

COMPETITION LAW AND THE COMMON LAW OF UNFAIR COMPETITION

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Abstract

Competition between trade rivals in a marketplace operating within a common law-based legal system is regulated primarily by two fairly distinct branches of the law: the prohibitions against anti-competitive conduct imposed by the competition law framework, and the common law restraints against acts of “unfair competition” that attract liability under the economic torts. This dissertation aims to critically examine both these legal frameworks and provide an integrated account of how these branches of the law distinguish between lawful and unlawful modes of competitive conduct. By scrutinising the doctrinal and policy foundations that underlie each of these legal frameworks, common thematic strands that may not be immediately apparent to lawyers working exclusively in either field will be exposed, while fundamental differences between their respective inner workings will also be uncovered in the process. Engaging in such a comparative exercise will facilitate a deeper understanding of the contrasting objectives and jurisprudential approaches associated with each legal framework which, in turn, sheds some light on the nature of their relationship with each other and the extent to which legal developments in one field ought to influence, or be influenced by, the other.

Besides evaluating *how* and *why* the common law economic torts operate differently from the competition law prohibitions in circumscribing the liberty of individual competitors to inflict economic harm upon their trade rivals, this dissertation will also analyse selected types of commercial conduct which are regarded as lawful under one framework but unlawful by the other, and contrast them with scenarios which could attract overlapping legal liability under *both* legal frameworks. In addition, this dissertation will explore a selection of legal issues arising from the doctrinal interaction between these areas of the law that may confront the courts as these two legal frameworks continue to develop in tandem with each other.

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CHAPTER 1: COMPETITION LAW AND THE COMMON LAW OF UNFAIR COMPETITION: AN INTRODUCTORY OVERVIEW

*The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered, but to have fought well.**

1. The laws of competition applied to commercial rivals in the common law marketplace

Unlike athletes who compete against each other on the sporting field, commercial competitors participating in market-driven capitalist economies do not typically aspire towards modes of competitive behaviour which reflect the values of good sportsmanship, fair play or other such lofty ideals. Such commercially-minded enterprises are, ultimately, interested in boosting their bottom-lines as far as possible and may adopt hostile modes of competition towards their rivals where such aggressive means might yield financially profitable results. However, business rivals engaged in mercantile competition with each other on the battlefield of commerce are subject to an array of different legal controls over what they are permitted to do in order to attract custom to themselves and, more specifically, how they behave towards each other, their upstream and downstream business associates and their customers. By distinguishing between legally prohibited and permissible modes of commercial conduct, the laws of competition set out the “rules of engagement” that business rivals trading in the common law marketplace are required to adhere to when they, in the

* Pierre de Coubertin, founder of the modern Olympic movement, coined this phrase in 1908 when London hosted the Olympic Games after hearing a sermon by Bishop Ethelbert Talbot for Olympic athletes at St Paul's Cathedral. Baron de Coubertin's phrase was adopted as part of the creed of the Olympic movement and has since been displayed on scoreboards during the opening ceremonies of every Olympic Games. See <http://www.olympic.org/en/content/Olympic-Games/All-Past-Olympic-Games/Summer/London-1908>. Baron de Coubertin also introduced the Olympic Oath in 1920 when the Games were held in Antwerp. The oath is recited by a sportsman from the host country in which the Games are held on behalf of all participating athletes. In its original form, the athlete's oath consisted of the following declaration: “In the name of all competitors, I promise that we shall take part in these Olympic Games, respecting and abiding by the rules that govern them, in the true spirit of sportsmanship, for the glory of sport and the honor of our teams.”

course of advancing their respective commercial interests, inflict economic harm upon each other as part of the competitive process. In particular, two distinct fields of law play significant roles in demarcating the boundaries of lawful and unlawful modes of competitive behaviour: Competition Law and the Law(s) of Unfair Competition. Despite their apparent thematic proximity, lawyers from common law jurisdictions working in these fields of law tend to regard these legal frameworks as distinct areas of specialised jurisprudence and frequently approach these legal frameworks independently rather than in conjunction with each other. The schism between these legal sub-disciplines may be the result of the methodological and analytical disparities between them given their very different historical origins, theoretical traditions and conceptual foundations. Modern competition law is a relatively new branch of the law – it is quasi-regulatory in character, heavily influenced by micro-economic principles, and driven by broad public policy considerations that extend beyond the immediate interests of the specific parties directly involved in any particular case. In contrast, the law of unfair competition in the common law world has ancient roots that go back into the nineteenth century – it comprises a small but eclectic suite of common law actions that have been developed incrementally by the courts, imposes liability based on the intentions of the wrongdoer and the character of his misconduct, and seeks to balance the rights and duties of claimants and defendants in each individual case.

This thesis seeks to explore the extent to which the jurisprudential gap between these two fields of law are can and should be bridged by examining their common boundaries and mapping the interface between them. The methodological structures employed by each legal framework to differentiate between lawful and unlawful modes of competitive conduct will be analysed with a view towards identifying and evaluating selected facets of these legal sub-disciplines that are critical towards understanding their respective inner workings. By uncovering the thematic commonalities shared by these legal frameworks and highlighting

the major points of divergence between them, a more holistic and integrated picture of this area of the law will, hopefully, emerge to give lawyers that have been hitherto working exclusively in one field a useful insights into the other. The opportunities for substantive interaction between these two fields of law will also be analysed to facilitate a deeper understanding of the potential practical synergies between them.

English law will be used as the focal point for analysis in this thesis because of its pervasive influence across the many jurisdictions that comprise the common law world, particularly in the realm of trade and commerce, though references are made to the common law decisions of other commonwealth jurisdictions where relevant. Given that the English competition law regime that is in force today is inextricably connected to the European legal framework, references to the decisions and judgments of the European legal institutions are also made, where appropriate, alongside the decisions of the domestic courts and specialised competition tribunals.

2. Competition Law in the United Kingdom

Before we examine the substantive legal prohibitions against anti-competitive conduct currently in force in Chapter 3, a brief introduction to the developmental arc of the legislative framework in the United Kingdom may be helpful to provide a contextual background against which the competition rules may be evaluated in conjunction with the other legal restraints imposed by the common law on commercial undertakings seeking to inflict economic harm upon their competitors. This birds-eye overview of the legislative and policy forces which have shaped the United Kingdom's competition law regime highlights three important features that buttress the conceptual foundations of the discussion in later chapters – firstly, that there has been a substantial convergence between the domestic and European

competition law regimes; secondly, that an effects-based analytical approach is now widely used in the interpretation and application of the competition law prohibitions; thirdly, that while the protection of competition and the competitive process is generally acknowledged to be a central objective of the competition law framework, there remain divergent views as to what exactly the pursuit of these goal entails, when and how far they should be pursued at the expense of other policy objectives, and how they ought to be translated into substantive legal norms.

(a) The legal regime before 1998

The United Kingdom's competition law regime originated from a fragmented framework of disparate statutes, including the *Monopolies and Restrictive Practices (Inquiry and Control) Act 1948*, the *Restrictive Trade Practices Act (1956, 1968, 1976)*, the *Fair Trading Act 1973* and the *Competition Act 1980*.¹ A bifurcated approach was taken between competition issues arising from the collective conduct of groups of economic entities and the unilateral commercial practices of monopolies. While cartels and other forms of multi-party restrictive practices were regulated under a highly formalistic regulatory framework that included a specialised tribunal, the Restrictive Practices Court,² other competition issues arising from monopolistic and oligopolistic commercial conduct were addressed by the predecessor-

¹ A concise overview of the “overlapping, competing and occasionally contradictory accretions to the law” can be found in Tom Sharpe, ‘British competition policy in perspective’ (1985) 1(3) *Oxford Review of Economic Policy*, 80-94. The other pieces of the complex collage of statutes that comprised the UK’s competition law framework are the *Monopolies and Restrictive Practices Commission Act 1953*, *Resale Prices Act (1964, 1976)*, the *Monopolies and Mergers Act 1965*, the *Telecommunications Act 1984*, the *Transport Act 1985*, the *Airports Act 1986*, the *Financial Services Act 1986*, the *Gas Act 1986*, the *Companies Act 1989*, the *Water Act 1989*, the *Electricity Act 1989*, the *Broadcasting Act 1990*, the *Water Industry Act 1991*, the *Railways Act 1993* and the *Deregulation and Contracting Out Act 1994*. Most of the sector-specific Acts with their own competition law provisions remain in force today.

² For an account of how the behind-the-scenes lobbying by industry and trade associations undermined the policy-making process behind 1956 Act and, ultimately, contributed to its failure in practice to effectively control restrictive trade practices, see J J Richardson, ‘The Making of the Restrictive Trade Practices Act 1956 – A Case Study of the Policy Process in Britain’ (1967) 20(4) *Parliam Aff*, 350-374.

institutions of the present-day Competition Commission³ which had no independent powers of investigation but had to be instructed to conduct market investigations upon references made by other agencies or government office-holders. This dual system of judicial control over restrictive practices and administrative control over monopolies was generally regarded as highly unsatisfactory. The regulation of horizontal agreements involved a legalistic and form-based system of registration that involved narrowly-defined categories of collusive behaviour that would be rendered unenforceable if not registered with the Registrar of Restrictive Trade Practices or, subsequently, the Office of Fair Trading within a prescribed time period and could give rise to civil liability to third parties for losses suffered as a result of their operation; parties to such agreements could only justify their conduct before the Restrictive Practices Court by invoking specific exemptions found in the statute.⁴ The regulation of anti-competitive practices by monopolies and oligopolies by way of market investigation reports proceeded on a discretionary basis and hinged on a legally amorphous standard against which the conduct in question had to be assessed – whether or not the practices under investigation operated ‘against the public interest’.⁵ Even when section 2(1)

³ The Competition Commission came into being in 1999, but was first created in 1948 as the Monopolies and Restrictive Practices Commission, before being reincarnated into the Monopolies Commission in 1956, and renamed again in 1973 as the Monopolies and Mergers Commission.

⁴ As one commentator has put it, “the legality and civil enforceability of agreements is conditional on the legal expression freely given to the economic relationships of the parties, rather than on the economic effects of the relationships themselves.” See See Sharpe (n 1) at 84.

⁵ Section 84 of the *Fair Trading Act 1973* defined the public interest test by reference to a list of non-exclusive policy factors. In exercising its functions, the Commission is required to have regard to “the desirability (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom; (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied; (c) of promoting, through competition, the reduction of costs and the development and use of new products, and of facilitating the entry of new competitors into existing markets; (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.” It has thus been argued by one commentator that, during this period, “a case can be made for the proposition that the UK really does not have an anti-monopoly policy, as the term is recognised in the USA, Germany and the EEC... what the UK possesses is a mechanism whereby certain defects or failures in the market mechanism can be investigated and ad hoc remedies applied.” See Sharpe (n 1) at 90.

of the *Competition Act 1980* explicitly adopted statutory language inspired by the effects-based provision found in European competition law – empowering the Director General of Fair Trading at the time to target conduct that was ‘intended to have or is likely to have the effect of restricting, distorting or preventing competition’ – the second stage of the legal process still involved a reference to the Monopolies and Mergers Commission which would then be required to apply the public interest test to the conduct in question.

Unlike other mature competition law regimes in the developed world, the competition law and policy framework of the United Kingdom was *not* first introduced with the original goals of controlling concentrations of economic power and safeguarding economic freedom, in parallel to the political freedoms secured by the tenets of liberal democracy;⁶ the post-war legislative framework was originally intended to facilitate government intervention in specific market situations that did not appear to work efficiently.⁷ Over the years, these other antitrust jurisdictions have since moved away from responding to the threats posed by large corporations to liberal democracy, arising from the spectacular growth of private industry in the earlier parts of the twentieth century, and have become increasingly preoccupied with using their competition law frameworks as an instrument to promote economic efficiency in

⁶ For example, John Sherman, the proponent of the American antitrust statute in 1890, declared to the US Congress, at 21 Cong Record 2457, that “(i)f we will not endure a King as a political power, we should not endure a King over the production, transportation and sale of any of the necessaries of life. If we would not submit to an Emperor we should not submit to an autocrat of trade, with power to prevent competition and affix the price of any commodity.”

⁷ See Sharpe (n 1) at 91. For an illuminating account of the socio-political and economic context in which the UK’s competition policy evolved during this period, see Stephen Wilks, *In the Public Interest: Competition policy and the Monopolies and Mergers Commission* (Manchester University Press, Manchester 1999), Chapter 2 (‘The post-war development of competition policy’). In Wilks’ analysis of the developmental history of Britain’s post-war competition policy evolution up to the passage of the 1998 Act, at 22, the regulatory efforts during this era were more concerned with specific issues of monopoly-control and restrictive trade practices, rather than a broader competition policy. “Competition” was just one aspect of a wider range of public policy concerns before it evolved into a dominant theoretical rationale for legal regulation. At 27-33, Wilks identifies five “sets” of goals that have been associated with British competition policy – promoting economic efficiency, enhancing international competitiveness, establishing linkages with national industrial policy and consumer protection, maintaining effective regulatory control and ministerial discretion over industrial reorganizations and “educating public, official (and academic) opinion” about the problems posed by cartels and monopolies.

the marketplace.⁸ Following the sweeping statutory reforms that occurred at the end of the twentieth century, the competition law regime of the United Kingdom has, in the same vein, morphed into a legal framework predominantly concerned with the protection of competition itself,⁹ or the competitive process between economic rivals, reflecting a fundamental legislative commitment to market-based economic policies.

(b) The legal regime after 1998

With the enactment of the *Competition Act 1998* and the *Enterprise Act 2002*, the United Kingdom finally adopted, like all the other Member States of the European Union, a competition law regime that was modelled after Articles 81 and 82 of the Treaty of Rome which have since been reincorporated into Articles 101 and 102 of the Treaty on the Functioning of the European Union.¹⁰ The Chapter I and II prohibitions of the 1998 Act

⁸ See Wilks (n 7) at 15-16 and 42-43, where he also asserts that the *Competition Act 1980* “symbolized a shift to competition as a criterion; to a focus on nationalised industries and post-privatisation regulation... and, most of all, it underlined the novel and principled commitment of Conservative industry ministers to liberal market competition.” He describes the years immediately preceding the 1998 Act as a period of “competition obsession”, with competition becoming a “governing principle of policy innovation” in sixteen pieces of legislation that regulated a broad range of industry sectors that included utilities, financial markets, housing, health care, pensions and transportation.

⁹ A Green Paper published by the Department of Trade and Industry in 1988 reviewing the government’s regulatory policies towards restrictive trade practices declared that “[a]greements with anti-competitive effects or purpose will be prohibited rather than merely made subject to a requirement to register which might lead eventually to the agreements being struck down. The registration system will be scrapped”. The Paper proposed replacing the existing system with a legal framework “designed to cover any agreement with anti-competitive effects” with provisions modelled after the European competition law prohibitions. DTI, *Review of Restrictive Practices Policy: A Consultative Document*, Cm 331 (London, HMSO, March 1988), 1, 1.6-1.7. It took almost ten years for the Conservative government to overcome the deep divisions between its Euro-sceptic free market advocates and pro-European members who were sceptical about excessive competition to fully accept the proposals made in a 1989 White Paper and it was the Labour government, which came into power in 1997, which eventually implement them by introducing the *Competition Act 1998*. See Wilks (n 7) at 305-308.

¹⁰ Apart from the formal renumbering of these treaty provisions following the Treaty of Lisbon 2007, which came into force on 1 December 2009, the substance of the European competition law regime and the text used in Articles 101 and 102 TFEU have otherwise remained completely unchanged. Given that the vast bulk of the caselaw used in the discussion below refer to the principal competition law provisions found in the Treaty of Rome 1957 – Articles 81 and 82 EC (which were previously Articles 85 and 86 EC/EEC prior to the re-numbering effected by the Amsterdam Treaty with effect from 1999) – these older numerical reference numbers will occasionally be used, where appropriate, throughout this dissertation when referring to the caselaw which preceded the Treaty of Lisbon. Similarly, references made to such cases will use identify the European judicial

prohibit, respectively, agreements which ‘have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom’ and any unilateral conduct that ‘amounts to the abuse of a dominant position in a market... within the United Kingdom’. Administered by the Office of Fair Trading, the Competition Commission, the Competition Appeals Tribunal and, ultimately, the courts, the scope of these legislative prohibitions against anti-competitive conduct found in these statutes was clearly intended to replicate the corresponding legal prohibitions found within European competition law insofar as the statutory language used in the former is identical to that found in the Treaty provisions.¹¹ Wilks has distilled the sweeping reforms that were made to the United Kingdom’s domestic competition law and policy framework when the 1998 Act was introduced into the following principal features:¹²

- The shift from agnostic investigation to prohibition
- The replacement of the ‘public interest’ test by an ‘effect on competition’ test
- The exclusion of the Secretary of State from the administrative process as regards actions and remedies
- The incorporation of the principles of European competition law jurisprudence into British administration

institutions responsible for those decisions using their old names – the Court of First Instance or CFI (now the General Court), and the European Court of Justice or ECJ (now the Court of Justice).

¹¹ Section 60 of the *Competition Act 1998*. See section 1 of Chapter 3. In addition to the European-styled competition law prohibitions found in the 1998 Act, sections 131-134 of the 2002 Act have also preserved key elements of one facet of the British model of competition regulation – the scale and complex monopoly inquiry provisions of the repealed *Fair Trading Act 1973* – by empowering the OFT to make market investigation references to the Competition Commission which would then have to decide “whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.” This enables the Competition Commission to investigate oligopolies and other sub-competitive markets where no individual market player has enough market power to qualify as a “dominant” undertaking within the scope of the Chapter II prohibition.

¹² Wilks (n 7) at 323.

- Hence the likely growth of legal involvement through defence, appeal and third party action
- The empowerment of third parties through rights of appeal and the potential to pursue damages in courts
- The imposition of substantial penalties

The European competition law prohibitions have operated within the United Kingdom in tandem with the domestic competition law framework since 1973, when the United Kingdom joined the European Community, with the former taking precedence over the latter when the conduct in question has a Community dimension insofar as it is capable of affecting trade between Member States. Since Regulation 1/2003 was introduced,¹³ the European Commission is no longer sole regulatory agency responsible for administering the Article 101 and Article 102 TFEU prohibitions. As the designated national competition authority in the United Kingdom, the Office of Fair Trading¹⁴ has also been empowered with the jurisdictional competence to apply these European competition law prohibitions directly alongside the English courts which were, prior to the Regulation, the only domestic institution could give direct effect to these Treaty provisions. With both these sets of legal prohibitions simultaneously in force in the United Kingdom and given the potential for conflicts arising from the concurrent application of corresponding European and the national competition law rules, Regulation 1/2003 sets out three governing principles that control each Member State's freedom to enact domestic laws that deviate from the European competition law prohibitions.

¹³ Council Regulation (EC) 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

¹⁴ *Competition Act 1998 and Other Enactments (Amendment) Regulations 2004*, SI 2004/1261, Article 3.

Firstly, in relation to the Article 101 prohibition, Member States are required to have national competition rules that are only as strict as the European prohibition, insofar as they apply to multi-party conduct that affects trade between Member States; this means that conduct that does not fall within the scope of Article 101(1) or which is exempted under the criteria in Article 101(3) should not attract legal liability under the United Kingdom's domestic competition law regime.¹⁵ Secondly, as far as the Article 102 prohibition against the abuse of dominance is concerned, Regulation 1/2003 provides that Member States are not precluded from adopting and applying within their respective territories stricter national competition laws which prohibit or impose sanctions on the unilateral conduct engaged in by undertakings.¹⁶ Dominant undertakings could thus, in theory, be subject to greater legal restraints under domestic competition law than under the European competition law framework. Thirdly, to the extent that national laws may 'pursue an objective different from that pursued by Articles [101] and [102] of the [TFEU]', Member States are empowered to further their own 'legitimate interests' by imposing legal restraints upon the commercial conduct of undertakings regardless of whether the conduct in question is unlawful under the European competition law rules.¹⁷ As such, Member States are permitted, for example, to implement 'national legislation that prohibits or imposes sanctions on acts of unfair trading

¹⁵ Article 3(2) of Regulation 1/2003 (n 13). As such, where the conduct of the parties in question is lawful under the European competition rules, it would not be possible to launch an investigation into such practices using the market investigation provisions of the *Enterprise Act 2002*. Regulation 1/2003 only governs "national competition law" and the English Court of Appeal has held that this does not include the section 188 of the *Enterprise Act 2002* which criminalises certain forms of dishonest cartel-related conduct. See *R v IB* [2009] EWCA Crim 2575, [2010] 2 All ER 728.

¹⁶ Recital 8 and Article 3(2) of the Regulation (n 13).

¹⁷ Article 3(3) of Regulation 1/2003 (n 13). Recital 9 of the Regulation explains that "Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market" and that the Regulation "does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law." The specific example given in the Recital is legislation "that pursues predominantly an objective different from that of protecting competition on the market" is "legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration."

practice, be they unilateral or contractual’ because ‘[s]uch legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market.’¹⁸ The last of these principles is of particular significance to this thesis insofar as it recognises that competition law principles can and must coexist with other legal rules that restrain the liberty of commercial undertakings to pursue their economic interests in the course of competition with each other: one of the key questions that will be carefully scrutinised in later chapters is the extent to which the common law economic torts in the United Kingdom ‘pursue an objective different from that pursued by Articles 101 and 102 of the [TFEU]’.¹⁹

(c) Competition and the competitive process

While there is a general consensus at present that the competition law regime currently in force in the United Kingdom has evolved into a regulatory framework that seeks to protect and promote ‘competition’,²⁰ there is still a significant divergence of views about what it actually means,²¹ whether it should be pursued in all circumstances and at what cost. Even

¹⁸ Recital 9 of Regulation 1/2003 (n 13). Consumer protection laws and unfair business practices laws thus remain compatible with the Regulation to the extent that they have their own sets of objectives and are not concerned with the protection of competition itself.

¹⁹ Elsewhere in the realm of the common law, it has been held by the English courts that the restraint of trade doctrine, as part of the common law of contract, cannot be characterised as predominantly pursuing an objective different from the European competition law prohibitions. The proximity between this facet of the common law and the Article 81 prohibition has been judicially recognised to the extent that “the particular concern of the common law involved is indeed a restraint on trade in a context which may be said to be no more than earlier language for the restraint on competition at which Art. 81 is aimed”. This meant that a court was precluded from subjecting an exclusive distribution agreement to an assessment under the restraint of trade doctrine once it had held that the agreement, while capable of affecting trade between Member States, did not have the necessary anti-competitive object or effect that would render it unlawful under the Article 81 prohibition. See *Days Medical Aids v Pihsiang Machinery Manufacturing* [2004] EWHC 44 (Comm), [2004] 1 All ER (Comm) 991 [254], [265]-[266] and *WWF v World Wrestling Federation Entertainment* [2002] EWCA Civ 196, [2002] UKCLR 388 [64] and [66].

²⁰ See, for example, the XXIX Report on Competition Policy (European Commission, 2000) at 6 which states that “[t]he first objective of competition policy is the maintenance of competitive markets”.

²¹ One author describes it as a “scandal of antitrust that neither its practitioners nor its theorists agree – in so far as they consider the question at all – on what competition is” and that competition lawyers “[o]pportunistically, insouciantly or ignorantly” lurch amongst the five possible definitions of “competition” articulated by Robert Bork decades ago: (1) the process of rivalry; (2) the absence of restraint over one firm’s economic activities by

though economic theories from the United States' antitrust regime have had some influence on the development of European competition law principles, which would, in turn, have had some impact on the way United Kingdom's domestic competition law regime has evolved, the fact is that economists have not been able to provide a straightforward or conclusive definition either.²² Competition officials and legislators have, instead, had to resort to adding qualifying adjectives to the concept of competition – “workable” or “effective” competition, for example, are commonly used – when trying to articulate what these laws are meant to achieve and protect. It is also worth pointing out that competition in the marketplace is not regarded as a goal in and of itself; competition is instead regarded as a means to the ends of improving consumer welfare, market efficiency, productivity and innovation.²³ In addition, promoting competition through a strong national competition law regime may also be regarded as a contributory factor towards enhancing the international competitiveness of home-grown industries on the world stage.²⁴

3. The Law(s) of “Unfair Competition” in the United Kingdom

In the United Kingdom, the law of “Unfair Competition” means different things to different segments of the legal community. Amongst intellectual property lawyers, the phrase refers to

another firm; (3) the state of the market in which the individual buyer or seller does not influence the price by his purchases or sales; (4) the existence of fragmented industries and markets; (5) a state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree. See Oliver Black, *Conceptual Foundations of Antitrust* (Cambridge University Press, Cambridge 2005), 6 citing Robert Bork, *The Antitrust Paradox* (Free Press, New York, 1978), 58.

²² As one commentator has put it, apart from a small number cases involving price-fixing or market-sharing, “economic analysis is generally ambiguous, *a priori*, about the efficiency effects of particular market structures and conducts”. See Donald Hay, ‘The Assessment: Competition Policy’ (1993) 9(2) *Oxford Review of Economic Policy*, 1-26, 2. Moreover, it is often contestable which variant of the ‘efficiency’ concept should be deployed in the analysis – productive or allocative, short-term or long-term – and how it should be measured.

²³ These goals identified by the Office of Fair Trading as the “benefits” of its work to the public. See <http://www.of.gov.uk/about/benefits/>.

²⁴ Michael Porter, *The Competitive Advantage of Nations* (Macmillan, London 1990).

specific common law actions, the torts of passing off and malicious falsehood in particular, that supplement the legislative instruments that comprise the intellectual property framework by providing aggrieved claimants non-statutory rights of action against those who have misappropriated their valuable intangibles or harmed their trading reputation in some way. In other legal circles, the phrase is closely associated with the legal frameworks that regulate “unfair” trading practices by businesses in their dealings with customers or consumers who have significantly weaker bargaining positions.²⁵ Straddling across both these segments of the legal landscape is the law of comparative advertising, which seeks to establish, *inter alia*, the boundaries of permissible conduct by traders when making references to the trade-marked products or services of their competitors. These are instances of “unfair” competitive behaviour that may give a trader a competitive advantage over his rivals, but do not specifically target nor necessarily cause financial injury to any particular rival undertaking.²⁶ Customers and the consuming public at large are likely to be the primary complainants of such behaviour and may be able to rely upon consumer protection or “fair trading” laws to seek redress against the offender. Regulations concerned with advertising standards and consumer marketing practices would therefore fall within this category of “unfair competition” law.²⁷

²⁵ As exemplified by the provisions of European Unfair Commercial Practices Directive, 2005/29/EC, [2005] OJ L149/22 and the European Misleading Advertising Directive, 84/450/EC, as recodified by Directive 2006/114/EC, [2006] OJ L376/21. It has been argued that the Unfair Commercial Practices Directive, while “enacted in the name of consumer protection... is bound to have profound effects on the competitive conduct of enterprises” and “is not just the culmination of a programme of harmonization of consumer protection law, but the first significant step in the renewal of a quite separate and much older programme to harmonise unfair competition law [in the European Union].” See Christopher Wadlow, ‘Unfair Competition in Community Law: Part 1: The Age of the ‘Classical Model’ [2006] EIPR 433,435.

²⁶ Comparative advertising causes economic injury to the party whose goods or services have been compared against, by diverting sales away from him to lower-priced products offered by the party who has made the comparison, only when goods or services concerned are substitutes for each other. Other forms of comparative advertising may not involve products that are close substitutes for each other, such as generic or low-budget versions of branded goods, where the crux of the complaint is that the party making the comparison has been free-riding on the positive reputation or image associated with such products.

²⁷ As regulated by the European Comparative Advertising Directive, 97/55/EC, [1997] OJ L290/18.

However, the notion of “unfair competition” can be used in a wider sense and be extended to encompass a broader range of situations where the defendant has advanced his own interests at the expense of his competitor, the claimant who has suffered economic harm, by means that can be meaningfully described as “unfair”. He might spread false rumours about his competitor’s products or services and scare the latter’s customers away. He might use threats against suppliers or distributors to coerce them not to deal with his competitor. He might collude with other undertakings in an orchestrated collective boycott to drive his competitor out of the market. In each case, the “unfairness” of the competitive conduct lies in the ethically questionable tactics employed by the defendant in his pursuit of self-interest and the economic injuries that have been deliberately inflicted upon his trade rival. The economic torts prescribe a framework of legal principles which attempt to capture some of these aspects of unfair competition. They are concerned with prescribing rules of fault-based liability in situations where a claimant has suffered economic loss as a result of the defendant’s conduct. The elements of each tort vary according to the category of behaviour which the common law seeks to regulate. For each of these torts, the challenge for the courts is to strike an appropriate balance, on the one hand, between the freedom of the defendant to engage in such modes of competitive behaviour to advance his own goals and, on the other hand, the claimant’s right to prevent his rivals from inflicting economic injury upon him by engaging in business practices that violate particular moral or social norms.

(a) Unfair competition and intellectual property law

Debates connected to the law of unfair competition within the intellectual property sphere have revolved around the role of the common law actions as adjuncts to the various statutory intellectual property regimes – copyright, patents and trade marks – in giving claimants who

have created valuable intangibles a right of action against third parties who have copied or made use of these intangibles, usually unprotected or unprotectable under any of the conventional statutory frameworks, without the claimant's prior consent.²⁸ A major facet of these debates involves an international and comparative dimension, with the landmark decision of the United States Supreme Court almost a century ago in *INS v Associated Press*²⁹ invariably emerging as a judicial point of reference, as well as the provisions of international intellectual property treaties that oblige its signatories, including the United Kingdom, to ensure that adequate laws are in place to deal with such conduct.³⁰ The law of "unfair competition" takes on two distinctive features when it is invoked by intellectual property lawyers. Firstly, the defendant's conduct is often characterised as some form of "misappropriation"; claimants in these cases seek exclusive rights to intangible intellectual products by asserting ownership over their "property".³¹ Secondly, the defendant's behaviour is frequently castigated on the basis that he has reaped the benefits of that which he

²⁸ Carty calls this a quest by claimants to use the common law to generate an "IP Effect" – to provide them with a measure of exclusivity over unauthorised commercial applications of their "ideas (including promotional and advertising ideas), information and "image": in essence legal protection is sought for all "valuable intangibles". See Hazel Carty, 'The Common Law and the Quest for the IP Effect' [2007] IPQ 237.

²⁹ 248 U.S. 215 (1918). In an action for "unfair competition in business", the defendants were found to have unlawfully misappropriated the claimant's news reports by telegraphing them from the east coast of the United States, where the claimants first published these reports, to the west coast of the United States, where the defendant's rival newspapers were distributed. An injunction was granted in favour of the claimants to prevent the defendants from "reaping the fruits of complainant's efforts and expenditure."

³⁰ Article 10*bis*(2) of the Paris Convention for the Protection of Industrial Property 1883 ("Unfair Competition") provides that "[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition", while Article 10*bis*(3) specifically identifies the following examples of unfair competition: (1) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (2) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (3) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods. Articles 39(1) and 39(2) of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) 1994 require member states to "[i]n the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention...protect undisclosed information" from "being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices".

³¹ This is manifested most clearly within the tort of passing off by the "goodwill" requirement – that claimants have acquired or cultivated a connection between their business and their actual and potential customers – which the English courts recognise as a species of intangible property. See section 2(d)(i) of Chapter 2.

has not sown, that he has been free-riding upon the efforts and expenditure of the claimant in some way. This line of argumentation emphasises the unjust enrichment³² of the defendant rather than any harm that has been caused to the claimant or any infringement of his property rights. Both these features advance moral justifications for the imposition of common law liability outside of the various legal frameworks created by the intellectual property statutes. However, the former focuses on the claimant's desert-based entitlements as the "creator", "owner" or "rights-holder" of the subject matter that has been copied or used by the defendant without the claimant's consent, while the latter places greater weight on the wrongfulness and blameworthiness of the defendant's misconduct.³³

Despite calls made by leading academic commentators over the years for a fully-fledged "tort of unfair competition" in the United Kingdom,³⁴ the English courts have displayed very limited enthusiasm towards developing such a common law action. While there have been some judicial dicta in support of extending the scope of the tort of passing off to ensure 'a degree of honesty and fairness in the way trade is conducted',³⁵ the courts have

³² See Michael Spence, 'Passing Off and the Misappropriation of valuable intangibles' (1996) 112 LQR 472 and Anselm Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (Oxford University Press, Oxford 1997), 121, where the author proposes a new action of "maligned competition" with "unjust enrichment as the basis for unfair competition".

³³ Carty argues that both these features serve as "essential fence posts" to common law liability since the "the theme of the common law... is that the law should intervene when something more than the protection of commercial value/valuable intangibles is involved. That something more seems... to involve a "deserving claimant" and a wrongful act". See Carty (n 28) at 261-262.

³⁴ See, for example, W R Cornish, 'Unfair Competition? A Progress Report' (1972) 12 Journal of the Society of Public Teachers of Law 126, Gerald Dworkin, 'Unfair Competition: Is the Common Law Developing a New Tort?' [1979] EIPR 241 and Gerald Dworkin, 'Passing Off and Unfair Competition – An Opportunity Missed' (1981) 44 MLR 564.

³⁵ *Irvine v Talksport* [2002] EWHC 367, [2002] 1 WLR 2355 [13]-[14] (Laddie J), where it was observed that, as far as the rationale for the tort of passing off concerned, "an underlying principle is the maintenance of what is currently regarded as fair trading" and that "the law of passing off responds to changes in the nature of trade." Similarly, in *Arsenal FC v Reed* [2003] EWCA Civ 696, [2003] RPC 39 [70], Aldous LJ suggested that "the cause of action traditionally called passing off, [is] perhaps best referred to as unfair competition", while in *British Telecommunications v One in A Million* [1998] EWCA Civ 1272, [1999] 1 WLR 903, 913, he observed that an overly strict adherence to the traditional requirements of the tort of passing off "would prevent the common law evolving to meet changes in methods of trade and communication as it had in the past."

not been prepared to create a general “unfair competition” tort.³⁶ The unwillingness of the courts to fashion a completely new cause of action of this sort is understandable given its nebulous scope of application and its potential to conflict with the statutory intellectual property frameworks which have specific legislative checks and balances built into them. Growth in this area of common law, at least where intellectual property issues are concerned, has been confined to gradual extensions to the scope of the tort of passing off and firmly anchored to the misrepresentation requirement as an indispensable element of the common law action.³⁷

Developments in the realm of trade mark law have also significantly eclipsed the common law in developing new forms of protection for registered trade mark proprietors against specific instances of “unfair competition”: the anti-dilution provisions of the European Trade Marks Directive have been interpreted by the courts to enable the owner of a trade mark with a “reputation” to bring an action for trade mark infringement against a defendant who ‘without due cause takes unfair advantage of... the distinctive character or repute of the trade mark’.³⁸ Even where no detriment or economic harm is suffered by the proprietor of a trade mark with a reputation, trade mark infringement liability may still arise where the defendant has intentionally obtained a ‘commercial advantage’ from the unauthorised use of a sign that

³⁶ See, for example, *L’Oreal SA v Bellure* [2007] EWCA Civ 968, [2008] RPC 9 [159]-[161], where Jacob LJ rejected the claimant’s attempts to persuade the court to recognise a new tort of “unfair competition” that, unlike the tort of passing off, did not require any sort of misrepresentation by the defendant. It was observed that “[i]f the courts (or indeed Parliament) were to create such a tort it would be of wholly uncertain scope – one would truly have let the genie out of the bottle.”

³⁷ See section 2(d)(i) of Chapter 2. The title of the leading text on the law of passing off clearly reflects the nexus between this tort and this narrower conception of “unfair competition” which is limited to acts of “misrepresentation”. See Christopher Wadlow, *The Law of Passing Off: Unfair Competition by Misrepresentation* (3rd revised edn Sweet & Maxwell, London 2005).

³⁸ 89/104/EEC, (21 December 1988), [1989] OJ L40/1, Article 5(2).

is identical or similar to the registered trade mark.³⁹ Similarly, when determining if a registered trade mark proprietor's exclusive rights over the trade mark under the statutory regime have been infringed by a defendant who has made use of the trade mark ostensibly "for the purpose of identifying goods or services as those of the proprietor", judges are required under English law to consider if such use is "in accordance with honest practices in industrial or commercial matters".⁴⁰ It remains to be seen whether these developments within the statutory framework for registered trade marks intensify or relieve the pressures on the common law, as a system for the protection of "unregistered" trade marks, to expand itself to accommodate non-misrepresentation-based claims of unfair competition.⁴¹

(b) The Common Law of Unfair Competition and the economic torts

³⁹In Case C-487/07 *L'Oreal SA v Bellure* [2009] OJ C180/6, [50], hearing an Article 234 EC reference from the English Court of Appeal, *L'Oreal SA v Bellure* (n 36) above, the European Court declared that "[t]he advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or repute of the mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image." These principles were subsequently adopted, albeit with great reluctance, by the Court of Appeal in *L'Oreal SA v Bellure* [2010] EWCA Civ 535 [49]-[50] where they were castigated by Jacob LJ as "a conclusion high in moral content... rather than economic content" that he was duty-bound to apply even though he "[did] not agree with or welcome this conclusion."

⁴⁰*Trade Marks Act 1994*, s 10(6).

⁴¹Carty (n 28) has argued that the expansion of the scope of registered trade mark protection to include anti-dilution liability will "add to the pressure... to refocus the tort [of passing off] from one based on misrepresentation to a tort based on an allegation of misappropriation". Similarly, in the *One in a Million* (n 35) decision, Aldous LJ echoed Lord Diplock's views (in *Erven Warnink BV v Townend* [1979] AC 731, 742-743) that since "Parliament [had] over the years progressively intervened in the interests of consumers and traders so as to impose standards of conduct and to ensure commercial honesty", it was "not surprising that the courts have recognised that the common law, in that particular field, should proceed upon a parallel course rather than a diverging one". However, it is by no means clear that the common law should, or can, move in the same direction as this facet of the law of registered trade marks which offers anti-dilution protection only to a very limited class of well-known trade marks. These developments within the statutory law of trade marks might adequately meet the needs of brand owners, who would almost certainly have secured the relevant trade mark registrations, in protecting their trade reputations from misappropriative conduct such that there would be no need for them to seek redress from the common law.

The English law of “unfair competition” will be assigned a broader meaning in this thesis than how it has been traditionally understood by intellectual property lawyers in the United Kingdom: the expression will be used to describe the entire range of common law actions that have been developed by the English courts to protect competitors that have suffered economic harm from the actions of their business rivals in the course of trade competition. In addition to the torts of passing off and malicious falsehood, which are most commonly associated with the “unfair competition” label in the eyes of English intellectual property lawyers, the scope of the discussion in this thesis will extend to include all the other economic torts as well, including the torts of inducing breach of contract, causing loss by unlawful means, intimidation and conspiracy to injure by lawful and by unlawful means.

By referring to the “common law of unfair competition”, the discussion below will focus on those causes of actions that have, historically, emerged from the common law courts, rather than the equitable actions developed by the Chancery courts such as the action for breach of confidence which could be used to prevent defendants from making unauthorised use of their rivals’ trade secrets and other types of confidential information. Limiting the analysis to just the economic torts also facilitates greater coherence in the legal analysis offered insofar as there are significant differences between the objectives pursued, and the methodologies employed, by the common law and equity.⁴² Similarly, the ambit of the discussion in this thesis will not extend to the statutory laws that place restraints on the commercial freedom of traders to publicise their wares or transact with their customers. These are largely regulatory instruments which may create statutory offences and administrative penalties imposed by executive agencies pursuing consumer protection objectives. In contrast, the economic torts are primarily rights of private action that

⁴²See J. Derek Davies, ‘Equity in English Law’, in Ralph Newman (ed), *Equity in the World’s Legal Systems: A Comparative Study* (USIU Studies in Jurisprudence Vol. 1, Bruylant, Brussels 1973), 159-185.

individual traders may elect to pursue against their rivals whose actions harm, or threaten to harm, their economic interests. Finally, since this thesis is primarily concerned with analysing the legal frameworks regulating the freedom of traders to deliberately injure the economic interests of their rivals in the name of competition, references made to the “economic torts” as a group are confined to those causes of action which require some form of intentional conduct as an ingredient of liability, rather than those torts which may be used by claimants who have suffered economic loss as a result of the defendants’ negligence.⁴³

As a cluster of torts, the common law economic torts have not been developed by the English courts in a coherent or coordinated manner. Attempts by academic commentators to unify them within a single theoretical framework have not been entirely successful.⁴⁴ The variegated character of these torts stems from their disparate historical origins and the specific factual circumstances in which each cause of action was developed. What they all have in common is the fact that the claimant has suffered some form of pure economic loss, rather than injury to the person or property, and that the defendants have intentionally engaged in some form of misconduct towards the claimant in the course of inflicting that economic harm upon the latter. The earliest landmark cases date back to between the seventeenth and nineteenth centuries, with factual scenarios as diverse as a defendant firing

⁴³ See, for example, Peter Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (LexisNexis, Canada, 2009) where the authors include negligent misstatement and other forms of negligence causing pure economic loss within their framework in Chapter 1 (“Introduction to the Economic Torts”).

⁴⁴ Tony Weir, *Economic Torts* (Clarendon Press, Oxford 1997) (articulating a general principle of liability based on the intentional causation of harm by unlawful means and arguing that the tort of inducing breach of contract should be regarded as species of the tort of causing loss by unlawful means); J D Heydon, *Economic Torts* (2nd edition) (Sweet & Maxwell, London 1978), 128 (advocating the use of the American “prima facie” tort doctrine – based on the Supreme Court of Minnesota’s famous decision in *Tuttle v Buck* (1909) 107 Minn 145 – as a unifying principle for the economic torts, such that “[i]f the defendant causes damage to the plaintiff intentionally and without justification he should be liable”). A comprehensive critique of these arguments can be found in Carty’s book – see Hazel Carty, *An Analysis of the Economic Torts* (2nd edn Oxford University Press, Oxford, 2010), 318 (where the economic torts are grouped into four categories based on their different “liability justifications”). Two of the principal categories defined by Carty, in the first edition of her book published in 2001, which distinguished between “primary liability” for causing loss by unlawful means and “secondary liability” for inducing breach of contract, were adopted affirmatively by the House of Lords in *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1.

cannons at native tribesmen off the coast of Africa to scare them away from trading with the claimant,⁴⁵ to a defendant luring a star mezzo-soprano away from a rival theatre impresario,⁴⁶ to a group of defendants banding together to selectively lower their shipping rates in order to keep a rival shipper out of the tea trade between China and the United Kingdom.⁴⁷ Many of the subsequent appellate decisions that have developed these torts involved labour disputes and industrial action by trade unions against non-members or employers.⁴⁸ The case-to-case approach taken by the common law in developing the economic torts makes it difficult to articulate, succinctly, a comprehensive set of legal principles that regulate the commercial conduct of competitors towards each other. These torts were not designed with rival traders specifically in mind and significant decisions along the evolutionary trajectory of these torts involved judicial responses to the legislative immunities introduced by the British Parliament to protect trade unions and their members from civil liability.⁴⁹

While they are an established part of a larger corpus of common law actions, tort lawyers have had some difficulty fitting the economic torts within the conventional theoretical models used to explain the other areas of tort law that do not involve recovery for economic losses. Proponents of rights-based theories of tort law have argued that corrective justice requires tort law to impose liability only when there is an infringement of the claimant's rights;⁵⁰

⁴⁵ *Tarleton v M'Gawley* (1790) 1 Peake 270, 170 ER 153 (Causing Loss by Unlawful Means).

⁴⁶ *Lumley v Gye* (1853) 2 E&B 216, 118 ER 749 (Inducing Breach of Contract).

⁴⁷ *Mogul Steamship v McGregor* [1892] AC 25 (Conspiracy to Injure by Lawful/Unlawful Means).

⁴⁸ *Allen v Flood* [1898] AC 1, *Quinn v Leatham* [1901] AC 495, *Rookes v Barnard* [1964] AC 1129.

⁴⁹ See section 2(b)(ii) and, in particular, (n 23) of Chapter 2.

