in which formalistic, or *per se*, rules are appropriate”.⁷³⁷ Indeed the European Court itself now appears to have recognized this, by overturning the General Court’s decision in *Intel*, on the grounds that the latter had failed to look at the economic effects of the loyalty rebate scheme in upholding the Commission’s decision that the scheme constituted an abuse.⁷³⁸

So how should unilateral conduct by dominant firms (or those with SMP) be handled? As with non-hardcore horizontal arrangements jurisdictions again, at least in theory, have a choice between two options. First, they could leave unilateral conduct out of the scope of the law completely, on the basis that the benefits of having measures in place to deal with such conduct are not justified by the costs. However, unlike with non-hardcore arrangements, such an exclusion is unlikely to be credible or feasible from the international perspective, given all of the external pressures we described in section above, and the fact that it is standard practice worldwide to have measures in place to deal with unilateral conduct by firms with dominance or SMP.⁷³⁹ Moreover, such an exclusion is unlikely to be palatable domestically in political terms: governments generally do not wish to appear powerless to deal with actions by dominant or powerful enterprises which are unpopular with the public. As we discussed in Chapter 2, one of the main reasons competition laws were introduced in the first place was to enable the authorities or courts to deal with abuses of

⁷³⁶ Whish and Bailey *Competition Law* 185.

⁷³⁷ N 736 above.

⁷³⁸ Case C-413/14 P *Intel v Commission*, judgment of 6 September 2017 (not yet reported), available at <http://curia.europa.eu/juris/liste.jsf?num=C-413/14> (accessed on 3-10-2017).

⁷³⁹ Section 7 2.

market power by dominant firms.⁷⁴⁰ If a government wishes to encourage new entrants to markets (whether overseas or domestic investors) it may also wish to re-assure potential investors that it has measures in place to deal with abuse.

As with non-hardcore arrangements, we have argued in this thesis that a *prohibition* against unilateral abusive conduct is unacceptable on legal certainty grounds. But the Canadian experience again shows that provisions to deal with abuse need not take the form of a prohibition. The same approach as noted above in relation to non-hardcore arrangements could be taken, with no prohibition against such conduct, but the Tribunal empowered to issue a cease-and-desist order for the future. As with non-hardcore arrangements, this would avoid the human rights concern of being found guilty of an infringement which the business could not reasonably predict.

In Canada this concern still exists because of the power to impose a penalty for abuse even though there is no infringement of a prohibition. In our view, this aspect is not acceptable on legal certainty grounds, and contravenes the principle of *nulla poena sine lege*.⁷⁴¹ Even if this power was removed, the Canadian approach would not resolve all of the adverse consequences of lack of legal certainty, as discussed in section 6 3. However, provided there is no such power to impose a penalty, the Canadian model of enforcement, coupled with a facility for prior authorisation and enforcement guidelines (which exists in Canada for proposed unilateral conduct as well as non-hardcore arrangements) would in our view be a reasonable pragmatic compromise between the public policy need to have some control over abuse, on the one hand, and to limit the harm from legal uncertainty described in Chapter 5, on the other.⁷⁴² While we do not envisage that as much use would be made of a prior authorisation facility for proposed conduct as for arrangements, for the reasons we discussed in Chapter 6,⁷⁴³ it would be potentially useful nonetheless.

It may be argued that, under the approach suggested above, the damage from the abuse may already have been done by the time the enforcement authority intervenes. However, we believe that this is

⁷⁴⁰ Section 2.

⁷⁴¹ See Chapter 4 section 4 5 3.

⁷⁴² Competition Act s 124.1.

⁷⁴³ Section 6 3 3.

a price that has to be paid if the law cannot define the conduct which is subject to a prohibition with sufficient certainty. A prohibition which is not sufficiently precise leads to the serious adverse consequences we discussed in Chapter 5.

Moreover, experience shows that there are other mechanisms and tools available to competition authorities that enable them to detect anti-competitive conduct quickly and put a stop to it, without having to prohibit the conduct in vaguely defined terms and imposing the added risk on the firm of being subject to substantial penalties or damages claims in the event of infringement.

For example, competition regimes can give powers to competition authorities to conduct market enquiries, to enable them to keep abreast of competition problems in particular sectors, and whether these may be due to anti-competitive conduct or other factors such as inappropriate regulation or high barriers to entry, whether avoidable or unavoidable. This facility could enable them to detect, and intervene more quickly to prevent, harm to competition arising from anti-competitive conduct by firms with substantial market power or dominance. For example, the competition authorities in South Africa and Hong Kong authority have such powers.⁷⁴⁴ Such powers are likely to be more effective if they include the power to require persons to provide information, as the EU and UK rules do. The Hong Kong competition authority has the power to conduct market inquiries, but has pointed out that the legislation does not give it the power to compel persons to provide information.⁷⁴⁵

Finally, competition problems in an economy may arise from factors other than anti-competitive conduct, and there are tools with which governments may equip themselves to deal with such problems. For example, in the UK, the competition authority has powers to conduct market investigations, which include the power to impose structural or behavioural remedies against

⁷⁴⁴ For South Africa see Competition Act s 43A-43C. For Hong Kong see Competition Ordinance s 130(e).

⁷⁴⁵ Competition Commission “Report on Study into Hong Kong’s Auto-fuel Market” May 2017 p 1, available at: https://www.compcomm.hk/en/media/press/files/Full_Report_Auto_fuel_Market_Study_Report_Eng.pdf(accessed on 10-11-2017).

businesses, even if they have not been found guilty of any anti-competitive conduct.⁷⁴⁶ In 2009, the UK Competition Commission required British Airports Authority to sell three of the seven UK airports it owned to different purchasers, in order to increase competition within the sector.⁷⁴⁷ And in 2014, the Competition & Markets Authority (the successor to the Commission) issued an order prohibiting auditing firms from conducting more than ten consecutive audits for any of the top 350 companies listed on the London stock exchange without going through a competitive tender process, in order to allow for greater competition between the big auditing firms and smaller ones.⁷⁴⁸

In conclusion, jurisdictions have a significant range of choice in deciding whether, and if so how, to deal with arrangements and conduct which fall outside the scope of *per se rules* of illegality. How they exercise that choice largely depends on their prior assumptions about the ability of markets to rectify themselves of any market failures (i.e. their faith in markets), or put another way, their willingness to intervene in markets, and the extent to which they are prepared to give a free rein to dominant firms. But international pressure, as explained in section 7 2 above, is also a significant factor.

7 8 Conclusion

In summary, the approach that we advocate is based on a combination of two methods:

- *Per se* rules of prohibition for agreements which can be presumed as economically harmful in net terms (in short, hardcore arrangements such as price-fixing) and,

⁷⁴⁶ Enterprise Act 2002 Part 4, in particular s 138.

⁷⁴⁷ See Competition Commission “BAA airports market investigation: a report on the supply of airport services by BAA in the UK” 19 March 2009, available at: http://webarchive.nationalarchives.gov.uk/20140402170726/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/545.pdf (accessed on 10-11-2017).

⁷⁴⁸ The Statutory Audit services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014, available at: https://assets.publishing.service.gov.uk/media/54252eae40f0b61342000bb4/The_Order.pdf (accessed on 11-11-2017).

conversely, *per se* rules of exclusion for agreements which can be presumed to be economically beneficial in net terms (vertical agreements);

- Where jurisdictions wish to have mechanism to intervene against non-hardcore agreements and abuse of a dominant position based on harm to competition and whether the harm is justified by efficiencies, this should not be done by way of outright prohibition. The Canadian model (minus the penalty provision for abuse) provides a model which is more consistent with the requirement for legal certainty.

Wils has also argued for a differentiation between hardcore arrangements and other conduct in enforcement models, and that only the former should be subject to *per se* prohibition. Although he made this point in arguing that hardcore arrangements conduct should attract jail sentences for individuals, our argument is that the clarity provided through *per se* prohibitions should also apply to hardcore arrangements even where no jail sentences are involved, given the serious consequences that a breach of competition generally can attract, that hardcore arrangements can be defined with sufficient legal certainty, and that they are generally regarded as harmful to an economy in net terms.

Wils recognises that imprisonment would be inappropriate for other types of anti-competitive arrangements and abuses of dominance, for reasons including lack of legal certainty: "...the risk of undesirably chilling lawful behavior is much more substantial, as the borderline between anti-competitive and pro-competitive behavior is often less obvious". He goes on to say that "for those types of violations, fines on undertakings, or fines combined with director disqualification, may suffice".⁷⁴⁹

It will be clear from this dissertation that we strongly disagree that such sanctions are appropriate even for non-hardcore arrangements or abuse of dominance or significant market power, for the same reason of legal uncertainty which Wils cites to justify no jail sentences for such

⁷⁴⁹ At 37. Whelan also recognizes that criminalisation is not appropriate outside hardcore arrangements, without specifying how other arrangements and abuse should be handled: Peter Whelan "Legal Cartel Criminalisation within the EU Member States" (2012) *Cambridge Law Journal* 71(3) 677.

infringements. Indeed, we have also argued that *no prohibition* leading to possible infringement is appropriate for such arrangements and conduct, given the current state of legal uncertainty in these rules. The model we have proposed is a more appropriate way of addressing them, as this dissertation has sought to demonstrate.

8 Overall Conclusions

This dissertation has shown that the general prohibition approach which is commonly adopted in competition law (including those of four out of the five jurisdictions examined in this paper)- an approach whereby arrangements between, or unilateral conduct by, businesses may or may not be prohibited and subject to penalties depending on economic assessments - is untenable in today's society, by commonly accepted standards of legal certainty.