⁵⁰ For example, under Weinrib's theory of corrective justice, tort liability "is a regime of right and correlative duty" which requires, firstly, that "the plaintiff's injury must be to something that ranks as the embodiment of a right, such as personal integrity or proprietary entitlement" and it is "not sufficient that the plaintiff has suffered the merely material loss of being made worse off or of being deprived of a prospective advantage"; secondly, the defendant "must have committed an act that violates a duty, incumbent on the defendant and thus can be regarded as wrongdoing"; thirdly, "the duty breached must be with respect to the embodiment of the right whose infringement is the ground of the plaintiff's cause of action." See Ernest J Weinrib, 'The Gains and Losses of

where the claimant has suffered economic loss as a result of the intentional conduct of the defendant, the obstacle faced by such theorists lies in satisfactorily identifying and characterising what “right” of the injured claimant has been violated.⁵¹ The tort of conspiracy to injure by lawful means, for example, cannot be rationally explained within a rights-based theoretical framework of tort law unless one is prepared to accept that the injured claimant has some sort of right not to have others gang up against him.⁵²

Similarly, economics-based models of tort law do not provide entirely convincing rationales for the existence of the economic torts. Broadly-speaking, these theoretical frameworks start from the premise that tort law seeks to maximise societal welfare and promote efficient resource allocation.⁵³ In order to deter economically “inefficient” behaviour, tort liability should be imposed whenever the defendant’s conduct produces benefits accrued by the defendant that are outweighed by the total costs incurred, which includes the injuries suffered by the claimant and any other “social costs” or “externalities”, and where the defendant is in a position to take measures to avoid such net losses at lower cost than the claimant. When applied to the context of the economic torts and economic losses arising from engaging in trade competition, fundamental difficulties with such theoretical approaches become apparent. Apart from the obvious practical difficulties of having judges systematically analyse and accurately evaluate the welfare gains and losses as

Corrective Justice’ (1994) 44 Duke L.J. 277, 294-295. Where the economic loss suffered by the claimant has been caused by the defendant using unlawful means against a third party, rights-based theorists suggest that the claimant’s remedy in tort is “parasitic” upon the rights of the third party that have been violated. See Robert Stevens, *Torts and Rights* (Oxford University Press, Oxford, 2007), 188-189. Another attempt to fit the different economic torts into the corrective justice framework using various different rights-based theories of private law can be found in J W Neyers, ‘The Economic Torts as Corrective Justice’ (2009) 17 Torts L. J. 162.

⁵¹ See section 3(a) and, in particular, (n 63) of Chapter 2.

⁵² See section 2(c)(ii) of Chapter.

⁵³ W M Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press, Cambridge, Massachusetts 1987).

between the defendant and the claimant that has been injured in the course of trade competition with each other, it is not entirely clear how the obvious financial risks inherent in the competitive process between rival traders ought to be accounted for.⁵⁴ While it has been argued that ‘many of the economic torts can be justified on the basis that the defendant’s conduct produces social cost by injuring the processes on which a free market depends’ or by ‘working against the proper functioning of the market’, this simply begs the question of what a “free” or “properly functioning” market entails and ignores the possibility that these social costs could be potentially offset by the social benefits of eliminating weaker competitors from the market place even if questionable means have been used to achieve this.

The goals of this thesis do not include trying to rationalise or integrate these economic torts within a grand conceptual framework. Instead, the purpose of examining these torts is to identify general thematic concerns and patterns in their methodological approaches towards the imposition of common law liability for what might be generally regarded as acts of “unfair competition” towards traders that have suffered economic loss at the hands of their rivals. It is hoped that by constructing an analytical framework capable of explaining how and why these torts impose tortious liability upon competitors that have injured the economic interests of their rivals, the principles underlying the common law boundaries between lawful and unlawful modes of competitive behaviour will become more visible so that meaningful comparisons and contrasts can be made with those boundaries drawn by the competition law rules.

(c) Defining the legal boundaries of “unfair” competition

“Unfair competition” cannot be used as a term of art simply because there is no general agreement, or even a broad consensus, amongst lawyers from the common law world what

⁵⁴ See Burns and Blom (n 43) at 27-28.

this category of conduct actually encompasses.⁵⁵ While attempts at defining this concept have been made over the years as part of proposals to give the common law a bigger role in tackling objectionable business practices that do not fall within an existing statutory framework,⁵⁶ the phrase is ultimately a convenient label that encapsulates all the various methods of competitive conduct that are unlawful because they violate particular social norms or prevalent ethical standards.⁵⁷ Even in the United States of America, where courts have, historically, been prepared to use the term to describe one competitor's unlawful conduct towards another,⁵⁸ it has been acknowledged that its boundaries exist in a state of flux because the law has evolved on a case by case basis.⁵⁹ English judges have consistently demonstrated great scepticism towards arguments that one competitor's conduct towards his rival is unlawful based purely on the grounds of "unfair competition":

What one man calls "unfair" another calls "fair". The market involves the interests of traders, their competitors and consumers. They all have different perspectives. An

⁵⁵ As legal concept, "unfair competition" has much deeper roots in the civil law countries such as Germany, where Article 3 of the German Unfair Competition Act 2004 prohibits "unfair acts of competition which are likely to seriously impair competition to the detriment of competitors, consumers or other market participants." *Gesetz gegen den unlauteren Wettbewerb* vom 3. Juli 2004 (BGBl. I 2004 32/1414).

⁵⁶ One writer has described "unfair competition" as "competition embracing non-constructive effort [that] violates the "rules of the 'game' competition", where "competition in business life comprises... 'struggle according to game-like rules by means of constructive effort to the natural conditions of the market'." Andrew Terry, 'Unfair Competition and the Misappropriation of a Competitor's Trade Values' (1988) 51(3) MLR 296, 297 citing Rudolf Callman, 'What is Unfair Competition' (1940) 28 Georgetown LJ 585.

⁵⁷ As one commentator has put it, "[t]he phrase is obviously more of an epithet than a word of art. Its legal usage embodies a conclusion rather than the means of determining the legality of business behaviour... Business men, economists, courts, legislatures and administrative agencies have arduously striven to chart the boundaries of this unruly concept, to give it some definite content without destroying the elasticity which is its chief virtue." Milton Handler, 'Unfair Competition' (1936) 21(2) Iowa Law Review 175.

⁵⁸ See, for example, *Apollinaris Co. v Scherer*, (1886) 27 Fed Rep 18, 22 (Circuit Court, SDNY) (Wallace J), which declared "[a]ll practices which tend to engender unfair competition are odious and will be suppressed by injunction."

⁵⁹ As one academic has noted, "[t]he types of cases labeled 'unfair' usually have specific doctrinal tags such as palming off, infringement of trade name, disparagement, filching of trade secrets and trade lists, plagiarism or lotteries. Many smack of deceit, fraud, libel, violation of statutes... New cases which are not easily identified by some specific tag are indiscriminately lumped together as 'unfair competition'. Leon Green, 'Protection of Trade Relations under Tort Law' (1961) 47(4) Va. L. Rev. 559, 566.

established trader would like the law to hold off all his competitors – and as far as possible. He would want to prevent all copying of his products and for as long as possible, preferably indefinitely... A newcomer will want to be able to copy – and to improve. He will want to be able fairly to advertise comparatively. And the consumer will want the best deal he can get. He would oppose anything deceptive, but probably nothing else.⁶⁰

Such judicial unwillingness to deploy the language of “unfair competition” as a basis for a standalone cause of action reflects the English judges’ general aversion towards broadly-framed legal propositions of uncertain scope and their perennial concern with not usurping the legislative functions that they believe ought to be performed by Parliament.⁶¹ However, to the extent that the courts take responsibility for the incremental development of the common law system in a way that reflects the social mores and ethical values of the society it serves, they cannot completely avoid using some sort of moral yardstick – which would inevitably encompass intuitive notions of “fairness” – to evaluate whether or not the

⁶⁰ *L’Oreal SA v Bellure* (n 36) at [139], where Jacob LJ rejected the claimant’s “invitation to invent a tort of unfair competition”, at [140] and [142] because of the real difficulties in formulating a clear and rational line between that which is fair and that which is not”.

⁶¹ See section 3(b) of Chapter 2. In some spheres of commercial activity, the common law actions simply cannot provide the same breadth of protection against “unfair” competition demanded by stakeholders as compared to a piece of legislation specifically enacted for this purpose. For example, a statutory framework is necessary to protect the commercial interests of sporting event organisers and their “official” sponsors from opportunistic “ambush marketing” activities in view of the limitations of the common law actions, such as the tort of passing off (discussed below in section 2(d)(i) of Chapter 3). Ambush marketing involves advertisers trying to create publicity for their businesses at high-profile sporting events, where public attention is drawn to them because of the association they have created between themselves and such events, without paying for these marketing opportunities to the relevant organisers and stakeholders. Ahead of the London Olympic Games in 2012, the United Kingdom Parliament passed the *London Olympic Games and Paralympic Games Act 2006* which created the “London Olympics association right”. Schedule 4 of the Act defines this statutory right, conferred on the London Organising Committee of the Olympic Games, as a set of “exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and (a) goods and services, or (b) a person who provides goods and services.” When deciding whether the London Olympics association right has been infringed by an ambush marketer, the courts are directed to take into account a list of specific expressions, set out in paragraph 3 of Schedule 4, which may be used to create an association with the London Olympic Games. Words on this list include “games”, “2012”, “gold”, “silver”, “bronze”, “London”, “medals”, “sponsor” and “summer”.

existing legal framework can or should be extended to prohibit such forms of competitive conduct.⁶²

4. The Interface between Competition Law and the Common Law of Unfair Competition

Despite their very different historical and theoretical backgrounds, it should be reasonably clear that the competition law rules and the common law economic torts perform broadly similar functional roles in regulating competitive behaviour in the marketplace. While acknowledging that both these legal frameworks share this common thematic boundary, the existing literature has generally tended to analyse these fields of law separately and has not endeavoured to explore the interface between them systematically.⁶³ By neglecting to explore this frontier between the competition law prohibitions against anti-competitive conduct and the common law actions against unfair acts of competition, lawyers working in these respective areas may have inadvertently missed out on the insights that could be acquired about one branch of the law from analysing it comparatively with another. Taking a holistic view of both these legal frameworks and their respective methodologies would facilitate a more nuanced understanding of their respective goals and objectives.⁶⁴ This could, in turn,

⁶² For example, in *Erven Warnink BV v Townend* (n 41) at 91, where the development of the tort of passing off was concerned, Lord Diplock observed that “the increasing recognition by Parliament of the need for more rigorous standards of commercial honesty is a factor which should not be overlooked by a judge”.

⁶³ One exception is Professor Cane’s analysis of how economic interests are protected simultaneously by tort law and other bodies of law. See Peter Cane, *Tort Law and Economic Interests* (2nd edn Clarendon Press, Oxford 1996), 3 where the author explains why it is “impossible to understand the way tort law protects economic interests without considering the relationship between rules and principles of tort law and other areas of law... and relevant statute law” and sets out to “integrate common law and statutory causes of action in tort by reference to the interests they protect and the legal techniques by which they provided that protection”.

⁶⁴ In Professor Cane’s analysis (n 63 at 485), “[b]oth the statutory and the common law of tort play a part in preventing distortions in competition” and that, despite their different approaches towards the “control [of] anti-competitive or excessive competitive behaviour”, “[w]hatever the technique used, the ultimate aim is the same.” One of the starting premises of this thesis is that the aims and objectives of these two legal frameworks are *not* identical and that this divergence is reflected in the different juridical techniques that each has developed to distinguish between lawful and unlawful modes of competition.

shed light on the potential directions in which each legal framework can and should grow. Furthermore, to the extent that both sets of legal prohibitions may offer competitors different ways of seeking legal redress for their economic injuries, there are interesting questions of practical importance arising from the concurrent availability of, and interaction between, these rules. It is thus worth setting out the different levels at which the interface between the competition law and common law frameworks can be analysed and why they deserve greater scrutiny.

(a) Objectives and methodology

One of the main reasons given by the English courts for restraining the expansion of the economic torts as a mechanism to protect claimants that have suffered economic injuries as a result of the actions of their rivals is the view that the common law should not assume too large a role in regulating competition in the marketplace.⁶⁵ Competition is regarded as an intrinsic facet of commerce in market-based economies and some market players will inevitably have to suffer economic harm as part of the competitive process. Imposing legal liability upon one competitor for inflicting such injuries upon another could have a broader chilling effect on how aggressively rival businesses compete with each other. Given the intrusion of such wider public policy considerations into the private dispute between the individual competitors, the common law is thus unsuited to assessing the lawfulness or unlawfulness of a defendant's injury-inflicting conduct towards the claimant because judges lack the necessary expertise and evidence to make such determinations. Legal restraints on a competitor's ability to inflict economic harm upon another competitor should therefore be principally governed by specifically-crafted legislation, such as the prohibitions found within

⁶⁵ See discussion below in section 3(b) of Chapter 2.

the competition law statute, instead.⁶⁶ This line of argument assumes, however, that the objectives of the competition law prohibitions are substantially aligned with those of the common law economic torts and that they can be regarded as functionally interchangeable in nature. However, if one regards the common law as performing a role in the regulation of competition in the marketplace that is distinct from the role of the competition law prohibitions, then the English courts can no longer use the mere existence of the latter as a justification for curtailing the development of the former.

That the competition law framework and common law economic torts have divergent underlying objectives may be vividly illustrated by looking at the contrasting liability outcomes that are arrived at when each set of laws is applied to the same set of facts.⁶⁷ However, even if these branches of the law have distinct objectives, it is also worth inquiring to what extent these objectives are complementary or contradictory. One way of making sense of *why* these legal rules restrain certain forms of competitive conduct but not others is to analyse *how* they go about differentiating between lawful and unlawful conduct in a comparative fashion. By comparing and contrasting the methodological approaches employed by each legal framework, the overlaps and boundaries between them should become clearer in the process. Recognising where, and understanding why, one legal framework begins and the other ends could then assist the institutions responsible for each legal framework to make better decisions about the directions in which they can and should develop.

(b) Principles, policy and doctrine

⁶⁶ This was emphasised by Lord Hoffmann in *OBG v Allan* (n 44) at [56].

⁶⁷ See section 2 of Chapter 4.

Embedded within the methodological structures of both legal frameworks are the principles and policies employed by tribunals to identify the categories of conduct that attract legal liability. A comparative analysis of the language used to articulate these principles and policies will show that a common vocabulary is shared by both legal frameworks to some extent. For example, both the competition law framework and the common law economic torts make constant references to promotion of “competition” as a policy consideration, or require some form of “intention” as a prerequisite for liability under one or more categories of prohibited conduct. The interesting question is whether the principles and policies in each framework are buttressed by similar conceptual foundations or whether greater care ought to be taken to distinguish them from each other. Given the stark differences between the analytical and doctrinal traditions associated with each legal framework, it could be fairly said that one should not read too much into these linguistic parallels. However, given that the United Kingdom’s competition law prohibitions have been interpreted and applied by lawyers and judges trained in the common law, it is entirely plausible to expect some of the common law’s most fundamental concepts – such as notions of “fault” and “fairness” – to have permeated into the competition law regime.

At a more practical level, the interface between the competition law prohibitions and the common law economic torts is important to competitor-claimants and their legal advisors when deciding how to frame their cause of action against the party responsible for the economic injuries they have suffered. Depending on the facts of the case, these two legal frameworks may offer the claimant more than one legal option to choose from. If he has been the target of a group boycott or the victim of a commercial cartel whose collective actions have injured his economic interests, the injured competitor might be able to bring a private claim for damages under the Article 101 prohibition as well as one of the common law conspiracy torts. If his economic interests have been harmed by the actions of a

competing corporate behemoth determined to eliminate all threats to its position of market power, the injured competitor might try to bring a private action for the infringement of the Article 102 TFEU prohibition or pursue a claim under one of other economic torts if the impugned conduct involves the use of unlawful means, an inducement to breach a contract with the claimant or some other relevant form of misconduct. An integrated appreciation of the range of actions available to the claimant under both legal frameworks, as well as their respective substantive and strategic advantages and disadvantages, could enhance the quality of the legal analysis of the competitor-claimant's case in such scenarios.

In addition, there is the possibility of these two legal frameworks interacting with each other at a doctrinal level. Several of the common law economic torts require the use of “unlawful means” as a key ingredient of civil liability, though there appears to be no judicial consensus as to what sorts of legal wrongs ought to qualify and whether the concept should have exactly the same meaning when it is used within the context of different torts.⁶⁸ One issue for tort lawyers is whether anti-competitive conduct that is prohibited by the competition law rules can qualify as “unlawful means” for the purposes of establishing common law liability under one of the economic torts. Could, for example, an abuse of a dominant position by a defendant that has entered into unlawful exclusivity agreements with the claimant's key suppliers amount to “unlawful means” for the purposes of establishing liability under the tort of causing loss by unlawful means? Conversely, a competition lawyer might be interested to know whether the commission of a common law economic tort by a dominant defendant – such as inducing the breaches of the claimant's contracts with key suppliers – could be regarded as an abuse of dominance within the scope of the Article 102 TFEU prohibition. The opportunities for such conceptual cross-fertilisation between these

⁶⁸ See discussion in section 2(b)(i) (Causing loss by unlawful means) and 2(c)(i) (Conspiracy to injure by unlawful means) in Chapter 2.

legal frameworks and the potential for other creative doctrinal combinations could potentially expand the practical frontiers of both these spheres of law.

(c) Competition and unfair competition laws in other jurisdictions

Mapping the interface between the United Kingdom's competition law prohibitions and its common law tort actions may also provide useful insights for the development of these legal frameworks in other jurisdictions which have similar legal systems or are in the early stages of developing these areas of the law. Almost all of the commonwealth countries, whose legal systems were inherited from the United Kingdom, have introduced, or are planning to introduce, competition law frameworks in some form or another.⁶⁹ The common law economic torts would have been received into these common law jurisdictions and become part of their respective domestic legal systems which subsequent competition law frameworks have been, or have to be, grafted upon. Many of the issues raised above concerning the mechanics of the relationship between these two legal frameworks, and the extent of their interaction with each other, will matter to these jurisdictions.

Apart from the common law-based actions against unfair competition, a number of jurisdictions have also introduced statutory restraints against unfair competition alongside their antitrust legislation. A holistic perspective of both legislative frameworks is thus imperative within such legal systems, especially when they have to be simultaneously administered by the same regulatory authorities. For example, the United States has, alongside the *Sherman Act 1890*,⁷⁰ legislative provisions against acts of unfair competition

⁶⁹ Apart from the United States of America (*Sherman Act 1890*), Canada (*Competition Act 1985*), Australia (*Trade Practices Act 1974*) and New Zealand (*Commerce Act 1986*), most of the other developing country members of the commonwealth are relatively new to the world of competition law. These countries include South Africa (*Competition Act 89 of 1998*), India (*The Competition Act 2002*, which came into force in 2009) Barbados (*Fair Competition Act 2002*) Singapore (*Competition Act 2004*), Malaysia (*Competition Act 2010*) and Hong Kong (legislative efforts in process).

⁷⁰ Title 15 of the United States Code, Chapter 1 ("Monopolies and Combinations in Restraint of Trade").

that may be enforced by its Federal Trade Commission, which is also one of the two agencies responsible for administering its antitrust laws. Section 45 of the *Federal Trade Commission Act 1914*⁷¹ provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”⁷² Less developed jurisdictions have also enacted multi-purpose legislative frameworks that introduce prohibitions against anti-competitive behaviour alongside statutory provisions proscribing acts of unfair competition.⁷³

5. An outline of the structure and contents of the remaining chapters

In this thesis, I propose to structure my inquiry into the nexus between these two legal frameworks in the following manner. Firstly, I will examine the methodological structure of each area of law to identify and explain how each goes about distinguishing between lawful and unlawful modes of competitive behaviour. Secondly, I will examine and explain the dichotomies between these legal frameworks by highlighting the potentially different liability outcomes that may arise from their concurrent application to the same set of facts. Thirdly, I

⁷¹ Title 15 of the United States Code, Chapter 2 (“Federal Trade Commission; Promotion Of Export Trade And Prevention Of Unfair Methods Of Competition”).

⁷² 15 U.S.C. §45(1). The FTC is, under 15 U.S.C. §45(2), “empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”. While this provision has, historically, been applied to consumer protection rather than antitrust cases, the breadth of the language used in this legislative provision has led the United States Supreme Court to hold that this statutory prohibition reaches “not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons”. See *FTC v Indiana Federation of Dentists* 476 U.S. 447, 454 (1986). This has left the door open for the US antitrust authority to use what is ostensibly an “unfair competition” provision as an instrument to pursue an antitrust case that cannot, for whatever reason, be easily fitted within the scope of sections 1 and 2 of the *Sherman Act* (n 70).

⁷³ Vietnam, for example, introduced a “comprehensive” Competition Law, comprising 123 Article in six chapters, whose objectives were declared stated to be to “control competition-restricting acts or acts that would likely result in competition restriction...”, to “protect from unfair competition actions the legitimate rights of enterprises to do business” and to “create and sustain a fair competitive environment”. (Competition Law No. 27/2004/QH11, which took effect on 1st July 2005).

will survey the commonalities and points of intersection between these two legal frameworks so as to illustrate where and how there might be substantive interaction between them.

Chapter 2 will outline the different common law actions – the economic torts – that comprise the common law of unfair competition: the torts of inducing breach of contract, causing loss by unlawful means, (three-party) intimidation, (three-party) deceit, conspiracy to injure by lawful means, conspiracy to injure by unlawful means, passing off and malicious falsehood. It examines this group of economic torts as a whole, to the extent that they impose legal restraints on the behaviour of rival traders in competition with each other, and attempts to distil some of the key methodological approaches devised by the common law to demarcate zones of unlawful competitive conduct that attract civil liability for the economic harm that is inflicted upon an injured competitor. It explains how and why the economic torts have adopted a generally conservative view of the role of the common law in regulating market behaviour that results in economic injury, while proposing a theoretical model for analysing these causes of action that is premised upon the degree of reprehensibility of the defendant's harmful conduct towards the claimant.

Chapter 3 will provide an overview of the competition law framework and the two principal prohibitions against anti-competitive behaviour in the United Kingdom: the Article 101 TFEU / Chapter I prohibition and the Article 102 TFEU / Chapter II prohibition. Particular attention is placed on those forms of anti-competitive conduct that are directed towards inflicting economic injury upon a targeted trade rival, particularly group boycotts and certain exclusionary abuses of dominance involving price-related conduct. This facilitates a meaningful comparative analysis between the competition law prohibitions and the common law prohibitions against unlawful modes of competitive behaviour in subsequent chapters. This chapter scrutinises the methodological framework that has developed around

the application of these competition law prohibitions by Anglo-European competition authorities and tribunals in order to highlight significant structural and doctrinal features that will be discussed further in subsequent chapters in conjunction with the parallel features of the common law economic torts.

Chapter 4 will engage in a comparative analysis of the two legal frameworks by focusing on the dichotomies between them. After identifying the differences between their respective goals, institutions and methodologies, the discussion examines the contrasting liability outcomes that arise when each legal framework is applied to the same factual matrix (multi-party situations and unilateral conduct situations), as well as the factual circumstances where there could be concurrent liability under both legal frameworks. This provides a platform for examining the differences between the ways in which competition law and the common law distinguish between lawful and unlawful modes of competitive conduct, thereby shedding light on the respective roles these legal frameworks perform, or ought to perform, in laying down the ground-rules for trade rivals intent on harming each other in the name of competition. Selected policy and conceptual facets of both legal frameworks are also identified and contrasted against each other in order to help explain the fundamental differences between these two branches of the law.

Chapter 5 will identify and explore some of the more significant points of contact between the competition law rules and the common law economic torts. It highlights interesting methodological parallels between the two legal frameworks that, while not immediately apparent to the casual observer, have emerged despite their starkly different origins and objectives. It also raises a cluster of significant but under-explored legal issues that arise from the substantive interaction between these two branches of the law – issues that should matter and be of interest to lawyers working in both legal sub-disciplines: whether the

tort of causing loss by unlawful means is, as some have argued it is, a suitable vehicle for the private enforcement of competition law infringements; if competition law infringements should qualify as “unlawful means” for the purposes of establishing common law liability under the tort of causing loss by unlawful means; the remedial advantages of common law actions over private actions based on competition law infringements; and the nature of the overlap between the two conspiracy torts and the competition law prohibition against anti-competitive agreements.

CHAPTER 2: COMMON LAW RESTRAINTS ON UNFAIR COMPETITION: THE ECONOMIC TORTS

1. An Overview of the Economic Torts and Trade Competition

The economic torts are a branch of the common law of torts concerned with creating private law liability for economic injury suffered by claimants while in pursuit of their trade, business or livelihood. By identifying the circumstances in which a defendant trader's conduct towards his rival will attract civil liability for the economic losses of the latter, the economic torts serve to demarcate the zone of forbidden conduct that may not be employed by competing traders on the battlefield of commerce. These legal restraints become a part of the "rules of the game" that regulate how commercial undertakings ought to behave towards each other while engaged in trade competition with each other.

Economic injury may be inflicted upon a claimant through the deliberate actions of an aggressive competitor in a wide variety of circumstances, and the role of the common law is to filter out those objectionable forms of conduct that give rise to valid causes of action. A trader who competes by offering his wares at more attractive prices, raising the standards of his products or services, providing better customer service or otherwise responding efficiently to shifts in consumer preferences cannot be chided if his actions divert custom away from his rivals who consequentially suffer negative economic repercussions. Such forms of competitive behaviour, where the actions of the aggressive competitor are focused entirely on enhancing his own business, are entirely beyond reproach.

In contrast, where the conduct of an aggressive competitor is directed towards interfering with, jeopardising or prejudicing the economic relationships which a claimant might have with a broad spectrum of third parties – his customers and employees (actual and prospective), contractors, agents, suppliers, distributors, lenders and other business partners – such behaviour might overstep the boundaries of legitimate competition prescribed by the

economic torts. He may try to get ahead of his rival by weakening the latter's ability to compete effectively in the marketplace by poaching his employees, persuading his associates to cease doing business with him, making misrepresentations to his customers that undermine the goodwill he has built up in the marketplace, denigrating his wares with false statements about their quality, or colluding with others in an orchestrated boycott against him. In doing so, he might attract liability under one or more of the diverse range of common law actions that comprise the economic torts, including the torts of inducing breach of contract, causing loss by unlawful means, passing-off, malicious falsehood and conspiracy.

Third parties play a significant role in the basic organisational structure of all the economic torts, though the character of their involvement in the circumstances surrounding the economic injury suffered by the claimant differs considerably between the torts.¹ At one extreme, the third party may be an eager accomplice working together with the defendant to execute a collective stratagem against the claimant. At the other end of the spectrum, the third party may simply be a pawn, an unwilling participant, played by the defendant as part of his carefully-planned scheme to harm the claimant. In some cases, the third party may have a pre-existing commercial, or possibly contractual, relationship with the claimant that becomes the medium through which economic injury is inflicted upon the claimant.² By imposing legal liability for the losses suffered by an injured claimant at the hands of the defendant and

¹ As one of the leading commentators in this field of tort law has noted, "while you can take direct action against a person's body or property... to ruin a person financially the action you take must be indirect, through another person, the source of his earnings or profits". Tony Weir, *A Casebook on Tort* (9th edn Sweet & Maxwell, London 2000), 568. See also Tony Weir, 'Chaos or Cosmos: Rookes, Stratford and the Economic Torts' [1964] CLJ 225, 227, where the same writer puts the point across more vividly: "one can bloody one's neighbour's nose unaided, but to ruin him usually requires assistance."

² The defendant's conduct towards the third party is employed as an "unlawful weapon" against the claimant. An early illustration of this can be found in dicta from the New Zealand Court of Appeal in *Fairbairn Wright v Levin* [1914] N.Z.L.R. 1, 29 where it was observed that "in the war of competition between rival traders use must not be made of unlawful weapons, and that if, for the purpose of advancing his own interests, a trader uses against a rival weapons that are unlawful and thereby causes him injury, the latter has a good cause of action for damages."

these third parties, the economic torts constrain the defendant's freedom to engage these third parties in his competitive campaigns against the claimant.

In essence, the economic torts identify the outer limits of a competitor's freedom to attack, undermine or outdo his rivals. If a defendant's conduct falls within the scope of any of these torts, it crosses the line between acceptable, and perhaps implicitly encouraged, forms of "aggressive" competition that must be tolerated as part and parcel of the competitive process, and unlawful instances of "excessive" competition. In this way, the economic torts indirectly prescribe minimum standards of behaviour – a common law code of civilised conduct for the capitalist marketplace – that competitors are held to in their commercial struggles with each other.

2. Defining the common law boundaries between lawful and unlawful modes of competitive behaviour

It is possible to divide the various economic torts into four, occasionally overlapping, categories of convenience. The purpose of these categories is to provide a framework for understanding the different normative justifications for imposing restrictions on a competitor's freedom to act in a way which causes economic harm to the claimant. The first category comprises the tort of inducing breach of contract. The second category is occupied by the tort of intentionally causing loss by unlawful means, often referred to as the tort of interference with trade by unlawful means, and its variants, which include the three-party versions of the tort of intimidation and deceit. The third category comprises the two torts of conspiracy – the tort of conspiracy to injure (lawful means conspiracy) and the tort of

conspiracy by unlawful means (unlawful means conspiracy). The fourth category comprises the torts of passing-off and malicious falsehood.³

(a) Secondary liability for the legal wrongs committed by a third party against the claimant: Inducing breach of contract

This category of tortious wrongdoing involves making the defendant liable for his role in procuring a third party to commit a distinct actionable wrong against the claimant. Unlike the second category which involves legal wrongs committed by the defendant against the third party, in this category, it is the third party who commits the “primary” legal wrong towards the claimant. In the realm of commercial competition, the tort of inducing breach of contract has occupied a time-honoured place on the common law landscape of economic torts since *Lumley v. Gye*,⁴ proscribing business rivals from persuading third parties with pre-existing contractual relationships with the claimant to break their contracts.

Various different normative justifications have been offered by academic commentators to explain the basis for such restraints on a defendant’s liberty to compete for resources controlled by the claimant through the latter’s contractual relationships. These

³ This four-category classification system is broadly similar to the framework proposed by Hazel Carty in her book: Hazel Carty, *An Analysis of the Economic Torts* (2nd edn OUP, Oxford 2010) 318. However, there are differences between these frameworks in at least two areas. Firstly, the tort of unlawful means conspiracy is not grouped together with the tort of inducing breach of contract (which Carty originally proposed in the first edition of her book, published in 2001, by arguing that these torts were both examples of “secondary liability”) but put into the same category as the other conspiracy tort. In the second edition of her book, Carty recognises (at 326-327) that her four-category framework needs to be adjusted in light of more recent decisions from the House of Lords, but is undecided as to whether a fifth category ought to be introduced to accommodate the unlawful means conspiracy tort, or if the boundaries of the category containing the unlawful means tort ought to be expanded to encompass the unlawful means conspiracy tort as well, or if the category containing the lawful means conspiracy tort ought to be “radically reworked to include liability for all conspiracies involving not merely malice but any means or motivation on ‘the scale of blameworthiness’.” Secondly, the tort of malicious falsehood is put into the same category as the tort of passing off rather than located next to the tort causing loss by unlawful means which, according to Carty (at 324), is logical because “(t)he leading cases on malicious falsehood often fall within the pattern of unlawful interference with trade, involving lies intended to harm the claimant” – though she does also acknowledge that the scope of the malicious falsehood tort is wider in some respects because it can impose liability where inherently harmful falsehoods have been uttered even without proof of an intention to injure the claimant.

⁴ *Lumley v Gye* (1853) 2 E&B 216, 118 ER 749.

include the view that since contracts are similar to personal property, they deserve property-like protection against external interferences⁵; there is also the view that contracts are important tools towards achieving stability in the commercial business environment and that such behaviour is potentially disruptive and ought to be restrained.⁶ More recent judicial consideration of the tort from the House of Lords suggests, however, that the normative basis for the tort is much narrower – that the tort is really just a species of secondary liability for the wrongdoings of another party.⁷ Liability is therefore entirely parasitic upon the third party’s commission of the legal wrong and requires the defendant’s role in bringing about that wrong to be sufficiently culpable to justify imposing tort liability upon him. If there is no breach of contract for which the third party is liable as a principal, then there is no legal wrong which the defendant can be made secondarily liable for.⁸

This tort involves the defendant persuading a third party to breach his existing contract with the claimant, with civil liability being imposed on the defendant for the claimant’s losses arising from that breach of contract in addition to the liability which the third-party contract-breaker may incur towards the claimant. The tort imposes liability upon the defendant for the wrongful acts of the contract-breaker in a manner analogous to how the doctrine of joint tortfeasance operates to make the associates of the tortfeasor share in the responsibility for

⁵ Roderick Bagshaw, ‘Inducing Breach of Contract’, ch. 7 in Jeremy Horder (ed), *Oxford Essays in Jurisprudence*, 4th series, (OUP, Oxford 2000).

⁶ John Danforth, ‘Tortious Interference with Contract: A Reassertion of Society’s Interest in Commercial Stability and Contractual Integrity’ (1981) 81 Col LR 1491.

⁷ *OBG Limited and others v Allan and others* [2007] UKHL 21, [2008] 1 AC 1 [8] (Lord Hoffmann), [172] (Lord Nicholls) and [320] (Lord Brown).

⁸ In the words of Lord Hoffmann, “one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability”. *OBG v Allan* (n 7) at [44]. It is not clear, however, whether the meaning of the “secondary liability” concept articulated by his lordship is identical to the equivalent concept that is used in criminal law, where the criminal defendant is made co-extensively responsible for the crimes committed by the primary wrongdoer. This could potentially expand the defendant’s tortious liability in cases where the contract-breaking third party’s contractual liability is significantly higher because the latter has special knowledge of the particularly severe financial consequences of breaching his contract with the claimant.

the tortious wrong. The third party's contractual liability towards the claimant provides the basis on which a species of secondary tort law liability is projected upon the defendant who, because of his deliberate role in procuring that breach of contract, becomes liable in tort for the economic harm suffered by the claimant.

Under this tort, the claimant must establish that the defendant intended to *procure* or *induce* the third party to breach his contract,⁹ requiring the defendant to have been aware of the existence of a contract¹⁰ between the third party and the claimant, to actually realise that that his conduct towards the third party will in fact result in a breach of the claimant's contract,¹¹ and that there was no justification for the behaviour of the defendant. The *mens rea* requirements of this action are thus fairly exacting: the claimant must show that the defendant acted with the necessary subjective knowledge¹² and intention¹³ to procure the

⁹ The tort requires more than just the defendant *causing* the breach of contract to occur through his actions – that a breach of the claimant's contract was a foreseeable or foreseen consequence, however inevitable, of the defendant's actions is insufficient to attract liability under this tort – which is why *Millar v Bassey* [1994] EMLR 44 was roundly criticised by academic commentators and eventually overruled by the House of Lords in *OBG v Allan* (n 7).

¹⁰ Though the defendant need not have been aware of the precise terms of the contract. See *Emerald Construction v Lowthian* [1966] 1 WLR 691, 700-701.

¹¹ According to Lord Hoffmann, who gave the leading judgment in *OBG v Allan* (n 7) at [39], liability under this economic tort required a high degree of subjective knowledge by the defendant of *both* the factual and legal effect of his actions towards the third party. It was not enough just to show that the defendant knew he was procuring an act which was, simply as a matter of law or construction of the contract, a breach of contract. The requisite knowledge will not be present if the defendant believed that no breach of contract would ensue, even if his views were based upon on a muddleheaded or illogical belief or on a mistaken view of the law. See *OBG v Allan* (n 7) at [202] (Lord Nicholls).

¹² This is subject to the proviso that the knowledge requirement will still be satisfied if the defendant acted with reckless indifference as to whether or not there was a breach of contract, since a "conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact." See *OBG v Allan* (n 7) at [40-41] (Lord Hoffmann, citing *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469). See also *Emerald Construction v Lowthian* (n 10), where Lord Denning MR observed that if a defendant "had the means of knowledge – which they deliberately disregarded – that would be enough. Like the man who turns a blind eye... For it is unlawful for [the defendant] to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."

¹³ The intention requirement is satisfied if the breach of the claimant's contract was an end in itself that the defendant had set out to achieve, or if it was simply a means to some further end (such as furthering the defendant's own interests). However, if the breach of the claimant's contract was merely a foreseeable consequence of the defendant's actions, then the defendant cannot be regarded as having acted with the necessary intention to commit this tort. See *OBG v Allan* (n 7) at [42-43]. This approach towards the intention

breach of contract before the conduct complained of can fall within the ambit of this economic tort.

Earlier judicial attempts at expanding the scope of the tort to encompass situations where there had been an “unlawful interference” with the performance of a contract, such as acts which prevented or hindered contractual performance, rather than the presence of an actual breach of the contract by the third party, were recently purged from the classic form of the tort in the interests of conceptual clarity and were either reclassified by the House of Lords as cases which were more appropriately analysed as examples falling within the framework of the general tort of causing loss by unlawful means or implicitly overruled.¹⁴ At the lower levels of the judicial hierarchy, it has been held that the defendant can avoid liability under this economic tort if he is able to show that he has procured the breach of a contract, between the third party and the claimant, which was voidable at the election of the third party.¹⁵ The defendant’s actions will not attract civil liability towards the claimant unless the defendant’s conduct towards the third party has also caused the third party to

requirement for the tort of inducing breach of contract is consistent with the approach taken in the context of the tort of causing loss by unlawful means. See (n 17) below and accompanying text.

¹⁴ *OBG v Allan* (n 7) at [22]-[24], dealing with cases such as *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376, and at [181]-[189] (*Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106). This means, by implication, that the line of cases that grew from these decisions which purported to espouse torts of “wrongful interference with contractual relations” or “indirect interference with contracts” – where no actual breach of contract had occurred, and where the defendants had no specific intention to interfere with the claimant’s contract – has also been cast into doubt.

¹⁵ In *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] 1 All ER 542 [33], the High Court held that “if a contract is voidable, then there should be no liability for procuring the breach of it” and that “it is no tort to procure the breach of a voidable contract, at least where the person induced is the party who enjoys the right to rescind.” The case involved a claimant sports agency suing its rival for inducing one of the claimant’s clients, a football player who had signed on with the claimant while he was a minor, to breach his contract with the claimant. Extrapolating from earlier cases which suggested that there was no liability in tort for inducing a contracting party to lawfully determine a voidable contract where the induced party enjoyed the right to rescind that contract, the High Court judge awarded summary judgment to the defendant on the premise that if the third party was entitled to rescind the voidable contract between himself and the claimant, then the defendant should not be liable in tort for inducing the third party to breach that contract “notwithstanding the fact that the contract remains valid until avoided” because “[t]he fact that it can be avoided should be... in principle a defence to any claim for the tort of ... wrongfully procuring a breach of, the contract.”

commit a legal wrong against the claimant. This underscores the inherently parasitic character of the tort of inducing breach of contract, where the availability of actionable breach of contract by the *third party* is regarded as an essential prerequisite for the *defendant's* liability to the claimant, and is consistent with a generally cautious judicial attitude that is concerned with confining the scope of this tort within narrow limits.

Competition between trade rivals may involve competition for scarce resources that a third party may have contracted to supply an injured claimant; his rivals are entitled to freely pursue these resources in furtherance of their own interests without attracting tortious liability even if, by doing so, their actions *prevent* the third party from performing his contractual obligations that would have conferred valuable benefits upon the claimant. While a competitor's actions may *result* in a breach of contract between the third party and the claimant, or *cause* the third party to be in breach when he has assumed strict and absolute contractual obligations towards the injured claimant, no tortious liability will be imposed upon him if he did not actually instigate the third party to breach his contract with the claimant.

(b) Primary liability for intentionally inflicting economic loss upon the claimant by employing independently unlawful means against a third party

Torts which fall within this category involve defendants using third parties as instruments¹⁶ through whom economic harm is intentionally inflicted upon their rivals. While, the third party is the immediate cause of the economic loss suffered by the claimant, his involvement is deliberately precipitated by the defendant so as to harm the claimant. The third party's acts

¹⁶ *OBG v Allan* (n 7) at [152]-[159] (Lord Nicholls), echoing Lord Lindley's description of the claimant in these sorts of cases as "wrongfully and intentionally struck at through others, and is thereby damnified" in *Quinn v Leatham* [1901] AC 495, 535).

or omissions need not necessarily amount to actionable wrongs against the claimant who proceeds in tort against the defendant. Unlike the third party, the defendant must have committed an independently unlawful act, which also satisfies the additional eligibility criteria described below, against the third party before the defendant is liable under these torts.

Such modes of competitive conduct are proscribed because the defendant intentionally seeks to harm his rival by utilising unlawful means, even though those unlawful means are not employed directly against the claimant but are channelled through the medium of a third party instead. Restricting the defendant's freedom to harm the claimant in such circumstances does not impose any significant additional burden on him as the law already prohibits him from carrying out the independently unlawful act. These torts protect the claimant from having his economic relationship with a third party, typically someone engaged in commerce with the claimant or in some position to adversely affect the claimant's financial interests through his conduct, undermined or interfered with by the defendant's unlawful conduct as a means of striking at the claimant.

(i) Causing loss by unlawful means

Liability under this tort essentially requires proof that the defendant had the requisite intention to cause economic injury to the claimant, either as an end in itself or a means to some other ends,¹⁷ and that "unlawful means" were used by the defendant towards a third party whose subsequent acts or omissions were the immediate cause of the claimant's losses. For example, the defendant may commit unlawful acts of hostility towards the trading

¹⁷ *OBG v Allan* (n 7) at [42]-[43] and [164]-[166].

partners, customers or employees of the claimant in order to drive them away from doing business with the latter.¹⁸

Despite the considerable vintage of this cause of action, judicial and academic opinions about the precise scope of the “unlawful means” criterion have been divided for many decades, with little doctrinal clarity on the issue until a recent majority decision of the House of Lords in *OBG v Allan* which suggested that it should be limited to independently actionable civil wrongs, though there was also a minority view in that case to suggest that the concept should also include crimes as well.¹⁹ Furthermore, it was the view of the majority of the judges in that case that, in addition to this “independent actionability” criterion, the legal wrongs committed by the defendant against the third party must also affect the liberty of the third party to deal with the claimant in some way before they could be considered eligible “unlawful means” for the purposes of this tort.²⁰ As a core ingredient of this cause of action, the “unlawful means” requirement serves as a significant gate-keeping mechanism which determines the ambit of the tort. The narrower the class of wrongful acts that qualify as relevant “unlawful means” for the purposes of this economic tort, the more limited its potential scope of application. This would correspondingly expand the boundaries of the permissible conduct that aggressive traders are allowed to engage in when competing with their rivals. Criminal wrongs which do not give rise to private rights of action against the

¹⁸ *Garret v Taylor* (1620) Cro Jac 567, 79 ER 485; *Tarleton v M'Gawley* (1790) 1 Peake NPC 270, 170 ER 153.

¹⁹ *OBG v Allan* (n 7) at [49] (Lord Hoffmann, whose views were adopted by the majority) and [150] (Lord Nicholls). In order to accommodate the three-party intimidation and deceit torts within the overarching framework of the unlawful means tort, Lord Hoffmann also placed, at [49] an important qualification on the independent actionability requirement – that acts by the defendant against the third party should still be regarded as unlawful means if the only reason why they are not actionable is because the third party has not suffered any loss. But see the criticism of Deakin and Randall discussed below at (n 26).

²⁰ *OBG v Allan* (n 7) at [51], where Lord Hoffmann articulated a second criterion for identifying the kinds of civil wrongs that qualified as “unlawful means” under this tort: they had to be “acts intended to *cause loss to the claimant by interfering with the freedom of a third party* in a way which is unlawful as against that third party”.

defendant, if committed against a third party with an intention to harm the claimant, would not attract liability under this tort.

This tort is also an “umbrella” tort in the sense that it provides a general framework for a few specific nominate torts that could fit within its broad parameters even though this may not have been part of a conscious effort by the courts. These would include the torts of intimidation and deceit when they are applied in a three-party setting.

(ii) Intimidation (three-party)

The tort of intimidation revolves around threats to commit legal wrongs, either against the claimant itself (two-party) or against a third party whose subsequent actions go on to harm the claimant (three-party) who is the real target of the defendant’s actions. Developed by the House of Lords in *Rookes v. Barnard*,²¹ where it was held that defendants who threatened to commit breaches of contract with a third party²² in order to coerce that third party to act to the detriment of the claimant committed an actionable wrong, the origins of the three-party version tort of intimidation are mired in some controversy. Firstly, the tort emerged as part of a judicial attempt to circumvent the existing statutory immunities given to trade union members.²³ This meant that labour law concerns regarding the right of workers to take

²¹ *Rookes v Barnard* [1964] AC 1129.

²² The intimidation tort had hitherto only been applied to threats to commit criminal and tortious wrongs, but the House of Lords unanimously reversed the decision of the Court of Appeal to hold breaches of contract could also qualify as legal wrongs for the purposes of the intimidation action. Lord Reid recognised, (n 21) at 1169, that “[t]hreatening a breach of contract may be a much more coercive weapon than threatening a tort... and... there is no technical reason requiring a distinction between different kinds of threats...”, while Lord Devlin, (n 21) at 1209, found “nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat”, and that “[t]he nature of the threat is immaterial because... its nature is irrelevant to the plaintiff’s cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of – whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced.”

²³ In *Rookes v Barnard* (n 21), the imposition of tortious liability on the defendants required the House of Lords to outflank the protective provisions of the *Trade Disputes Act 1906*. Getting around the language of the statutory immunities required, in that case, the action to be framed as a joint action by the defendants to intentionally cause harm to the claimant by intimidating a third party with threats to commit breaches of contract rather than with threats to *induce* breaches of contract. See L Hoffmann, ‘Rookes v Barnard’, (1965) 81

industrial action against their employers had a profound influence on the evolution of this branch of the economic torts.²⁴ In addition, the decision raised difficult conceptual and policy questions as to the potential existence of a corresponding two-party tort of intimidation based on one contracting party threatening to breach his contract with another contracting party.²⁵

The basic structure of the three-party version of the tort can be rationalised within the framework of the general tort of causing loss by unlawful means to the extent that it similarly involves the commission of a wrongful act against the third party as a means of inflicting economic injury upon the claimant.²⁶ The “unlawful means” employed by the defendant involves a *threat* of wrongful conduct against the third party. As such, regardless of what sorts of legal wrongs qualify as “unlawful means” for the purposes of the tort of causing loss

LQR 116, 128-129. As another commentator has put it, “[i]n the light of the history of judicial attitudes to industrial conflict, it is less than fortunate that a new extension of the common law should create liability in a case concerning the right to strike, especially when followed by their Lordships’ interpretation of the statute.” See K W Wedderburn, ‘Intimidation and the Right to Strike’ (1964) 27 MLR 257, 280.

²⁴ Legal commentators have described “[t]he entire law of industrial action [as] based on the assumption that strikes and related forms of economic pressure would be prima facie tortious in the vast majority of instances”, with nearly all the caselaw from the 1980s concerned with the economic torts involving trade unions, labour disputes and industrial action. It has thus been observed that “the priorities of industrial action law came to overshadow the evolution of the economic torts” such that “in the context of labour cases their evolution has been a strange and even rather artificial one, directed above all by plaintiffs’ attempts to circumvent the immunities” found in statutes that regulated trade disputes involving trade union members. See Simon Deakin and John Randall, ‘Rethinking the Economic Torts’ (2009) 72 MLR 519, 524 and 531.

²⁵ See Wedderburn (n 23) at 261. However, the question of whether there should be a corresponding action for intimidation in two-party situations, where one contracting party threatens another to commit a breach of their contract, has been deliberately left unanswered by the House of Lords. In *Stratford v Lindley* [1965] AC 269, 325, Lord Reid observed that “[a] case where the defendant presents to the plaintiff the alternative of doing what the defendant wants him to do or suffering loss which the defendant can cause him is not necessarily *in pari casu* and may involve questions which cannot arise where there is intimidation of a third person.” More recently, in *OBG v Allan*, (n 7) at [61], Lord Hoffmann was careful to qualify his analysis of the tort of causing loss by unlawful means by saying that he did not “intend to say anything about the question of whether a claimant who has been compelled by unlawful intimidation to act to his own detriment, can sue for his loss. Such a case of ‘two party intimidation’ raises altogether different issues.”

²⁶ *OBG v Allan* (n 7) at [7] and [47]. However, Deakin and Randall (n 24 at 548) have argued that the independent actionability criterion for the “unlawful means” requirement of the unlawful means tort, espoused by the majority in *OBG*, is inconsistent with the *ratio* in *Rookes v Barnard* (n 21 at 1207) where Lord Devlin declared that, as far as the intimidation tort was concerned, it did not matter at all whether or not the third party could sue the defendants because “[t]he two causes of action – [the third party’s and the claimant’s] – are in law quite independent.”

by unlawful means, the judicial recognition of the tort of intimidation as a variant of this general tort effectively expands the scope of the “unlawful means” concept to include threats to commit those legal wrongs. Just as it is justifiable to restrain a trader from engaging in unlawful acts against third parties so as to harm his competitor, it is, by extension, appropriate to prohibit him from using threats to engage in such unlawful acts in order to achieve the same intended results. Just as the commission of some legal wrongs by the defendant against the third party might interfere with the freedom of the third party to deal with the claimant and cause the claimant to suffer economic harm, perhaps by disabling the third party in some way from conferring a benefit on the claimant, so too might the liberty of the third party to transact with the claimant be curtailed by *threats* from the defendant to commit legal wrongs against the third party if the third party did not comply with the defendant’s demands.²⁷

(iii) Deceit (three-party)

In its classic form, the two-party tort of deceit requires proof of a fraudulent intention by the defendant who makes a false representation to the claimant, intending that the latter relies on the representation, where the claimant goes on to act in reliance on the falsehood and suffers damage as a result. As with the tort of intimidation, it is the three-party version of the action which makes the economic tort a significant legal restraint on unfair conduct in the context of commercial competition between rival traders. The key to the three-party version of the tort of deceit lies in the false representation being fraudulently made to a third party who then, following the overarching structure of the general tort of causing loss by unlawful means, goes on to behave in a way which is financially detrimental to the claimant. In these sorts of

²⁷ See (n 20) above. In seeking to prevent the third party from dealing with the claimant, the defendant might either cripple the third party such that he is physically unable to transact with the claimant, or he may *threaten* to cripple the third party as a way of *discouraging* him from transacting with the claimant. Either way, the inability or the unwillingness of the third party to transact with the claimant causes the claimant to suffer economic injury.

cases, rather than having been coerced into acting against the economic interests of the claimant by the threats made by the defendant against him, the third party's "freedom" to deal with the claimant is interfered with by the falsehoods that have been told to him by the defendant which have, as a result, misled him into engaging in conduct which causes economic harm to the claimant when he would not have otherwise behaved in that way. In essence, the "unlawful means" deployed against the third party is deceit, where the defendant deliberately deceives the third party with the ultimate goal causing harm to the claimant.²⁸

(c) Primary liability for combining together with third parties to injure the claimant

The two torts which fall within this category involve defendants acting in concert with third parties, who may well be co-defendants, to execute a common design against the claimant that causes the latter to suffer economic harm. Unlike the tripartite torts described above, where the defendant causes economic harm to the claimant via a third party and where the third party, rather than the defendant, is the immediate cause of the loss suffered by the claimant, these economic torts, while involving three or more parties, are akin to two-party torts where the third party or parties conspire with the defendant to commit acts that are collectively directed against the claimant. The essence of the wrong in these torts lies in the combination itself.²⁹ Traders who gang up against their rivals are more dangerous than if

²⁸ *Lonrho v Fayed (No 1)* [1990] 2 QB 479 and [1992] 1 AC 448. In this case, the alleged deception of the Secretary of State for Industry, a third party, by the defendants in order to influence his decision-making process, can be characterised as the "unlawful means" that were used against a third party to cause economic loss to the claimants. The liberty of the deceived party to make an independently informed decision or to exercise his discretion in a rational manner would thus have been interfered with by the defendant's deception, resulting in a decision with detrimental ramifications on the economic interests of the claimant.

²⁹ That the two conspiracy torts are variants of a common underlying action was recognised by the House of Lords in *Total Network SL v Her Majesty's Revenue and Customs* [2008] UKHL 19, [2008] 1 AC 1174 [44] (Lord Hope), [68] (Lord Walker), [122] (Lord Mance) and [221] (Lord Neuberger). At [100], Lord Walker described the gist of liability for the conspiracy tort as "damage intentionally inflicted by persons who combine for that purpose", while, in contrast, the gist of liability for the tort of causing loss by unlawful means

each had acted alone, being more likely to succeed in their efforts to inflict harm upon their targets and more likely to inflict harm of a greater magnitude than if they acted singly.³⁰

These torts circumscribe a defendant's freedom to join together with like-minded conspirators to intentionally inflict economic injury upon others by making overall assessments of his reprehensibility based on the character of his conduct and his mental state. Legal liability will be imposed on a defendant who intends to cause harm upon his target and carries out that intention by conspiring with others to employ unlawful means against that target. In contrast, if he conspires with others to use lawful means to harm the target, it is not enough that he intended to cause harm to that target: the infliction of such harm upon the claimant must be the principal motivation behind the conspiracy. In the latter case, the defendant's more blameworthy state of mind offsets the less blameworthy character of his conduct so as to provide, all things considered, a sufficient normative justification for imposing legal liability on the defendant.³¹

to involve "striking at the claimant through a third party and doing so by interfering with his freedom of economic activity". At [44] (Lord Hope), the House of Lords also echoed the views of Lord Wright in *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435, 462, that "it is in the fact of conspiracy that the unlawfulness [of these tortious combination] resides", while Lord Mance at [122] observed that "the fact of conspiracy... offers a sufficient justification for recognising tortious responsibility".

³⁰Not only may a combination of individuals acting in concert with each other to act against the claimant "make oppressive or dangerous that which if proceeded from a single person would be otherwise... the very fact of the combination may [show] that the object is simply to do harm, and not to exercise one's own just rights." See *Mogul Steamship v McGregor* (1889) 23 QBD 598, 616 (Bowen LJ). Similarly, in *Quinn v Leathem* (n 16) at 530, Lord Brampton observed that "a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison."

³¹The focus of one tort lies in the unlawful nature of the methods deployed by the combination, while the other tort lies emphasises the unlawful character of the underlying purpose behind the actions of the members of the conspiracy. See *Lonrho v Fayed (No 1)* [1992] 1 AC 448, 465 where Lord Diplock contrasted the two conspiracy torts: "Where conspirators act with the *predominant purpose of injuring* the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in *the fact of their concerted action for that illegitimate purpose* that the law, however anomalous it may seem now, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use *unlawful means* to do so, it is no defence for them to show that their

(i) Conspiracy to injure by unlawful means

Where there is an agreement between two or more parties who intentionally combine together to cause harm to the claimant, using means which are independently unlawful to carry out that intention, and the claimant does in fact suffer such harm as a result, then the tort of conspiracy to injure by unlawful means has been committed. Recent guidance from the House of Lords indicates that the breadth of the concept of “unlawful means” for the purposes of this tort is wider than how it is understood in the context of the general tort of causing loss by unlawful means. “Unlawful means”, for the purposes of this variant of the conspiracy tort, is not limited to independently actionable civil wrongs; it may also include certain criminal wrongs where the claimant is also the victim which the criminal offence was designed to protect.³²

Academic commentators have characterised this tort as a form of secondary civil liability, along the same lines as the tort of inducing breach of contract, which made all the accomplices of a principal actor jointly liable for the unlawful act perpetrated against the claimant.³³ This opened up the tort to the criticism that it was a superfluous cause of action in light of the more established general doctrine of joint tortfeasance that could be invoked to achieve the same results.³⁴ Indeed, some have gone so far as to argue that no such

primary purpose was to further or protect their own interests; it is *sufficient to make their actions tortious that the means used were unlawful.*” (Emphasis added).

³² *Total Network* (n 29), at [120] (Lord Mance) and [222] (Lord Neuberger). For a concise critique of the reasons given by the House of Lords for not adopting exactly the same definition given to the “unlawful means” requirement by their peers a few months earlier in *OBG v Allan* (n 7) within the context of the tort of causing loss by unlawful means, see Hazel Carty, ‘The Economic Torts in the 21st Century’ (2008) 124 LQR 641, 662-666.

³³ This was a prevalent view amongst legal commentators before the *Total Network* (n 29) decision. See Carty (n 3) at 22; Philip Sales, ‘The Tort of Conspiracy and Civil Secondary Liability’ [1990] CLJ 491.

³⁴ Carty (n 3) at 23-26, though see John Eekelaar, ‘The Conspiracy Tangle’ (1990) 106 LQR 223, where the author argues that the conspiracy tort may be a useful tool to attach liability in cases where the wrongdoing is complex and there are practical difficulties in identifying which of the conspirators was responsible for each specific act leading up to the commission of the actionable wrong.

independent tort should exist.³⁵ However, this limited view of the tort was recently rejected by the House of Lords, when it decided that the unlawful means deployed by the conspirators need not necessarily be independently actionable civil wrongs, because it ‘would deprive the tort of any real content’.³⁶

(ii) Conspiracy to injure by lawful means

The ingredients of liability for this variant of the conspiracy tort, also known as the tort of simple conspiracy or *Quinn v Leathem*³⁷ conspiracy, are almost identical to those required for the unlawful means conspiracy tort except in respect of two key features. The defendant-conspirators would not have committed independently unlawful acts against the claimant³⁸ and liability also requires the fulfilment of an additional criterion: not only must the conspirators have intended to cause harm to the claimant, they must have had the infliction of such harm as their *predominant purpose* or objective, as opposed to the pursuit of some other legitimate goal such as the advancement of self-interest.³⁹ Historically, the common law courts have adopted a very generous attitude towards interpreting and analysing the motives of defendants in conspiracy cases involving trade competition, thereby limiting its practical significance as a restraint on aggressive traders who band together against a common rival.⁴⁰

³⁵ Robert Stevens, *Torts and Rights* (OUP, Oxford 2007) 249-251.

³⁶ *Total Network* (n 29) at [94] (Lord Walker).

³⁷ (n 16).

³⁸ As the defendants who have combined together to injure the claimant have not engaged in any independently unlawful acts, the unlawfulness of the combination resides principally in the fact of the conspiracy to inflict injury upon a common target – the concerted act of banding together to strike at that victim – coupled with their predominant purpose to harm the claimant. *Crofter Hand Woven Harris Tweed v Veitch* (n 29).

³⁹ *Crofter Hand Woven Harris Tweed v Veitch* (n 29) 469, where Lord Wright explained that “the true contrast is between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause”.

⁴⁰ Compare *Mogul Steamship v McGregor* [1892] AC 25 (a trade competition case involving a conspiracy comprising members of a shipping cartel) with *Quinn v Leathem* (n 16) (a secondary action case involving a conspiracy comprising members of a trade union). See also Patrick Elias and Keith Ewing, ‘Economic Torts and Labour Law – Old Principles and New Liabilities’ (1982) 41 CLJ 321, 324.

In addition, the practical evidentiary difficulties of proving such a narrow mental element are compounded by the philosophical incompatibility of such motives with the very nature of the competitive process in which every participant seeks to eliminate his competitors from the marketplace. The trader in competition with his rival will always intend to harm his rival's business whenever making gains at the latter's expense will make his own business more profitable.⁴¹

(d) Primary liability for making misrepresentations to third parties that injure the claimant

The economic torts which fall within this category involve defendants making misrepresentations, either about themselves or about the claimant, which result in economic injury to the claimant. Unlike the torts described in the second and third categories above, liability can arise under the torts in this category even if the defendant did not intend to cause harm to the claimant, although he may actually have had such an intention in most cases. These torts reflect the law's recognition that a defendant's misleading actions or untruthful statements, communicated to the claimant's customers or other members of the public, are capable of prejudicing the claimant's commercial interests. The legal restraints imposed by these economic torts exhort minimum standards of commercial honesty for competing traders in their commercial conduct, requiring them to ensure that they neither behave in ways that create consumer confusion in the marketplace, nor make false statements about their rivals to the public that are capable of causing economic injury.

⁴¹ See *Sorrell v Smith* [1925] AC 700, 742 where Lord Sumner identified the practical difficulties of "how any definite line is to be drawn between acts, whose real purpose is to advance the defendant's interests, and acts, whose real purpose is to injure the plaintiff in his trade" given that "when the whole object of the defendant's action is to capture the plaintiff's business, their gain must be his loss". When deciding whether to impose liability under this conspiracy tort, judges face a practical problem of having to sift through a "quagmire of mixed motives". See *Crofter Hand Woven Harris Tweed* (n 29) 445 (Viscount Simon LC).

(i) Passing-off

The “classic trinity” of elements necessary for liability under this tort requires the claimant to establish protectable goodwill, an operative misrepresentation that causes or is likely to cause confusion, and damage to the claimant’s goodwill.⁴² Liability under this tort traditionally involved the defendant making misrepresentations about his goods or services which confuse customers into thinking that those goods or services originated from, or were connected in some way to, the claimant. Economic injury is suffered by the claimant when such misrepresentations lead customers to make purchasing decisions which divert sales away from the claimant. The tort of passing off has proven to be the most versatile of the economic torts and has had its scope of application progressively stretched to include a wide variety of situations: operative misrepresentations now include cases where the defendant has misled consumers about the quality of the claimant’s goods (which are sold by the defendant),⁴³ where the goodwill is shared by producers of products marketed under a single appellation,⁴⁴ in character merchandising cases,⁴⁵ celebrity endorsement cases⁴⁶ and online cybersquatting cases.⁴⁷

The prominence of this economic tort in the field of intellectual property law, where it has been developed as a highly flexible common law adjunct to the law of registered trade marks, has resulted in this tort being regarded in some circles as synonymous with the law of

⁴² *Reckitt & Colman Products v Borden Inc* [1990] RPC 340 (Jif Lemon).

⁴³ *Spalding v Gamage* (1915) 32 RPC 273.

⁴⁴ *Bollinger v Costa Brava Wine Co. Ltd.* [1960] Ch 262. See also *Erven Warnink BV v Townend & Sons* [1979] AC 731 (The *Advocaat* case), 739-740, where Lord Diplock observed that the question of whether or not the boundaries of the tort of passing off could be extended was “essentially one of legal policy” and that because “unfair trading as a wrong actionable at the suit of other traders who thereby suffer loss of business or goodwill may take a variety of forms...The forms that unfair trading takes will alter the ways in which trade is carried on and the business reputation and goodwill acquired”.

⁴⁵ *Mirage v Counter Feat Clothing* [1991] FSR 145 (Teenage Mutant Ninja Turtles).

⁴⁶ *Irvine v Talksport Ltd* [2002] FSR 60 and [2003] FSR 35.

⁴⁷ *Marks & Spencer plc v One In A Million Ltd.* [1999] RPC 1.

unfair competition.⁴⁸ It should be observed, however, that this tort is only concerned with a narrow band of activity within the broader spectrum of commercial conduct that might be regarded as modes of unfair competition: where the defendant seeks to gain a competitive advantage over the claimant by particular forms of misleading behaviour, thereby making gains at the expense of his rival by diverting sales from confused customers away from the claimant, or by misappropriating a valuable intangible which the claimant lays claim to.⁴⁹

(ii) Malicious falsehood

Establishing liability under this tort requires proof that the defendant has made false statements to a third party that are likely to injure, and do actually injure, the claimant as a result. Unlike the tort of passing off which is concerned about misrepresentations made by the defendant about his business, the falsehoods communicated here have to be directed at or related to the claimant's business. This would include factually untrue statements which disparage the claimant's goods or services so long as they are assertions of fact rather than mere statements of opinion or advertising puffs.⁵⁰ The breadth of the class of falsehoods that might be actionable under this tort extends beyond slander of title to land or goods, where the tort had its historical origins, and includes any false statement *about the claimant* that is *inherently likely* to cause him economic injury.⁵¹ In addition, the statements must have been

⁴⁸ *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414, 439 (Deane J); [1985] RPC 219 (Aust. H.C.). Post-*Advocaat* (n 44), however, there has been some resistance from the Privy Council towards the expansion of the tort of passing off into a broader "tort of unfair competition". See *Cadbury-Schweppes v Pub Squash* [1981] 1 WLR 193 (PC, Australia) and text accompany (n 107) to (n 109) below.

⁴⁹ Andrew Terry, 'Unfair Competition and the Misappropriation of a Competitor's Trade Values' (1988) 51(3) MLR 296.

⁵⁰ *White v Mellin* [1895] AC 154, 167, where Lord Watson noted that false statements made by the defendant about himself were not actionable, and that "it must be shown that the defendant's representations were made of and concerning the plaintiff's goods".

⁵¹ See *Wilts United Dairy v Robinson* [1957] RPC 220, 237, where Stable J explains that liability arises when "it is clear from the nature of the falsehood that it is intrinsically injurious".

made maliciously, either in the sense of spitefulness (*mala fides*) towards the claimant, or with knowledge of the falsity of the statements or recklessness as to its accuracy.⁵²

Given the three-party structure of this economic tort, where the defendant's actions engage a third party whose subsequent reaction results in economic loss to the claimant, it is also possible to fit this tort within the overarching framework of the general tort of causing loss by unlawful means. However, unlike the three-party version of the tort of deceit described earlier, this tort does not necessarily have to involve an independently actionable wrong being committed against the third party. Even though the third party has been told a falsehood by the defendant, that alone will not, in most cases, amount to fraudulent conduct by the defendant unlike those three-party situations where there is an allegation of deceit involved. More importantly, it appears that an intention to cause harm to the plaintiff may not strictly be necessary for the purposes of this tort as liability can attach to a defendant who recklessly communicates falsehoods about the claimant instead.⁵³ As one commentator has observed, the real basis of liability for malicious falsehoods is that the defendant utters falsehoods about the claimant at his peril.⁵⁴

⁵² Lord Herschell LC, in *White v Mellin* (n 50) 160, explained that making a "malicious" publication entailed either that "the object of the publication must be to injure another person and... not published *bona fide* to sell the advertiser's own goods or... published... with a knowledge of its falsity".

⁵³ In contrast, the false statements made by the defendant when the tort of deceit is committed need not have anything to do with the claimant at all, so long as they were made with the fraudulent intention of deceiving the person to whom these false statements were made into acting in a way which causes harm to the claimant. The tort of malicious falsehood therefore covers a narrower range of false statements than the tort of deceit with a different *mens rea* requirement.

⁵⁴ Carty (n 3) at 286.

3. Mapping the boundaries of unfair competition through the economic torts: the methodological framework of the common law

The diverse range of private law actions which comprise the economic torts might give the initial impression that the common law has developed a rigorous and comprehensive framework of legal restraints on the commercial freedom of traders engaged in competition with each other. However, upon a closer examination of the chequered histories of some of these torts, it becomes clear that they have developed unevenly in fragmented parcels across the common law terrain, without any Atkinian masterplan to lend order or coherence to their respective boundaries.⁵⁵ The tort of causing loss by unlawful means has, historically, stagnated in obscurity by a lack of judicial clarity⁵⁶ on its proper relationship with the tort of inducing breach of contract, resulting in more than a century of confusion arising from the sprinkling of cases since *Allen v. Flood*⁵⁷ that was only recently explicitly clarified by the House of Lords in *OBG v. Allan*.⁵⁸ On the other hand, the tort of passing off has taken off dramatically since *Reddaway v. Banham*,⁵⁹ having evolved dramatically in the hands of intellectual property barristers in response to the constantly changing dynamics of the marketplace and the different valuable intangibles that have emerged from new ways of doing business. In contrast, the conspiracy torts have been regarded by commentators as

⁵⁵ See K W Wedderburn, 'Rocking the Torts' (1983) 46 MLR 224, 229, where the author describes the intentional torts as "at best a ramshackle construction for decades" and "have lacked their Atkin".

⁵⁶ One of the main reasons why the principles underlying this tort have not been clearly developed in the caselaw lies in the fact that the tort has been invoked in a wide variety of factual scenarios in which overriding policy considerations might have shaped the way in which the elements of the tort were analysed and applied. Apart from trade competition cases, which are probably a minority segment of the caselaw as a whole, the tort has been developed in trade or labour dispute cases (where judges are confronted with statutory immunities to navigate around, as well as their own political views about the role of trade unions in an industrialized society), interlocutory proceedings (where the primary objective is to seek interlocutory relief by establishing that some form of civil liability exists), and a couple of "bootlegging" cases (where the issue of whether making such a tort available would circumvent the relevant statutory intellectual property regimes arises). See Hazel Carty, 'Unlawful Interference with Trade' (1983) 3 LS 193, 200-205.

⁵⁷ *Allen v Flood* [1898] AC 1.

⁵⁸ (n 7).

⁵⁹ *Reddaway v Banham* [1896] AC 199.

either redundant or anomalous,⁶⁰ in the absence of clear judicial guidance as to their normative bases until their revival in the recent decision of the House of Lords in *Total Network*.⁶¹ This uncertain state of affairs in the past has led both academics and judges to lament the impenetrability of this branch of the law.⁶²

Despite the many residual uncertainties surrounding the precise contours of each of the individual economic torts, it is still possible to distil a few broad propositions that may be useful towards understanding how the economic torts operate as mechanisms for identifying prohibited modes of unfair competition. Firstly, when drawing the boundaries between lawful and unlawful forms of competitive behaviour, the common law seeks to strike an appropriate balance between the rights of injured claimants against the liberty of their rivals to cause them economic harm. Secondly, when engaged in this process of balancing the competing, and conflicting, interests of parties in cases of intentionally inflicted economic harm, common law judges appear anxious to confine the scope of these torts and demonstrate palpable reluctance towards imposing liability upon defendants. Thirdly, in making assessments of whether or not tortious liability ought to be imposed on a defendant alleged to have engaged in acts of unfair competition, the common law appears to employ two broad methodological approaches: one approach identifies unlawful behaviour based on impressionistic assessments of the defendant's reprehensibility, while the other identifies unlawful behaviour with reference to more formalistic criteria, such as whether independent

⁶⁰ See Hazel Carty, *An Analysis of the Economic Torts* (1st edn OUP, Oxford 2000) at 26 and 41.

⁶¹ (n 32).

⁶² See Hazel Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability' (1988) 104 LQR 250, 278, where the author observes that "the economic torts are in a mess", while in *Associated British Ports v TGWU* [1989] 1 WLR 939, 961, Butler-Sloss LJ describes this as a "difficult if not to say obscure branch of the law of tort".

wrongs have also been committed by the defendant in the course of his actions or whether a contract between the claimant and a third party has been breached.

(a) Balancing the opposing interests of the claimant and the defendant

In setting the boundaries between legitimate competitive conduct and acts of unfair competition, the economic torts operate against a common law backdrop in which an abstract balancing exercise, between protecting the interests of injured claimants and the liberty of the rival defendant to cause harm to the claimant while in pursuit of his own commercial goals, is carried out. One of the central themes of this balancing process is the notion that both the claimant and his rival, the defendant who has injured him, have equal and opposing rights:

The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same and compete with him, though to his damage.⁶³

More precisely, both parties enjoy an antithetical dichotomy of rights.⁶⁴ Each competitor has the right to engage in his own business and the right to advance his business interests by competing with, and causing economic harm to, the other. The inexorable coexistence of these rights in all market-based capitalist economies, as well as the oppositional symmetry between the injured claimant's rights and those simultaneously

⁶³ *Allen v Flood*, (n 57) at 173 (Lord Davey). Echoing the same sentiment, in *Crofter Hand Woven Harris Tweed v Veitch* (n 29) 462, Lord Wright explained that “a conspiracy to injure is a tort which requires careful definition, in order to hold the balance between the defendant's right to exercise his lawful rights and the plaintiff's right not to be injured by an injurious conspiracy.”

⁶⁴ These rights may not strictly qualify as Hohfeldian “rights”, and might instead be characterised by Hohfeld as mere “liberties” or “privileges”, because they do attract corresponding duties in the same manner that conventional legal rights do. See W N Hohfeld, ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 *Yale LJ* 16. Other criticisms of a “rights-based” justification for general economic tort of causing loss have also been made in J W Neyers, ‘Rights-based justifications for the tort of unlawful interference with economic relations’ (2008) 28 (2) *LS* 215. Deakin and Randall (n 24 at 529) have described the claimant's “right to trade” as “the right to take part in certain economic activity without interference which the law regards as illegitimate.” This unsettled facet of the theoretical debate about the nature and definition of the “rights” that competitors have against each other does not detract from the simple proposition that the common law approach towards establishing boundaries of civil liability for economic injury fundamentally acknowledges the need to balance the competing private interests of the parties involved.

enjoyed by other traders competing for business in the same marketplace, means that the common law must necessarily permit, and competitors must necessarily tolerate, commercial behaviour which results in the infliction of economic harm. Such forms of injury are unavoidably incidental to the competitive process in a capitalistic market system. In the realm of trade competition, rival traders cannot complain if all they have suffered is economic harm arising from ‘mere competition’:

...every man has a right to carry on his lawful trade or employ his industry as he thinks fit, understanding by his right to do it that the law will secure him in the enjoyment of it, and will protect him against any improper interference or molestation in so doing, but that mere competition by rivals in trade who have an equal right to carry on a like business is not such interference or molestation....⁶⁵

Something more than ‘mere competition’ is required in order for the claimant to show that the defendant’s conduct has transgressed the boundaries of legitimate conduct drawn by the economic torts. In the more straightforward cases, the claimant might argue that one or more of his legal rights⁶⁶ have been violated by the unjustified actions of the defendant. The defendant who has engaged in acts of industrial espionage to surreptitiously acquire his rival’s trade secrets may be liable under well-established legal causes of action, such as the property-based tort of trespass or an equitable action for breach of confidence. A common law court would have no difficulty in accepting that such acts of “unfair” competition ought to be regarded as legal wrongs committed by the defendant against the claimant.

⁶⁵ *Allen v Flood* (n 57) at 40 (North J). As Lord Wright put it, in *Crofter Hand Woven Harris Tweed v Veitch* (n 29) 463, “it cannot be merely that the appellants’ right to freedom in conducting their trade has been interfered with. That right is not an absolute or unconditional right... that right is qualified by various legal limitations... (which are) inevitable in organised societies where the rights of individuals may clash. In commercial affairs, each trader’s rights are qualified by the right of others to compete.”

⁶⁶ *Quinn v Leathem* (n 16) 539 (Lord Lindley): “According to our law, competition, with all its drawbacks... is permissible, provided nobody’s rights are infringed”.

On the other hand, the boundaries between “fair” and “unfair” competition, between lawful and unlawful competitive conduct, becomes a lot less obvious when other strategies are deployed by aggressive defendants against their rivals, particularly where the conduct complained about involves the defendant ‘deliberately striking at his target through a third party.’⁶⁷ Fine distinctions are frequently drawn by the economic torts between permissible and prohibited conduct, with the common law looking favourably upon, or at least tolerating, some instances of ethically questionable competitive behaviour even if one trader has suffered economic injury as a result of the actions taken by his competitor. Persuading a third party to breach his contract with the claimant attracts liability under the tort of inducing breach of contract, but obstructing the performance of that contract, or facilitating the third party’s commission of the breach, without committing any independently unlawful act does not.⁶⁸ The common law seeks to promote, on the one hand, the sanctity of contracts by extending legal liability beyond the third party who has contracted directly with the claimant, imposing secondary liability upon a defendant who has procured the breach of contract for his own selfish purposes,⁶⁹ while recognising, on the other hand, that the very essence of competition in a market economy requires the preservation of some freedom for competitors to secure for themselves the benefit of the products or services supplied by these third parties. Competition in the common law marketplace includes competition *for* contracts.

This policy tension between recognising the need to curtail “unfair” modes of competitive behaviour, as well as the importance of allowing *some* forms of such conduct to take place as part of the normal operational parameters of a market-based economy, makes it difficult for

⁶⁷ *OBG v Allan*, (n 7) at [306] (Baroness Hale).

⁶⁸ See *Carty* (n 3) at 45-50.

⁶⁹ The defendant must have intended to bring about the breach of contract either as an end in itself or a means to an end. See discussion above relating to *OBG v Allan* at (n 7 and n 17), where the errors in this respect made by the Court of Appeal in *Millar v Bassey* [1994] EMLR 44 were explicitly addressed by the House of Lords.

the economic torts to formulate clear boundaries between lawful and unlawful conduct that are buttressed by coherent legal principles. The difference between lawful and unlawful modes of competition, in the context of the different economic torts, will often simply be a matter of degree.

- Where a defendant's motives for conspiring with others to injure the claimant through lawful means include the objective of causing harm to the claimant, as well as to advance his own interests, then his liability depends on whether the former motive overshadows the latter or not. The claimant's right not to be targeted through the collective actions of others acting in concert with each other have to be balanced against the defendant's economic freedom to pursue his own commercial goals with the assistance of his allies.
- Where a defendant deliberately utters falsehoods about the claimant to a third party that result in economic harm to the claimant, his liability under the torts of malicious falsehood or deceit depends on whether his state of mind satisfies the different *mens rea* criteria required under each of these torts. The claimant's right not to be injured by untruthful statements told by others has to be balanced against the defendant's freedom to engage in commercial speech with third parties.
- Where a defendant's egregious behaviour towards a third party involves using the latter as a vehicle through which economic harm is inflicted upon the claimant, he only attracts liability under the tort of causing loss by unlawful means if his conduct towards the third party amounts to an independently actionable wrong. The claimant's right not to be harmed through the instrumentality of a third party, whose freedom to deal with the claimant has been affected by the defendant's actions, has to be balanced against the defendant's own liberty to influence how third parties behave

towards the claimant while the defendant is in pursuit of his own commercial objectives.

- Where a defendant substantially reproduces the distinctive features of a claimant's product get-up in his own products, his liability depends on whether the claimant is able to show that the consuming public has been confused in a relevant way by such conduct. No liability attaches if customers continue to be able to distinguish the products originating from the defendant from those originating from the claimant. The claimant's right not to have others free-ride upon the commercial reputation he has built up in the course of trade has to be balanced against the defendant's liberty to imitate the appearance of his competitor's products so as to send signals of substitutability to consumers.

Two broad methodological approaches employed by the common law towards identifying when a defendant's conduct has gone beyond 'mere competition', such that he attracts liability under one or more of the economic torts, will be discussed in greater detail below. The first involves making assessments of defendant reprehensibility based on the blameworthiness of his actions towards the claimant. The second involves reliance on more formalistic criteria – such as the presence of independently unlawful wrongdoings – as a benchmark for liability. Both these approaches need to be understood against the backdrop of judicial conservatism that extends across this branch of the common law, with English judges demonstrating a generally cautious attitude when assessing allegations of unfair competition made by claimants against their trade rivals. This judicial hesitance towards harnessing the inherent flexibility of the common law as an instrument to regulate unfair competitive practices in the marketplace needs to be examined in closer detail.

(b) Judicial Minimalism

The conservative attitude of common law judges towards limiting the scope of some of the economic torts needs to be explained because of its significant impact on the substantive requirements of the various causes of action. This ethos was unequivocally articulated by Lord Hoffmann in *OBG v Allan*:

The common law has traditionally been reluctant to become involved in devising rules of fair competition, as vividly illustrated by *Mogul Steamship Co Ltd v. McGregor, Gow & Co.* [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed *only to enforce basic standards of civilised behaviour* in economic competition, between traders or between employers and labour.⁷⁰

Where the tort of causing loss by unlawful means is concerned, this restrained approach towards limiting the scope of the tort has translated into very few reported cases in which such liability is actually imposed upon defendants. In contrast, where the defendant's conduct has impinged upon proprietary or quasi-proprietary interests belonging to the claimant, such as where the defendant has interfered with a claimant's contract with a third party or jeopardised the claimant's goodwill in some way, the common law courts have been more readily persuaded to stretch the boundaries of the relevant torts to provide the claimant with some relief,⁷¹ though sometimes sacrificing conceptual clarity in the process.⁷²

⁷⁰ *OBG v Allan* (n 7) at [56].

⁷¹ See text accompanying (n 43) to (n 47) for an overview of the elasticity of the tort of passing off.

⁷² This resulted in the judicial expansion of the tort of inducing breach of contract into what Carty (n 3) at 81, has described as "the 'half-way' tort of unlawful interference with contractual performance" which the House of Lords had to tidy up in *OBG v Allan*. See note 14 above and accompanying text.

In addition, the minimalist instincts of the common law judges towards the creation of private law liability in the realm of trade competition manifest themselves in the stringent substantive elements required under some of the economic torts. Following the House of Lords' judgment in *OBG v Allan*, it appears that the economic torts have entered a contractionary phase in their developmental arc – at least compared to the expansionary impulses that underpinned the earlier judicial milestones in the previous caselaw⁷³ – given the significant degree of judicial attention that was directed towards confining the scope of these common law actions within narrow limits.⁷⁴ For example, the majority of the House of Lords agreed that it was necessary to circumscribe the scope of the concept of “unlawful means” further, in the context of the tort of causing loss by unlawful means, such that only actionable civil wrongs that are ‘intended to cause loss to the claimant by interfering with the freedom of a third party’⁷⁵ can be used to establish a cause of action against the defendant. As far as the tort of inducing breach of contract was concerned, it was held that a cause of action would only be available where there was an actual breach of contract suffered by the claimant and where the defendant was actually aware of the existence of the contract that was breached as a result of his actions.⁷⁶

Elsewhere, the substantive requirements of some of the other economic torts also demonstrate a significant degree of respect for the liberty of potential defendants to inflict

⁷³ These cases include *GWK v Dunlop* (n 14), *DC Thomson v Deakin* [1952] Ch 646 and *Torquay Hotel v Cousins* (n 14) which either attempted to stretch the scope of the tort of inducing breach of contract or create a hybrid between that tort and the tort of causing loss by unlawful means.

⁷⁴ Though Carty, (n 32) at 667 and 674, has argued that there is a “spirit of creeping interventionism that lies behind” the House of Lords’ subsequent approach towards the unlawful means conspiracy tort in the *Total Network* (n 29) case which may be regarded as “the start of a process shifting these torts from the abstentionist track onto the interventionist track of development”.

⁷⁵ (n 7) at [51] (Lord Hoffmann, whose views were explicitly endorsed by which Lord Brown and Baroness Hale).

⁷⁶ See text accompanying (n 9) to (n 14) above.

economic harm upon their rivals by permitting them to vindicate their actions on the basis that they were legitimately pursuing their own interests. A defendant's pursuit of self-interest may be a valid justification, for example, when it is alleged that he has induced a third party to breach his contract with the claimant, if he is able to show that he possesses an equal or superior right such as a pre-existing contract that is inconsistent with the claimant's contract.⁷⁷ The tort of conspiracy to injure by lawful means goes one step further in favour of the defendant: instead of just giving the defendant an opportunity to justify his actions in conspiring against the claimant, the claimant is required to show a *lack of justification* by the defendant for his actions as a primary constituent ingredient of the tort itself. Where the pursuit of self-interest is the principal reason motivating the defendant's behaviour, he would necessarily lack the 'predominant purpose' of causing harm to the claimant, the key ingredient of liability for a tort which does not require any of the conspirators to have engaged in any form of independently unlawful behaviour.⁷⁸

There are at least two explanations why there exists this general reluctance⁷⁹ to actively develop the economic torts into vehicles for restraining acts of unfair competition. Firstly, there is judicial resistance towards making bare determinations of fairness or unfairness when assessing the legal character of the defendant's harming-causing conduct. Secondly, there is the judicial sentiment that there is a clear societal interest in robust

⁷⁷ *Edwin Hill & Partners v First National Finance Corp* [1989] 1 WLR 225.

⁷⁸ See (n 39) above and accompanying text. As Lord Wright observed, in *Crofter Hand Woven Harris Tweed v Veitch* (n 29) 472, "English common law... has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful" and that because "we live in a competitive or acquisitive society, the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom".

⁷⁹ Describing the approach taken by the English courts when dealing with disputes involving the injury to a competitor's economic interests, Professor Cane takes the view that common law judges have decided that "the best general policy for them to adopt in the face of conflicts between competitors is neutrality" because of their "unwillingness... to get involved in regulation of markets" and their "desire to have relatively objective criteria of actionability". Peter Cane, *Tort Law and Economic Interests* (2nd edn Clarendon Press, Oxford 1996), 259-260 and 264.

competition which might be detrimentally stifled if tortious liability for excessive conduct was too readily imposed upon competitors.

(i) Evaluating the “fairness” or “unfairness” of the defendant’s conduct

When deciding if a defendant should be liable for the economic injury he has intentionally inflicted upon the claimant, common law judges rarely engage in direct or explicit assessments of the “fairness” or “unfairness” of the defendant’s conduct, preferring instead to fall back upon more concrete criteria – such as the presence or absence of independent legal wrongs, including fraud, dishonesty and coercion – when delineating the boundaries between lawful and unlawful conduct via the various economic torts. In the frequently-cited words of Fry L.J.:

To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts.⁸⁰

While English judges are tasked with deploying principles of fairness on a daily basis when shaping the many different facets of the common law, they appear to shun the task of having to make raw distinctions between fair and unfair forms of commercial behaviour in the context of competing undertakings, reflecting perhaps the significant impracticalities of importing everyday man-on-the-street notions of fairness and morality into the cold-blooded

⁸⁰ *Mogul Steamship v McGregor* (n 30) at 625-626, “vigorous language” that was adopted by Lord Bramwell in the House of Lords, (n 40) at 49, while Lord Morris went further to add, at 51, that “[t]he question of “fairness” would be relegated to the idiosyncrasies of individual judges.... [and that he could] see no limit to competition, except that you shall not invade the rights of another”. Similarly, Bowen LJ (at 615) emphatically rejected the argument that the defendants had done anything “unfair” by deliberately reducing their freight charges to undercut the claimant’s rates: “The offering of reduced rates by the defendants in the present case is said to have been “unfair.” This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of “fairness” or “reasonableness” (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade”.

realm of capitalistic commerce.⁸¹ The case law palpably demonstrates the reluctance of the courts to take a pro-active role in formulating the ground-rules of engagement for trade rivals based on notions of fair-play. Common law judges have considered themselves constitutionally unqualified to draw legal distinctions between lawful and unlawful conduct using “fairness” as the principal criterion because such pronouncements could have far-reaching ramifications on the behaviour of individuals and groups of individuals in a wide spectrum of commercial and non-commercial settings. The economic torts impose limits on the freedom to inflict economic harm which apply not only to commercial undertakings engaged in trade competition with each other, but also to trade unions, societies, associations and their respective members. Unique policy considerations may have to be addressed within each particular contextual setting that exceed the competence or expertise of the common law courts:

Parliament has shown itself more than ready to draw the line between fair and unfair trade competition or between fair and unfair trade union activity. This can involve major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise. Such things are better left to Parliament.⁸²

However, the courts have also recognised that the common law marketplace should not be governed by the law of the jungle, where the strong are free to prey upon their rivals with absolute impunity. The economic torts were thus formulated to embody the common

⁸¹ Where there is a clear element of dishonesty in the defendant’s conduct, however, judges seem to have less difficulty making such pronouncements. In the *Advocaat* decision, (n 44) at 740, Lord Diplock characterised the defendant’s misleading conduct as “a case of unfair, not to say dishonest, trading of a kind for which a rational system of law ought to provide a remedy to other traders whose business or goodwill is injured by it.”

⁸² *OBG v Allan* (n 7) at [306] (Baroness Hale).

law's response to certain specific forms of 'clearly excessive conduct',⁸³ even though the courts may regard this role as a modest one that ought to be subordinated to more specialised legislative initiatives:

Business people are not free to promote their own businesses at the expense of others by whatever means they may choose. There are limits. The common law has long recognised that some forms of conduct, intentionally damaging other traders, are not acceptable... [but] ... English courts have long recognised that they are not best equipped to regulate competitive practices at large. Parliament is better placed to decide what interests need protection and by what means.⁸⁴

This assumes, however, that the parliamentary instruments that 'regulate competitive practices at large' share the same underlying goals and objectives as the common law economic torts. If not, then the reasons for the common law viewing 'some forms of conduct' as 'not acceptable' might not correlate with the objectives and bases of liability found in the legislative framework, thereby making them imperfect substitutes for each other. Competition statutes designed, for instance, with a view to prohibiting particular modes of competitive behaviour based on the actual or predicted economic effects of such conduct on the general level or state of competition in the marketplace as a whole would not be suitable legislative instruments to regulate "unfair" methods of competition which are objectionable on the basis

⁸³ *OBG v Allan* (n 7) at [153] (Lord Nicholls).