It is untenable for many reasons, but they can be grouped as follows:

- It is unfair. It is fundamentally unfair that persons who are legally obliged to comply with a law cannot predict with any great level of certainty whether their proposed actions will be held legal or illegal. But this is the situation under the general prohibition approach. This unfairness is not a merely subjective or arbitrary judgment- it is based on standards established by the ECtHR under the ECHR.
- It causes economic waste. The vagueness which is inherent in the general prohibition approach creates much greater costs than either no prohibition, or a specific prohibition would, in terms of compliance costs, costs of dealing with investigations or litigation, and chilling conduct which is economically beneficial. It is ironic that competition, and competition law, is valued for its ability to promote efficiency, but the general prohibition approach does the opposite.
- It is an affront to the rule of law principle. This is on two grounds. First it violates the principle that persons bound by a prohibition should know what they have to do to comply with it (the first point above). Secondly, it exposes the interpretation and application of the law to the policy and vagaries of the individual preferences of whoever is in charge of enforcement, as opposed to applying the law objectively to the facts. In other words, “a government of men, not laws”.
- It damages the credibility of the legal system, by encouraging the authorities to enforce the law only in extreme or obvious cases, leaving broad swathes of conduct within the scope of the prohibition but in practice unchallenged.

So what can be done about this situation? We have considered the various methods that have been used to provide greater certainty, and to mitigate the effects of lack of certainty, under the general

prohibition approach, and found them lacking in serious respects, in terms of bringing sufficient legal certainty to a general prohibition. We have also considered, and rejected, the option of abandoning competition laws addressing business arrangements and conduct completely. Even if is not clear from the economic situation in a particular country that there is conduct causing economic harm which is of such an extent as to justify the cost of a regime to tackle it, there are wider concerns to consider, such as encouraging inward investment, securing free trade deals, and generally being considered as a “good international citizen”. And politically it is also important to have an instrument in place to address egregious conduct by powerful firms, that is measures to address abuse of dominance or substantial market power.

This leads us to the following conclusions:

1. The competition law should have measures to address certain anti-competitive arrangements, and abuse of dominance market power. The law should have the basic components outlined below.
2. For vertical agreements, jurisdictions should seriously consider excluding them from the prohibition of anti-competitive agreements, given that they are widely recognized as efficient, and that the provisions on abuse of dominance or substantial market power should be sufficient to deal with any competition problems that may arise from them.
3. In the case of horizontal agreements, the law should *prohibit* by means of *per se* rules hardcore arrangements, i.e. price-fixing, output restriction and market-sharing, where their predominant purpose is to affect price, and bid-rigging in supplies (not purchases). This is for four reasons: (a) they can generally be considered to be harmful (or at least not beneficial) to competition and inefficient; (b) prohibitions for these types of conduct can be defined with sufficient legal certainty (c) it is difficult to see how a mechanism other than prohibition would be effective in deterring them and (d) any mechanism other than prohibition would not be perceived as in accordance with international standards.
4. In the case of non-hardcore horizontal arrangements, the provisions should not take the form of a prohibition, because of the uncertainties of weighing harm to competition against economic efficiency or other public benefits. It is not acceptable that businesses should be exposed to the possibility of being found guilty of an infringement and penalised

for making an economic assessment which differs from that of the enforcement authority or adjudicating body, looking at the matter *ex post facto*. The consequences are exacerbated where jurisdictions allow standalone private actions, exposing businesses not only to the risk of infringement and penalties, but also private claims for damages. Instead, jurisdictions should follow the Canadian model of enforcement, allowing the competition authority, as a last resort to issue a cease and desist order (under the administrative enforcement model) or to seek such an order from the adjudicating body (under the judicial enforcement model). It should only be unlawful to implement such arrangements if there is a breach of a consent agreement or cease and desist order, or if the authority had refused prior authorisation where it was applied for (see 6 below).

5. In the case of abuse, the provisions should also not take the form of a prohibition, because there are no specific types of unilateral conduct that can be categorized as always harmful in net terms- the effects of the conduct have to be considered case by case. Since a general prohibition based on economic effects would not provide sufficient legal certainty, as discussed above, another mechanism has to be found. In our view, as with non-hardcore agreements, the Canadian model of enforcement (minus the ability of the Tribunal to impose a penalty) is the most appropriate solution, since it gives the authority power to tackle abusive conduct, but does not put the business at risk of breaching the law by engaging in conduct that it could not have predicted was illegal.
6. For both non-hardcore agreements and abuse, the Canadian model of enforcement could be supplemented by a facility for voluntary applications for prior approval (provided vertical agreements are excluded from the scope of the law) and enforcement guidelines issued by the competition authority.

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