⁸⁴ *OBG v Allan* (n 7) at [143] and [148] (Lord Nicholls), echoing sentiments that have been expressed by the English courts for more than a century. The Court of Appeal in *Mogul Steamship v McGregor* (n 30) at 620 (Bowen LJ), for example, observed that "[i]f peaceable and honest combinations of capital for the purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law". In that case, the aggressive and coordinated commercial tactics employed by the shipping cartel, carried out without committing independent legal wrongs and in the absence of malice, were characterised as a "peaceable and honest" combination in the eyes of the common law.

that they violate the behavioural norms expected of traders in society or that they impinge upon the private interests of particular traders that suffer economic injury.⁸⁵

(ii) Promoting competition and preserving the liberty of the defendant to injure the economic interests of the claimant in the course of competition

The common law recognises that competition is an intrinsically valuable⁸⁶ part of commercial life which ought to be encouraged and protected.⁸⁷ This is most clearly illustrated by the common law restraint of trade doctrine which renders void certain agreements that unreasonably eliminate or impede competition between rivals.⁸⁸ In the realm

⁸⁵ This would explain Lord Esher's Court of Appeal valiant attempt, in *Mogul Steamship v McGregor* (n 30) at 609-610, to distil nine common law principles of "fair trade competition": "First, that the head of law, which we are considering, applies only to trade and to traders; second, that the law has a peculiar care for the preservation of a free course of trade as between traders, because such freedom is for the benefit of the public; third, that the principal formula of law for the purpose of enforcing this peculiar care is — that every trader has a legal right to a free course of trade, meaning thereby a legal right to be left free to exercise his trade according to his own will and judgment; fourth, that if anyone, by an act wrongful as against that right, interferes with it to the injury of a trader, an action lies against such person by such trader; fifth, that any act of *fair trade competition*, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader's right, but is only the exercise of the first-mentioned trader's equal right, and is therefore not actionable; sixth, any act, though of the nature of competition in trade, but which is an act beyond the limits of *fair trade competition*, and which is therefore not an act of any real course of trade at all, and the immediate and necessary effect of which is such an interference with a rival trader's right to a free course of trade as prevents him from exercising his full right to a free course of trade, leads to an almost irresistible inference of an indirect motive, and is therefore — unless, as may be possible, the motive is negative — a wrongful act as against his right, and is actionable if injury ensue; seventh, an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensue; eighth, an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering, i.e. with intent to interfere with the trade of another, is a thing done not in the due course of trade, and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is therefore a wrongful act against such trader, and, if it is carried out and injury ensue, is actionable; ninth, such an agreement, being a public wrong, is also of itself an illegal conspiracy, and is indictable."

⁸⁶ *Allen v Flood* (n 57) at 179, where Lord James noted that "every man's business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference", and yet it is in the interest of the community that it should exist." More recently, in *L'Oreal SA v Bellure* [2007] EWCA Civ 968, [2008] RPC 9 [141], Jacob LJ noted that "the basic economic rule is that competition is not only lawful but a mainspring of the economy".

⁸⁷ *OBG v Allan* (n 7) at [142], where Lord Nicholls observed that "Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition."

⁸⁸ *Hilton v Eckersley* (1855) 8 E&B 47, 119 ER 781; *Nordenfelt v Maxim Nordenfelt* [1894] AC 535. However, the doctrine has sometimes been used as a tool for protecting weaker parties in situations where there is a severe

of the economic torts, these policy considerations have translated into legal principles that reflect a keen awareness of the importance of preserving the freedom of traders to compete rigorously in the marketplace and have contributed substantially to the overall climate of judicial conservatism in this sector of the common law. Even within the context of the tort of passing off, where the common law action has undergone remarkable expansionary phases to cover a wide variety of imitative and misappropriative behaviour, English judges have voiced their concerns about common law liability placing undue burdens on competitive behaviour:

...in an economic system which has relied on competition to keep down prices and to improve products there might be practical reasons why it should have been the policy of the common law not to run the risk of hampering competition by providing civil remedies to everyone competing in the market who has suffered damage to his business or goodwill....⁸⁹

However, even as the common law seeks to ensure that traders engaged in competition with each other are given the latitude to pursue their commercial goals in an aggressive manner, it should also be just as concerned with *how* that competition takes place and consider whether the different modes of competitive conduct engaged in by traders ought to be encouraged, tolerated or castigated. Certain modes of “healthy” competition in the marketplace are desirable in that they may spur traders to lower their prices and raise the quality of their offerings, benefiting consumers in the process, while other modes of “unhealthy” competition can be destructive by inflicting economic harm upon rival traders

inequality the bargaining positions of the contracting parties. See *Shroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308.

⁸⁹ *Advocaat* (n 44) at 742 (Lord Diplock). Similarly, in the adjacent realm of trade mark law, forceful criticisms have been made by English judges against the severe restraints that have been placed upon the “freedom to trade” by European trade mark jurisprudence relating to comparative advertising and ability of traders to offer low-cost alternatives to goods or services sold under registered trade marks that have a reputation in the United Kingdom. See *L’Oreal SA v Bellure* [2010] EWCA Civ 535, [16]-[17].

such that they are eliminated from the marketplace, thereby reducing consumer choice and raising prices down the road. While the line between healthy and unhealthy competition, just like the boundary between fair and unfair competition, is incapable of being drawn with such precision that would eliminate all uncertainty as to whether a liability ought to be imposed upon a defendant whose misconduct has caused economic harm to his rival, the claimant, it is a distinction that is inevitably made by the common law through the shape and structure of the various economic torts.

The irony of the common law embracing a freedom-of-competition policy which limits the scope of application of the economic torts to just a small segment of the full spectrum of shabby conduct that traders might employ against their rivals, thereby preserving the liberty of the former to inflict economic injury upon the latter in the name of competition, is this: respecting the freedom of competitors to decide how they engage their rivals in their competitive struggles, in the name of competition, also entails recognising their freedom to obstruct competition in the marketplace by preventing their rivals from competing effectively with them. Given their role as the only liability-imposing tools of the common law of unfair competition, it is submitted that the economic torts can and should focus – notwithstanding the reservations expressed by Fry LJ in the *Mogul Steamship* case⁹⁰ – on the dimensions of *fairness* of the competition between the trader and his injured rival, rather than being excessively, or exclusively, preoccupied with concerns related to the former's *freedom* to compete with the latter.

(c) Two methodological approaches towards establishing liability under the economic torts

⁹⁰ See (n 30) and accompanying text.

Looking across the eclectic range of economic torts introduced earlier, two broad methodological approaches can be extracted to explain how the common law identifies acts of unfair competition that attract tortious liability. One approach emphasises the subjectively reprehensible character of the defendant's conduct as a significant threshold requirement for imposing liability upon him. The other approach relies on more specific, and formalistic, alternative criteria – such as the presence of independently recognisable legal wrongs committed by the defendant or a third party – as objective benchmarks for distinguishing between lawful and unlawful modes of competitive conduct.

Despite this apparent divergence in methodology, the latter approach can possibly be reconciled with the former by viewing the commission of independently unlawful acts as a convenient, albeit imperfect, proxy for assessing the reprehensibility of the defendant's behaviour. The fact that the defendant has committed, or has persuaded someone else to commit, an independent legal wrong as a means of causing economic injury to the claimant puts him in a sufficiently blameworthy position that justifies the imposition of civil liability and the judicial recognition of a legal rule which deprives all traders of their liberty to engage in such modes of conduct to inflict economic harm upon their rivals under the banner of market-driven competition.

(i) Defendant Reprehensibility

Given that economic injury is an integral and unavoidable facet of the competitive process in which traders deliberately set out to make commercial gains at the expense of their rivals, tortious liability cannot be imposed in respect of such injury simply on the basis that it has been intentionally inflicted. Something more than 'mere competition' is required of the defendant to bring his conduct within the forbidden zones of conduct demarcated by the

different torts. One of the themes which pervades the economic torts is the notion that liability will arise if the defendant's behaviour is sufficiently reprehensible to make him blameworthy for the economic losses suffered as a result of his actions. This would entail an examination of the overall reprehensibility of both his motives as well as his behaviour.

Allegations of unfair competition are frequently accompanied by the presence of malice or maliciousness in the defendant's conduct, even though the meaning of the concept appears not to have been universally settled upon or applied consistently across the different torts. In the context of a trade combination seeking to inflict economic harm upon a competitor by engaging in collusive commercial tactics, Bowen LJ has explained the concept of a 'malicious wrong' in the following way:

Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong.⁹¹

Where the tort of malicious falsehood is concerned, malice is a key element of liability. However, after *Allen v. Flood*, it is fairly clear that malice, regardless of its precise legal definition, is not going to be enough on its own to justify the imposition of liability upon defendants, who have not acted in combination with others, in the absence of any independently unlawful acts.⁹² The presence of a malicious intent to harm the claimant

⁹¹ *Mogul Steamship v McGregor* (n 30) at 613. The Court of Appeal's decision to impose liability upon the defendants in this case, which was ultimately reversed by the House of Lords on appeal, was strongly influenced by the court's opinion that the hostile motives of the defendants should have a direct bearing on the legality of their conduct. Conversely, as Lord Cave has stated in *Sorrel v Smith* (n 41) at 712, "[i]f the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, though damage to another ensues."

⁹² (n 57) at 118-124, where Lord Herschell argued that there was "no greater danger to the community than... a jury... at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say they are malicious". He then went on to discuss the

cannot transform an otherwise lawful act into an unlawful one.⁹³ In any case, when the economic injury has arisen from trade competition, a reliance on “malice” – assuming that the term is even capable of precise definition – as a principal criterion of liability would seem peculiar in a capitalistic market economy in which traders are very much encouraged to pursue their individual commercial goals at the expense of their rivals.⁹⁴

However, many of the economic torts still require a close examination of a defendant’s mental state as a criterion for liability, over and above the fact that his actions were intentional in the sense that they were voluntary, suggesting an underlying preoccupation with his reprehensibility as a justification for curtailing his freedom to act to the economic detriment of the claimant.⁹⁵ The state of his knowledge and subjective beliefs are critical. For example, in establishing liability under the tort of inducing breach of contract, the claimant must show that the defendant not only had actual knowledge of the existence of the contract between the claimant and the third party, but that he also had actual

several possible meanings of the term “malicious”, only to conclude that none of them were ultimately satisfactory or workable benchmarks for liability: 1) personal spite or ill-will, 2) pursuing one’s interests “with such a disregard of his neighbour as no honest and fair-minded man ought to resort to”, 3) “benefiting the defendant at the expense of the plaintiff”, 4) “wilfully and knowingly procuring an unlawful act”, and 5) committing “a wrongful act... intentionally without just cause or excuse” (citing Bayley J in *Bromage v Prosser* 4 B & C 247, 255; 107 ER 1051, 1054).

⁹³ *Allen v Flood* (n 57) at 107 (Lord Watson), 123 (Lord Herschell), 151-152 (Lord MacNaghten), 168 (Lord Shand) and 172 (per Lord Davey).

⁹⁴ As Lord Halsbury LC explained in *Mogul Steamship*, (n 40) at 36, “it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person’s trade when you appropriate the trade to yourself.”

⁹⁵ The one striking exception amongst the common law actions is the tort of passing off which does not, strictly speaking, require proof that defendant *intended* to pass off his wares as those of the claimant, or proof of an intention to deceive or confuse the public. An operative misrepresentation can be established from the fact that the defendant’s actions had the *effect* of causing confusion among customers in the marketplace, thereby damaging the claimant’s goodwill in the process. However, the courts have also recognised that where an intention to deceive the public is established on the part of the defendant, the claimant’s case is strengthened insofar as a lighter burden is placed on him to show that the defendant has actually succeeded in causing confusion in the marketplace. See *Claudius Ash, Sons & Co v Invicta Manufacturing Company* (1912) 29 RPC 465, 475, where Earl Loreburn LC observed that “no Court would be astute when they discovered an intention to deceive, in coming to the conclusion that a dishonest defendant had been unsuccessful in his fraudulent design”.

knowledge of the fact that he was causing a breach of that contract to occur. It would not be enough if the breach of contract was merely a foreseeable consequence of the defendant's actions, or if he actually believed that no contractual breach would occur as a result of his actions.⁹⁶ Similarly, where the torts of causing loss by unlawful means and conspiracy to injure by unlawful means are concerned, some judges have stressed the importance of showing that the unlawful conduct carried out by the defendant was indeed the 'means' or, in the language of Lord Nicholls, the 'instrumentality' through which the defendant carried out his intention to harm the claimant.⁹⁷ This requires the claimant to show that the defendant has deliberately committed a legal wrong against the third party *for the purpose* of causing harm to the claimant. An intention to cause the claimant to suffer economic harm is not enough; there must also be an intention to *use* the third party as the channel through which injury is inflicted upon the claimant's economic interests.

Perhaps the most explicit illustration of how the English courts have focused their attention on assessing the blameworthiness of defendants can be seen in the context of the two conspiracy torts, where a less blameworthy state of mind (an intention to harm the claimant) is enough if unlawful means have been used to injure the claimant while a higher degree of blameworthiness (a predominant purpose to injure the claimant) is required if lawful means have been employed against the claimant:

⁹⁶ *OBG v Allan* (n 7) at [42]-[43] and [66]-[72] (Lord Hoffmann), where the defendant in one of the cases decided in that joint appeal, *Mainstream Properties v Young*, was held not to have committed the tort of inducing breach of contract against a company because he "honestly believed that assisting [the two employees of the company]... would not involve them in the commission of breaches of contract [with the company]".

⁹⁷ *Total Network* (n 29) at [95] (Lord Walker), citing Lord Nicholls in *OBG v Allan* (n 7) at [152] and [159].

The circumstances must be such as to make the conduct *sufficiently reprehensible* to justify imposing on those who have brought about the harm liability in damages for having done so.⁹⁸

A similar doctrinal calibration between the defendant's state of mind and his conduct towards the claimant is echoed elsewhere in the other economic torts, where a higher degree of blameworthiness associated with one element may be offset by a lesser degree of blameworthiness associated with the other. The prerequisites for liability that comprise the torts of inducing breach of contract and causing loss by unlawful means are illustrative. The first tort requires a less blameworthy state of mind (the intention to procure a breach of contract between a third party and the claimant)⁹⁹ while the latter tort requires a more blameworthy state of mind (the intention to cause harm to the claimant). However, the first tort involves a situation where the defendant is regarded as an accomplice¹⁰⁰ to the third party contract-breaker's unlawful acts against the claimant, where the claimant's economic injury has arisen from the commission of an independent legal wrong (the breach of contract) against him, while the latter tort does *not* involve any independent legal wrong having been committed against the claimant by *either* the defendant or the third party. Instead, the latter tort involves unlawful conduct by the defendant against the third party, whose subsequent

⁹⁸ *Total Network* (n 29) at [56] (Lord Scott, emphasis added). Similar sentiments were echoed by Lord Mance at [122] ("sufficient justification for recognising tortious responsibility") and Lord Neuberger at [227] ("sufficient unlawfulness to establish a claim in unlawful means conspiracy").

⁹⁹ The intention requirement for this tort would be satisfied even if the defendant had believed that the claimant would ultimately benefit from, rather than be harmed by, the breach of that contract which the defendant had sought to procure.

¹⁰⁰ That the blameworthiness of the defendant's *actions* is relevant to an action under the tort of inducing breach of contract is evident from the requirement that he must have procured or induced the contractual breach between the third party and the claimant. This would suggest an active or material role on the part of the defendant in causing the third party to be in breach of the latter's contractual duties to the claimant. Liability would not arise if he merely facilitated the third party's breach of contract – such as purchasing goods from the third party that the third party was contractually obliged to sell to the claimant – or if his role in the third party's decision to commit a breach of contract was limited to some form of passive participation. See (n 9) and accompanying text.

actions are the immediate cause of the claimant's economic injury, and the stronger mental element that is required for this tort – that he must have intended to harm the claimant through his actions – serves to “connect” the defendant's unlawful conduct towards the third party to the economic injury ultimately suffered by the claimant.¹⁰¹ The significance of establishing sufficient blameworthiness on the part of the defendant before tortious liability can be imposed upon him was thus strenuously emphasised by Lord Nicholls in *OBG v Allan* when he examined the intention requirements for the tort of causing loss by unlawful means:

Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant.¹⁰²

Judicial scrutiny of the reprehensibility of the defendant's behaviour is most pronounced where he has carried out his intention of causing economic harm to the claimant while only engaged in lawful acts. The great lengths to which some judges examine the moral turpitude of the defendant's behaviour, or lack thereof, is best illustrated in the category of cases involving secondary action by trade unions which, although concerned with ‘competition in labour... is in all essentials analogous to competition in trade, and to which

¹⁰¹ Some commentators have observed that the defendant's intention to harm the claimant establishes the nexus required to overcome the objection that the defendant's unlawful conduct was too remote from the claimant's loss. See Philip Sales and Daniel Stilitz, ‘Intentional infliction of harm by unlawful means’ (1999) 115 LQR 411, 412. Carty describes this aspect of the tort as “the magic transfer of liability”. See Carty (n 60) at 111 and 127, citing Eekelaar (n 34) at 226.

¹⁰² *OBG v Allan*, (n 7) at [166].

the same principles must apply'.¹⁰³ For example, in *Allen v. Flood* and *Quinn v. Leathem*, the members of the House of Lords devoted a substantial part of their judgements towards analysing the intricacies of the respective defendants' objectives and the legitimacy of their actions.

In *Allen v. Flood*, the defendant was a trade union representative who had warned a third party employer that members of his union would get "called out" from their day-to-day employment contracts if the claimants, who were members of a rival union, were not dismissed from their employment. Lord Shand, who was part of the six-to-three majority of the House of Lords who held in favour of the defendant, described the defendant in almost glowing terms:

... the defendant Allen was only doing what was right and proper in intimating the resolution to the employers, in place of allowing the men to leave without notice to the employers of what would certainly cause them great inconvenience and loss.

There was no threat of the nature of menace...¹⁰⁴

In *Quinn v. Leathem*, the defendants were trade union officers who had conspired to injure the claimant for having non-union members in his employment, and for not dismissing these employees in compliance with their demands, by pressurising one of the claimant's customers not to deal with the claimant. Lord Lindley, who was part of a unanimous decision

¹⁰³ *Allen v Flood* (n 57) at 164 (Lord Shand).

¹⁰⁴ See (n 57) at 165. In contrast, the members of the House of Lords who were in the minority, and held in favour of the claimants, characterised the defendant's actions very differently. Lord Ashbourne, at 114, observed that "the motive of the defendant was founded on the determination to inflict punishment on the plaintiffs for their past actions by driving them out of employment". Lord Morris, at 159-160, observed that the defendant's "object was to injure the plaintiffs and to punish them, and he had the intention of further persecuting them by not allowing them to work anywhere... his conduct was unauthorized, and he misrepresented to the employers both the wishes of the men and their objects, and acted outside the scope of his authority as a district delegate of the union."

by the House of Lords to impose liability on the defendants, assessed the defendants' actions in the following manner:

... in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons working lawfully for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants.¹⁰⁵

It seems, however, that the common law courts are not always prepared to make such direct assessments of reprehensibility in every case when analysing if a defendant's conduct ought to fall within the scope of an economic tort, preferring instead to rely on more formalistic benchmarks, such as the presence of independently unlawful conduct, as the principal pre-requisites for the imposition of civil liability.

(ii) Judicial Formalism

This alternative methodological approach towards identifying unlawful modes of competitive behaviour involves a design feature of some of the economic torts which requires the establishment of a very specific and narrowly defined wrongdoing – such as an unlawful act that is independently actionable against the defendant – as a central ingredient of liability.

¹⁰⁵ See (n 16) at 536. Lord Brampton, at 516-531, used even stronger language to condemn the defendant's behaviour. Noting that the defendants' desired to punish the plaintiff's non-union employees by putting them on "black lists", and had sought to "put them out of... employment" and "make them walk the streets for twelve months", his lordship described them as engaging in "acts of wanton aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade". The conspiracy between the defendants was described by his lordship as one "formed by a number of unscrupulous enemies acting under an illegal compact... and actuated by malevolence, to injure [the plaintiff] and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has... been employed by the defendants for the perpetration of organized and ruinous oppression."

The tort of causing loss by unlawful means is the archetypal example, with one of its core elements being the commission of an independent actionable civil wrong against a third party as the means by which economic harm is inflicted upon the claimant. Similarly, the tort of inducing breach of contract, as a species of accessory or secondary liability, requires the third party to have actually breached his contract with the claimant, and to have been instigated by the defendant to commit a breach of that contract, before liability can be imposed upon the defendant. Under this methodological approach, the common law draws the dividing line between lawful and unlawful conduct based on the presence or absence of such “objective” indicia:

... a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition – competition which is in itself lawful, and which cannot be complained of where no *unlawful means*... have been employed.¹⁰⁶

A similar adherence to formalistic criteria as pre-requisites for tortious liability can be discerned in the tort of passing off, where the English courts have clung on to the classic trinity of elements required for liability: the subsistence of protectable goodwill, an operative misrepresentation that causes confusion, and damage as a result of such misrepresentation. The means that the boundary line between “fair” and “unfair” competitive conduct is drawn between situations where these elements are all present and when they are not. This is probably a much easier border to police, even though the conceptual limits of these elements have proven to be very elastic in the past, because it is defined by relatively less controversial

¹⁰⁶ *Allen v Flood* (n 57) at 166 (Lord Shand). Emphasis added. Similarly, in *Mogul Steamship v McGregor* (n 40) at 51, Lord Watson noted that where trade competition was concerned, he was “not aware of any stage of competition called “fair” intermediate between lawful and unlawful”; otherwise, “[t]he question of ‘fairness’ would be relegated to the idiosyncrasies of individual judges” and he could “see no limit to competition, except that you shall not invade the rights of another.”

factual assessments of whether the claimant can establish the goodwill he is seeking to protect, as well as the actual or likely effects of the defendant's conduct. Thus, despite attempts by claimants to expand the tort of passing off into a more general tort of unfair competition or misappropriation, the courts have stressed:

... the necessity in this branch of the law of the balance to be maintained between the protection of a plaintiff's investment in his product and the protection of free competition. It is only if a plaintiff can establish that a defendant has invaded his "intangible property right" in his product by misappropriating descriptions which have become recognised by the market as distinctive of the product that the law will permit competition to be restricted. Any other approach would encourage monopoly.¹⁰⁷

In *Cadbury-Schwepes v. Pub Squash*, for example, the Privy Council refused to impose liability for passing off upon a defendant when the claimant was unable to establish that the expensive advertising campaign he had invested in had become part of his protectable goodwill and that, while the defendant had 'set out in a deliberate and calculated fashion to take advantage of the plaintiff's past efforts in developing [the plaintiff's product] and of the plaintiff's past and anticipated future efforts in developing a market for [the product]', his conduct did not fall within the scope of the tort because there was 'no relevant misrepresentation, no deception or probability of deception'.¹⁰⁸ It is worth noting that despite the deliberate acts of imitation, free-riding and 'reaping without sowing' carried out by the defendant in this case, its actions were ultimately condoned by the court which viewed its

¹⁰⁷ *Cadbury-Schwepes v Pub Squash* (n 4844) at 205 (Lord Scarman).

¹⁰⁸ *Cadbury-Schwepes* (n 48) at 202. The same sentiment was reiterated in *L'Oreal SA v Bellure* (n 86) at [155]-[161] by Jacob LJ who concluded that "the tort of passing off cannot and should not be extended into some general law of unfair competition" while insisting that common law liability for passing off could only be imposed if the defendant had made a misrepresentation of some sort.

conduct in a positive light because it was not trying to confuse customers into thinking its products originated from the claimant, but were simply trying to successfully break into a lucrative market – and offer an substitute product – which the claimant had opened up through its highly successful advertising and marketing efforts.¹⁰⁹

Such formalism may be explained on a number of bases. It is perhaps a more convenient approach towards regulating acts of unfair competition through the economic torts because ostensibly neutral criteria – independent legal wrongs – are used to identify when the defendant’s behaviour has crossed the line. Such an approach would also flow from the reluctance demonstrated by English judges towards making open assessments of the “fairness” or “unfairness” of a defendant’s conduct in each case, though it unsatisfactorily transforms the process of differentiating between legitimate and illegitimate modes of competitive behaviour into a highly formalistic exercise entirely dependent on whether another, possibly unrelated, legal wrong has been committed in the process. Under this approach, however badly the defendant has misbehaved, and however egregious his conduct in pursuit of his campaign to cause economic injury to the claimant, so long as his conduct does not satisfy all the formal elements of another independent legal wrong,¹¹⁰ the common law will not impose tortious liability towards the claimant upon him.

Those who support the common law’s reliance on criteria such as “unlawful means” to differentiate between tortious and non-tortious competitive behaviour argue that courts are unlikely to ‘readily accept and properly perform the role of determining whether conduct is

¹⁰⁹ *Cadbury-Schweppes* (n 48) at 200, where Lord Scarman emphasised that “a defendant... does no wrong by entering a market created by another and there competing with its creator. The line may be difficult to draw: but unless it is drawn, competition will be stifled.”

¹¹⁰ Where the tort of causing loss by unlawful means is concerned, the unlawful actions of the defendant towards the third party will be regarded as an independently actionable legal wrong, for the purposes of satisfying the elements of this tort, even if the third party has not suffered any loss as a result of the defendant’s conduct towards him. See (n 19) above.

immoral or not'.¹¹¹ Furthermore, such transparency in the design of the economic torts allows for a greater degree of certainty¹¹² in their practical application. However, such an approach avoids directly confronting the core reasons underlying the rationale for curtailing a trader's freedom through these torts.¹¹³ Why does the common law insist that an additional, actionable and independent, civil wrong has been committed by the *defendant against a third party*, or by a *third party against the claimant*, before it recognises the *defendant's* tortious liability towards the *claimant*? Perhaps these benchmarks – the “unlawful means” element of the tort of causing loss by unlawful means and the “breach of contract” requirement of tort of inducing breach of contract – operate as compendious shorthands for identifying ‘sufficiently reprehensible’¹¹⁴ behaviour by defendants that justifies the imposition of liability upon them.¹¹⁵

Given the reservations which English courts have about taking a pro-active approach towards using the common law as an instrument to regulate competitive conduct in the marketplace, a passive reliance on a checklist of criteria that a claimant has to satisfy before

¹¹¹ See Tony Weir, *Economic Torts* (Clarendon Press, Oxford 1997), 74. One of the author's central propositions, at 77, is that “in the economic sphere where some deliberate harm may unquestionably be caused... the common law should not, unless the law has itself outlawed the means used, impose liability; liberty of action should not be constrained by vaguer criteria, however inspiring their formulation”.

¹¹² As Lord Donaldson has observed, “the efficacy and maintenance of the rule of law... has at least two prerequisites. First, people must understand that it is in their interests, as well as that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second, they must know what those rules are. Both are equally important....” See *Merkur Island Shipping v Laughton* [1983] 2 AC 570. 594.

¹¹³ According to the authors of one of the leading English tort law textbooks, “the requirement of unlawful means... imposes an arbitrary and illogical limit on the development of a rational principle to explain this part of the law. See R Heuston and R Buckley, *Salmond & Heuston on the Law of Torts* (21st edn Sweet & Maxwell, London 1996), 346. See also Roderick Bagshaw, ‘Can the Economic Torts be Unified?’ (1998) 18 OJLS 729 at 732, where the author argues that “‘unlawful means’ can only be accepted as satisfactory factor if it is identical with or in some way approximates to ‘behaviour that is unacceptable between competitors and should give rise to liability in tort’.”

¹¹⁴ See (n 98) above and accompanying text.

¹¹⁵ As one commentator has noted, one might sensibly “look to see what is forbidden or discountenanced elsewhere in the legal system, on the supposition that the law is a crystallization of the morality felt to require legal enforcement”. See Weir (n 111) at 54.

liability under the economic torts is imposed upon the defendant is certainly not a surprising approach for the English courts to take instead of always engaging in an open assessment of the reprehensibility of the defendant's conduct. However, it should be appreciated that both approaches are inextricably interconnected because the former may be regarded as a formalistic approximation of the latter. One might go further and say that both approaches co-exist along the same spectrum, and that the main difference lies in how explicitly and openly the culpability of the defendant is assessed by the courts. The periodic pressures exerted upon the economic torts to expand their frontiers to cover new forms of "unfair" commercial conduct can also probably be explained as sympathetic judicial responses to the reprehensible acts committed by defendants against claimants in the course of their competitive struggles with the each other. The formalistic approach described above towards demarcating the parameters of the economic torts could simply reflect a conscious attempt by common law judges to inject a degree of certainty, predictability and order into the "rules of the game".¹¹⁶

¹¹⁶ Maintaining a tolerable level of certainty in the legal rules regulating the freedom of rival traders to compete against other has been an important priority for the English courts which have, for example, shunned "deprecatory metaphorical expressions such as... ["riding on the coattails" and "free-riding"]... containing as they do clear disapproval of the defendant's trade... [because] they do not provide clear rules by which a trader can know clearly what he can and cannot do." *L'Oreal SA v Bellure* (n 89) at [17].

CHAPTER 3: COMPETITION LAW PROHIBITIONS AGAINST ANTI-COMPETITIVE CONDUCT

1. An overview of the types of anti-competitive conduct prohibited by Competition Law

The competition law framework of the United Kingdom comprises two relatively modern statutes: the *Competition Act 1998*¹ and the *Enterprise Act 2002*.² Both statutes essentially replicate the principal prohibitions against anti-competitive conduct that comprise the European competition law regime that were found in Articles 81 and 82 of the Treaty of Rome (now Articles 101 and 102 TFEU)³ and various accompanying regulations issued by the European Commission. There are three principal competition law prohibitions – one prohibition directed at various forms of collective behaviour involving two or more parties (the Article 101 TFEU/Chapter I prohibitions), one prohibition targeting various types of unilateral conduct of engaged in by a dominant undertaking (the Article 102 TFEU / Chapter II prohibitions) and one prohibition concerned with blocking certain mergers and concentrative behaviour between two or more undertakings that result in, or may be expected to result in, a significant reduction in the level of competition in the marketplace (the Part 3 Merger Regulation). All three prohibitions are premised on the actual or likely detrimental effects such forms of conduct will have on competition in the relevant marketplace. The first two prohibitions are *ex post* behavioural restrictions on the anti-competitive conduct of

¹ 1998 c.41. The statutory provisions containing the two key substantive prohibitions (the Chapter I and II prohibitions) against anti-competitive conduct were brought into force on 1st March 2000 via the *Competition Act 1998 (Commencement No. 5) Order 2000 SI 2000/344 art 2*.

² 2002 c.40. The statutory provisions concerned with merger regulation, market investigation references and the cartel offence were brought into force on 20th June 2003 via the *Enterprise Act 2002 (Commencement No.3, Transitional and Transitory Provisions and Savings) Order 2003 SI 2003/1397 art2*.

³ It should be reiterated at this point that references throughout this chapter will be made, where appropriate, to the European competition law framework using the treaty numbers that were adopted prior to the Lisbon Treaty which took effect on 1 December 2009, where Articles 81 and 82 EC were respectively renumbered as Articles 101 and 102 TFEU. Similarly, references will be made, where appropriate, to the European Court of Justice (ECJ) when discussing the relevant European caselaw rather than its current proper name, the Court of Justice of the European Union (CJEU).

undertakings that have had appreciably adverse effects on the competitive process, while the third is a form of *ex ante* regulation against prospective consolidations of market power that substantially weaken the competitive structure of the market.

These legal prohibitions are primarily enforced by two administrative agencies in the United Kingdom: the Office of Fair Trading (OFT) and the Competition Commission.

Decisions made by these competition authorities may be appealed against to the Competition Appeal Tribunal and thereafter to the UK Court of Appeal. The OFT is the sole government agency responsible for investigating and enforcing the Chapter I and II prohibitions, while references are made by the OFT to the Competition Commission in cases concerned with the Part 3 Merger Regulation. Apart from administering the United Kingdom's domestic competition laws, the OFT is also the designated national competition authority empowered to simultaneously enforce the parallel European competition law prohibitions as well.⁴

Section 60 of the *Competition Act 1998* requires the interpretation and application of the domestic competition law prohibitions found in that Act to be '(having regard to any relevant differences between the provisions concerned)... dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.' The OFT and the courts are statutorily obliged to ensure there is 'no inconsistency between' the domestic competition law principles and the principles underlying the competition law provisions of the EC Treaty, the decisions of the European Commission and the European Courts 'as applicable at that time in determining any corresponding question arising in Community law'.

⁴ This additional role was introduced via the *Competition Act 1998 and other enactments (Amendment) Regulations 2004* SI 2004/1261 which, with effect from 1st May 2004, implemented *Council Regulation (EC) 1/2003* of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ("the EC Competition Regulation 1/2003").

(a) Multi-party conduct: Agreements and other collective behaviour which prevent, restrict or distort competition in the market

The Chapter I prohibition is anchored in section 2(1) of the *Competition Act 1998* which prohibits ‘agreements between undertakings, decisions by associations of undertakings or concerted practices’ which ‘may affect trade within the United Kingdom’ and ‘have as their object or effect the *prevention, restriction or distortion of competition* within the United Kingdom’.⁵ A non-exhaustive list of examples of such prohibited multi-party conduct can be found in section 2(2) of the Act which includes price-fixing, output-limitations, market-sharing, as well as agreements that ‘apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’ or ‘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’.

Such collective conduct is unlawful unless it qualifies for an exemption, either automatically or by way of a block exemption or a parallel exemption,⁶ because it satisfies the criteria set out in section 9 of the Act. Section 9 describes a category of agreements which, while containing certain restrictions on competition, are likely to promote competition on the whole. These “pro-competitive” agreements are defined as those which contribute to ‘improving production or distribution, or... promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’ but do not ‘impose on the undertakings concerned restrictions which are not indispensable to the attainment of those

⁵ The language of the prohibition is substantially identical to Article 81(1) of the EC Treaty (Article 101 TFEU) except that the European equivalent requires the conduct to “affect trade between Member States”.

⁶ Block exemptions are specific categories of agreements defined in a block exemption order issued by the Secretary of State, on the recommendation of the Director General of Fair Trading at the OFT, pursuant to section 6 of the Act. Individual exemptions used to be available on a case-by-case basis, upon application by the parties concerned to the OFT, but this option was removed when the statute was updated by SI 2004/1261 to reflect the provisions of the EC Competition Regulation (n 4). Parallel exemptions are exemptions obtained under European Competition law which and are provided for in section 10 of the Act.

objectives’ or ‘afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question’.⁷ This exemption may be applied directly by the OFT, the Competition Commission or the courts when evaluating the legality of conduct that is alleged to contravene the Chapter I prohibition.⁸

The wide scope of this prohibition covers all forms of multi-party conduct that involve the voluntary and consensual⁹ participation of two or more commercially independent undertakings whose collusive or coordinated behaviour result in, or may be expected to result in, an appreciably¹⁰ adverse effect on competition in the market. The parties to such prohibited agreements may be in horizontal or vertical relationships, meaning that they could be operating and competing on the same level of the economy or operating at different levels of the supply chain. Liability is strict insofar as it is unnecessary for the parties involved to intend or know that their conduct will result in the ‘prevention, restriction or distortion’ of competition in the market. The precise form of the agreement is unimportant. A legally binding agreement between the parties is not required¹¹ though any

⁷ That language of the exemption was taken from Article 81(3) of the EC Treaty (Article 101(3) TFEU).

⁸ This mirrors the approach set out in Articles 5 and 6 of the EC Competition Regulation 1/2003 in relation to the application of Article 81(3) EC. Applying European competition law principles to the Chapter I prohibition, the burden of proving that the elements of the statutory prohibition are satisfied lies with the party or authority alleging an infringement of the competition rules, while the burden of proving the criteria of the defence lies with the undertakings seeking to invoke the benefit of that defence. See Art 2 of the EC Competition Regulation 1/2003 and Cases C-204, 205, 211, 213, 217 and 219/00P *Aalborg Portland A/S v Commission (Cement)* [2004] ECR I-123at [78].

⁹ Analysing the meaning of the term “agreement” in Article 81 EC, the Court of First Instance has held that the concept “centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties union”. See Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383 at [69].

¹⁰ See Case 56/65 *Société La Technique Minière v Macschinebau Ulm GmbH* [1966] ECR 234 at 239 where the ECJ held that for an agreement to be caught by the Article 81 prohibition, it had to be shown that “competition has in fact been prevented or restricted or distorted to an appreciable extent”. See also Case 5/69 *Völk v Vervaecke* [1969] ECR 295, [302] where the ECJ noted that an agreement falls outside the scope of the Article 81 prohibition “when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question”.

¹¹ The European Court of Justice has held that a “gentlemen’s agreement” would suffice for the purposes of an Article 81 infringement so long as the parties had declared themselves willing to abide by its terms. See Case 41/69 *ACF Chemiefarma NV v Commission (the Quinine Cartel)* [1970] ECR 661.

contractual agreement which falls within the prohibition is declared void under section 2(4) of the Act, and neither is it necessary to show that it has been actually implemented or acted upon. The types of anti-competitive conduct prohibited by this segment of competition law are traditionally divided into two sub-categories, with each scrutinised using different analytical frameworks that have emerged from the European caselaw. The first sub-category involves prohibited anti-competitive agreements which have as their *object* the restriction of competition, while the second category involves anti-competitive agreements that have as their *effect* the restriction of competition.

(i) Anti-competitive agreements which have as their object the restriction of competition

Agreements, concerted practices and other collusive behaviour that fall into this sub-category are characterised by obvious restrictions on competition such as those typically associated with cartels: price-fixing, market-sharing or market-allocation, and output limitation agreements. Such “hardcore” restrictions¹² have as their object the restriction of competition and automatically fall within the ambit of the Chapter I prohibition unless the parties to the agreement are able to show that it meets the efficiency-based exemption criteria in section 9 of the Act. Where an agreement has as its object the restriction of competition, ‘there is no need to take into account the concrete effects of [that] agreement’¹³ or demonstrate that the agreement has had an actual negative impact on competition in the relevant market because such restrictions are presumed to produce anti-competitive effects.¹⁴

¹² These restrictions are typically identified and blacklisted in European Commission’s block exemptions, guidelines and notices. Where vertical agreements are concerned, this category of restrictions include fixed minimum resale price controls, as well as contractual restrictions which confer absolute territorial protection for distributors or retailers such as prohibitions against passive sales.

¹³ Cases 56 and 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH* [1966] ECR 299 at 342.

¹⁴ See Commission Notice, *Guidelines on the application of Article 81(3)* [2004] OJ C101/97 (‘*Article 81(3) Guidelines*’) [21] which states that the “presumption is based on the serious nature of the restriction and on

Relevant factors which are taken into account when assessing whether an agreement has as its object the restriction of competition include the content of the agreement, the objective aims pursued by it, the context in which the agreement is applied or to be applied, the actual conduct and behaviour of the parties, how the agreement is implemented and the subjective intent of the parties.¹⁵ While it is unnecessary to show that agreements which fall within this sub-category actually generate any anti-competitive effects, it remains one of the cardinal principles of competition law that the prohibition only applies to conduct which affects competition in the market to an appreciable extent. This means that an agreement which has as its object the restriction of competition, and which does not meet the exemption criteria set out in the statute, may still escape the prohibition if it will have an insignificant impact on competition because the parties to the agreement collectively occupy a relatively insubstantial share of the relevant market.¹⁶

(ii) Anti-competitive agreements which have as their effect the restriction of competition

While every contract may impose restraints on the conduct or, more generally, the economic freedom of the contracting parties, not every restriction on the *conduct* of the parties qualifies as an appreciable restriction on *competition* within the meaning of the Chapter I prohibition. The European jurisprudence on the corresponding limb of Article 101(1) TFEU reveals three general guiding principles. Firstly, that the effects of the agreement are to be assessed by considering the counterfactual situation of how competition would take place in the market in the absence of the agreement in dispute.¹⁷ Secondly, restraints on competition which are

experience showing that restrictions on competition by object are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules”.

¹⁵ *Article 81(3) Guidelines* (n 14) [22].

¹⁶ *Völk v Vervaeke* (n 10).

¹⁷ *Société La Technique Minière* (n 10) 249.

merely ancillary to a main transaction which does not restrict inter-brand or intra-brand competition are not unlawful.¹⁸ Thirdly, that the effects of the agreement on competition have to be assessed using an economic approach that looks at the agreement in the market context in which it operates.¹⁹

This market-based approach towards assessing the effects of the agreement means that the relevant considerations have to be factored into the overall analysis include: market contestability or the possibility of new competitors penetrating the market, the size and reaction of other competitors in the market to the agreement, the existence and effects of networks of similar agreements operating in the market, the degree of saturation in the market, brand loyalty, as well as all the other ‘actual conditions in which [the agreement] functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.’²⁰ In addition, the European Commission’s Guidelines on the Application of Article 81(3) of the Treaty [Article 101(1) TFEU] indicates that both the *actual* and *potential effects* of the agreement on competition have to be taken into account, as well as the degree of market power possessed by the parties prior to, or as a result of, the agreement.²¹

¹⁸ *Article 81(3) Guidelines* (n 14) [28-31], where ancillary restraints are defined as restraints “directly related to” and “necessary for the implementation of that transaction or activity and proportionate to it”.

¹⁹ This does not mean, however, that all the possible anti-competitive and pro-competitive effects of the agreement have to be identified and weighed against each other when deciding if an agreement falls within the language of Article 81(1). The European Court of First Instance has, in Case T-528/93 *Métropole Télévision SA v Commission* [1996] ECR II-649 at [74], made it clear that the appropriate forum for such a task should be within the exemption criteria framework of Article 81(3). This view is reflected in the *Article 81(3) Guidelines* (n 14) [11].

²⁰ Cases T-374, 375, 384 and 388/94 *European Night Services v Commission* [1998] ECR II-3141 at [136]. Similar approaches which looked at the economic and legal context of the agreement were taken by the CFI in Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935 at [27] and Case T-328/03 *O2 (Germany) GmbH & Co v Commission* [2006] ECR II-1231 at [71-72], and by the ECJ in *Métropole Télévision SA* (n 19) at [76].

²¹ *Article 81(3) Guidelines* (n 14) [24-26]. At [26], the Commission explains that “[t]he creation, maintenance or strengthening of market power can result from a restriction of competition between the parties to the agreement. It can also result from a restriction of competition between any one of the parties and third parties... The degree

(b) Unilateral conduct: Commercial behaviour that constitutes an “abuse of a dominant position” in the market

The Chapter II prohibition is housed within section 18 of the *Competition Act 1998* and prohibits ‘any conduct on the part of one or more undertakings which amounts to the *abuse of a dominant position* in a market... if it may affect trade within the United Kingdom’.²² The scope of the prohibition encompasses unilateral conduct which takes place within national, regional and local geographical markets all across the United Kingdom.²³ Section 18(2) of the Act reproduces the non-exhaustive list of examples of abusive conduct that might violate the Chapter II prohibition. These include the imposition of ‘unfair purchase or selling prices or other unfair trading conditions’, ‘limiting production, markets or technical development to the prejudice of consumers’, ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’ and ‘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 the contracts’. Specific exclusions from the Chapter II prohibition are provided for in Schedules 1 and 3 of the Act, with the Secretary of State empowered to make special orders at any time to add to or modify the exclusions in the latter Schedule.

This prohibition only applies to undertakings that possess a position of market dominance, or benefit from a position of collective dominance²⁴ with other undertakings, such that they wield a degree of market power that gives them relative economic

of market power normally required for a finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82”.

²² The language of the prohibition is substantially identical to Article 82 of the EC Treaty (Article 102 TFEU).

²³ Section 18(3) explains that “dominant position” “means a dominant position within the United Kingdom” and “the United Kingdom” means the United Kingdom or any part of it”.

²⁴ Cases C-395 and 396/96P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, Cases T-191/98 and 212-214/98 *Atlantic Container Line & Ors v Commission* [2003] ECR II-3275 at [595].

independence to set their own prices independently of their competitors.²⁵ Establishing dominance requires an accurate definition of the relevant market and holding a large market share is commonly relied upon as a presumptive indicator of market dominance.²⁶ However, the mere possession or exercise of this market power is not a violation of the Chapter II prohibition. What is prohibited are unilateral actions taken by such an undertaking which *abuse* that dominance in a way that causes harm to the competitive process as a result. The European Court of Justice has characterised the dominant firm's duty not to engage in abusive conduct in the following way:

A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has *a special responsibility not to allow its conduct to impair genuine undistorted competition* on the common market.²⁷

Two broad categories of abusive conduct are discernible from the European competition law jurisprudence. The first category involves what are known as “exploitative” abuses – extreme examples of monopolistic conduct where the dominant firm profits at the

²⁵ The classic definition of a “dominant position” used in European competition law jurisprudence is that given by the ECJ in Case 27/76 *United Brands Co and United Brands Continental BV v Commission* [1978] ECR 207 at [65] (“The dominant position... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”) and elaborated upon in Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461 at [39] (“Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”)

²⁶ See Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 at [42] where the ECJ noted that “the definition of the relevant market is of essential significance”, and *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7. (‘*Article 82 Guidance Paper*’) at [14] where the European Commission suggests that the market share of a dominant firm in most cases is, from its own experience, above 40%.

²⁷ Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461 at [57] (emphasis added).

expense of its consumers because of the high degree of market power it enjoys. The second, much broader, category involves “exclusionary” abuses – conduct by the dominant undertaking which harms competition by excluding existing competitors from the market or foreclosing entry into the market by potential competitors.

As an alternative to investigating the market behaviour of an undertaking under the Chapter II framework, the OFT also has the option of scrutinising the undertaking’s conduct as part of a ‘market investigation reference’ under Chapter 1 of Part 4 of the *Enterprise Act 2002*. Section 131 of that Act empowers the OFT to make a reference to the Competition Commission to carry out further investigations where it reasonably suspects that ‘any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom’.²⁸ If the Competition Commission decides, after carrying out the market investigation reference, that ‘there is one or more than one adverse effect on competition’, section 138 empowers the Commission to take appropriate remedial steps. Market investigation references under the *Enterprise Act 2002* are probably viewed as a more convenient option for the domestic competition authority to address concerns about single-firm conduct because it does not have to show that the undertaking in question occupies a position of market dominance or that the undertaking’s behaviour amounts to an “abuse” of that dominance.

(i) Exploitative abuses

Exploitative abuses of dominance involve dominant firms taking full advantage of their strong market positions by attempting to maximise their profits at the expense of their

²⁸ Section 131(2) of the *Enterprise Act 2002* goes on to define a “feature” of a market to mean the “structure of the market”, “any conduct of (whether or not in the market concerned) one or more than one person who supplies or acquires goods or services in the market concerned” and “any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services”.

customers and consumers.²⁹ Prohibited conduct which falls into this category includes charging customers unfairly high prices,³⁰ price and other forms of discrimination³¹ between customers and imposing unfair trading conditions in supply agreements with third parties.³² Conduct which falls into this category of abusive conduct does not typically rank highly on the list of enforcement priorities of the competition authority because a dominant firm's ability to charge supra-competitive prices should theoretically serve as a signal for new competitors to enter the market and, eventually, lower price levels. However, even before such allegations of exploitative conduct can be scrutinised, the authority would probably have to examine the contestability of the relevant market to determine if the undertaking in question possesses the requisite level of market power to be regarded as a dominant firm in the first place. If new market entry by other competitors does not take place in response to the high prices charged by the dominant undertaking, the competition authority is more likely to focus its investigations on the structure of the market and whether, in particular, any of the barriers to market entry are attributable to the practices of the dominant firm which could fall within the other category of unilateral (exclusionary) anti-competitive conduct. This regulatory preference in favour of addressing exclusionary conduct over exploitative

²⁹ In the context of the Article 82 EC prohibition, the European Commission has stated, in a case involving discriminatory ticket sales practices by a French football organizer, *1998 World Cup* [2000] OJ L5/55, [2000] 4 CMLR 963 at [100] that this segment of competition law “can properly be applied, where appropriate, to situations in which a dominant undertaking’s behaviour directly prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition.”

³⁰ This has been defined by the ECJ as “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied” in *United Brands* (n 25) at [250]. This approach was adopted by UK Court of Appeal in *Attheraces Ltd v The British Horseracing Board* [2007] EWCA Civ 38, [2007] UKCLR 309 .

³¹ See, for example, Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331 which involved an airline abusing its dominant position by imposing discriminatory conditions for remuneration between different ticketing agents.

³² See, for example, *Tetra Pak II* [1992] OJ L72/1 which involved a dominant machine manufacturer imposing onerous contractual restrictions on third parties who purchased or hired machines from them.

conduct³³ reflects the competition authorities' general aversion towards having to take on the invariably controversial role of a price regulator because of the monumental difficulties of determining when prices are excessive to such a degree that they should be regarded as "unfair".

It should be noted that the categorisation of abusive conduct is by no means watertight because many forms of anti-competitive conduct by a dominant firm can be both exploitative in character *and* have exclusionary effects at the same time. Discriminatory pricing, for example, may exploit one class of customers by charging them more than what customers in another class are prepared to pay for the dominant firm's goods, while charging a lower price to customers in the latter class may deter them from making purchases from a competing undertaking and have exclusionary effects as a result. Similarly, a dominant firm which engages in tying or bundling practices may be exploitative, on the one hand, because it deprives consumers of the choice to make individual purchases, while such conduct might, on the other hand, be exclusionary at the same time because such conduct might produce market foreclosure effects by diminishing the pool of customers who might purchase goods from competing suppliers in the market for the tied product.

(ii) Exclusionary abuses

Exclusionary abuses of dominance comprise various forms of anti-competitive conduct which ultimately affect the economic structure and contestability of a market, weakening the competitive process by driving existing competitors from the market or deterring market entry from potential competitors. Such conduct forecloses the market by excluding

³³ Despite reaffirming that "[c]onduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82", the European Commission's failure to include any further substantive discussion on its policy towards exploitative abuses of dominance in its 2008 Guidance Paper is telling. See *Article 82 Guidance Paper* (n 26) [7].

competitors who are, or could be, as efficient as the dominant firm from competing with the dominant firm. The ECJ has explained the “abuse of dominance” concept in the following terms:

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... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.³⁴

The “objective” character of the concept means that it is theoretically unnecessary to establish any specific intention or motive on the part of the dominant firm to engage in anti-competitive behaviour, though it appears that the European Commission and Community Courts have, on several occasions, highlighted the presence of an “exclusionary intent” on the part of the dominant firm when condemning its conduct as an exclusionary abuse of its dominance.³⁵ Under current approaches to competition regulation, greater attention is likely to be paid by the competition authority or tribunal to the actual or likely anti-competitive foreclosure effects³⁶ of the dominant firm’s conduct on competition in the relevant market. If the dominant firm’s behaviour generates market-foreclosing effects, and where such

³⁴ *Hoffmann-La Roche* (n 25) at [91].

³⁵ The situations in which a dominant firm’s exclusionary intent seems to be regarded as an ingredient of liability under the Article 82 EC prohibition include below-cost predatory pricing and above-cost selective price-cutting by a dominant firm. See Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359 at [72] and Case C-395 and 396/96P *Compagnie Maritime Belge* (n 24) at [119].

³⁶ *Article 82 Guidance Paper* (n 26) [19].

behaviour deviates from the parameters of ‘normal competition’³⁷ – such as competition based on ‘price, choice, quality and innovation’³⁸ – it will fall within the scope of the prohibition against exclusionary abuses of dominance. Unlawful conduct within this category includes unilateral acts of below-cost predatory pricing, above-cost selective price undercutting, imposing exclusive dealing obligations, incentivising customer loyalty through rebate or discount schemes, tying and bundling arrangements, as well as refusing to supply competitors. In all these examples of prohibited conduct, the exclusionary effects on competitors – which may cause actual competitors to exit the market, discourage potential competitors from entering the market, or ‘discipline’ existing competitors to discourage them from challenging the dominant firm’s position in the future – provide the basis on which the competition authority may conclude that the competitive process and consumer welfare have been harmed.

(c) Alterations of market structure which produce, or are likely to produce, anti-competitive effects

The merger control framework comprises sections 22 to 130 of the *Enterprise Act 2002*. The main prohibition is concerned with ‘relevant merger situations’ between two or more enterprises which have ‘resulted, or may be expected to result, in a *substantial lessening of competition* within any market or markets in the United Kingdom for goods or services’.

³⁷ *AKZO* (n 35) at [69]. Distinguishing between legitimate “competition on the merits” and anti-competitive behaviour has been a long-standing but unsettled issue within European competition law. The European Commission applies an “efficient competitor” analysis in its *Article 82 Guidance Paper* (n 26) [23-26] to explain when it considers conduct involving rebates or lowered pricing to amount to abusive conduct. Other economists have advocated various other standards such as the “profit sacrifice” test and the “no economic sense” test as the appropriate benchmarks for identifying legitimate forms of competition. See, generally, R O’Donoghue and A J Padilla, *The Law and Economics of Article 82* (Hart Publishing, Oxford 2006).

³⁸ *Article 82 Guidance Paper* (n 26) [6], though, as far as dominant firms are concerned, not all competition based on price is regarded as legitimate – particularly certain forms of below-cost pricing and non-quantity-based rebates and discounts. *AKZO* (n 35) at [70].

Section 23 provides that ‘relevant merger situations’ are created when ‘two or more distinct enterprises have ceased to be distinct enterprises’³⁹ and the value of the enterprise being taken over exceeds £70 million or where the merger results in at least one quarter of all goods or services being supplied by the merged entity. When these criteria are satisfied, the OFT is under a duty to make a merger reference to the Competition Commission for further investigation unless ‘the market concerned is not... of sufficient importance to justify the making of a reference to the Commission’ or ‘any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned’. Section 22 deals with references involving completed mergers, while section 33 deals with references involving anticipated mergers. Upon receiving such merger references from the OFT, the Competition Commission investigates and reports on the completed or anticipated merger before taking remedial steps if it decides that the merger has or will produce an ‘anti-competitive outcome’.⁴⁰

2. Anti-competitive conduct which directly results in economic injury to third party competitors

While the competition law prohibitions are primarily designed to enable a regulatory agency to respond to instances of private conduct which have a negative impact on the level of competition in a market, they may also be used by third parties who have been directly injured as a result of anti-competitive conduct as a basis for private actions against those who have engaged in such conduct. The type of harm suffered by, and the identities of, the third parties who may bring private actions against undertakings whose conduct infringe these

³⁹ See section 26 of the *Enterprise Act 2002*.

⁴⁰ See section 35(2) of the *Enterprise Act 2002*.

statutory prohibitions will vary depending on the character of the conduct in question. A further distinction may be drawn between two sub-categories of cases within each of the Chapter I/Article 101 TFEU and Chapter II/Article 102 TFEU prohibitions. In the first sub-category, the anti-competitive consequences resulting from infringing conduct may cause direct harm to customers or consumers who suffer immediate financial detriment in the form of higher prices, for example, as a result of price-fixing or price-discrimination practices. In the second sub-category, the anti-competitive consequences are directly felt by specifically targeted competitors who suffer economic harm as a result of being prevented from gaining access to, or completely eliminated altogether from, a particular market as a result of the anti-competitive actions of the undertakings in question.

The discussion which follows will examine this dichotomy between those forms of anti-competitive conduct which result in economic injury to third party competitors and those which do not, while using selected caselaw to illustrate in greater detail those forms of anti-competitive conduct by which third party competitors are directly injured and may, as a result, have rights of private action under the competition law rules.

(a) The Chapter I / Article 101 TFEU [Article 81 EC] prohibition: Multi-party conduct with the object or effect of restricting competition from, and thereby causing economic harm to, third party competitors

The breadth of the legislative language used in the statutory prohibition that comprises the Chapter I prohibition easily embraces both sub-categories of conduct. The first sub-category would typically involve agreements between trade rivals who agree *not to compete* with each other or to restrain some aspect of their competitive relationship in the market, whereas the second sub-category might include a situation where several undertakings band together to foreclose a third party competitor's access to the market by, for example, making it difficult

for their collective target to gain access to the relevant supply or distribution networks. In the first sub-category, the objective of the colluding parties is to lessen or eliminate competition *amongst themselves*. In the second sub-category, the objective of the colluding parties is to lessen or eliminate competition from *other competitors* by impeding those targeted third parties from competing effectively in the market, perhaps in the hope that their targets will eventually exit the market. In both sub-categories, there is harm to the competitive process as a result of the collective conduct of the undertakings involved and consumers will, ultimately, feel the adverse consequences of the weakened state of competition in the market. However, third party competitors are only likely to have rights of private action, in respect of the economic injuries they have suffered, against the colluding undertakings where the anti-competitive conduct in question falls into the second sub-category.

This dichotomy between the two types of anti-competitive conduct that fall within the scope of the Chapter I prohibition is clearly recognised within the European competition law framework. For example, in the European Commission's Guidelines on Article 81(3) EC [Article 101 TFEU], this is reflected in the following passages:

Agreements between undertakings are caught by the prohibition rule of Article 81(1) 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. Agreements can have this effect by appreciably reducing rivalry *between the parties to the agreement or between them and third parties*.⁴¹

Does the agreement restrict actual or potential competition that would have existed without the agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition *between the*

⁴¹ *Article 81(3) Guidelines* (n 14) [16]. (emphasis added)

parties and competition from third parties. For instance, where two undertakings established in different Member States undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a supplier imposes obligations on his distributors not to sell competing products and these obligations foreclose third party access to the market, actual or potential competition that would have existed in the absence of the agreement is restricted.⁴²

Anti-competitive conduct falling within the first sub-category would typically involve horizontal agreements of the sort associated with cartels and their hardcore restrictions on competition, including price and output controls, market-sharing by giving cartel members exclusive areas within which to practice their trade and so forth. On the other hand, anti-competitive conduct falling within the second sub-category is likely to be a vertical agreement of some sort, where exclusivity restraints are placed upwards or downwards along the supply chain to make it difficult for other undertakings to enter or expand into a particular market. This division between horizontal and vertical agreements does not, however, give the full picture. Some horizontal agreements between competitors can clearly be used to injure specifically identified competitors – a group of undertakings may collude with each other to consistently underbid a third party competitor who is not a member of the group, for example – such that the anti-competitive conduct properly belongs in the second sub-category.

Undertakings may simultaneously employ a combination of strategies from both sub-categories of anti-competitive conduct to achieve their commercial objectives. A decision from the European Commission finding an infringement of Article 101 TFEU illustrates both

⁴² *Article 81(3) Guidelines* (n 14) [18(1)]. (emphasis added)

the differences and the synergies between the two sub-categories of anti-competitive conduct. In *FEG and TU*,⁴³ the undertakings on whom fines were imposed were a Dutch trade association of wholesalers in the wholesale market for electrotechnical fittings (FEG) and the largest wholesale distributor of electrotechnical fittings in the Netherlands (TU) who was also the largest member of FEG. The complainant, CEF, was a UK wholesale distributor of electrotechnical fittings with a Dutch subsidiary that was having difficulty getting supplies from distributors and manufacturers' agents for its wholesale operations in the Netherlands because of the collective exclusive dealing agreements which FEG had entered into with the members of NAVEG, a Dutch trade association comprising representatives of manufacturers and importers of foreign-manufactured electrotechnical fittings. Under the collective exclusive dealing agreements, members of NAVEG would only supply goods to wholesalers who were members of FEG, whose membership criteria were strictly applied to exclude CEF from being admitted into the trade association. Other suppliers who were not members of NAVEG were also hesitant to supply their goods to non-FEG wholesalers because the members of FEG controlled a 96% market share in the wholesale market. In addition, TU actively applied pressure on non-NAVEG suppliers to refrain from supplying their goods to non-FEG wholesalers like CEF. Individual suppliers were approached and persuaded to cease supplying CEF using threats to discontinue stocking their product lines if they did not comply. In addition to these (vertical) supply restraints created by the collective behaviour of FEG and TU, there were also (horizontal) supply restraints imposed by FEG on all its members which banned them from supplying other non-FEG wholesalers such as CEF. These collective dealing arrangements were viewed as competition restraints which had 'as its object or effect the restriction of competition within the common market within the meaning of Article 81(1)' because they restricted 'the freedom of suppliers to determine themselves

⁴³ *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)* [2000] OJ L39/1, [2000] 4 CMLR 1208.

which wholesalers they wish to supply' and placed 'both the suppliers and the wholesalers who do not belong to FEG... at a disadvantage'.⁴⁴

Furthermore, there were other (horizontal) restraints on competition between the members of FEG through the trade association's decisions on price-controls and discouraging sales of goods at specially reduced prices, its discussions on product pricing and rules for customer discounts, and its regularly-circulated recommended-price lists containing the most recent gross and net prices calculated by TU. Smaller FEG wholesalers also made use of the price catalogues of the larger FEG wholesalers which included many identical gross prices and identical customer discounts. These decisions by an association of undertakings (FEG) and concerted practices by FEG members were found to 'restrict competition within the meaning of Article 81(1) by their very nature.'⁴⁵ The Commission noted the mutually supportive character of two sub-categories of anti-competitive conduct that violated Article 81 EC [Article 101 TFEU]. The relationship between the collective exclusive dealing arrangement and the price agreements between FEG members was described in the following terms:

... the price agreements are aimed at establishing an artificially stable price level with healthy margins for the wholesale trade. This can succeed only if the wholesalers observe a measure of price discipline. The FEG has therefore brought various forms of pressure to bear on its members to avoid any intense price competition. This meant that intense price competition was to be feared only from wholesalers outside the FEG. The collective exclusive dealing arrangement prevented deliveries to these potential 'price cutters', thus reducing the danger that the artificial price level might

⁴⁴ *FEG and TU* (n 43) [105].

⁴⁵ *FEG and TU* (n 43) [113].

come under pressure. In this way the collective exclusive dealing arrangement helped to underpin the price agreements.⁴⁶

Excluding a rival trader from a collective exclusive dealing arrangement involving an association of undertakings, thereby preventing him from competing effectively in the market and causing him to suffer economic injury as a result, was a means employed by the infringing parties in this case to advance their overall anti-competitive goal of restraining price competition between them. The concerted practice involving price controls falls within the first sub-category of multi-party anti-competitive conduct and the real “victims” of this horizontal arrangement, who may want to pursue a private claim for damages against the infringing parties, are the customers of the undertakings who paid artificially inflated prices for their goods. On the other hand, the collective exclusive dealing arrangement falls within the second category of multi-party anti-competitive conduct and it is the injured third party competitor who may have a right of private action in respect of the losses he has suffered from the exclusionary effects of his trade rivals’ conduct.

(b) The Chapter II / Article 102 TFEU [Article 82 EC] prohibition: Unilateral abusive conduct that causes economic harm to third party competitors

Looking at the various types of commercial conduct that are caught by the Chapter II prohibition, the dichotomy described above, between anti-competitive conduct which involves direct economic injury to competitors and those that do not, is reflected in the distinction between “exclusionary” abuses of dominance and “exploitative” abuses of dominance. Exclusionary abuses, it will be recalled, encompass those types of conduct by a dominant firm which contribute to sub-competitive market conditions that prevent third party

⁴⁶ *FEG and TU* (n 43) [122].

competitors from competing effectively with the dominant firm and, if left unregulated, may result in these competitors being driven out of the market. Ultimately, this weakened state of competition is harmful to consumer welfare. Exploitative abuses, on the other hand, injure consumers directly because they involve the dominant firm flexing its market power to maximise its profits, since it is able to sustain raising prices above the competitive level, from its sales transactions in the market.

Third party competitors are often the complainants in cases involving exclusionary abuses of dominance because they are the ones whose commercial lives are directly disrupted by the strategic behaviour of the dominant firm. Such forms of conduct make it more difficult for these competitors, as well as other potential market entrants, to retain or grow their market shares. However, not every instance of exclusionary conduct involves the dominant firm targeting a specific third party competitor that finds itself excluded from the market. The dominant firm's exclusionary conduct may simply be a general response to all the competitive pressures it faces in the market⁴⁷ rather than part of a specific campaign waged against specific competitors. A narrower class of abusive conduct can therefore be distilled from the various prohibited commercial practices that amount to exclusionary abuses of dominance – these are instances of abusive conduct which are driven by an exclusionary intent towards specifically identified competitors.

This narrower class of exclusionary conduct is exemplified by the various examples of unlawful conduct carried out by the dominant undertakings in the *Compagnie Maritime Belge* and *Irish Sugar* cases in which the Community courts upheld the European

⁴⁷ For example, exclusive dealing arrangements, loyalty-inducing discounts or rebates, and tying or bundling arrangements might be used by a dominant firm to effectively maintain or strengthen its market position against competitive threats from all its actual or potential rivals. These forms of exclusionary conduct benefit the dominant firm by altering the ways in which consumers make their purchasing decisions and produce market foreclosure effects by restricting access to important links along the supply chain.

Commission's findings that the infringements of Article 82 EC [Article 102 TFEU] had been committed. In *Compagnie Maritime Belge*⁴⁸, the infringing parties were members of a liner conference (CEWAL), a group of shipping companies operating cargo vessels between Europe and West Africa, with a near-monopoly of particular shipping routes between the North Sea and Zaire. CEWAL engaged in a number of exclusionary practices with the aim of eliminating independent shipping companies (including G and C) that were not a part of the liner conference.⁴⁹ The European Commission singled out CEWAL's practice of using "fighting ships" – specially designated vessels belonging to the members of the liner conference which were deployed to sail on dates that were close to G and C's scheduled voyages – as an abuse of the parties' collective dominant position.⁵⁰ CEWAL fixed the shipping rates charged by these "fighting ships" at levels below that which the conference members normally charged but did not appear to charge below their total costs.⁵¹ In addition,

⁴⁸ *CEWAL* [1993] OJ L34/20 (Commission's decision); Case T-24/93, etc *Compagnie Maritime Belge Transports SA v Commission* [1996] ECR II-1201 (CFI's decision); Case C-395 and 396/96P *Compagnie Maritime Belge* (n 24) (ECJ's decision).

⁴⁹ While the existence of the liner conference itself was not prohibited at the time because there was a block exemption in force – Regulation (EEC) No 4056/86 – its conduct could nevertheless exceed the scope of protection given to it under the block exemption if the liner conference engaged in practices that were caught by the Article 81 or 82 EC prohibitions.

⁵⁰ The liner conference was also held to infringe Article 82 by engaging in a number of closely related acts to exclude G and C from the market, including actively implementing an agreement with the local government authorities which enabled the conference to monitor trade along the shipping route and prevent the intrusion of independent rivals, as well as introducing loyalty rebates in their contracts with shippers to encourage them to ship exclusively with members of the conference. The Commission also found a market-sharing agreement between CEWAL and other liner conferences, prohibiting companies from one conference from operating as independent shipping companies in ports serviced by members of another conference, to be in breach of Article 81 EC.

⁵¹ The exclusionary abuse committed by CEWAL did not require it to suffer losses as a result of its price-cutting behaviour (see the CFI's decision (n 48) at [134]), unlike exclusionary abuses of dominance involving below-cost predatory pricing. In selectively lowering its freight charges for its fighting ships which sailed near the scheduled departure times of G and C, CEWAL's conduct was held to be a "subsidization of the cost of the fighting rates by the conference's normal rates charged on its other sailings" which was "in itself... abusive, anti-competitive conduct which might have the effect of eliminating from the market an undertaking which is perhaps as efficient as the dominant conference but which, because of its lesser financial capacity, is unable to resist the competition practised in a concerted and abusive manner by a powerful group of shipowners operating together in a shipping conference". Moreover, by charging different freight rates to different shippers depending on whether they loaded their cargo on the same dates as the sailing dates of G and C's ships, CEWAL's conduct had a discriminatory effect which amounted to an abuse of Article 82(c) because it

CEWAL concluded loyalty contracts with shippers using its services whereby shippers were give rebates in exchange for shipping their goods exclusively with CEWAL members. A blacklist was also drawn up by CEWAL to identify and penalise those shippers who were not entitled to its rebates because they used the services of G and C and other independent shipping companies. On appeal to the CFI and then to the ECJ, the Community Courts upheld the decision of the European Commission that the selective price undercutting behaviour of CEWAL was abusive because it was ‘part of a plan aimed at eliminating its principal competitor in the trade’⁵² and sought to foreclose the shipping routes for the benefit of CEWAL members by eliminating G and C from the market. While the CFI acknowledged that a dominant firm was entitled to defend itself from competition and ‘protect its own commercial interests if they are attacked’,⁵³ CEWAL was not able to persuade the courts that it was merely trying to defend its commercial interests since ‘that practice was carried out with a view to removing CEWAL’s only competitor on the relevant market’.⁵⁴ Moreover, given that CEWAL had a market share of more than 90% of the relevant market, the ‘circumstances could not render the response put into effect by the members of CEWAL reasonable and proportionate’.⁵⁵ As such, the ECJ held that CEWAL’s selective price cutting

amounted to the imposition of dissimilar conditions on equivalent transactions. Commission’s decision (n 48) [81-82].

⁵² Commission’s decision (n 48) [73]. In addition, the success or failure of the dominant firm giving effect to its exclusionary intent is not critical. According to the CFI (CFI’s decision (n 48) [149]), where a dominant firm “implement[s] a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse of a dominant position within the meaning of Article [82]”. That the targeted competitor has not exited the market does not mean that the exclusionary conduct has not had any negative *effect* on competition in the market – the targeted competitor could have been in a better market position in the absence of such conduct!

⁵³ CFI’s decision (n 48) [107] citing Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 [69].

⁵⁴ CFI’s decision (n 48) [147]. That “the purpose of the conduct complained of was to eliminate G & C from the market” was re-emphasised in the ECJ’s decision (n 48) [119].

⁵⁵ CFI’s decision (n 48) [148].

was inconsistent with its ‘special responsibility... considered in light of the specific circumstances... which show that competition has been weakened’.⁵⁶

In *Irish Sugar*⁵⁷, the infringing party was the sole processor of sugar beet in Ireland and occupied positions of market dominance in both the Irish retail and industrial markets for granulated sugar. The dominant firm, which enjoyed market shares averaging in the region of 90%, reacted to the threat of competition from sugar importers and competing domestic sugar packers by selectively cutting its prices in favour of those customers who were most vulnerable to sourcing their sugar supplies from alternative suppliers. The European Commission and CFI, reiterating that not all forms of price competition can be regarded as legitimate,⁵⁸ held that Irish Sugar abused its dominance by employing a number of different selective and discriminatory rebate schemes which produced anti-competitive exclusionary effects in the market by stifling competition from competitors who imported sugar into Ireland as well as those customers who competed with it in downstream markets. While not engaging in below-cost predatory pricing, the dominant firm engaged in a variety of exclusionary pricing practices which had the effect of stifling competition from its competitors, including selective border rebates (in favour of customers near the border with Northern Ireland who might have switched to sugar imports),⁵⁹ fidelity rebates (where rebates

⁵⁶ ECJ’s decision (n 48) [114]. It should also be noted, at [118] of the decision, that the court was not prepared “to rule generally on the circumstances in which a liner conference may legitimately, on a case by case basis, adopt lower prices than those of its advertised tariff in order to compete with a competitor who quotes lower prices”.

⁵⁷ *Irish Sugar* [1997] OJ L 258/1 (Commission’s decision); Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 (CFI’s decision).

⁵⁸ CFI’s decision (n 57) [111], citing *AKZO* (see n 38).

⁵⁹ The CFI affirmed that “[t]he purpose of this rebate was to reduce the imports of cheaper retail packets from Northern Ireland into Ireland” and “unrelated to objective economic factors like the sales volume of the customers” and “was used and modulated whenever it was considered that the price difference between Northern Ireland and Ireland might have induced cross-border sales”, before concluding that the border rebate was “part of a policy of dividing markets and excluding competitors” and “not based on an objective economic justification, such as the quantities purchased by the customer, marketing and transport costs or any

were given to customers who purchased all or a certain percentage of their capacity requirements from the dominant firm),⁶⁰ target rebates (where rebates were given to customers based on percentage increases in the volume of their purchases over fixed time periods)⁶¹ and export rebates (where rebates were awarded to customers who exported some of the sugar they purchased rather than supplying it to domestic consumers in competition with the dominant firm).⁶² As a result, the dominant firm charged selectively lower prices, and offered some of the rebates just described above, to those of its customers who were potential customers of competitors who supplied imported sugar. By not awarding rebates to certain customers, Irish Sugar charged discriminatory prices to those customers who were also competing sugar packers supplying their own downstream customers in the same domestic retail market as Irish Sugar.⁶³ Furthermore, these price-related abuses of

promotional, warehousing, servicing or other functions which the relevant customer might have performed”. CFI’s decision (n 57) [173].

⁶⁰ These rebates were described by the CFI as part of the dominant firm’s “strategy... to prevent the expansion of [a competitor’s] brand on the Irish market by ensuring the fidelity of its customers” and “had the effect of tying the customer to the supplier in a dominant position. CFI’s decision (n 57) [198].

⁶¹ Target rebates, while dependent on meeting particular sales volume targets, were not quantity discounts which are generally regarded as unobjectionable because they were related to purchases in fixed time periods (weekly, monthly or annual targets) and not paid on the basis of cost-savings to the supplier. The Commission found that the target rebates used here were “clearly aimed at tying customers closely to the dominant company and making it difficult for competitors to gain a foothold in the market.” Commission’s decision (n 57) [152]. Such conduct by the dominant firm resulted in its customers “building up major stocks... following the granting of those rebates” to the detriment of competing sugar packers. CFI’s decision (n 57) [203]. As such, “the granting of target rebates by an undertaking in a dominant position, one of the immediate effects of which has been... to result in a build-up of stocks and a concomitant reduction in purchases amounts to restricting the normal development of competition... and is incompatible with the objective of undistorted competition in the common market. It is not based on any economic service justifying that advantage, but seeks to remove or restrict the purchaser’s freedom of choice concerning his sources of supply and to block the access of other suppliers to the market.” CFI’s decision (n 57) [214].

⁶² The export rebates were viewed as somewhat arbitrary because they were not fixed according to the actual level of sugar exported by customers but were given in respect of the entire amount purchased from Irish Sugar, thereby producing distorting competition in downstream retail sugar markets in supplied by these customers. Commission’s decision (n 57) [143]. Furthermore, “[b]y securing the loyalty of its exporting customers for their supplies of sugar, the [dominant firm] prevented those of them who were most open to Inter-State trade from seeking supplies from competitors established in other Member States”. CFI’s decision (n 57) [147].

⁶³ Not only were these customers put at a competitive disadvantage in downstream markets, but the “sheer lack of transparency of Irish Sugar’s entire rebate system... in which neither the scale of the rebates nor the volume to which they relate is either uniform or communicated in writing” was an abuse of the dominant firm’s position since the “non-transparent and variable system of rebates [provided] an easy opportunity for it to restrict the

dominance were supplemented by other forms of exclusionary conduct by the dominant firm. Irish Sugar agreed to product swaps with its customers (where sugar supplied by competitors would be exchanged for sugar from the dominant firm)⁶⁴ and placed pressure on a shipping company not to transport sugar imported into Ireland by the dominant firm's competitors.⁶⁵ All these elements of Irish Sugar's commercial policy enabled it to shield its home market in Ireland from both imports from other Member States and competing sugar packers within Ireland by engaging in practices which enabled it to have 'recourse to methods different from those which condition normal competition in products or services based on traders' performance, the effect thereof being that the maintenance of the degree of competition still existing in the market or the growth of that competition has been hindered.'⁶⁶

Apart from the near-monopoly status of the dominant firm and the cumulative effects of various combinations of the exclusionary conduct identified above, the Commission and CFI also premised their findings of abuse of dominance on cogent evidence of the dominant

already limited competition on the industrial sugar market in Ireland". Commission's decision (n 57) [150]. The CFI affirmed that the "grant of discriminatory price rebates to the applicant's customers on the industrial sugar market... depending on whether or not these customers competed with the [dominant firm] on the retail market" was an abusive practice within the scope of Article 82 EC. CFI's decision (n 57) [162].

⁶⁴ The "apparent objective of Irish Sugar in carrying out the product swap was to prevent [its competitor] from gaining any market presence in Ireland and thus obtaining the necessary commercial goodwill" and the swap "had the effect of hampering the entrance of a new product on the Irish market". Commission's decision (n 57) [125]. This was echoed by the CFI which, while emphasising the degree of dominance possessed by the Irish Sugar, held that the dominant undertaking "undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product, sugar of the [competitor's] brand, by carrying out an exchange of products... on a market in which it held more than 80% of the sales volume". CFI's decision (n 57) [233].

⁶⁵ The dominant firm threatened to take away all its business from the shipping company if it continued to transport imported sugar from France into Ireland for its competitor. The Commission observed that "[p]utting pressure on a carrier to prevent him from transporting competing goods [could not] be considered to constitute normal business practice" because "[t]he object and effect of this action was the protection of Irish Sugar's position in Ireland and therewith the restriction of competition in that market to the detriment of consumers." Commission's decision (n 57) [122].

⁶⁶ Commission's decision (n 57) [114], citing *Hoffmann-La Roche* (n 25). The selective pricing behaviour of the dominant firm was an abuse of Irish Sugar's position of market dominance because "in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition". CFI's decision (n 57) [114], again, citing *Hoffmann-La Roche* (n 25) at [90].

firm's clear intention to exclude its competitors from the retail and industrial sugar markets in Ireland.⁶⁷ Moreover, the dominant firm was unable to justify its behaviour on the basis that it was merely exercising its right to protect its own commercial interests because 'the protection of the commercial position of an undertaking with the characteristics of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers'⁶⁸ and Irish Sugar could not show that its behaviour satisfied these criteria.

Both the *Compagnie Maritime Belge* and *Irish Sugar* decisions have been adopted by the English competition tribunals and courts in subsequent cases involving abusive price-related conduct. In *Napp Pharmaceutical*, the Competition Appeal Tribunal held that, drawing from the principles articulated in these cases, 'even if the prices of a dominant firm remain above costs, and simply match the price of a competitor, there may still be an abuse, at least where a super dominant firm is concerned, if the reduced prices in question are made on a selective basis and have no economic rationale other than the elimination of competition'.⁶⁹

⁶⁷ For example, the CFI emphasized that the investigation into the dominant firm's conduct showed that the selective price reductions were "aimed at discouraging imports of sugar from Northern Ireland and restricting competition on the retail sugar market", and that since the dominant firm did not dispute "the fact that they were aimed at 'confronting' competition from sugar imported from Northern Ireland", this amounted to "acknowledging that the rebates were aimed at preventing such competition from developing on its market". CFI's decision (n 57) [190].

⁶⁸ CFI's decision (n 57) [189].

⁶⁹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No.4)* [2002] CAT 1, [230]. This part of the decision was subsequently reaffirmed by the Court of Appeal, *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No.5)* [2002] EWCA Civ 796, [2002] 4 All ER 376 [26]. *Compagnie Maritime Belge* was also cited extensively by the English High Court in *Arkin v Borchard Lines* [2003] EWHC 687 (Comm), [2003] 2 Lloyd's Rep 225, a case involving an unsuccessful claim against liner conferences for conduct alleged to have infringed the Article 82 EC prohibition.

(c) Rights of private action for third party competitors injured by anti-competitive conduct

When the anti-competitive conduct of one or more undertakings causes economic injury to a third party competitor, the injured competitor may have one or more causes of action to pursue against the infringing parties within the competition law framework. Depending on whether the conduct in question has a Community dimension or not, there are two routes open to the injured competitor to pursue when seeking legal redress via the UK courts.

Firstly, European competition law gives injured parties a direct right to sue for damages against undertakings that infringe Articles 101 and 102 TFEU in cases where the conduct in question is capable of affecting trade between Member States. These claims for breaches of the Treaty provisions may be brought before the national courts. In addition, rights of private actions for individual claimants in respect of infringements of the Chapter I and II prohibitions in the *Competition Act 1998* are also available.⁷⁰ Secondly, the *Competition Act 1998* gives an injured party the right to make “follow on” private claims against defendants who have been successfully prosecuted by the UK or European competition authorities for anti-competitive conduct that violates the domestic or European competition rules.

(i) Private actions in national courts seeking redress for violations of European and UK competition law rules

As a result of the principle of ‘direct effect’ under European law, rights and obligations created by the European Community Treaty that are capable of direct effect within each Member State are enforceable by individuals before national courts even without any specific

⁷⁰ Section 60(2)(b) of the Act requires the Chapter I and II prohibitions to be interpreted with reference to governing principles which include “the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding questions arising in Community Law”. This means that Community law principles governing the availability of rights of private action in respect of the European competition rules generate parallel principles in the context of the Chapter I and II prohibitions. See n 85 below and accompanying text.

national implementing legislation in place.⁷¹ The competition law prohibitions in Articles 101 and 102 TFEU [Articles 81 and 82 EC] have direct effect in the UK⁷² and can be relied upon by parties injured by conduct that falls within the scope of these prohibitions as a basis for seeking legal remedies from the English courts, assuming, of course, that they are able to establish that the conduct in question is incompatible with these Treaty provisions. In most situations where these Treaty provisions are invoked in domestic legal proceedings, the litigant typically seeks to use them defensively because of their nullifying effects upon contractual agreements that fall within their scope.⁷³ However, the injured competitor invoking these provisions could wield them offensively as the basis for an action against undertakings whose anti-competitive conduct has caused him to suffer economic injury.

While the ECJ has held that Community law requires national courts to ensure that individuals who have been harmed by breaches of the Treaty competition provisions have a right to claim damages⁷⁴ and interim injunctions⁷⁵ from the infringing parties, the principle of ‘national procedural autonomy’ under European law means that it is for the domestic legal system of each Member State to determine the appropriate procedural and substantive rules⁷⁶

⁷¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12. Section 2(1) of the UK *European Communities Act 1972* obliges English courts to recognise and enforce directly effective Community law.

⁷² Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty No [2003] OJ L1/1, Article 1. Article 6 of the Regulation gives national courts the power to apply Articles 81 and 82 of the Treaty.

⁷³ Article 81(2) EC provides that agreements prohibited by Article 81(1) are void if they do not satisfy the exemption criteria in Article 81(3). Only the specific restrictive clauses of the agreement are rendered void while the rest of the contract remains intact unless those clauses cannot be severed from the remaining provisions of the contract. *Société La Technique Minière* (n 10). The same legal principles have been applied in the context of agreements which violated the Article 82 prohibition. See *English Welsh & Scottish Railway Ltd v E.On UK plc* [2007] EWHC 599, [2007] UKCLR 1653.

⁷⁴ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, [49] where the ECJ held that an absolute bar to a damages claim based on the English illegality rule in contract law was incompatible with Community law.

⁷⁵ Case 213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433, [21].

⁷⁶ Case 33/76 *Rewe-Zentral Finanze eG and Rewe-Zentral AG v Landswirtschaftskammer für das Saarland* [1976] ECR 1989.

governing the cause of action that is brought before the national courts by the injured party to enforce his Community rights. Where English law is concerned, the currently prevalent view is that infringements of the directly effective competition law provisions in the Treaty are actionable wrongs that give rise to tortious claims under the tort of breach of statutory duty.⁷⁷ For actions based on the common law tort of breach of statutory duty, the claimant has to show that the defendant has breached a duty imposed upon him by the statute (by engaging in conduct prohibited by Articles 101 and 102 TFEU in this case), that the duty breached was one owed to individuals like the claimant, that the duty breached was imposed upon the defendant to ensure that the kind of loss suffered by the claimant was avoided (that the duty was imposed in respect of the type of economic injury suffered by the claimant) and that Parliament intended for the breach of that statutory duty to be actionable against the defendant in a civil action.⁷⁸ The claimant must also show, using the civil standard of proof on a balance of probabilities,⁷⁹ that the breach has caused him to suffer the loss for which he is seeking compensation.

⁷⁷ *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, 144 where Lord Diplock stated that the contravention of Article 82 which causes damage to an individual gives rise “to a cause of action in English law of the nature of a cause of action for breach of statutory duty”, rejecting Lord Denning’s views in *Application des Gaz v Falks Veritas* [1974] Ch 381 that a new tort of ‘abuse of a dominant position within the common market’ ought to be recognised under English law. However, some legal commentators have suggested that it might be more appropriate to frame the cause of action within the economic tort of unlawful interference with business. See M Hoskins, ‘Garden Cottage revisited: the availability of damages in the national courts for breaches of the EEC competition rules’ (1992)13 ECLR 257, 262 and Richard Whish, ‘The Enforcement of EC competition law in the domestic courts of Member States’ [1994] 15 ECLR 60, 65. That the UK’s membership with the European Community resulted, in relation to Articles 81 and 82 of the EC Treaty, in the creation of new torts of breach of statutory duty, was noted by the House of Lords in *Norris v Government of the United States* [2008] 1 AC 920, [32]

⁷⁸ See *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191, 211 where Lord Hoffmann observed that “[a] plaintiff who sues for breach of a duty imposed by the law... must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered”.

⁷⁹ Case 1022/1/1/03 *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, where the correctness of the approach taken by the Competition Appeal Tribunal was affirmed on appeal to the Court of Appeal in *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, [2006] UKCLR 1135.

In their relatively limited experience dealing with private actions for breaches of the European competition rules based on the tort of breach of statutory duty, the English courts have tended to focus their attention on whether the substantive rules have been breached and whether the loss suffered by the claimant was caused by the breach. In one case, while arguments were made by legal counsel suggesting that not all the ingredients of the tort were adequately established because the type of loss suffered by a claimant may not have been the kind of loss which these competition rules were designed to protect against, the Court of Appeal ruled that such objections, while a ‘formidable argument’ as a matter of English law, had to be rejected⁸⁰ as a strict application of English law would deprive claimants of their Community right to damages clearly identified by the ECJ⁸¹ and would be inconsistent with the Community principle of effectiveness.⁸² It would therefore appear that the English courts do not rigidly insist upon conformity with all the traditional common law elements of the tort of breach of statutory duty before an injured party can succeed in his private action for damages against those who have caused him economic harm by engaging in conduct prohibited by the European competition rules. The pragmatism behind such an approach is particularly striking in light of the ongoing “modernisation” of the European Commission’s approach towards the Article 82 EC [Article 102 TFEU] prohibition, where it has been declared that ‘what really matters is to protect an effective competitive process and not simply competitors’.⁸³ The tension which surfaces is this: if the objective of Article 102

⁸⁰ *Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637, [2004] UKCLR 1500 [162]-[168].

⁸¹ The Court of Appeal had earlier made a reference to the ECJ for guidance on the application of national laws that might curtail the Community right to damages. The ECJ made it clear in its response, in Case C-453/99 *Courage Ltd v Crehan* (n 74), that Community law required such a right to damages to be made available subject to the Community principles of equivalence and effectiveness.

⁸² According to the ECJ in *Courage v Crehan* (n 74) [29], citing Case C-261/95 *Palmisani* [1997] ECR I-4025 [27], national laws “must not be framed so as to make it virtually impossible or excessively difficult to obtain reparation.” See, generally, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn CUP, Cambridge 2009) Chapter 7 (‘Rights and Remedies in National Courts’).

⁸³ *Article 82 Guidance Paper* (n 26) [6].

TFEU is *not* to protect the competitors of a dominant firm from its exclusionary conduct, would it be internally consistent to allow competitors who have been injured by the exclusionary effects of the dominant firm's abusive conduct to pursue private claims for damages based upon breaches of the dominant firm's duties imposed upon it by that Treaty provision? After all, the justification for common law liability under the tort of breach of statutory duty is premised upon the existence of a corresponding rationale underlying the existence of that particular statutory duty. If the competition rules are there to protect competition in the market and consumers, rather than individual competitors, from harm, then the economic injury suffered by competitors seeking to establish a claim under this tort should not – strictly as a matter of principle – qualify as the kind of loss which the statutory duty was intended to avoid. The economic harm that is suffered by the individual competitor can only serve, at most, as an indirect proxy of the harm to the competitive process in the market as a whole. While one might regard the availability of private rights of action for individual competitors who have been harmed by the anti-competitive activities of others as consistent with the broader deterrence goals of an effectively enforced competition law regime, it seems unsatisfactory that this should be achieved by instrumentally creating private rights of action that are incongruent with the conceptual foundations of the long-established tort of breach of statutory duty rather than employing a dedicated *sui generis* cause of action that has been specifically designed for this purpose.⁸⁴

⁸⁴ Stanton has argued that breaches of European Community law that give rise to private actions under English law are actually a distinct species of a “modern” tort of breach of statutory duty – as distinct from the “traditional” tort of breach of statutory duty – and that the former has not inherited any significant features of liability associated with the latter. In addition, that the modern “Eurotort” is conceptually detached from the traditional tort should not be surprising because “[t]he traditional tort has no firm characteristics on which the new tort can be based”. The connection between the modern Eurotort and the traditional tort of breach of statutory duty has simply left the former “unencumbered... from the constraints of established authority, in particular the influence of negligence” and “the use of a reference to breach of statutory duty when creating new areas of tortious liability achieves little other than leaving the characteristics of the new torts entirely open”. In his view, “[t]he Eurotort is simply to be classified as a tort in domestic proceedings and the repeated references to breach of statutory duty are a redundancy”. K M Stanton, ‘New forms of the tort of breach of statutory duty’ (2004) 120 LQR 324, 329-330 and 340.

While there are no statutory provisions within the *Competition Act 1998* that explicitly give private litigants the right to bring direct stand-alone claims based upon infringements of the Chapter I and II prohibitions, the Parliamentary debates leading up to the Bill make it clear that the availability of such rights of private action was clearly intended.⁸⁵ This was understood to be an implicit consequence of section 60 of the Act and no specific legislative language was included in the text of the Bill because the European jurisprudence in this area was, and still is, evolving and it was thought prudent not to create by statute rights of private action that could diverge from the European competition rules.⁸⁶ Private actions commenced by injured traders against their competitors for infringing the Chapter I and II prohibitions would be regarded by the English courts as actions for breach of statutory duty that are substantively equivalent to private actions invoking the Article 101 and 102 TFEU prohibitions, except that the statutory duty in question emanates from a piece of national, rather than European, legislation and thus does not require the conduct complained of to “affect trade between Member States”. Under the *Competition Act 1998*, the jurisdictional threshold requirements for the Chapter I prohibition against anti-competitive agreements are that they “affect trade within the United Kingdom” and are “implemented in the United Kingdom”, though agreements may be limited in geographical scope such that they “operate

⁸⁵ Hansard HL vol 586 col 1325 (5 March 1998), where Lord Simon of Highbury, the Minister of State, Department of Trade of Industry, explained that “[t]he courts have held that a right of action exists for breach of the EC prohibitions. The same right of action will exist for breach of the UK prohibitions.”

⁸⁶ Hansard (n 85) where Lord Simon went on to state: “We do not want to go wider or narrower than the rights which exist for breach of the EC prohibitions. We believe that the best way to achieve this result is for the Bill to remain silent on the issue of private rights of action... It is clear that Community law confers rights arising from a breach of Articles [81] and [82]. This is a "principle" laid down by the European Court of Justice within the meaning of subsection (2) of the governing principles clause which will be imported into the domestic system ... However, Community law is still in the process of development, for example, in terms of the class of persons able to claim such rights... An express right of action for breach of the prohibitions would need to provide answers to these unresolved EC questions. That, in turn, could lead to a divergence between rights of private action under European Community and UK competition law. We would not want a situation where the extent of rights of private action depended on whether the agreement affected trade between member states, often a difficult line to draw. Leaving the Bill as drafted will ensure that our courts can evolve third party rights of action as they evolve in the context of Articles [81] and [82].”

only in a part of the United Kingdom”.⁸⁷ Similarly, conduct which amounts to an abuse of a dominant position under the Chapter II prohibition has to “affect trade within the United Kingdom” and requires the alleged infringing party to have “a dominant position within the United Kingdom... or any part of it”.⁸⁸

(ii) Follow-on private claims in national courts for violations of the Competition Act 1998 prohibitions and European competition law rules

Under section 47A of the *Competition Act 1998*, injured competitors may bring private actions for monetary claims against those who have been found by the UK or European competition authorities to have infringed the Chapter I and II prohibitions. These follow-on claims may be brought before the Competition Appeal Tribunal after final decisions have been reached and no further appeals are brought against these infringement decisions. The obvious advantage of such claims is that the claimant does not need to take on the burden of proving that the conduct complained of has contravened the relevant competition law prohibitions because the tribunal is bound by the earlier decisions which establish that such infringements have indeed occurred.⁸⁹ The drawback is that it is dependent on the competition authority making a formal infringement decision which may not materialise if the parties under investigation reach a settlement with the authority beforehand.

Section 47A(10) provides that the existence of this avenue of recourse for the injured claimant ‘does not affect the right to bring any other proceedings in respect of the claim’. As such, it is open to the claimant to bring a civil action based on direct breaches of Articles 101 and 102 TFEU, if the requirements identified earlier are met, against the parties engaged in anti-competitive conduct if, for whatever reason, a formal infringement decision has not been

⁸⁷ Sections 2(1)(a), 2(3) and 2(7) of the *Competition Act 1998*.

⁸⁸ Sections 18(1) and 18(3) of the *Competition Act 1998*.

⁸⁹ Section 47A(9) of the *Competition Act 1998*.

taken against them by the national or European competition authorities. Furthermore, an injured competitor may have other common law unfair competition claims available to him, depending on how the other parties behaved and how the economic loss he suffered was caused, which he may concurrently pursue with his private action based on the competition law rules.

3. How does Competition Law distinguish between lawful and unlawful behaviour when specific competitors are injured by the deliberate efforts of rival undertakings?

An examination of how the competition law rules draw the line between lawful and unlawful modes of competitive conduct requires an understanding of what the objectives and policy concerns underlying this branch of the law are. The analytical approach taken by competition authorities and tribunals assessing the legality of an undertaking's impugned conduct and the legal principles developed by such institutions are inextricably tied to what they think the competition law rules are trying to achieve. It is thus necessary to first examine exactly *what* it is that the prohibitions in Articles 101 TFEU / Chapters I and 102 TFEU / Chapter II prohibitions are trying to protect – “competition” – before looking at *how* the law goes about protecting it.

(a) Protecting “competition” by prohibiting certain forms of conduct

Competition involves a state of economic rivalry between economic undertakings in a market and is understood to be beneficial to the public interest because it leads to lower prices, encourages innovation and other economically efficient outcomes. Having robust competition is thus beneficial to consumers because it enhances consumer welfare. Protecting and promoting competition through the competition law rules means having to identify when the

conduct of the undertakings being scrutinised produces, or is likely to produce, negative effects on competition in the market. But what exactly does harm to “competition” entail? And what impact does the meaning assigned to “competition” have on the shape and features of the competition law prohibitions?

(i) The competitive process

In assessing whether or not private conduct has negative effects on competition in the market, the focus of the inquiry is most often placed on whether or not “the competitive process” has been impaired by such conduct. This involves assessing whether the ability of rival undertakings to compete with each other is stifled in any way by the conduct of the parties under investigation. Attention is focused on whether competition *can* meaningfully take place in the market given the actual or likely effects produced by the impugned conduct. This is the approach which the European Commission’s Competition Directorate has endorsed:

Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive gains which could result from restrictive agreements...rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process.⁹⁰

When “competition” is regarded as “the competitive process”, protecting competition ultimately entails ensuring that markets remain contestable – that no barriers to market entry or market expansion are artificially created, maintained or strengthened by the conduct of the

⁹⁰ *Article 81(3) Guidelines* (n 14) [105]. Similar sentiments can be found in the Commission’s *Article 82 Guidance Paper* (n 26) [6] which declares that “[t]he emphasis of the Commission’s enforcement activity in relation to exclusionary conduct is on *safeguarding the competitive process* in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is *protecting an effective competitive process* and not simply protecting competitors.”(emphasis added).

relevant parties under investigation. The analytical framework that is applied to the competition law prohibitions must thus assess the economic and structural effects of the impugned conduct to determine if it impedes the ability of actual and potential competitors to compete effectively in the market. Any private conduct which does not curtail the ability or freedom of other undertakings to compete by substantially foreclosing the market should not be prohibited under the competition law rules.

(ii) Small competitors

Critics of the European competition law regime have often alleged that the competition law prohibitions tend to be applied in ways that protect competitors, rather than competition itself.⁹¹ However, one might see the protection of competitors as an inextricable part of protecting competition in the market. The protection of competitors may not be the *goal* of the competition law regime, but prohibiting private conduct which has negative effects on competition in the market must necessarily include *some* instances of conduct which have negative effects on competitors. The economic harm suffered by injured competitors – who may have been driven out of, or otherwise excluded from, the market – may provide the most compelling evidence of the adverse effects on competition produced by the conduct of the undertakings under investigation. The real task for the competition authority or tribunal is to distinguish between those situations when the injury suffered by competitors takes place in the ordinary course of competition – “normal competition” or “competition on the merits” – and those situations where the impugned conduct cannot be justified on these grounds. As one learned English judge has put it:

⁹¹ See, for example, the statements made by the Assistant Attorney General for Antitrust at the US Department of Justice in response to the CFI’s judgment in 2007 upholding the Commission’s infringement decision against Microsoft for abusing its dominant position. Thomas Barnett, ‘Statement on European Microsoft Decision’ (Press Release) <http://www.usdoj.gov/atr/public/press_releases/2007/226070.htm> last accessed 11 May 2009. A list of similar critics of the European competition law framework can be found in the first footnote of Professor Fox’s article. See Eleanor Fox, ‘We Protect Competition, You Protect Competitors’ (2003) 26(2) World Competition 149.

Even big businesses are entitled to win in the market place. Even big businesses are entitled to take rational decisions which are beneficial to them and harmful to competitors or others in the market.⁹²

The protection which the competition law regime extends to individual competitors is most strikingly visible in the application of the Article 102 TFEU and Chapter II prohibitions against dominant firms with very significant levels of market power. Greater concern is often shown towards small competitors in markets almost entirely dominated by a single commercial behemoth – the “super-dominance” scenarios – because they provide the only buffer against the emergence of an absolute monopoly:

The maintenance of a system of effective competition does, however, require that competition from undertakings which are only small competitors on the geographic market where dominance prevails... be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power.⁹³

Acknowledging the importance of ensuring the continued existence of small competitors in particularly sub-competitive markets more than others means that the competition law regime may have developed and applied different variants of the same basic principles to different types of undertakings. While individual undertakings with no market power have the greatest freedom to unilaterally engage their rivals as aggressively as they want, dominant firms will find their freedom curtailed in varying degrees to reflect the scope of the “special responsibility” they bear towards maintaining the already-weakened state of

⁹² *Suretrack Rail Services v Infraco* [2002] EWHC 1316 (Ch), [2003] UKCLR 3 [20] (Laddie J).

⁹³ Commission’s decision in *Irish Sugar* (n 57), [134].

competition in the market. Dominant firms and “superdominant”⁹⁴ firms are thus not subject to identical rules of conduct because of the greater importance attached towards protecting competitors in nearly-monopolised markets; they are required to adhere to a more stringent set of standards because of the magnitude of the market power they possess. For some dominant firms, the special responsibility they bear towards the maintenance of existing levels of competition in the market has been described by the English Competition Appeal Tribunal as ‘particularly onerous where it is a case of a quasi-monopolist enjoying “dominance approaching monopoly”, “superdominance” or “overwhelming dominance verging on monopoly”’, thereby justifying the imposition of wider, and perhaps more onerous, behavioural restrictions on their freedom to engage in price-related conduct in the market.⁹⁵

(iii) “Normal” competition

Undertakings occupying positions of market dominance are constrained by their ‘special responsibility’⁹⁶ towards preserving existing levels of genuine undistorted competition in the market to engage their rivals only by means that qualify as ‘normal competition’.⁹⁷ Conduct that deviates from this hypothetical benchmark is unlawful under the Article 102 TFEU and Chapter II prohibitions. But how exactly does one determine which forms of behaviour count as “normal” competition and which do not? On the one hand, one might define “normal”

⁹⁴ See Opinion of Mr Advocate General Fennelly in *Compagnie Maritime Belge* (n 48), [137] where it was argued that “Article [82] cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their superdominance confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking, or group of undertakings whose conduct must be assessed collectively, enjoys a position of such overwhelming dominance verging on monopoly... it would not be consonant with the particularly onerous special obligation affecting such a dominant undertaking not to impair further the structure of the feeble existing competition for them to react, even to aggressive price competition from a new entrant, with a policy of targeted, selective price cuts designed to eliminate that competitor.”

⁹⁵ *Napp Pharmaceutical (No.4)* (n 69)[219], citing with approval Advocate General Fennelly’s opinion in *Compagnie Maritime Belge* (n 94).

⁹⁶ See text accompanying n 27 above.

⁹⁷ See text accompanying n 34 above.

competition as all the modes of competitive conduct which every competing undertaking, including both dominant and non-dominant firms, should be at liberty able to pursue – competition based on price, quality, product range and services, for example – and where the efficacy of such methods of competition are not dependent upon the possession of substantial market power. Conversely, conduct that falls outside the scope of “normal” competition would comprise those practices which non-dominant firms would not be capable of effectively or sustainably executing – such as tying or bundling, price-discrimination and exclusive dealing arrangements – because they lack the necessary market power to compel their customers or suppliers to accept such trading conditions. This means that the competition rules should only prohibit dominant firms, which do wield the requisite market power to implement such exclusionary strategies, from engaging in these forms of behaviour.

However, this definition of “normal” competition does not account for other types of abusive conduct which are not dependent on whether the undertaking in question is in possession of market power, such as selective above-cost price-matching when carried out, in particular, by superdominant firms with near-monopoly market positions.⁹⁸ What counts as “normal” competition in such vulnerable markets is different from how the concept is understood in a market where the dominant firm has a market share of 40-50%. The range of conduct that qualifies as “normal”, and thus legitimate, forms of competition in a market occupied by a superdominant firm would thus be relatively narrower because of the particular market conditions present and the specific circumstances of each case.⁹⁹

⁹⁸ See, for example, the range of conduct found to infringe the Article 82 EC prohibition in *Irish Sugar* (n 57).

⁹⁹ This is reflected in the ECJ’s judgement in *Compagnie Maritime Belge*, (n 35),[114], where it held that “the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened.”, an approach that was explicitly adopted by the English Competition Appeal Tribunal in *Napp Pharmaceutical (No.4)* (n 69),[215 and 219].

Placing greater restraints on what modes of competitive conduct dominant firms may engage in compared to non-dominant firms, and even greater restraints on superdominant firms, means that the standard of “normal” competition from which dominant firms cannot depart is not a single monolithic concept. This explains the legal prohibitions imposed upon undertakings in possession of very high market shares against certain forms of price-cutting behaviour – conduct which would ordinarily be considered the quintessence of “normal” competition. Superdominant firms are thus unable to justify selective pricing conduct which matches the prices offered by their competitors as “normal” competition that rationally responds to conditions in the market when these sub-competitive conditions are “created at least in substantial part by the presence of the dominant firm itself”.¹⁰⁰

(iv) The normative value of competition

Protecting competition could also entail embracing a normative commitment towards the intrinsic value of competition as an integral part of a market-driven society. Such a commitment would manifest itself in a set of legal rules which automatically outlawed conduct that was inconsistent with the most fundamental economic principles underlying the operation of market economies. Agreements between competing undertakings to fix prices or restrict output, for example, should always be regarded as automatically unlawful because these market players are seeking to insulate themselves from the competitive pressures generated by market forces. Such a blatant disregard for the most basic tenets of the competitive order could justify the imposition of an absolute prohibition against these forms of conduct – this would translate into competition law rules which treated such conduct as unlawful *per se*, without making it necessary for any further inquiry into the actual effects

¹⁰⁰ *Napp Pharmaceutical (No.5)* (n 69)[26].

produced by the conduct in question, because they strike at the very core of competition as a normative good.

(b) Rule-based approaches (per se unlawfulness) vs. Effects-based approaches

While contemporary discourse in the field of European competition law has emphasised the importance of adopting a more effects-based approach towards the interpretation and application of the two prohibitions, it would be unrealistic to expect the competition law regime to devise rules of conduct that are premised *entirely* on the effects of such conduct on the market. Such an approach would be practically unworkable because of the difficulty of having to evaluate, *ex post*, every case on its specific facts – when the relevant harm, if any, has already been done. The legal uncertainty that would be generated by such an approach would make it very difficult for commercial undertakings to plan their behaviour in advance. The legality of these commercial decisions would have to be based on potentially speculative, and hence unreliable, predictions of what consequences the intended conduct will have on entire markets rather than just their impact on the bottomline. As such, some of the competition rules that have been developed distinguish between lawful and unlawful conduct simply based on the form or type of the conduct engaged in by the undertaking. These categories of prohibited conduct involve certain specific practices by undertakings that almost always produce, and are thus presumed to produce, anti-competitive effects on the relevant market.¹⁰¹

¹⁰¹ Categories of unlawful conduct that are regarded as anti-competitive *per se* were first introduced into the United States before making their way across the Atlantic because of the discomfort which American courts had in dealing with difficult extrinsic evidence about their alleged adverse economic effects. J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, Australia 2008), 277.

Where the Article 101 TFEU and Chapter I prohibitions are concerned, it is unlawful *per se* for parties to engage in price-fixing, market-sharing or output-limiting arrangements. These practices have as their “object” the prevention, restriction or distortion of competition and are thus prohibited automatically. Anti-competitive effects are *presumed* whenever undertakings engage in these types of behaviour.¹⁰² Where Article 102 TFEU and the Chapter II prohibitions are concerned, the European Commission has suggested that certain forms of conduct which raise obstacles to competition without any corresponding efficiencies are prohibited because their anti-competitive effect may be inferred. Such conduct might consist of unusual situations where ‘the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a rival’s product’.¹⁰³

(c) Justifying apparently anti-competitive behaviour: Balancing the pro-competitive and anti-competitive effects of the impugned conduct

Adopting an effects-based approach in the design of the competition law rules means that the competition authority or tribunal has to make a global assessment of *all* the effects of an undertaking’s conduct on the market before it is able to determine if it should be prohibited or not. In many cases, the impugned conduct will have both positive and negative effects on competition. When the latter is outweighed by the former, the conduct should not, in theory, be prohibited because whatever harm it causes is offset by the benefits it generates. The practical difficulty with this approach, however, is that it is not possible to assign uniform

¹⁰² (n 14) though it remains theoretically possible to rebut this presumption if it can be shown that the exemption criteria in Article 81(3) EC are satisfied.

¹⁰³ *Article 82 Guidance Paper* (n 26) [22].

units of measurement to each of the effects that are being considered in the weighing process, rendering the balancing process a largely impressionistic, rather than quantitative, exercise.

(i) Pro-competitive efficiency-based exemptions for multi-party conduct

The legislative structure of the Article 101 TFEU and Chapter I prohibitions clearly reflects the balancing process which needs to be carried out when evaluating the legality of the impugned conduct under the competition law rules. Article 101(1) TFEU and section 2(1) of the *Competition Act 1998* set out the elements for identifying multi-party anti-competitive arrangements. Article 101(3) TFEU and section 9 of the Act provide criteria for exempting what are apparently anti-competitive agreements – that the agreement contributes to improving production or distribution or promoting technical or economic progress (while allowing consumers a fair share of the resulting benefit), and does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. Meeting the conditions identified in the latter provisions requires the parties to establish that their conduct, while detrimental to competition at first blush, is pro-competitive on the whole because of the overall consumer welfare gains that result from such conduct.¹⁰⁴

The European Commission reaffirmed this approach towards the balancing exercise that is carried out when evaluating the legality of agreements under Articles 101(1) and 101(3) TFEU:

The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of

¹⁰⁴ According to the ECJ, in order to rely on the exemption criteria in Article 81(3) of the Treaty, the parties to the agreement must “show appreciable objective advantages of such character as to compensate for the disadvantage which they cause in the field of competition”. *Consten & Grundig* (n 13), [348].

resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals.¹⁰⁵

(ii) Objective economic justifications for unilateral abusive conduct

Unlike Article 101 TFEU and the Chapter I prohibitions, there is no equivalent list of exemption criteria expressly set out in the Article 102 TFEU and Chapter II prohibitions. However, the European Commission has canvassed an ‘objective economic justification’ defence by which a dominant firm may point to the economic efficiencies generated by its conduct as a basis for rendering its apparently abusive conduct non-abusive. In *Irish Sugar*, for example, the border rebates given by the dominant firm to encourage customers to make all their purchases from it to the exclusion of its competitors was held by the Commission to be an abuse of dominance that could not be objectively justified because they were forms of competition seeking to exclude competitors from the market which relied on the dominant firm’s superior financial position rather than the operational efficiencies it enjoyed:

¹⁰⁵ *Article 81(3) Guidelines* (n 14) [33]. At [51] of the Guidelines, the Commission explains that it expects parties making pro-competitive efficiency claims about their agreement to substantiate (a) the objective nature of the claimed efficiencies; (b) the causal link between the agreement and the efficiencies; (c) the likelihood and magnitude of the claimed efficiencies; and (d) how and when each claimed efficiency would be achieved.

The border rebate therefore forms part of a policy of dividing markets and excluding competitors. The rebate was not based on an objective economic justification, such as the quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed. It was granted on the sole basis of the retailer's place of business, in particular whether or not the relevant customer is established in the border area with Northern Ireland.¹⁰⁶

Elaborating further in its Guidance Paper on exclusionary abuses prohibited under Article 82 EC [Article 102 TFEU], the Commission suggests that a dominant firm may justify its apparently abusive conduct 'by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers' resulting in 'no net harm to consumers'.¹⁰⁷ Once again, it appears that some sort of effects-based balancing mechanism is employed to differentiate between lawful and unlawful competitive behaviour by undertakings that occupy positions of market dominance.

(d) Considerations of “fairness” and the competition law prohibitions

Given the strong influence which economic theory has had in shaping contemporary competition law jurisprudence, it is perhaps not surprising that considerations of fairness do

¹⁰⁶ Commission's decision (n 57), [129].

¹⁰⁷ *Article 82 Guidance Paper* (n 26) [28]-[30]. In order to rely on this efficiency-based justification, the dominant firm must satisfy the following cumulative conditions: (1) the efficiencies have been, or are likely to be, realized as a result of the conduct; (2) the conduct is indispensable to those efficiencies and there are no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies; (3) the likely efficiencies brought about by the conduct will outweigh the likely negative effects on competition and consumer welfare in the affected market; (4) the conduct does not eliminate effective competition in the market by removing all or most existing sources of actual or potential competition. The Commission takes the view that efficiency gains cannot normally be used to justify exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly.

not feature significantly – at least not explicitly – in the substantive content of these rules. On the other hand, matters of procedural fairness¹⁰⁸ have played a very significant role in shaping the legal framework governing the investigation and prosecution of parties suspected of engaging in anti-competitive conduct. To what extent can it be said that norms of substantive “fairness” are embedded within the competition law prohibitions and the ways in which they have been applied?

(i) “Fairness” towards the injured competitor-claimant

Competition, by definition, involves rival undertakings seeking to outdo each other making economic gains at the expense of each other. The competition law regime prescribes rules of conduct which limit the modes of conduct which competing undertakings may engage in but does not apply exactly the same constraints to all market players. One major distinction is drawn between dominant and non-dominant firms, where the former is placed under a more extensive range of behavioural restrictions than the former. While the Chapter I/Article 101 TFEU prohibition applies to all market participants, the Chapter II/Article 102 TFEU prohibition applies to a much narrower class of firms with enough market power to be regarded as dominant undertakings, and only to such firms. While the economic arguments for placing greater restraints on dominant firms emphasise the market power they wield and their capacity to further distort the already-weakened state of competition in the market, it may be possible to also rationalise the imposition of these restraints on the basis of the extreme economic inequalities between the dominant firm and its smaller competitors.

Why should the competitors of a dominant firm that has engaged in below-cost predatory pricing or loyalty-based rebates be entitled to relief under the competition law rules, when no claim can be sustained by competitors in another market where exactly the

¹⁰⁸ See generally, Richard Whish, *Competition Law* (6th edn OUP, Oxford 2009) Chapters 7 and 10.

same conduct is carried out by a non-dominant firm? The economic harm to the injured competitors in each case is the same. The difference lies in the ability of the dominant firm to financially sustain his attacks, in the short to medium term at least, unlike the non-dominant firm. The dominant firm is able to discourage its competitors from engaging in aggressive price competition and to deter potential competitors from entering the market. The flipside of this is that the injured competitors of the dominant firm are not as capable of retaliating with the same prospects of success as the injured competitors of the non-dominant firm. The disparity between the market positions of the players in one market and not the other means there is an “inequality of arms” in the former – conduct that the dominant firm may engage in to increase its market share cannot be replicated with the same degree of success as its competitors. Fairness would thus dictate that the dominant firm should be limited to competing in ways which are equally economically viable options for their competitors.¹⁰⁹

(ii) “Fairness” towards the alleged infringer

Dominant firms that have engaged in abusive practices frequently seek to defend the legitimacy of their actions on the basis that they are merely seeking to protect their economic interests from the competitive pressures exerted by their trade rivals. It is fairly well established within European competition law jurisprudence that such a right of self-interest exists but is often highly circumscribed:

Whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it

¹⁰⁹ This could partially explain why the CFI, in *Irish Sugar* (n 57) [148], observed that the dominant firm’s practice of granting “peripheral factor allowances”, which were essentially selective rebates, to its exporting customers was unlawful because it “prevent[ed] other potential suppliers from competing, on a fair basis, with the services offered by the applicant to its exporting customers.”

deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen this dominant position and thereby abuse it.¹¹⁰

Dominant firms are thus not expected to stand idly by and watch their market shares get eroded by the competitive challenges put up by their smaller rivals. They are entitled to respond, or meet the competition, head-on but must do so in a way that is proportionate¹¹¹ to the competitive threat and reasonable¹¹² in the circumstances. This means the level of action that a dominant firm may take in response to competition from his rivals is calibrated to take into account the strength of the dominance it enjoys.¹¹³ The recognition of a dominant firm's limited right of retaliation could be interpreted as a manifestation of a policy of "fairness" towards the dominant firm which recognises the importance of giving it sufficient leeway to defend and advance its economic interests when its market position is challenged by its trade rivals.

Similarly, the European Commission has suggested that a dominant firm may justify its conduct, at least in theory, by demonstrating that its conduct is 'objectively necessary and

¹¹⁰ Case T-65/89 *BPB Industries and British Gypsum* (n 53) [69]. The origins of this principle can be traced back to the ECJ's decision in *United Brands* (n 25), [189-190], where it was also held that "[e]ven if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other".

¹¹¹ In Case T-51/89, *Tetra Pak Rausing SA v Commission* [1990] ECR II-309, [68], the CFI has explained the application of principle of proportionality to the dominant firm's right to defend itself in the following way: "the undertaking in a dominant position may act in a profit-oriented way, strive through its efforts to improve its market position and pursue its legitimate interests. But in so doing it may employ only such methods that are necessary to pursue those legitimate aims. In particular, it may not act in a way which, foreseeably, will limit competition more than is necessary."

¹¹² *BBL/Boosey & Hawkes: Interim Measures* [1987] OJ L282/36, [19] where it was observed that "[a] dominant firm may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat."

¹¹³ So a "superdominant" firm with a "virtual monopoly" may not even be permitted to match, without undercutting, the lower prices offered by its competitors "where its prices go below average variable cost, on a selective basis, in order to "see off" the competitor on the particular products where the dominant enterprise is facing competition, leaving other prices unchanged." *Napp Pharmaceuticals* (n 69), [343].

proportionate'.¹¹⁴ This is one of the facets of the “objective justification” defence, the other being related to the economic efficiencies created by the conduct, which could plausibly be raised by a dominant firm to legitimise its behaviour. The caselaw suggests that the objective necessity defence might succeed where the dominant firm’s conduct consisted of legitimate business behaviour, such as refusing to make supplies to a customer that was a bad debtor or which chose to promote a competitor’s products over those supplied by the dominant firm,¹¹⁵ but not where the dominant firm had health and safety concerns relating to the competitor’s business because the regulation of such issues was the proper responsibility of the relevant public authorities.¹¹⁶ One might also regard the availability of this defence as indicative of fairness considerations towards the dominant firm which balance, on the one hand, the duty it owes under the competition law regime not to allow the already-weakened state of competition to be destroyed by its exclusionary conduct, with, on the other hand, its right to actively compete for customers in the market.¹¹⁷

(e) Intention and abuse of dominance

Despite being frequently described as an ‘objective’ concept,¹¹⁸ the abuse of dominance standard has been applied by competition authorities, tribunals and courts in ways which

¹¹⁴ *Article 82 Guidance Paper* (n 26) [28].

¹¹⁵ *BBI/Boosey & Hawkes* (n 112), where it was also noted that “[i]n the case where a customer transfers its activity to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship”.

¹¹⁶ Case T-30/89 *Hilti v Commission* [1991] ECR II-1439; Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951.

¹¹⁷ See Advocate General Fennelly’s Opinion in *Compagnie Maritime Belge* (n 35) [117] where it was argued that “[p]rice competition is the essence of the free and open competition which it is the objective of Community policy to establish on the internal market. It favours more efficient firms and it is for the benefit of consumers both in the short and the long run. Dominant firms not only have the right but should be encouraged to compete on price.”

¹¹⁸ See text accompanying (n 34) above.

place significant emphasis on the intentions of the dominant firm, particularly whether or not the presence of an exclusionary intent – to foreclose a market from existing or potential competitors – was disclosed in the evidence or if such intent could be inferred from its strategic conduct. The ECJ first incorporated subjective elements of intention into its test for predatory pricing in *AKZO*¹¹⁹ and subsequent decisions involving abuses of dominance by selective above-cost price-cutting conduct from the CFI and European Commission have continued to emphasise the fact that the dominant firm’s behaviour was abusive because it was aimed at eliminating competition from the market.¹²⁰ This approach is also clearly reflected in the European Commission’s Guidance Paper on Article 82 EC [Article 102 TFEU] where unlawful acts of predation by a dominant firm are described as ‘predatory conduct by *deliberately* incurring losses or foregoing profits in the short term... so as to foreclose or be likely to foreclose one or more of its actual or potential competitors *with a view to* strengthening or maintaining its market power, thereby causing consumer harm.’¹²¹ Similarly, the English competition tribunals and courts have focused significant attention on

¹¹⁹ The ECJ upheld the European Commission’s infringement decision against the dominant producer of benzoyl peroxide, a raw material used in the manufacturing processes for both flour and plastics, whose predatory price reductions in the flour market were aimed at driving its competitors out of the plastics market, holding that “[t]he maintenance of a system of effective competition does... require that a small competitor be protected against behaviour by dominant undertakings designed to exclude it from the market not by virtue of greater efficiency or superior performance but by an abuse of market power.” (n 35), [81].

¹²⁰ See the discussion above relating to *Compagnie Maritime Belge* and *Irish Sugar* (n 52, 61, 67 and accompanying text).

¹²¹ *Article 82 Guidance Paper* (n 26) [63] (Emphasis added). In proving that a dominant firm has indeed engaged in such abusive conduct, the Commission also states, at [65], that it will be possible to “rely on direct evidence consisting of documents from the dominant undertaking showing clearly a predatory strategy, such as a detailed plan to sacrifice in order to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action.” This emphasis on the subjective strategies of the dominant firm and the objectives behind its conduct is part of the general analytical framework proposed by the Commission, in [21], when evaluating all types of exclusionary conduct that might infringe the Article 82 EC prohibition.

the presence or absence of such an intention in assessing the lawfulness of a dominant firm's pricing-related conduct under the Article 102 TFEU and Chapter II prohibitions.¹²²

In addition, apart from being treated as a constituent element of abusive conduct, a dominant firm's exclusionary intentions towards a competitor could also disqualify it from offering an objective justification for its conduct. In *Aberdeen Journals*, the Competition Appeal Tribunal raised the possibility of a dominant firm rebutting, in exceptional circumstances, the presumption of abuse by predatory conduct when it prices below its average variable costs, but was swift to point out that:

...the presumption of abuse will rarely, if ever, be rebutted if the pricing policy under scrutiny originates as an aggressive response to market entry by a competitor, or is directed towards eliminating a competitor. An objective justification will normally be particularly difficult to establish if there is evidence of selective price cutting by a dominant undertaking that is targeted specifically towards the customers or potential customers of a competitor.¹²³

The difficulty with relying on a dominant firm's subjective intention to exclude competitors from the market, as a criterion of liability to differentiate between competitive and anti-competitive conduct, is that it overlaps substantially with the intentions one would expect, and indeed encourage, competitors to possess when engaged in 'normal

¹²² See *Napp Pharmaceutical (No.4)* (n 69), [327 and 326], where the CAT concluded that "[t]here [was] no credible evidence that [the dominant firm] ever saw any justification for its hospital discount policy, other than the need to exclude competitors from the hospital segment, and thus prevent them from gaining hospital influence which would, in turn, threaten [its] market share in the community segment ... The evidence establishes that [the dominant firm's] pricing policy was intended to eliminate competition" In refusing leave to appeal, the Court of Appeal, in *Napp Pharmaceutical (No.5)* (n 69), [51], reiterated that "[the CAT's] findings of [the dominant firm's] intention to exclude competition are, on any view of the jurisprudence of the European Court, fatal to [its] case." See also *Arkin v Borchard Lines* (n 69),[20] where the English High Court stated that "[a] fundamental issue on the question of liability is whether the [dominant undertakings] reduced their rates with the intention of eliminating or distorting competition in the Relevant Market."

¹²³ *Aberdeen Journals v OFT* [2003] CAT 11, [358].

competition'.¹²⁴ Overzealousness towards the competitive process might be misinterpreted as evidence of anti-competitive intentions, thereby creating the risk that instances of rigorous competition, inherently beneficial to consumers, are mistakenly prohibited.¹²⁵ In addition, it has been argued that a focus on intention as an ingredient of liability under Article 82 EC [Article 102 TFEU] would divert attention away from what should be 'at the heart of the primary analysis' – an examination of the consumer welfare effects of the dominant firm's impugned conduct.¹²⁶ However, the subjective intention of the dominant undertaking is never relied upon in isolation and is always evaluated in the context of the actual conduct it has engaged in, and the actual or likely effects of such conduct on the market.¹²⁷ Furthermore, the presence of such an intention would also reinforce the likelihood of competitive harm actually manifesting itself in the market, to the extent that the dominant firm's efforts would be directed towards fulfilling its goals. The subjective attitude of a dominant firm towards a particular competitor it seeks to eliminate from the market could also reveal the extent to which that competitor is viewed as a competitive threat to, and hence competitive constraint upon, the dominant firm.¹²⁸ This might provide the competition

¹²⁴ The US courts have, in contrast, been particularly wary about using subjective intent as a basis for antitrust liability because, as one judge has put it, there is an expectation that firms will "crush their rivals if they can". *AA Poultry Farms, Inc v Rose Acre Farms, Inc* 881 F.2d 1396, 1401 (7th Cir. 1989).

¹²⁵ Price-based competition is, after all, the most quintessential form of competitive behaviour which competition law ought to encourage, especially in sub-competitive markets already dominated by firms that wield significant market power. As one commentator has argued, "aggressive competition is distinct from anti-competitive conduct and the competition rules must be sufficiently refined to distinguish between them if winners in the competitive process are not to be deterred." See A Jones, 'Distinguishing Predatory Prices from Competitive Ones: Tetra Pak II' [1995] EIPR 252, 258-259.

¹²⁶ A Bavasso, 'The role of intent under Article 82 EC: from "flushing the turkeys" to "spotting lionesses in Regent's Park' [2005] ECLR 616, 623. The author argues that competition law analysis should focus on evaluating the likelihood of detrimental effects on consumer welfare flowing from the dominant firm's conduct, including positive externalities and economies of scale – "the issues that we should expect competition authorities and courts to focus on, not a sterile debate on the unresolvable question as to whether there was an intention to compete rather than exclude."

¹²⁷ This is the approach taken under US antitrust law. See *United States v Microsoft* 253 F3d 34 (2001), 59, where the Court of Appeal for the D.C. Circuit observed that "[e]vidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."

¹²⁸ Bavasso (n 126), 622.

authority or tribunal with helpful insights into the prevailing market conditions and economic context that would facilitate its analysis of the likely effects of the impugned conduct.

That the dominant firm's intentions have evolved into one of the focal points for the legal inquiry that is carried out when analysing this sub-category of exclusionary conduct, to determine if an infringement of the Article 102 TFEU / Chapter II prohibitions has occurred or not, results in an interesting structural parallel between this limb of the competition law framework and the Article 101 TFEU / Chapter I prohibitions against anti-competitive agreements which have as their "object" the prevention, restriction or distortion of competition. This conceptual symmetry between these two halves of the competition law regime reinforces other structural similarities that can be discerned from other aspects of these legal prohibitions. Dominant firms have, for instance, the opportunity to offer an objective justification for their conduct so that they bring themselves outside the scope of the Article 102 TFEU prohibition, just as the parties to an anti-competitive agreement may attempt to excuse themselves from liability under Article 101(1) TFEU by showing that their conduct falls within the scope of Article 101(3) TFEU. By making the anti-competitive intentions of the dominant firm a relevant criterion for evaluating the lawfulness of its behaviour towards its rivals in respect of the Article 102 TFEU / Chapter II prohibitions, this area of the law appears to have taken more than just a passing interest in the culpability of the dominant firm's conduct. This is consistent with the view that the English courts have expressed about the "morally reprehensible" character of anti-competitive conduct which infringes the Article 101 TFEU / Chapter I prohibition and whether such infringements were of sufficient gravity to trigger an application of the common law defence of *ex turpi causa*.¹²⁹

¹²⁹ *Safeway Stores v Twigger* [2010] EWHC 11 (Comm), [2010] 3 All ER 577, [26]-[28]. Mr Justice Flaux held that "anti-competitive acts in breach of the prohibition in Chapter 1 of the Competition Act do involve the necessary element of moral reprehensibility or turpitude and are sufficiently serious to engage the *ex turpi causa* rule in principle" in light of the following considerations: (1) the ECJ's decision in *Courage v Crehan* (n 74) to

If one is prepared to accept that there are at least some areas within the competition law regime that consider the culpability of the relevant undertakings when evaluating the lawfulness of their conduct, then this would show that there are perhaps *some* facets of the competition law prohibitions that are concerned with more than just a purely utilitarian calculus of the positive and negative economic effects that are produced by such conduct. This might suggest that embryonic notions of “fairness” or “unfairness” may be obscured within the methodological foundations of the competition law framework which, if uncovered, could potentially narrow the gulf between this branch of the law and the common law of unfair competition.

permit the English courts to invoke the *ex turpi causa* principle to prevent a party to a contract that was prohibited by the competition rules from claiming damages against another contracting party where the claimant bore significant responsibility for the infringement; (2) the quasi-criminal nature of the legal proceedings involving competition law infringements; and (3) the punitive nature of the “administrative” penalties that may be issued by the OFT for infringements of the competition law prohibitions which, under section 36 of the *Competition Act 1998*, can only be imposed in respect of infringements that have been committed “intentionally” or “negligently” and their overall resemblance to fines.

CHAPTER 4: THE DICHOTOMOUS DIVIDE BETWEEN THE COMPETITION LAW PROHIBITIONS AND THE COMMON LAW RESTRAINTS ON UNFAIR COMPETITION

1. Objectives, Institutions and Methodology

Following from the discussion in the two preceding chapters which have analysed the methodological techniques adopted by the common law and competition law frameworks towards differentiating lawful and unlawful modes of competitive conduct, this chapter will focus on the conceptual and practical dichotomies between these two branches of the law by, firstly, exploring the contrasting liability outcomes that might arise when both of these legal frameworks are applied to the same fact pattern and, secondly, examining selected thematic facets of each legal framework to illustrate their divergent approaches towards regulating the commercial conduct of trade rivals engaged in competition with each other.

Perhaps the most obvious difference between these legal frameworks is the fact that one is essentially comprised of a body of judge-made case law that has evolved incrementally on a case-by-case basis, while the other is anchored within the statutory provisions of a legislative instrument that has been interpreted and applied by the courts. In terms of their internal jurisprudential structure, the common law tends to design its prohibitions around an analytical framework which balances the opposing interests of the parties involved in the dispute, while statutes tend to be enacted with the legislative intention of facilitating the production or the avoidance of particular outcomes.¹ When deciding whether or not a particular form of competitive conduct ought to be regarded as unlawful, the common law examines the nature of the claimant's and defendant's interests, as well as the quality of the defendant's conduct towards the claimant which results in infliction of economic injury upon the latter. In contrast, statutes tend to identify a particular state of affairs and prescribe a set

¹ Peter Cane, *Tort Law and Economic Interests* (2nd edn, Clarendon Press, Oxford 1996), 218-219.

of legal mechanisms to facilitate the attainment or avoidance of that state of affairs. The application or non-application of a statutory prohibition to the defendant's conduct would thus require the tribunal to determine the extent to which his conduct has produced, or is likely to produce, this particular state of affairs.

The distinct policy objectives underlying each branch of the law have a profound bearing on the dichotomies between these two legal frameworks. The economic torts, when placing restraints on unfair modes of competitive behaviour, seek to protect the injured claimant-competitor from the economic losses that have been, or may be, inflicted upon him by his trade rivals. These common law actions have introduced minimalist standards of legitimate competitive behaviour by confining the scope of tortious liability to a relatively modest, and narrowly defined, restricted zone of unlawful acts. Competitors are permitted, and perhaps even encouraged, to compete as aggressively as they deem necessary to achieve their own competitive goals so long as they do not violate the 'basic standards of civilised behaviour'² that are embedded within the various torts. The discussion in Chapter 2 suggested that the common law restraints on unfair competition are concerned with prohibiting conduct that breaches some threshold of defendant reprehensibility, culpability or blameworthiness which ultimately, it is submitted, entails an assessment of the "fairness" of the defendant's injury-inflicting conduct towards the claimant, even though the courts might sometimes hesitate to acknowledge or embrace such an approach explicitly.³

In contrast, the objectives of the competition law prohibitions are not typically expressed within a framework which includes the protection of injured competitors as a

² *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 [56].

³ See sections 3(b)(i), 3(c)(i) and 3(c)(ii) of Chapter 2.

primary goal.⁴ Instead, the competition law rules seek to protect competition itself – the competitive process between trade rivals, rather than individual traders that are harmed in the process – though injured competitors may acquire private remedies against defendants that have engaged in conduct that produces detrimental effects on competition in the market. Harm to competition may manifest itself in different guises, including conduct that eliminates or diminishes competition between rival undertakings that would have taken place otherwise, as well as conduct that weakens the degree of competition in a market by causing existing competitors to suffer economic losses so as to force them to exit the market, or preventing market entry by potential competitors.⁵ Individual competitors derive their rights of private action only indirectly from breaches of the competition law prohibitions because they are only entitled to relief when they can establish that the economic injury they have suffered flows causally from such harm to the competitive process.⁶ These rights of private action simultaneously facilitate the enforcement of the competition rules by empowering individual complainants to take action against those that have engaged in anti-competitive behaviour, as well as enabling these injured claimants to obtain compensation for the economic losses they have suffered as a result of such conduct. The discussion in Chapter 3 also identified other closely related objectives of the competition law rules, such as promoting economically efficient outcomes and advancing consumer welfare.

Another important feature of the dichotomy between these two branches of the law lies in the differences between the institutional settings in which these legal prohibitions have

⁴ *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7, [6].

⁵ See section 2 of Chapter 3.

⁶ See section 2(c) of Chapter 3.

been developed. The economic torts are essentially the creations of the common law courts, where these conduct prohibitions have been incrementally fashioned entirely by judges on a case-by-case basis. Many of the landmark cases in which the economic torts were developed concerned economic harm arising from labour disputes involving trade unions rather than competition between commercial rivals.⁷ The legal contours of the economic torts have thus been influenced by judicial attitudes towards trade unions, industrial action and the various statutes that have existed to shield such parties from legal liability. In those cases where the factual matrix involved economic injury caused by one trader to his rival within a commercial setting, most English judges have tended to approach attempts at expanding the boundaries of tortious liability with great caution because of their instinctive preference for a greater degree of legal certainty⁸ in their definition of what constitutes unlawful modes of competitive conduct. One major concern of the courts is that open-ended formulations of tortious liability might excessively curtail the liberty of trade rivals to compete aggressively with each other in the marketplace. In addition, common law judges sitting in non-specialist courts have not been willing to take on a more interventionist role towards using the economic torts to regulate competitive behaviour in the market because they have regarded the performance of such a role as beyond their competence as legal generalists. The English courts have thus frequently taken the position that the primary responsibility for such a role should belong to Parliament and should be discharged within the legal framework of a statutory instrument.⁹ As such, the gestational history of the economic torts has been long and protracted, with a

⁷ See section 2(b)(ii) of Chapter 2.

⁸ See section 3(c)(ii) of Chapter 2 .

⁹ See section 3(b)(i) of Chapter 2. In *Safeway Stores v Twigger* [2010] EWHC 11 (Comm), [2010] 3 All ER 577, [129], *OBG v Allan* (n 2) was referred to as a “[case] on judicial deference in competition law... concerned with whether the courts should extend the rules of fair competition into new areas” where what the House of Lords had to decide was “whether to extend the scope of the tort of causing loss by unlawful means”.

relatively limited number of incremental caselaw developments stretching across the last two centuries.

On the other hand, the current competition law framework has been developed largely outside of the mainstream English courts. Given their origins in the provisions of the European Treaty, and the central roles played by the European Commission and Community courts in developing this branch of the law, it is clear that these legal prohibitions against anti-competitive conduct have been developed in a very different institutional setting before they were transplanted into the English legal landscape via the *Competition Act 1998*. One major difference between these institutions and the English courts is the way in which the vast majority of cases are investigated and prosecuted at the discretion of the Competition Directorate of the European Commission, rather than via private lawsuits pursued independently by aggrieved parties. This has allowed the Commission to hand-pick from a range of cases spread across the European Community with different fact patterns to which the relevant competition law principles may be applied and progressively developed, thereby enabling it to construct a diverse body of jurisprudence within a much shorter timeframe. In addition, the European competition authorities and their domestic counterparts, the Office of Fair Trading and Competition Commission in the UK, are specialist agencies staffed with officers possessing both legal and economics expertise. This has allowed economic theory and economics-based reasoning to infiltrate into legal analyses of the competition law rules, resulting in the boundaries of each category of prohibited conduct being delineated by essentially non-legal concepts such as market power, average fixed and variable cost profiles and efficiency gains.

The distinct objectives and institutional settings behind these two branches of the law shed some light on the different methodologies employed by each legal framework to

distinguish between lawful and unlawful modes of competitive conduct. *What* each branch of the law is trying to achieve, and the *process* by which the law is developed, are critical factors that influence *how* they go about circumscribing the means that rival undertakings may utilise against each other when in pursuit of their own commercial ends. The next section will examine the dichotomy between the common law economic torts and the competition law prohibitions within the context of specific factual matrices to illustrate how different conclusions about the lawfulness of a defendant's impugned conduct are arrived at when it is evaluated against the different legal benchmarks developed by these two legal frameworks. The discussion in the section which follows thereafter will go on to focus on specific facets of the analytical frameworks associated with these two areas of the law to illustrate the methodological differences between them.

2. Comparing and contrasting liability outcomes under each legal framework

When the competitive strategy of an undertaking involves the deliberate infliction of economic injury upon one of its rivals, such conduct may attract legal liability under the competition law rules, the common law rules or both. The aggressive behaviour of a competitive trader towards its commercial rivals may be regarded as entirely legitimate when assessed using common law principles, but may nevertheless be prohibited when the competition law framework is applied to it instead. Conversely, conduct that is regarded as lawful under the competition law rules may still attract some form of common law liability under one of the economic torts. The different liability outcomes that are reached arise from the application of different legal criteria when the conduct is assessed which, in turn, reflect

the different objectives underlying each branch of the law.¹⁰ In this section, the legal prohibitions imposed by the common law economic torts will be compared and contrasted against those imposed by the competition law rules by illustrating how opposite liability conclusions may sometimes be reached by these two branches of the law when each of them is applied to the same set of facts.

(a) Multi-Party Conduct – Taking collective action against a common target

One of the classic cases which illustrates the limited reach of the common law restraints against acts of unfair competition is a House of Lords decision dating back to 1891. In *Mogul Steamship v McGregor*,¹¹ the claimants were shipowners who competed with the defendants, an association of shipowners who worked together to inflict economic injury upon the former, in the tea trade between China and the United Kingdom. The defendants operated a shipping conference under which they agreed to set common freight rates for their ships which serviced this lucrative trade route while jointly seeking to prevent other steamship operators such as the claimant from obtaining a share of this trade. In furtherance of their exclusionary objectives, the defendants pursued a number of highly-coordinated and aggressive commercial strategies. Firstly, conference members sent ships to Chinese ports to coincide with the arrival of, and thereby challenge, non-conference ships and underbid the

¹⁰ Article 3 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, which defines the relationship between national competition laws and the Article 81 EC and Article 82 EC prohibitions from the European Treaty, explicitly accommodates the freedom of Member states to adopt other national laws, apart from national competition laws, that regulate competitive behaviour. Article 3(3) of the Regulation provides that the restrictions found in Articles 3(1) and 3(2) – provisions which determine how strict national competition laws can be when they are applied to situations that are simultaneously subject to the European competition law prohibitions – do not “preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty”.

¹¹ [1892] AC 25.

freight rates of the latter, resulting in ‘low and unremunerative rates’ being charged. Secondly, conference members threatened to terminate the services of third party shipping agents if they provided loading services to the claimant’s ships. Thirdly, conference members put pressure on shippers, their customers, by refusing to accept cargoes from those who used the claimant’s shipping services, while ‘offering exceptional and very favourable terms to customers who [would] deal exclusively with them’.¹² The combined effect of these actions by the defendants was to cause the claimants to lose their lucrative share of the market for the carriage of tea because they were no longer able to financially sustain their cargo-carrying voyages between the tea-trading ports in China and London, resulting in the latter’s financial detriment. The claimant sought damages for the losses it suffered in an action for conspiracy but was unsuccessful in both the High Court and Court of Appeal before an appeal was brought to the House of Lords.

The House of Lords unanimously dismissed the appeal and held for the defendants on the basis that no actionable wrong had been committed by them. The conspiracy between the defendants did not involve any unlawful means¹³ and lacked any ‘malice’ towards the

¹² (n 11) at 35. These trading terms given to the defendant’s customers were described by Lord Halsbury as “so favourable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves.”

¹³ It is entirely possible that the lawfulness of the defendants’ conduct in this case would be assessed quite differently today in light of the jurisprudential developments that have been made to the economic torts by the English courts over the course of the century since the *Mogul Steamship* case was decided. If contracts between third parties and the claimants were unlawfully terminated at the request or insistence of the defendants, then there might be liability under the tort of conspiracy to injure by unlawful means, where the unlawful means used was the commission of the tort of inducing or procuring breach of contract. Similarly, threats by the defendants to unlawfully terminate their contracts with the third party shipping agents in order to coerce the latter into withdrawing their services from the targeted claimants could be characterised, without too much difficulty, as threats to commit actionable breaches of contract, for the purposes of the (three-party) tort of intimidation, which is regarded as variant of the tort of causing loss by unlawful means. This could also have given rise to an action against the defendants under the tort conspiracy to injure the claimants by unlawful means, where the unlawful means was the commission of the (three-party) tort of intimidation. See discussion below on the facts of *FEG and TU* (n 33 and accompanying text) for another example of a factual setting in which these common law actions could possibly be argued. Furthermore, there is also the possibility that the facts of the *Mogul Steamship* case might be reinterpreted, in light of the present-day competition law framework, as an unlawful

claimant in the sense that the defendants' actions were not motivated by a desire to harm the claimant. In modern terms, neither the tort of conspiracy to injure by unlawful means nor the tort of conspiracy to injure by lawful means could be established on the facts of this case. The predominant purpose behind their actions was to advance their own commercial interests by driving their competitors out of business, 'an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is, in the eye of the law, perfectly legitimate'.¹⁴ The Lord Chancellor concluded that 'a combination to trade, and to offer, in respect of prices, discounts and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade'¹⁵ was not unlawful, even though the defendants were 'encouraging a ruinous competition'¹⁶ by carrying out an agreement regarded by the common law as an unlawful restraint of trade.¹⁷ While recognising that 'there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become

means conspiracy where the unlawful means was the infringement of the statutory prohibition against anti-competitive agreements. See discussion in section 2(b) of Chapter 5.

¹⁴ (n 11) at 42 (Lord Watson). As Lord Morris put it, at 49, "[t]he object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons."

¹⁵ (n 11) at 40.

¹⁶ (n 11) at 37. Such conduct was not "out of the ordinary course of trade" because the he believed that it was "very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself".

¹⁷ (n 11) at 39 (Lord Halsbury LC). Even though the contract between the members of the shipping conference violated the common law restraint of trade doctrine and was void on grounds of public policy, the effect of this doctrine would have simply rendered the contract unenforceable at law as between the parties. This was not enough to give the claimant, a third party, a cause of action against the parties to the agreement. In the words of Lord Bramwell, (n 11) at 46, "It is quite certain that an agreement may be void, yet the parties to it are not punishable."

unlawful’,¹⁸ their lordships were unable to accept that the defendants had done anything illegal in this case for the purposes of establishing civil liability towards the claimant.

Even though the defendant’s conduct comprised an agreement to act ‘in restraint of trade’, which could have rendered a contract unenforceable on grounds that it was contrary to public policy, this was not the same as establishing ‘unlawful’ conduct on their part for the purposes of attracting common law tortious liability.¹⁹ Their lordships also rejected arguments raised by the claimant that the defendant’s conduct ought to be regarded as unlawful purely on grounds of public policy – that such behaviour was not in the public interest – with Lord Watson noting that ‘the decision of this appeal depend[ed] upon more tangible considerations than any which could be derived from the study of what is generally known as public policy’.²⁰ Similarly, Lord Bramwell was unwilling to decide whether or not the defendants’ conduct was against public policy ‘without any evidence as to its effects and consequences’.²¹

In response to the argument that the defendant’s methods of competition, while not involving illegal acts, were nevertheless “unfair”,²² and that the aggressive tactics adopted by

¹⁸ (n 11) at 38. At 45, Lord Bramwell provides two reasons why an act if lawful when done by one may nevertheless be wrong when done by several: “one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable... de minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime.”

¹⁹ (n 11) at 39.

²⁰ (n 11) at 42.

²¹ (n 11) at 45-46. Public policy arguments could have been canvassed to support the legitimacy of the defendants’ actions. Lord Coleridge, the judge at first instance, seemed prepared to accept the argument that that there could have been a public benefit flowing from the defendants collective conduct because the profits they earned from monopolising the lucrative tea trade during the “tea season” enabled them to operate regular freight services along the same shipping route all year round. See *Mogul Steamship v McGregor* (1888) 21 QBD 544, 548.

²² (n11) at 43.

conference members interfered with the freedom²³ of the claimant to deal with his customers, Lord Bramwell made the following observations:

It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of “fair competition”? What is unfair that is neither forcible nor fraudulent? It does seem strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.²⁴

Merely combining with another party to compete against a rival, without deploying independently unlawful means or harbouring unlawful motives, could not be regarded as “unfair” competition. His lordship’s statements suggest an extremely sympathetic assessment of the collective action taken by the defendants. Not only was the conduct complained about not “unfair”, it was characterised as the product of a ‘perfectly honest agreement’ that was ‘fairly’ believed to be required to protect the parties’ interests. Whatever interference with the claimant’s ‘right to a free course of trade’ that resulted from the defendants’ conduct was not actionable because the defendants had not done ‘more than they had a legal right to do’.²⁵ By collectively lowering their freight rates to induce customers to ship exclusively with conference members, the defendants had engaged in ‘nothing more than the ordinary form of

²³ This was the basis on which the sole dissenting judge in the Court of Appeal, Lord Esher, held for the claimant – that the collective conduct of the defendants “was not... done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with, i.e. with intent to interfere with, the plaintiffs’ right to a free course of trade, and was therefore a wrongful act as against the plaintiffs’ right; and as injury ensued to the plaintiffs, they had also in respect of such act a right of action against the defendants.” *Mogul Steamship v McGregor* (1889) 23 QBD 598, 610.

²⁴ (n11) at 47 (Emphasis added).

²⁵ (n11) at 48-49. Lord Bramwell was unsympathetic towards the claimants, who were former shipping conference members themselves, because they had complained about “the very practices they wished to share in, and once did”. Similarly, Lord Field, at 54, noted that the claimants had been parties to the shipping conference in previous years “and only brought their present action because the other parties to the conference... refused to extend its provisions to them.”

competition between traders by offering goods or services at a cheaper rate than their rivals'.²⁶

While the conduct of the defendants in the *Mogul Steamship* case did not attract liability under the common law conspiracy torts, a different outcome would almost certainly have been reached had a claim been pursued today under the present-day competition law framework instead. To begin with, the collective efforts of the shipping conference members to drive the claimant out of the market for freight services in the tea trade would have readily qualified as an agreement or concerted practice whose object or effect was the 'prevention, restriction or distortion of competition' within the scope of the prohibitions in Article 101 TFEU and Chapter I of the *Competition Act 1998*. Both types of competitive harm discussed in Chapter 3 are present in these circumstances: customers suffer financial detriment because of the elimination of price competition between members of the shipping conference, while a specifically targeted competitor – the claimant – is exposed to the exclusionary effects of the concerted action taken by the defendants to eliminate him from the competitive process.²⁷ The latter sub-species of competitive harm would be sufficient for a claimant to sustain an action for private remedies against the defendants for breaches of statutory duty imposed upon them by the competition law rules, especially since it is likely that the shipping conference would have collectively possessed the requisite market power to successfully execute their conspiracy against the claimant.

One obstacle that a claimant suing under the competition rules might encounter, in these types of factual circumstances, is the availability of a block exemption that immunises the agreement between the members of the shipping conference from liability under the

²⁶ (n11) at 59 (Lord Hatten).

²⁷ See sections 2 and 2(a) of Chapter 3.

Article 101 TFEU or Chapter I prohibitions.²⁸ This was a feature of the European and English competition law cases that were concerned with exactly the same sorts of collective conduct by the members of shipping conferences in *Compagnie Maritime Belge*²⁹ and *Arkin v Borchard Lines*.³⁰ Both these cases involved similar complaints of liner shipping conference members collectively agreeing to send ‘fighting ships’ to arrive at or near the same dates as their rivals’ vessels, selectively lowering their freight charges to undercut the prices charged by their rivals, and encouraging customers to ship exclusively with conference members with loyalty-inducing rebates. However, such conduct exceeded the scope of protection offered by the block exemption and could still attract liability under the Article 102 TFEU and Chapter II prohibitions – as abuses of a position of market dominance collectively held by the conference members. Establishing that the shipping conference occupies a dominant position in the relevant market opens the door to the imposition of additional behavioural restraints against exclusionary conduct that stifles competition from existing competitors and prevents market entry by potential competitors.

Opposite liability conclusions are thus arrived at when the collective conduct of shipping conference members against a common target is assessed against the different legal benchmarks found within the competition law and common law regimes. While a group of shipowners acting in concert to inflict economic injury upon a targeted rival may, according to House of Lords in the *Mogul Steamship* decision, evade common law liability under the conspiracy torts, they are likely to expose themselves to liability for infringements of the

²⁸ The relevant block exemption which previously covered liner shipping conferences was *Council Regulation (EEC) 4056/86* of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJ L378/4 but this was subsequently repealed by the European Commission in *Council Regulation (EC) 1419/2006* [2006] OJ L269/1.

²⁹ CEWAL [1993] OJ L34/20; Case T-24/93 etc [1996] ECR II-1201; Case C-395 and 396/96P [2000] ECR I-1365.

³⁰ [2003] EWHC 687 (Comm), [2003] 2 Lloyd's Rep 225.

competition law prohibitions against anti-competitive agreements and abuses of market dominance. While generally concerned about protecting injured claimants upon whom economic harm has been deliberately inflicted, the common law economic torts will not curtail the liberty of multiple parties working with each other to target a common rival because it views such collective conduct as nothing more than an 'ordinary form of competition' which is not indictable. The rough-and-tumble of the common law mercantile world is not for the faint-hearted and injured competitors who are expected to bear the slings and arrows of their competitive struggles without legal recourse when the colluding parties have not used unlawful means or acted upon unlawful motives. In contrast, while the competition law regime is not primarily concerned with protecting individual competitors, one or both of the principal competition law prohibitions could have been triggered in the same circumstances to enable an injured competitor to sustain a private action against the parties colluding against him. A claimant suing under the competition rules would have to establish, however, that the economic losses that he has suffered flowed directly from the exclusionary *effects* of such collective conduct which, in the final analysis, undermine the competitive process in the relevant market.

However, there are certain forms of conduct associated with competitors who gang up against a common rival, with a view to eliminating that rival from the market, which may attract legal liability under *both* the competition law and the common law prohibitions. These are situations where at least one of the defendants commits a civil wrong in the course of his campaign against the injured claimant, while the remaining defendants participate in the commission of the unlawful acts to such an extent that they qualify either as joint tortfeasors or co-conspirators. For example, where the loss suffered by the injured claimant is caused by the breach of a contractual obligation owed to it by a third party who has been persuaded, or pressured, by the defendants to terminate their commercial relationship with the claimant,

there might be liability under the tort of inducing breach of contract.³¹ Where the loss suffered by the claimant is caused by a third party's lawful conduct, but where the third party was coerced into acting in the way that he did because of the defendant's unlawful actions towards him – including threats of unlawful actions such as the defendant's threat to breach his contract with the third party – there might be liability under the torts of causing loss by unlawful means or (three-party) intimidation.³²

The facts of the European Commission's *FEG and TU*³³ decision are illustrative. The Article 81 EC [Article 101 TFEU] prohibition was infringed by the collective conduct of the members of a Dutch wholesale trade association who had sought to exclude a non-member from competing in the relevant market by preventing the latter from obtaining supplies from product manufacturers and other individual wholesalers. The members of the trade association agreed amongst themselves not to sell their products to the complainant. On these facts alone, given that this group boycott does not involve the commission of an independent legal wrong and appears to be motivated by the members of the trade association to protect their own interests, it is unlikely that such collective conduct would have been actionable under the conspiracy torts. However, the members of the trade association also applied pressure on third parties – representatives of manufacturers and importers – to refrain from making supplies to the complainant.³⁴ If such action resulted in the termination of a

³¹ See section 2(a) of Chapter 2.

³² See sections 2(b)(i) and 2(b)(ii) of Chapter 2.

³³ *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)* [2000] OJ L39/1, [2000] 4 CMLR 1208. See (n 43) of Chapter 3 and accompanying text.

³⁴ This is a tactic commonly associated with dominant undertakings who wield enough market power to enable them to compel third party service providers to deal exclusively with them, thereby making it more difficult for their rivals to compete in the same market. Examples include the 'blacklisting' practices of the shipping conference in *Compagnie Maritime Belge* and the pressure applied on shipping companies by the dominant sugar manufacturer in *Irish Sugar*. See discussion in section 2(b), (n 52) and (n 65), of Chapter 3 and accompanying text.

concluded supply contract between a third party and the complainant, where such termination amounted to a breach of the terms of the contract, those trade association members involved could have been made tortiously liable for inducing or procuring the breach of that contract. If the trade association members had coerced the third party into refusing to make supplies to the complainant by threatening to withdraw their custom from the third party, in breach of a pre-existing contractual arrangement between trade association members and the third party, then one might mount a case for tortious liability under the (three-party) tort of intimidation, a species of the general tort of causing loss by unlawful means.

While this analysis allows for both the competition law framework and the common law framework to arrive at, ultimately, the same liability conclusions, the underlying rationale for prohibiting such conduct under each legal framework is distinct. The imposition of liability under the competition law rules was premised on the adverse anti-competitive effects of the impugned conduct – that the competitive process was appreciably weakened when the complainant was prevented from competing effectively in the wholesale market because his access to the upstream supply channels had been cut off. Competition in the relevant market had thus been impaired by the market foreclosure effects of the defendants' collective behaviour. On the other hand, liability under the economic torts, if any, would have arisen because the legitimate interests of the injured competitor had been wrongfully injured by the defendant's misconduct. The common law would have been prepared to grant relief to the injured competitor-claimant because the defendants' excessive conduct towards him was sufficiently reprehensible in that it violated basic norms of civility and fair play that

restrain competitors from utilising third parties as the instruments through which economic harm is inflicted upon their rivals.³⁵

(b) Unilateral Conduct – Intentional acts which inflict economic injury upon a targeted rival

There is one crucial distinction between the legal prohibitions imposed by each legal framework against unilateral conduct by undertakings that have deliberately set out to cause economic harm to their competitors. Under the competition law regime, unilateral conduct by an undertaking is only regarded as anti-competitive if it is an abuse of a dominant position.

The dominant status of the defendant is thus an essential prerequisite for liability.³⁶

Unilateral conduct which falls within the scope of the Article 102 TFEU and Chapter II prohibitions may be legitimately carried out by those who do not possess the necessary market power to qualify as dominant undertakings. In contrast, the economic status of the defendant is irrelevant to the establishment of liability under the common law economic torts, though larger entities with deeper pockets are probably in a better position to successfully leverage on their relatively stronger bargaining positions should they resort to tortious competitive strategies in order to advance their own interests. A dominant undertaking with a significant market power is more likely to wield enough commercial influence to enable it to influence the behaviour of third parties whose actions ultimately cause economic injury to its trade rivals. Similarly, many of the defendants in the landmark cases were members of trade

³⁵ As Lord Devlin put it in *Rookes v Barnard* [1964] AC 1129, 1209, where threats to commit breaches of contract were held to qualify as threats of unlawful action for the purposes of the tort of intimidation, “metaphorically speaking, a club has been used” by the defendants against the claimant. The defendants, by making threats against the intermediate third party, coerced the third party into complying with their demands and consequently behaving in a manner which was calculated to, ultimately, cause economic harm to the injured claimant.

³⁶ See section 2(b) of Chapter 3.

unions³⁷ whose collective bargaining strength made them formidable opponents who wielded enough power to influence how third parties behaved towards those whom they wished to inflict economic injury upon.

Examples have already been given, in the discussion above, of anti-competitive abusive conduct that may also attract liability under the economic torts. These include inducing breaches of contracts made by the injured competitor with third parties,³⁸ as well as using unlawful means – which extends to threats of unlawful means – against third parties that interferes with their freedom to trade with the injured competitor.³⁹ Dominant firms that deploy these tactics in their competitive strategies are more likely to succeed in carrying out their schemes to injure their trade rivals because of the degree of commercial clout – or market power, in the language of competition law – they possess. Third parties that have contractual arrangements with a smaller competitor may be more easily persuaded to breach their existing contacts and switch their allegiances to the dominant firm because of the more attractive financial incentives that the latter is likely to be able to offer. Commercial threats made by a dominant firm against a third parties, such as a threat to breach a supply contract if these third parties continue do business with its trade rivals, are also more likely to be taken seriously by the latter because of the magnitude of the financial pressure it is capable of placing on the latter who would then be coerced into complying with the demands of the dominant firm to behave in a way which causes economic injury to the targeted rival. Given that the categories of conduct that fall within the scope of the Article 102 TFEU and Chapter II prohibition have not been exhaustively defined, it is entirely possible that other forms of

³⁷ See (n 7) and accompanying text above.

³⁸ See discussion in section 2(a) of Chapter 2.

³⁹ See discussion in section 2(b)(i) and 2(b)(ii) of Chapter 2

conduct caught by the other economic torts may be concurrently unlawful under the competition rules as well.

In *Arkin v Borchard Lines*, for example, even though the claimant was ultimately unsuccessful in establishing his private action against the defendant on competition law grounds, the High Court was prepared to entertain the possibility that dominant undertakings could abuse their dominance by circulating rumours in the market about the financial instability of their small rivals.⁴⁰ Such conduct involves making statements about the targeted rival to its customers and business associates which, if those representations are untrue, might cause the targeted rival to suffer economic losses depending on how the recipients of these statements react to them. If the statements made to the third party had been fraudulent in character, then the dominant firm's conduct might have fallen within the scope of the (three-party) tort of deceit, a species of the general tort of causing loss by unlawful means.⁴¹ On the other hand, if the statements that were made to third party about the claimant were simply untrue or disparaging, but not made fraudulently, such conduct may attract liability under the tort malicious falsehood instead.⁴² A similar form of misconduct was found by the European Commission to infringe the Article 82 EC [Article 102 TFEU] prohibition, where the dominant firm had made misrepresentations to national patent offices

⁴⁰ (n 30) [352-358].

⁴¹ See discussion in section 2(b)(iii) of Chapter 2.

⁴² See discussion in section 2(d)(ii) of Chapter 2. If, however, the statements made are truthful but nevertheless injure the reputation, including the business or commercial reputation, of the claimant, he will not be permitted to bring a claim for damages under any the economic torts. In *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, 1496, it was held that the claimant was precluded from claiming damages under an action under the tort of conspiracy to injure by lawful means for "injury to reputation or injury to feelings", as opposed to injury to business goodwill or some other specific form of pecuniary loss, because such claims could only be pursued under the law of defamation which provided an absolute defence for truthful statements.

in order to prolong the duration of the patent protection it enjoyed over its pharmaceutical products in order to delay competition from generic drug manufacturers.⁴³

On the other hand, there are other forms of abusive conduct within the scope of the Article 102 TFEU and Chapter II prohibitions that do not attract co-extensive liability under the common law economic torts. Exploitative abuses such as excessive pricing and price discrimination, on their own, do not involve the deliberate commission of any actionable wrongs that are directed against the dominant firm's rivals.⁴⁴ In addition, not all exclusionary abuses by a dominant firm will involve misconduct that attracts tortious liability towards its competitors, even if the adverse economic effects of such behaviour are felt by these competitors.⁴⁵ For example, conduct by a dominant firm which seeks to foreclose a market from other competitors by promoting exclusive dealing arrangements with customers and suppliers, or by engaging in tying or bundling sales practices, need not necessarily be directed against specifically identified competitive targets. The dominant firm may simply be seeking to advance its own commercial interests and strengthen its market position *vis a vis* all its competitors in general. Even where the dominant firm is targeting a particular trade rival, no common law liability arises unless appropriate unlawful acts have been committed

⁴³ Case COMP/A.37.507/F3 *AstraZeneca* [2006] OJ L332/24, affirmed by the General Court of the European Union (Case T-321/05 *AstraZeneca v Commission* [2010] OJ C221/33). At [355], the General Court held that “the submission to the public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled... constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition. Such conduct is not in keeping with the special responsibility of an undertaking in a dominant position not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market.”

⁴⁴ See discussion in section 1(b)(i) of Chapter 3.

⁴⁵ See discussion in sections 1(b)(ii) and 2(b) of Chapter 3.

by the dominant firm or a third party against that rival, such as inducing a customer to breach its contract⁴⁶ with the rival so that it deals exclusively with the dominant firm instead.

This divergence in the liability conclusions arrived at when assessing the dominant firm's conduct under each legal framework is particularly pronounced when the abusive conduct in question involves some form of predatory or selective pricing behaviour. Conduct falling within the scope of this category of anti-competitive conduct involves either setting one's prices below average total costs or average variable costs, or selectively lowering one's prices to lure away the customers of a specifically targeted competitor.⁴⁷ When assessing the lawfulness of the dominant firm's conduct under the competition law framework, the "eliminary" or "predatory" intent of the dominant firm – the intention to eliminate selected competitors from the market and foreclose the relevant market from competition – is regarded by the courts as an important criterion of liability.⁴⁸ This sort of behaviour involves one of the most aggressive forms of price-based competition by a dominant firm which would normally be encouraged, since lowered prices are usually regarded as one of the principal benefits of competition in a market economy. However, such extreme instances of price-cutting conduct are prohibited under the competition rules when they degenerate into economically irrational behaviour, at least in the short term, where losses are incurred by pricing one's goods below their variable or marginal costs of production for no logical reason other than to bankrupt financially weaker competitors in order to force them out of the market

⁴⁶ Post *OBG v Allan* (n 2), it is reasonably clear that no common law liability can arise under the *Lumley v Gye* tort for merely "preventing" or "obstructing" or "interfering" with the performance of a contract between a third party – the defendant must have induced or procured the third party to commit the breach of the latter's contract with the claimant. In addition, it is clear that no liability under this economic tort can arise where no actual breach of the claimant's contract, actionable by the claimant against the third party, has occurred. See section 2(a) of Chapter 2.

⁴⁷ See discussion relating to *Compagnie Maritime Belge* and *Irish Sugar* in section 2(b) of Chapter 3.

⁴⁸ The dominant firm's eliminatory intentions may have to be proven by the party alleging abusive conduct, though a rebuttable presumption of such intent may arise where it prices below average variable costs. See *Arkin v Borchard Lines* (n 40) at [298-299]. See also discussion in section 3(e) of Chapter 3.

so that the dominant firm is ultimately able to recoup its losses, at least in theory, by subsequently raising its prices above competitive levels.⁴⁹

In the eyes of the common law, on the other hand, simply lowering one's prices, even to absurdly 'unremunerative' levels, is not seen as unlawful conduct; such behaviour is considered, on the contrary, to be 'nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals'.⁵⁰ Predatory pricing or selective price-cutting would not be prohibited by the common law, regardless of the dominant firm's unequivocal intention to destroy his rivals by deliberately inflicting economic injury upon them, because the position taken ever since *Allen v. Flood*⁵¹ has been that the lawful conduct of an undertaking cannot attract tortious liability just because it was carried out with the intention of causing harm to the injured claimant. Before imposing legal restraints on the freedom of commercial undertakings to compete with each other, many of the common law economic torts insist upon the additional presence of some form of independently unlawful conduct (the "unlawful means" requirement) by the defendant as an objective indicator of the gravity of his "bad" behaviour that justifies the imposition of liability upon him.⁵² However, the concept of "unlawful means" has shown itself to be a highly amorphous one in the hands of the common law courts, with its definition varying in its scope between the different economic torts – potentially encompassing civil wrongs, criminal wrongs, or both, or perhaps smaller sub-sets within these two categories of legal

⁴⁹ It should be noted that proof of a dominant firm's ability to recoup its losses is not a necessary element for establishing predatory pricing behaviour that infringes the Article 82 EC prohibition. See the ECJ's judgment in *Tetra Pak International SA v Commission* [1996] ECR I-5951, [44]. However, the likelihood that a dominant firm might succeed in recouping its losses at a later stage might be relied upon as evidence which points towards the presence of an eliminatory intention. See *Arkin v Borchard Lines* (n 40) at [274].

⁵⁰ See text accompanying (n 26) above which describe the House of Lords' favourable assessment of the price-cutting behaviour of the shipping conference in the *Mogul Steamship* case.

⁵¹ [1898] AC 1.

⁵² See section 3(c)(ii) of Chapter 2.

wrongs.⁵³ Given that the competition law prohibitions have also evolved into independently actionable statutory infringements capable of private enforcement by injured competitors, it remains to be seen whether the common law would ever be prepared to recognise anti-competitive abusive conduct such as predatory pricing and selective price-cutting as “unlawful means” for the purposes of establishing liability under the economic torts.⁵⁴

(c) Taking an integrated perspective of both legal frameworks

Two useful insights about the nature of the relationship between these two adjacent legal frameworks will, hopefully, have emerged from the comparative analysis carried out above. Firstly, by illustrating how these legal frameworks may arrive at opposite conclusions about the legality of the economic injury that a defendant has inflicted upon his trade rival, and by highlighting the distinct policy considerations which drive them to these contrary conclusions, it should be apparent that these two branches of the law should not be regarded as substitutes for each other. The development of one should thus not be encumbered by the concern that the other ought to perform the role of the former instead. Recognising the distinct functions that each legal framework performs in regulating competitive behaviour in the common law marketplace sheds light on the possible directions in which they could, or should, be developed by courts and competition authorities in future.

Secondly, by showing how liability may be imposed upon a defendant under one branch of the law even though his conduct is regarded as lawful by the other, would-be defendants that engage in such forms of behaviour should be sensitised to the potential

⁵³ See discussion on the meaning of “unlawful means” in the context of the torts of causing loss by unlawful means and conspiracy to injure by unlawful means in section 2(b)(i) and 2(c)(i) of Chapter 2

⁵⁴ This is an issue of some significance which will be separately addressed in greater detail in section 2(a) of Chapter 5 where the substantive interface between the competition law prohibitions and the common law economic torts will be analysed in greater detail.

liabilities they expose themselves to from adjacent fields of the law. Conversely, injured undertakings who have suffered economic harm as a result of the aggressive behaviour of their competitors that is regarded as lawful under one legal framework should become more aware of the spectrum of alternative causes of action potentially available to them under the other legal framework. In those fact patterns where the defendant's conduct might potentially attract liability under both legal frameworks, the injured claimant's decision as to which route or routes to pursue may be guided by strategic considerations related to the characteristics of the different causes of action available to him and their respective advantages and disadvantages.

(i) Regulating “unfair” modes of competition: Common law or Statute?

One of the recurrent arguments raised by both the English courts and legal commentators for confining the scope of the economic torts within narrow parameters rests on the view that the regulation of competitive behaviour is a function that is better performed by Parliament via its legislative instruments.⁵⁵ Common law judges have traditionally shied away from explicitly crafting robust legal prohibitions against “unfair” modes of competition because they have taken the view that it would be more appropriate for such pronouncements to be made by Parliament in a statute after careful consideration has been given to the ramifications of such rules on the wider public interest – matters which involve ‘major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise’.⁵⁶

While such judicial sentiments are warranted within the context of the overtly political dimensions that are associated with labour disputes involving trade unions, their

⁵⁵ See discussion in section 3(b)(i) of Chapter 2.

⁵⁶ *OBG v Allan* (n 2) at [74] (Baroness Hale).

members, non-member employees and employers – the types of cases which featured prominently in the developmental history of the economic torts in the twentieth century – it is less apparent whether such judicial conservatism is justifiable within the context of trade competition between commercial rivals. It is not entirely clear why Parliament should be in a better position than the courts to regulate the commercial conduct of private undertakings engaged in competition with each other. Any legislative framework that is devised for this purpose will inevitably be couched in broadly-worded language that would closely resemble a wide legal principle formulated by the common law.⁵⁷ The courts will, ultimately, be required to articulate and develop more detailed rules such that this statute may be applied to the myriad of possible situations in which conflicts between competitors may arise. The common law economic torts can be used to accomplish exactly the same task and are likely to provide a more effective framework for setting behavioural norms in the marketplace because of their inherent doctrinal flexibility. Legislative instruments might serve as appropriate tools for promoting specific public interest objectives, such as protecting consumers from misleading advertising practices or unethical sales tactics, but they cannot match the potential versatility and adaptability of the common law's responses to the broad spectrum of "unfair" behaviour that traders might engage in when trying to outdo their competitors.

More significantly, it should be reasonably clear by now that the existing statutory regime for regulating competitive behaviour found in legislative instruments such as the *Competition Act 1998* is incapable of serving as a substitute for the common law economic torts. The prohibitions found in this statute were simply not designed to regulate competition

⁵⁷ The experience which the English courts have had with broadly-worded statutory provisions regulating specific forms of competitive behaviour involving the use of trade marks – whether a trader “has without due cause [taken] unfair advantage of... the distinctive character or repute” of a trade mark with a reputation, or whether the trader has acted “in accordance with honest practices in industrial or commercial matters” – shows that judges are not incapable of dealing with the rubric of “fairness” within the common law of unfair competition. See section 3(a) of Chapter 1 and, in particular the text accompanying (n 38) to (n 40).

in the same way as the common law legal restraints. When evaluating the legality of a defendant's conduct, the common law economic torts pay close attention to *how* that trader has behaved – his motives, his conduct, and the manner in which economic harm was inflicted upon the claimant. On the other hand, the legal prohibitions found in the competition law statute are generally more concerned with the actual or potential economic *effects* or consequences of the defendant's commercial practices on competition in the marketplace rather than the specific details of his conduct. Given the distinct policy objectives and methodologies associated with these two legal frameworks, which translate into the contrasting liability outcomes discussed above, it would be illogical to expect the competition statute to also assume the responsibility of identifying when acts of “unfair” competition by traders ought to be regarded as unlawful.

It follows that the scope of the role of the economic torts, as the only real legal mechanisms for reining in unfair competition in the common law marketplace, should not be constrained by the existence of a competition statute that prohibits anti-competitive conduct. If the common law courts are unwilling or unprepared to expand the role of these torts beyond the narrowly-defined parameters that they currently occupy, then a more convincing alternative justification needs to be offered for adopting such a minimalist approach. Otherwise, there ought to remain plenty of doctrinal space for the economic torts to further evolve into a more robust regime of behavioural standards, perhaps based on moral or ethical norms of “fair play” between rivals, that contribute to the “ground rules” which competing traders in the common law marketplace are expected to comply with when engaging each other on the battlefield of commerce.

(ii) Single or multiple causes of action for inflicting economic injury upon a competitor

That a defendant's conduct towards the injured claimant may, in some factual scenarios, be regarded as unlawful under one legal framework but not the other, while other instances might attract liability simultaneously under both legal frameworks, raises issues of considerable practical significance to would-be defendants and would-be claimants. Taking an integrated perspective of both legal frameworks is important to the legal advisers of those contemplating commercial behaviour that could inflict economic injury upon their trade rivals because of the different benchmarks used by each framework to identify unlawful conduct. Two or more traders who, in order to further their own commercial interests, gang up against a targeted competitor without using any independently unlawful means may fall outside the scope of the common law conspiracy torts, but if they collectively wield a significant degree of market power compared to the injured competitor, such behaviour could be caught by the competition law prohibition against anti-competitive agreements and concerted practices. Conversely, if the conspirators are relatively small undertakings participating in a large market alongside many other actual and potential competitors, their actions might not produce anti-competitive effects of sufficient magnitude to trigger the competition law prohibitions, though they should be advised of their potential liability under the common law conspiracy torts should their collective conduct towards their target cross the line and include the commission of a legal wrong or threats to commit such wrongs. Being familiar with the differences between the liability rules used within each of these legal frameworks would thus be very useful in helping liability-conscious traders better plan and execute competitive strategies that will inflict economic injury upon their rivals.

From the injured competitor's perspective, a holistic appreciation of both the competition law prohibitions and the common law actions relating to unfair modes of

competitive conduct is valuable because it would provide a fuller picture of the range of legal options that are available to him when framing his cause of action against the defendant. In those factual circumstances when the conduct in question could attract liability under *both* legal frameworks and potentially give the injured competitor two causes of action, his decision to pursue one or both legal routes might be guided by a number of related strategic considerations. The main advantage of pursuing an action under the competition law framework lies in the availability of the option of lodging a complaint with the competition authority who might be persuaded to prosecute the defendant for infringing the relevant competition law prohibition, instead of having to launch a private action to seek direct enforcement of the relevant European or national statutory prohibitions. If an infringement of the competition law rules is established by the competition authority, the injured competitor can then launch a follow-on action to recover damages in respect of the losses that have been caused by the infringing conduct.⁵⁸ This is a much cheaper alternative to bringing a private claim directly against the defendant for violating the competition law prohibitions as the injured competitor would then have to bear the costs of proving all the required elements and establish, with the aid of expensive expert witnesses, the relevant adverse economic effects of the defendant's conduct on the competitive process. The follow-on action simply requires the claimant to show the requisite causal connection between the competition law infringement and the loss he has suffered, unlike the common law actions which require him to prove that the defendant acted in a particular way and with a particular state of mind in order to satisfy all of the ingredients of one of the economic torts. If the defendant's conduct could potentially incur liability under both legal frameworks, the injured competitor might consider it an attractive proposition to commence concurrent actions under both routes – submitting a complaint to the competition authority alleging that the competition rules have been infringed

⁵⁸ See section 2(c)(ii) of Chapter 3.

while simultaneously commencing civil proceedings and seeking preliminary injunctive relief before the common law courts by alleging that one or more of the economic torts have been committed against him. Alternatively, the injured competitor may consider choosing between personally pursuing a private action under the tort of breach of statutory duty in respect of the competition law prohibitions and, alternatively, framing his cause of action as an economic tort instead.⁵⁹

If the injured competitor with two potential civil claims available to him, one from each of the legal frameworks, had to choose between these alternative actions, the following strategic advantages associated with the common law economic torts should be carefully evaluated. Firstly, where there is a single potential defendant whose unilateral actions have caused economic harm to the would-be claimant, pursuing a common law-based claim might be an easier option if the would-be defendant does not obviously cross the threshold requirements for dominance in the relevant market. The common law economic torts may be committed by anyone, regardless of their size or whether they wield any market power, whereas the competition law prohibitions against unilateral anti-competitive conduct only apply to those that qualify as “dominant” undertakings. Secondly, the scope of the common law actions is potentially wider than the competition law prohibitions in the sense that certain *threats* to commit unlawful acts by the would-be defendant that cause economic loss to the injured competitor might be actionable under the (three-party) tort of intimidation, even

⁵⁹ Both private actions would be subject to the same limitation period under section 2 of the *Limitation Act 1980* which prevents any “action founded on tort” from being brought “after the expiration of six years from the date on which the action accrued”. In relation to infringements of rights conferred by European Community law, including the competition law prohibitions found in Articles 81 and 82 EC, the English courts have explicitly characterised the “Eurotort” as a species of the tort of breach of statutory duty which thus constituted an “action founded on tort” that was subject to the domestic regime on limitation of actions. See *R v Secretary of State for Transport, ex p Factortame (No.7)* [2001] 1 WLR 942. Stanton has argued that characterising this private action specifically as a species of the tort of breach of statutory duty was unnecessary, and that “a finding that the Eurotort was a tort would have been sufficient to bring it within the scheme of the Limitation Act”. KM Stanton, ‘New forms of the tort of breach of statutory duty’ (2004) 120 LQR 324, 330. See also (n 84) of Chapter 3 and accompanying text.

though no independently unlawful acts have actually been carried out.⁶⁰ If competition law infringements were regarded as the sorts of legal wrongs that could qualify as “unlawful means” for the purposes of the economic torts,⁶¹ then threats to commit competition law infringements could, at least in theory, fall within the scope of the (three-party) tort of intimidation. Thus a group of undertakings, or a single but dominant firm, which coerces a particular trade rival to fall into line by threatening to use their market power to compel a third-party wholesaler not to do business with that trade rival could potentially attract liability under the (three-party) tort of intimidation even though the anti-competitive boycott has only been threatened and not actually implemented. Thirdly, while the monetary remedies for private civil claims based on breaches of the competition law prohibitions are limited to compensatory damages, the common law economic torts provide the additional option of pursuing claims for exemplary damages against the defendant in the appropriate factual circumstances.⁶² In the appropriate factual circumstances where the injured claimant could frame his civil claim either based on a competition law infringement actionable under the tort of breach of statutory duty, or based on one of the economic torts instead, it might be worthwhile to give serious consideration to the remedial advantages of the latter where the gravity of defendant’s misconduct could justify a punitive award of damages.⁶³

⁶⁰ See discussion in section 2(b)(ii) of Chapter 2.

⁶¹ See discussion in section 2(b) of Chapter 5.

⁶² See discussion in section 2(c) of Chapter 5.

⁶³ There is judicial dictum from the English courts to suggest that awards of exemplary damages for breach of statutory duty (which would include a direct private action brought under the competition law framework) would only be permissible when the governing statute expressly specifies that such an award is possible. On this view, exemplary damages would not be available in the vast majority of cases of statutory torts because it is unlikely that the relevant statutes will be drafted in sufficient detail to satisfy this criterion. See Stanton (n 59) at 339-340, citing *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

3. Differentiating between lawful and unlawful modes of competitive conduct: Selected facets of both legal frameworks

By exploring how and why the competition law and common law legal frameworks might reach similar or divergent liability conclusions when assessing the legality of conduct that inflicts harm upon one's commercial rivals, the discussion above has highlighted the distinct but proximate roles played by each branch of the law in regulating the modes of competitive conduct pursued by rival traders against each other in the marketplace. What follows below is a closer examination of four specific thematic strands that have emerged from the two preceding chapters and which run through the fabric of both these legal frameworks.

However, while both the competition law regime and common law economic torts share these common legal threads, the ways in which they have been woven into the methodological structures of these legal frameworks is strikingly different. The discussion below aims to highlight the contrasting treatment given by these two branches of the law to these particular facets of their respective legal frameworks. Given the significance of these issues to the legal analyses adopted by both legal frameworks when they distinguish between lawful and unlawful modes of competitive behaviour, taking a comparative perspective of these issues across both legal frameworks could yield important insights into their respective inner workings

Firstly, although a competitor-claimant that has suffered economic injury as a result of the actions of his rival could potentially bring actions against the latter under either or both legal frameworks, this harm that has been inflicted upon the competitor-claimant does not take on the same legal significance under both legal frameworks. Secondly, while both legal frameworks look to the defendant's state of mind as one of their criteria for imposing liability for their conduct, it is clear that they place very different emphases on the moral culpability of the defendant when they evaluate the lawfulness or unlawfulness of his conduct. Thirdly,

despite both legal frameworks acknowledging the importance of promoting “competition” in the marketplace, simultaneously recognising that it is a valuable public good that the law should protect, they seem to have adopted very different understandings of what the pursuit of this public policy consideration entails and what impact it should have on the substantive scope of their respective legal prohibitions. Fourthly, even though both legal frameworks make occasional references to “ordinary” or “normal” competition to describe perfectly lawful methods of competitive behaviour, these benchmarks have adopted significantly different meanings within the specific contexts in which they have been used.

(a) Economic injury suffered by the competitor-claimant

Actions brought under any of the common law economic torts require the claimant to prove that he has suffered, or is likely to suffer, economic losses that have been or will be caused by the defendant’s behaviour towards him. The economic loss suffered by the claimant is an indispensable constituent element of *all* the tortious wrongs that these common law actions seek to remedy. The harm inflicted upon the injured competitor is thus a fundamental part of the framework of criteria used by the various economic torts to demarcate their respective zones of prohibited conduct. In the process of drawing the line between lawful and unlawful modes of unfair competitive behaviour, one of the core objectives of the common law is to strike an appropriate balance between protecting the interests of the competitor-claimant who has suffered economic injury and preserving the liberty of the competitor-defendant who has caused that injury.⁶⁴

In contrast, whether or not a competitor has been specifically injured by the conduct of his rivals is generally regarded as irrelevant to the legal assessment of such conduct under

⁶⁴ See section 3(a) of Chapter 2.

the competition law rules. This regulatory attitude is clearly reflected in a public speech made by the European Commissioner for Competition regarding the European approach towards the enforcement of Article 82 EC [Article 102 TFEU]:

In our view, the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources... My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm.

I like aggressive competition – including by dominant companies - and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market.⁶⁵

While proof of actual economic loss and a causal connection between the impugned conduct and the loss he has suffered may be required to support a claimant's *private* action for damages arising from breaches of the competition law rules, such matters are not essential to a competition authority's or tribunal's decision that the conduct under scrutiny has infringed these rules. That one competitor has been injured by the actions of another may provide some evidence of the market foreclosure effects produced by such conduct but it is neither a necessary nor a sufficient condition for the imposition of liability under the competition law regime. Competition law protects individual competitors only indirectly by restraining their rivals from engaging in conduct that subverts the competitive process. The rights of private action that the competition law regime confers upon the injured competitor

⁶⁵ Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (Speech at Fordham Corporate Law Institute, New York, 23rd September 2005), SPEECH/05/537 (available online from <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537>, last accessed 15 March 2011)

are not primarily concerned with protecting the interests of that specific party, even though they enable him to claim compensation for the losses he has suffered as a result of the infringement of the competition law prohibitions.⁶⁶ These direct rights of private action exist as a means of decentralising and making more effective the enforcement of the competition law prohibitions so that private parties may, in addition to efforts of the competition authority, also participate in eradicating anti-competitive conduct for the benefit of consumers and the public at large. Private claims for competition law infringements brought by injured competitors may thus be regarded as ultimately ancillary to,⁶⁷ while still supportive of,⁶⁸ the public enforcement actions taken by the competition authority.

(b) The defendant's moral culpability

One of the main arguments advanced in Chapter 2 about the methodological structure of the economic torts was that they distinguished between lawful and unlawful modes of competitive behaviour by assessing the reprehensibility of the defendant's conduct towards the claimant, using legal benchmarks that articulate basic standards of civilised behaviour that are expected of participants who compete with each other in the common law marketplace. The substantive scope of these causes of action thus determines the extent to

⁶⁶ See discussion in section 2(c) of Chapter 5 and, in particular, the text accompanying (n 58) to (n 63).

⁶⁷ This is certainly the case where the civil action pursued by the injured competitor is a 'follow-on' claim derived from an infringement decision issued by the competition authority. Under section 47A of the *Competition Act 1998*, which sets out the circumstances in which monetary claims relating to infringements of the European and English competition law prohibitions may be brought, private actions may be initiated "by a person who has suffered loss or damage as a result of the infringement" through civil proceedings only after the relevant competition authorities have determined that an infringement has indeed occurred and the period for appeals against such decisions has expired.

⁶⁸ This appears to be the position taken by the ECJ in Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, [27] where it was observed that the existence of a right of private action based on Article 81 EC "strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition" and that "[f]rom that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

which restraints are imposed by the common law upon the freedom of competitors to deliberately inflict economic harm upon each other. Each economic tort reflects a particular species of “unfair” competition recognised by the common law, though all of them share a common thread that pays attention to the blameworthiness of the defendant’s conduct towards the injured claimant. This underlying interest in the moral culpability of the defendant is expressed differently in each of the economic torts, with most torts using convenient proxy devices such as “unlawful means” or “misrepresentations” to do the job, while others assess the extent of the defendant’s “bad” behaviour in a more direct and explicit manner.⁶⁹ This is underscored by the fact that most of these common law actions require the establishment of some species of intentional conduct on the part of the defendant before these liability-creating rules are triggered.⁷⁰ Acting with the intention of causing economic harm to the claimant, or committing an act which one knows will cause such harm, are strong indicators of the defendant’s moral culpability, although the precise *mens rea* requirement for legal liability varies from tort to tort. This was discussed in Chapter 2, where it was suggested that a “lesser” form of intention used in particular tort might be offset by some other constituent element of that tort, such as the character of the defendant’s conduct or the claimant’s interest that has been damaged, that attracts a “higher” degree of blameworthiness.⁷¹

⁶⁹ See section 3(c) of Chapter 2.

⁷⁰ But see section 2(d) of Chapter 2. Where the torts of passing off and malicious falsehood are concerned, even though an intention to cause harm to the claimant is not, strictly speaking, a pre-requisite for tortious liability, the defendant’s culpability may stem from other facets of his conduct – such as misleading the customers of the claimant or spreading intrinsically injurious statements about the claimant that are untrue.

⁷¹ See text accompanying (n 93) to (n 96) in section 3(c)(i) of Chapter 2. So while no specific intention to cause harm to the claimant is required under the torts of inducing breach of contract or passing-off, the overall level of reprehensibility attached to the defendant’s “misconduct” is elevated by the fact that his conduct has interfered with the property-like contractual expectations or the valuable goodwill of the claimant. Similarly, while the tort of conspiracy to injure by unlawful means requires an intention to harm the claimant, the tort of conspiracy to injure by lawful means requires something more – a predominant purpose to harm the claimant – because the latter tort does not involve the defendants using unlawful means.

In contrast, it would appear that the moral culpability of the parties whose conduct is alleged to have infringed the competition law rules should not really matter one way or another. If the touchstone for legal liability within the competition law regime is premised upon the actual or likely anti-competitive consequences arising from such conduct – such as whether or not the collective behaviour of the colluding parties or the unilateral actions of the dominant firm produce exclusionary or market foreclosure effects – then its lawfulness or unlawfulness should not, in theory, depend on the blameworthiness of the responsible parties.⁷² However, the jurisprudence that has emerged from the English and European courts indicates that the subjective intentions of the parties alleged to have engaged in anti-competitive practices has taken on at least some legal significance within the analytical frameworks that have been developed to assess the lawfulness of such modes of conduct.

For example, whether or not a dominant firm's below-cost pricing strategies or selective customer rebate schemes amount to abusive predatory conduct may turn on whether it was deliberately acting upon a preconceived plan to target its competitors.⁷³ While this focus on the intentions of the dominant firm may be regarded as a little anomalous given that what this branch of the law is ultimately concerned with are the economic impact of such conduct on competition in the market as a whole,⁷⁴ this feature of the competition law regime is potentially explicable on at least three bases. Firstly, examining the intentions of relevant

⁷² However, it has been argued by at least one leading commentator that the reprehensibility of the parties that have infringed the competition law rules ought to be a relevant consideration when determining whether the domestic courts ought to impose civil liability, via the common law tort system, when private actions for damages are brought by injured claimants. See Richard Whish, 'The enforcement of EC competition law in the domestic courts of Member States' [1994] 15 ECLR 60, 65.

⁷³ See section 3(e) of Chapter 3.

⁷⁴ It should be recalled that the ECJ has, in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at [91], declared that "[t]he concept of abuse [of a dominant position] is an *objective* concept relating to the behaviour of an undertaking which is such as to influence the structure of a market... which... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." (Emphasis added) See text accompanying (n 34) of Chapter 3.

parties may have probative value towards predicting the outcomes that are likely to flow from their conduct. Scrutinising the objectives of the parties involved alongside the practices they have engaged in could enable a competition authority or court to draw reliable inferences about the actual or likely adverse anti-competitive effects from such practices.⁷⁵ This could explain the Article 101 TFEU and Chapter I *per se* prohibitions against agreements and other multi-party practices that have as their *object* the prevention, restriction or distortion of competition, where legal liability may arise without having to prove the actual consequential effects of such conduct. Secondly, given the deterrent and punitive objectives underlying the potentially severe financial penalties that may be imposed by the competition authority for infringements of the competition law prohibitions, it is appropriate for the law to take into consideration the *mens rea* of the parties under investigation when assessing the legality of their actions and the gravity of the legal wrong that has been committed.⁷⁶ Thirdly, since the competition law rules translate into potentially intrusive restrictions on the liberty of undertakings to select and pursue competitive strategies of their choice against their trade rivals, it would seem fair that at least some of these liability-creating rules scrutinise the intentions of the defendant before curtailing his autonomy to compete in a capitalistic marketplace.⁷⁷

⁷⁵ As Brandeis J. observed, in the US Supreme Court decision of *Chicago Board of Trade v US*, 246 US 231 (1918) at 238, “knowledge of intent may help the court to interpret facts and to predict consequences”.

⁷⁶ While fines may be imposed by the competition authority for violations of Articles 81 and 82 EC regardless of whether the infringements occurred intentionally or negligently, evidence that the infringement has taken place as a result of negligence is regarded as a mitigating circumstance by the European Commission that might reduce the amount of the fine ultimately payable. See *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C210/2, [29]. Similarly, the Office of Fair Trading is only empowered to impose financial penalties under section 36(3) of the *Competition Act 1998* if it “is satisfied that the infringement has been committed intentionally or negligently”.

⁷⁷ Indeed, it has been argued that private actions based on competition law infringements that are pursued via the English tort law system should “like the economic torts, presuppose intentional conduct” and that the “intention to injure the claimant... is indisputably presumed from the fact that that the anti-competitive practice specifically harmed the claimant”. See Cristian Banfi, ‘Defining the competition torts as intentional wrongs’ [2011] 70 CLJ 83, 83-84, where the author asserts that “the competition torts... are inextricably intertwined with economic torts around intention, which is a decisive limit of tort liability between competitors.”

(c) Competition as a public policy consideration

Competition lies at the core of the market-driven economy. That competition in the marketplace is beneficial to the public at large has been explicitly acknowledged by both the competition law rules and the common law of unfair competition.⁷⁸ Competition between commercial rivals encourages lower prices, higher standards of quality, product developments that correspond to customer demand and more rapid rates of innovation. Recurrent references can be found in the caselaw of both legal frameworks to the public interest in competition as a relevant public policy consideration that influences how distinctions are drawn between lawful and unlawful modes of competitive behaviour. However, striking differences can be seen from the manner in which this public policy consideration has been invoked by each legal regime and its ultimate impact on the eventual scope of their respective legal prohibitions.

Under the common law, the public interest in having robust competition has translated into a conservative judicial approach towards defining the scope of the liability-creating economic torts that would curtail the liberty of traders to pursue aggressive competitive strategies against their rivals.⁷⁹ The importance of pro-competition policy considerations have thus been used as a reason for *not* imposing legal liability.⁸⁰ On the other hand, the competition law rules regard the promotion and protection of competition as the principal basis on which restraints are placed on the freedom of competing undertakings to engage in

⁷⁸ However, English judges have not always embraced this view without qualification and have been prepared to tolerate anti-competitive cartel arrangements in the earlier parts of the twentieth century. See, for example, *A-G of Commonwealth of Australia v Adelaide Steamship* [1913] AC 781 and *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461.

⁷⁹ See section 3(b) of Chapter 2.

⁸⁰ See section 3(b)(ii) of Chapter 2.

various types of multi-party and unilateral conduct. Legal liability under the competition law regime is thus *justified* by the public interest in having effective competition take place in the marketplace.

This dichotomy between *how* competition as a public policy consideration is deployed by both branches of the law warrants further scrutiny. It is invoked within one regime to support a generally non-interventionist approach towards regulating the competitive struggle between rival traders, while the other regime relies upon it as the theoretical backbone for regulatory intervention. However, it would seem that different conceptions of “competition” are held by each of these regimes. Where the common law economic torts are concerned, the defendant’s position – that he should be entitled to a wide amount of latitude to compete aggressively with the claimant whose economic interests have been harmed by his conduct – is buttressed by pro-competition policy considerations. In the eyes of the common law, promoting competition entails preserving, as far as possible, the freedom of the *individual* competitor – the defendant who has inflicted economic loss upon his rival, the claimant, in the course of their competitive struggle – to pursue as broad a range of aggressive competitive strategies as possible without incurring legal liability. In the final analysis, the common law does not appear to look beyond the dynamics of the specific competitive relationship between the parties in each case and focuses its energies on balancing their respective interests against each other.⁸¹

On the other hand, one might regard the competition law rules as adopting a wider and more sophisticated conception of competition as a public policy consideration. When allegations of competition law infringements are raised in a dispute between competitors, *both* the claimant and the defendant invoke pro-competition policy arguments to bolster their

⁸¹ See section 3(a) of Chapter 2.

respective positions. The claimant alleges that the economic injury it has suffered as a result of the defendant's conduct is symptomatic of the harm that has been caused to competition in the market; conversely, the defendant alleges that any economic injury it has caused is the result of its competitive, rather than anti-competitive, behaviour and such injury is the natural and inevitable consequence of the competitive process in a market-based economy.

Furthermore, within the competition law framework, promoting and protecting competition in furtherance of the public interest necessarily requires looking *beyond* individual competitors and the specific economic injury suffered by their rivals as a consequence of their actions.

Protecting competition ultimately requires protecting the competitive process.⁸² When evaluating the lawfulness of these actions under the competition law prohibitions, the legal analysis must take into account the effects of the impugned conduct on *competition in the market as a whole*. In addition to the adverse impact such conduct may have on the injured rival, attention must also be paid to how *other* actual and potential competitors are ultimately affected as well – whether or not their freedom or ability to compete by expanding in, or entering into, the market is significantly impaired. Protecting competition, in the language of competition law, involves ensuring that the conduct complained about does not produce exclusionary market foreclosure effects or erect barriers to market entry.

In contrast, when deciding if a defendant's conduct falls within the scope of the economic torts, the English courts have been reluctant, when evaluating the lawfulness of a defendant's conduct, to place too much reliance on public policy arguments that have to be premised on allegedly positive or negative effects on society at large. This attitude is explicable on the basis that using broad notions of “public policy” in the decision-making

⁸² See section 3(a)(i) of Chapter 3.

process would introduce an unacceptable degree of uncertainty⁸³ to the law and that, even if it was legitimate for judges to take such matters into consideration, the common law courts lacked the necessary means to analyse such policy-related considerations. In the *Mogul Steamship* case, Lord Bramwell, after reiterating the often-cited judicial aphorism that ‘public policy is an unruly horse, and dangerous to ride’, observed that the case before him provided ‘an illustration of the wisdom of these remarks’ and ventured further to say:

No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effects and consequences?⁸⁴

These ‘effects and consequences’ of the defendant’s actions on trade competition in the wider marketplace, and its impact on consumers and the public at large, are thus generally regarded as beyond the common law judge’s scope of inquiry when determining if such conduct falls within the scope of the economic torts. However, as far as the competition law prohibitions are concerned, these are precisely the sorts of considerations that occupy centrestage within the analytical framework that is used to distinguish between lawful competitive behaviour and unlawful anti-competitive behaviour.

(d) Hypothetical benchmarks of “ordinary” or “normal” competition

In trying to distinguish between legitimate and illegitimate modes of competitive behaviour, both legal frameworks make references to idealised standards of “ordinary” or “normal”

⁸³ English judges have been reluctant to place too much weight on policy arguments in arriving at their decisions because, as Lord Campbell CJ explained in *Hilton v Eckersley* (1855) 6 E&B 47hh, 64; 119 ER 781,788, “different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy”.

⁸⁴ (n 11) at 45-46, concluding that he was “by no means sure that the conference did not prevent a waste, and was not good for the public” even though the trial judge had thought it was and had held in favour of the defendants. Similarly, Lord Morris observed, at 50, the practical difficulties of determining whether or not a particular trade practice complained about would be beneficial to the public at large (“I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade....”).

competitive conduct that the commercial actions of traders towards their business rivals should be measured against. These benchmarks are used to describe the vast majority of modes of competition that are regarded as perfectly legitimate and whose consequences, however detrimental to the business interests of the injured claimant, are tolerated as part-and-parcel of a robust competitive process which both legal frameworks recognise as something that is, ultimately, beneficial to the public interest. Within each legal framework, however, the boundaries between this zone of permissible conduct and the narrower spectrum of prohibited conduct are delineated in a way which reflects their respective internal expectations about how trade competition *ought* to take place within a capitalistic market-driven economy. Legal liability is imposed upon a defendant for harming the competitor-claimant in the course of trade competition only if it can be shown that the former's conduct has clearly deviated from these hypothetical behavioural benchmarks.

The scope of what is regarded as “ordinary” or “normal”, and thus legitimate, modes of competitive conduct differs tremendously between the legal frameworks because of their distinct objectives and theoretical foundations. Where the common law economic torts are concerned, a defendant's aggression towards his trade rival attracts liability only if it is shown that unlawful means or illegitimate motives of the right kind are present; otherwise, regardless of the egregiousness of the conduct towards the injured rival or the magnitude of economic harm that has been inflicted upon him, such competitive behaviour will be regarded as a legitimate and ‘ordinary form of competition’ in the eyes of the common law:

The object of every trader is to procure for himself as large a share of the trade he engaged in as he can. If then the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such

shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.⁸⁵

The claimant in that case had tried to argue that the conduct of the defendants, who collectively lowered their prices to unprofitable levels, ‘was done for the purpose of influencing other traders against coming [to compete with them] and so encouraging ruinous competition’ and that this was thus ‘out of the ordinary course of trade’; the swift response from Lord Halsbury was ‘that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.’⁸⁶ In the eyes of the common law, “ordinary competition” encompasses an enormous range of competitive strategies that *every* trader is entitled to deploy against its rivals regardless of its market power or bargaining position. Those injured in the course “ordinary competition” have no recourse to the common law economic torts, even if their injuries were deliberately inflicted by rival traders driven by the most selfish of motives, so long as the aggressor’s conduct has not crossed into one of the categories of misconduct defined by the various proxy devices used by the courts to identify instances of sufficiently reprehensible behaviour.⁸⁷

On the other hand, the notion of “normal competition” takes on a substantially different meaning within the context of the competition law prohibitions when it is used to

⁸⁵ *Mogul Steamship v McGregor* (n 11) 58-59 (Lord Hannen). See text accompanying (n 26) and (n 50) above. In *Allen v Flood* [1898] AC 1, 102, Lord Watson referred to a hypothetical case of a schoolmaster whose school has been injured because a rival establishment has attracted away his students as one which gave rise to no cause of action because it was “obviously in the ordinary course of competition”.

⁸⁶ *Mogul Steamship v McGregor* (n 11) 37.

⁸⁷ See section 3(c)(ii) of Chapter 2.

describe the sorts of competitive conduct that ought to be regarded as lawful. In the context of the Article 102 TFEU and Chapter II prohibitions, what counts as “normal competition”, which is sometimes described as “competition on the merits”,⁸⁸ will vary according to the type of undertaking whose conduct has come under scrutiny and the competitive environment of the market in which it operates. In particular, whether or not the undertaking in question enjoys a position of market dominance, and the degree of that dominance, will have a direct bearing on what sorts of competitive behaviour that undertaking is permitted to engage in as part of “normal competition” in the particular market that it operates within. This category of “normal competition” that the conduct of dominant undertakings is measured against is ultimately a relative benchmark where “normalcy” has to be contextualised within the specific economic structure of the market in which they operate because, in the words of the ECJ:

The concept of abuse...[relates] to the behaviour of an undertaking in a dominant position which is to influence the structure of a market where, *as a result of the 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...* has the effect of hindering the maintenance of the degree of *competition still existing* in the market or the growth of *that competition*.⁸⁹

A dominant undertaking could not, for example, claim that its predatory or selective pricing practices were a part of “normal competition” if such conduct produced anti-competitive exclusionary market foreclosure effects by eliminating its smaller rivals and

⁸⁸ *AstraZeneca v Commission* (n 43).

⁸⁹ *Hoffmann-La Roche v Commission* (n 74) (Emphasis added).

detering market entry by potential competitors. In contrast, such forms of below-cost pricing would, if carried out by non-dominant firms against their rivals, be regarded as a completely unobjectionable instance of “normal competition”.

CHAPTER 5: THE INTERSECTION BETWEEN COMPETITION LAW AND THE COMMON LAW OF UNFAIR COMPETITION

1. Common methodological approaches used to distinguish between lawful and unlawful modes of competitive conduct

In the previous chapter, the dichotomy between the competition law rules and the common law economic torts was explored through illustrations of how they could arrive at contrasting liability conclusions when their respective rules are applied to the same fact patterns. Even when legal liability could be concurrently established under both legal regimes, closer scrutiny of each species of legal liability revealed distinct juridical bases underlying each liability outcome. The discussion then went on to examine the differences between these regimes by analysing selected facets that these legal frameworks appeared to have in common before exposing the fundamentally different policy foundations buttressing these apparent commonalities. In this chapter, the discussion will seek to identify and explore the less superficial, but nevertheless important, structural parallels between these two legal frameworks, focusing in particular on the similarities between the methodological approaches developed by each legal framework to differentiate between legitimate and illegitimate methods of competition.

Moving away from the more visible differences between these two branches of the law that were examined in the previous chapter, the main goal of this chapter is to establish the existence of some common ground between the competition law regime and the common law of unfair competition and to highlight the points of intersection between them which have the potential for doctrinal interaction. The first part of this chapter will highlight a few noteworthy, but not immediately apparent, parallels between the methodological structures of both these legal frameworks that influence how they make assessments of the lawfulness or unlawfulness of the economic injury caused by an undertaking to its rival in the course of trade competition. The discussion here will explain the nature of these commonalities and

explore their impact on how these laws operate to determine if the harm that one competitor has caused to another ought to attract legal liability. The second part of this chapter will then map out the areas in which legal principles from both branches of the law are simultaneously engaged with a view to analysing some of the more interesting, but yet unresolved, legal issues arising from the interaction between these two legal frameworks.

(a) Reliance on proxy mechanisms to identify unlawful conduct

Despite the very different substantive criteria used by each branch of the law to identify modes of competitive conduct that attract legal liability, both of them share a similar structural feature in the design of their respective analytical frameworks. Both legal frameworks have developed legal rules that define the scope of the prohibited conduct by using proxy mechanisms to identify the sorts of competitive behaviour that each finds objectionable. These proxy mechanisms consist of objectively ascertainable criteria that are meant to provide some measure of certainty and predictability to the outer boundaries of what is regarded as legitimate conduct within each legal framework. They are used by tribunals as indirect indicia of the real policy concerns underlying each legal framework – the propriety of the defendant’s behaviour towards the claimant in the case of the common law economic torts (using “unlawful means” as a proxy for explicit assessments of the reprehensibility of the impugned conduct), and the consequential effects on competition arising from the defendant’s actions in the case of the competition law rules (using form-based rules as a proxy for an effects-based assessment of the anti-competitive consequences of the impugned conduct).

As convenient benchmarks that are easier to identify and apply in any given situation where a competitor objects to the harm that has been inflicted upon him by his rival, these proxy mechanisms make the practical administration of these two bodies of law more

manageable, though this comes, as one might expect, at a price. Conceptual coherence and analytical rigour may be compromised when these legal “shorthands” are used in the process of differentiating between lawful and unlawful behaviour.

(i) The Economic Torts: Formalistic legal requirements as proxies for direct assessments of reprehensibility

One of the main themes of Chapter 2 was how the common law of unfair competition paid close attention to the reprehensibility or culpability of the defendant’s conduct towards the injured claimant-competitor when evaluating the legality of such conduct.¹ Rather than engaging directly in making subjective value judgments about the propriety of the defendant’s conduct, and given their reluctance towards making legal distinctions between “fair” and “unfair” conduct, the common law courts chose to develop the economic torts along generally conservative lines and relied instead on what were perhaps perceived as more objective legal criteria as indicators of unlawful behaviour – “unlawful means”, “breach of contract”, “falsehoods” and so forth.² These criteria are used essentially as proxies for identifying instances of sufficiently reprehensible conduct that violate the basic standards of civility which competitors are held to by the common law.³ In the absence of these elements, however egregious the behaviour of the defendant towards the injured competitor-claimant, it is very unlikely that the former’s actions would fall within the scope of these common law prohibitions.

¹ See section 3(c)(i) of Chapter 2.

² See section 3(c)(ii) of Chapter 2.

³ See section 3(b) of Chapter 2. As one commentator has put it, the reluctance of the English courts to define what amounts to “unfair ultra-competitive activity” has led it to develop the law concerned with regulating excessive competition based on concepts such as the “appropriation of property interests... [as] an ‘external’ yardstick of liability”. Peter Cane, *Tort Law and Economic Interests* (2nd edn Clarendon Press, Oxford 1996), 219.

While such a formalistic approach may have helped sharpen the outlines to the boundaries between lawful and unlawful modes of competitive behaviour, it has also crippled the inherent flexibility of the common law to some extent. These self-imposed restraints formulated by the common law courts reflect the unwillingness of English judges to involve themselves in the regulation of how competitors engage each other on the battlefield of commerce and their preference for such matters to be dealt with via legislative mechanisms instead. Only when *other* well-established legal boundaries have been crossed by the defendant's actions – by the commission of an independently actionable civil wrong, for example – will the common law economic torts impose tortious liability upon the defendant.⁴ By strictly insisting upon the presence of these preconditions before the defendant's conduct attracts civil liability, the English courts have consciously reined in the inherent potential of these actions to evolve into robust restraints against unfair competition in the common law marketplace. The growth of the common law of unfair competition has thus been restrained to a great extent by the rigidities of this methodological approach towards demarcating the boundaries between lawful and unlawful modes of conduct that cause economic harm to one's business rivals in the course of trade competition.

⁴ The degree of emphasis which the common law has traditionally placed on independent legal wrongs as a prerequisite for regarding the defendant's conduct as an unlawful mode of "unfair competition" is captured in the frequently-quoted words of Lord Bramwell, from the decision of the House of Lords in *Mogul Steamship v McGregor* [1892] AC 25, 47: "What is unfair that is neither forcible nor fraudulent?" Similar sentiments were echoed across the judgments of the other members of the House of Lords who unanimously rejected the injured claimant's case. The defendants had not engaged in any act of "unlawful obstruction, violence, molestation, or interference... [or] [i]ntimidation, violence, molestation, or the procuring of people to break their contracts" (Lord Halsbury LC, at 37); they had not "used either misrepresentation or compulsion for the purpose of attaining the object of their combination" (Lord Watson, at 43); they had not employed "any trespass, violence, force, fraud or breach of contract, not any tort or violation of any right of the plaintiffs" (Lord Bramwell, at 44); they did not "use... unlawful means" nor did they "invade the rights of another" (Lord Morris, at 50-51); they did not commit "any act of fraud or violence, or of any physical obstruction with the appellants' business" (Lord Field, at 53).

(ii) Competition Law: Per se rules, presumptions and other proxy devices

Proxy mechanisms can also be found within the corpus of legal principles that comprise the competition law regime. In Chapter 3, the use of *per se* rules within the competition law analytical framework was examined, particularly in the context of certain forms of multi-party conduct that have as their “object” the prevention, restriction or distortion of competition.⁵ When conduct – such as price-fixing, output restrictions and market-sharing – is regarded as unlawful *per se* under the competition law rules, they are outlawed because theory and experience suggest that they are inherently detrimental to competition and unlikely to have any redeeming pro-competitive qualities.⁶ These *per se* rules are used as proxies for assessing the anti-competitive effects associated with such conduct, where adverse effects on competition are presumed from the very nature of the conduct impugned. Competition authorities and courts are thus spared the potentially resource-intensive and complex task of predicting and appraising the economic effects generated by such practices on every occasion when they have to be scrutinised.⁷ Similarly, commercial undertakings that require some degree of legal certainty in the course of their strategic planning activities are able to depend on these form-based rules for guidance as to the types of anti-competitive behaviour that they should not engage in.

Apart from the *per se* rules that apply to a very specific category of anti-competitive agreements and collective conduct, other similar proxy mechanisms can also be found elsewhere within the competition law rules relating to anti-competitive unilateral conduct. For example, the reliance on presumptions when evaluating the legality of below-cost pricing

⁵ See sections 1(a)(i) and 3(b) of Chapter 3.

⁶ See the European Commission’s *Guidelines on the application of Article 81(3)* [2004] OJ C101/97, [21].

⁷ For a fuller account of the advantages of relying on *per se* competition rules, see Oliver Black, *Conceptual Foundations of Antitrust* (CUP, Cambridge 2005) 74-75.

practices, where a dominant firm that prices below its average variable costs (AVC)⁸ or its average avoidable costs (AAC)⁹ is presumed to have abused its dominant position by engaging in predatory conduct, operates as another proxy mechanism for identifying unlawful conduct in lieu of direct evaluations of the exclusionary effects produced by such conduct. By the same token, the intentions motivating a dominant firm's conduct may also be relied upon by competition tribunals to draw reliable inferences about the likely adverse consequential effects of such conduct on competition in the market.¹⁰ Similarly, when the efficiency gains generated by a dominant firm's allegedly abusive conduct are invoked as part of an objective justification defence, the competition tribunal may be persuaded to rely on these private gains¹¹ as proxy indicators for how the public at large will benefit from these pro-competitive effects and the overall improvements to consumer welfare that will flow from such conduct.

⁸ See Case 62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, where the ECJ at [71] held, in relation to pricing below one's average variable costs, that "[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss...".

⁹ This is the price benchmark used in the European Commission's *Article 82 Guidance Paper*, [2009] OJ C45/7 at [26] and [64], which explain that AVC and AAC will be the same in most cases, except that the latter, but not the former, will capture any sunk costs incurred by the dominant firm to expand its capacity in order to predate. In the Commission's view, "[i]f a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided. Pricing below AAC will thus in most cases be viewed by the Commission as a clear indication of sacrifice". [63] of the Guidance Paper defines "sacrifice" as a situation where "a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term ... so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm".

¹⁰ See section 3(e) of Chapter 3 and section 3(b) of Chapter 4. Similar presumptive techniques can be found in the common law economic torts as well, where the courts have been prepared to draw adverse inferences against defendants about the consequences of their conduct when it is shown that their actions were in fact driven by dishonest intentions. For example, the tort of passing off does not require an intention to mislead the public to be shown, as a formal requirement, before an operative misrepresentation for the purposes of this tort is established. Instead, all that this tort requires is evidence of actual or likely consumer confusion that has resulted from the defendant's conduct. However, if the claimant is able to show that the defendant did, in fact, intend to deceive the public through his actions, then the court might be more inclined to conclude that some manner of public deception did actually take place. In *Claudius Ash, Sons & Co v Invicta Manufacturing Company* (1912) 29 RPC 465, 475, Earl Loreburn LC observed that "[w]hen once you establish the intent to deceive, it is only a short step to proving that the intent has been successful".

¹¹ This would include "technical improvements in the quality of goods, or a reduction in the cost of production or distribution" which must, according to [30-31] of the Article 82 Guidance Paper (n 9), be taken into account when "weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies" to determine if the dominant firm's conduct is ultimately "likely to result in consumer harm".

These are all examples of convenient signposts used by competition authorities and courts to facilitate the identification of anti-competitive practices without having to directly measure or appraise the specific economic effects arising from the dominant firm's conduct.

(b) Separate rules for multi-party and unilateral conduct

Another common feature of the structure of both the competition law and common law regimes is the division that has emerged within each framework between multi-party and unilateral conduct. The legal principles that have been developed to define the zone of prohibited conduct applicable to defendants who act in concert with each other against the claimant are quite distinct from those principles applicable to defendants who act singly.

The common law regime has developed around several distinct categories of misconduct, with each tort requiring its own set of criteria for legal liability to arise. Liability under the two conspiracy torts requires the defendants to have either collectively used unlawful means to intentionally inflict economic injury upon the claimant or to have collectively acted with the predominant purpose of injuring the claimant, while liability under the remaining torts requires the defendant to cause third parties to behave in ways which are detrimental to the economic interests of the claimant. Each of these single-defendant torts is concerned with a different species of reprehensible behaviour towards the third party – by committing, or threatening to commit, unlawful acts against the third party, by persuading the third party to breach his contract with the claimant, or by lying or making misrepresentations to the third party.

In contrast, the competition law regime is structured around just two general prohibitions from which jurisprudential sub-categories have been developed by tribunals that

have had to apply them on a case-by-case basis to different forms of conduct. One prohibition covers anti-competitive multi-party conduct – agreements, concerted practices and all other forms of collective action – while the other covers unilateral conduct that amounts to an abuse of a dominant position. Only dominant firms are subject to the latter prohibition whose scope encompasses a broad spectrum of unilateral exploitative and exclusionary conduct.

Why have both these branches of law developed separate rules for dealing with unlawful conduct involving the collective behaviour of multiple parties? Would it not have been adequate for these legal regimes to develop *only* primary prohibitions relating to the conduct of single actors, but perhaps supplemented with doctrines of accessory or joint liability where additional parties participate in the commission of such acts? The bifurcated design of these legal frameworks leads one to imagine that there may be underlying justifications for formulating specific legal rules that only apply to multi-party conduct.

Where the economic torts are concerned, the common law courts recognised early on that the actions of those who had strength in numbers could be extremely prejudicial to those who did not, particularly when the former set their sights on collectively causing harm to the latter.¹² A separate cause of action was thus regarded as a necessary in addition to all the other forms of reprehensible conduct that were actionable under the other single-defendant

¹² Many of the seminal cases in which the economic torts were developed involved trade unions and their members around the turn of the twentieth century when some members of the bench may have had concerns about the increasing concentration of economic power in the hands of these labour groups and their potential to injure the economic interests of their employers via industrial action. For a concise account of the “rapid expansion of economic-tort liability” during this era and the legislative responses to key decisions by the House of Lords concerning the common law liability of trade unions, such as *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426, see S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (6th edn Clarendon Press, Oxford 2008), 598-601.

economic torts.¹³ This would explain the rationale buttressing the ‘anomalous’ tort of conspiracy to injure by lawful means:

... a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison.¹⁴

A trader who wants to wreak economic harm upon his competitor is thus more likely to succeed in causing greater injuries if he acts in combination with other like-minded parties than if he acted singly.¹⁵ As such, the common law courts have recognised that situations where defendants have come together to coordinate their attacks against the injured claimant may require judicial scrutiny because:

... the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many.

Thus if several persons agree not to deal at all with a particular individual, as this

¹³ As Professor Cane has put it, “the common law makes the assumption that the element of combination upsets the equality of competition which justifies the law’s basic approach of neutrality”. See Cane (n 3) at 264.

¹⁴ *Quinn v Leathem* [1901] AC 495, 530 (Lord Brampton). Just a few years earlier, the Court of Appeal in *Mogul Steamship v McGregor* (1889) 23 QBD 598, 616 (Bowen LJ) had reaffirmed that “[o]f the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one’s own just rights”.

¹⁵ This structural feature of the conspiracy torts, where more than one party is significantly involved in the misconduct towards the claimant before the latter has an actionable claim at common law, is echoed in the other non-conspiracy economic torts as well. It should be recalled that third parties play essential roles in the defendant’s misconduct towards the claimant where the torts of inducing breach of contract and causing loss by unlawful means are concerned – the third parties are the instruments or vehicles through which economic injury is inflicted upon the claimant. See text accompanying (n 1) of Chapter 2.

could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual.¹⁶

In the eyes of the common law, the act of coming together in combination against a common target is regarded as a particular species of misconduct that has evolved into a distinct branch of the economic torts. This is reflected in the House of Lords' conscious decision to adopt, for the purposes of the tort of conspiracy to injure by unlawful means, a broader definition of the concept of "unlawful means" that differed from the narrower definition it had given to the same concept a few months earlier within the context of the tort of causing loss by unlawful means.¹⁷ While ganging up against the injured claimant attracts liability at common law because of the morally culpable character of such concerted conduct, the rationale for having separate rules for regulating multi-party conduct within the competition law regime is quite different. Acting in concert with one or more other parties attracts competition law liability not because such behaviour is regarded as a form of misconduct, but because of the adverse economic consequences associated with such forms of collusive behaviour.

The essence of competition involves two or more economically independent undertakings being engaged in a continuous process of trade rivalry within a market. In a branch of law that is primarily concerned with proscribing harms to the competitive process, many forms of collective behaviour involving multiple undertakings substituting their economic independence for some form of coordinate arrangement would be fundamentally incompatible with this archetype of adversarial independence. Collusive cooperation between rivals is thus regarded as the antithesis of competitive autonomy. The prohibition against anti-

¹⁶ *Mogul Steamship v McGregor* (n 4) at 60 (Lord Hannen).

¹⁷ See section 2(c)(i) of Chapter 2.

competitive agreements, concerted practices and collusive conduct thus lies at the very core of the competition law framework. This prohibition is, accordingly, much wider in scope compared to the common law conspiracy actions in the sense that it applies not only to collective conduct which injures a targeted rival, but also to conduct where the parties involved agree *not* to compete with each other.¹⁸ Unlawful conduct which falls within the scope of the Article 101 TFEU and Chapter I prohibitions is regarded as “anti-competitive” because the harmful effects of such behaviour on competition in the market, regardless of whether the parties involved have conspired against anyone in particular. Competition law liability also depends on whether the aggregate market power of the parties to the agreement or concerted practice is sufficient for their collective conduct to have an appreciable adverse impact on competition in the relevant market. This facet of the prohibition against anti-competitive multi-party conduct is mirrored in the other major prohibition against anti-competitive unilateral conduct where an assessment of the magnitude of the market foreclosure effects arising from the defendant’s exclusionary conduct is also typically carried out.

While it might have been possible, at least in theory, to construct a competition law framework around a single prohibition against any conduct that has an appreciably adverse effect on the competitive process in a relevant market, experience with the bifurcated design of the existing competition law regime suggests that multi-party conduct, particularly where the parties involved are in a horizontal relationship with each other, poses more readily apparent dangers to the competitive process than situations involving unilateral conduct by a dominant undertaking. Currently, there is far less controversy about whether cartel behaviour or a group boycott ought to be regarded as unlawful, as compared to whether the unilateral

¹⁸ See section 2(a) of Chapter 3.

actions of a dominant undertaking, which might simultaneously generate both foreclosure effects and efficiency gains, ought to be sanctioned or not. This is a noteworthy mirror image of the state of affairs within the realm of the economic torts, where the need for, and legitimacy of, the conspiracy torts has been called into question by tort law academics.¹⁹

(c) Intention as a criterion for liability

Another structural parallel between the competition law and common law regimes is that both of them pay some attention to the intentions of alleged wrongdoer when assessing the legality of his conduct within their respective analytical frameworks. The common law unfair competition actions require some form of intention as an ingredient for tortious liability because it contributes towards the defendant's overall culpability and strengthens the case for regarding his actions as a form of misconduct that ought to be prohibited. In contrast, the significance of the intentions of the parties to the legal assessment under the competition law rules varies between the prohibitions against anti-competitive multi-party conduct and abusive unilateral conduct. Given that the infliction of economic harm upon one's competitors is an inevitable part of the competitive process, which both legal frameworks have consistently recognised as something that is ultimately valuable to the public at large, that both systems may insist upon some form of intentional conduct on the part of the defendant as a precondition for imposing liability – over and above the other conduct-based requirements of their respective legal prohibitions – could reflect a tacitly shared recognition of the importance of not unduly stifling the autonomy of competitors to pursue their respective competitive strategies in the marketplace.

¹⁹ See text accompanying (n 33) to (n 35) of Chapter 2.

(i) The Economic Torts: Intentional conduct by the defendant

Unlawful modes of competition that fall within the scope of the various economic torts require the presence of some form of intention on the part of the tortfeasor. Many of these torts require an intention to cause harm to the injured claimant is required (causing loss by unlawful means, three-party intimidation, three-party deceit, conspiracy to injure by lawful and unlawful means), though lesser forms of intention may suffice for others – including an intention to cause a third party to breach a contract with the claimant (inducing breach of contract) or an intention to communicate falsehoods or make misrepresentations that damage the economic interests of the claimant (malicious falsehood and passing off). The defendant's intentions are analysed by the common law courts as part of an overall package, alongside the character of his conduct and the interests of the claimant that have been damaged, that evaluates the reprehensibility of his conduct and to determine if the gravity of his misconduct outweighs the interest in preserving his liberty to pursue competitive strategies that inflict economic harm upon his rivals.²⁰

The intentions underlying a defendant's actions play a pivotal role in the common law's methodological approach towards distinguishing legitimate forms of aggressive competition and unlawful methods of competition that amount to economic torts. Not only does the common law scrutinise his intentions in relation to his actions, it may also inquire into the motives and objectives underlying those actions.²¹ Where the tort of conspiracy to injure by lawful means is concerned, the investigation is taken even further by the courts in that liability hinges upon whether or not the infliction of harm upon the claimant was, relative to the other motives that the defendants might have had for their actions, the "predominant

²⁰ See sections 3(a) and 3(c)(i) of Chapter 2.

²¹ For example, the intention requirement for the tort of causing loss by unlawful means is satisfied by showing either that the defendant intended to cause economic harm to the claimant – as an end in itself – or that such economic harm to the claimant was simply a means to some other end. See section 2(b)(i) of Chapter 2.

purpose” of the conspiracy.²² This nexus between the defendant’s intentions and the legal characterisation of certain forms of commercial behaviour as “unfair” modes of competitive conduct is also evident in adjacent fields of intellectual property law concerned with restraining the freedom of rival traders to make use of trade marks with a reputation when comparing their goods and services against those supplied by the registered proprietors of such trade marks.²³

(ii) Competition Law: Anti-competitive objectives and exclusionary intention

While the intentions of the parties play a much less prominent role²⁴ in the formulation of the competition law prohibitions, they remain a significant feature of the legal landscape in at least two key areas. Firstly, in relation the Article 101(1) TFEU prohibition, the disjunctive structure of the treaty language – which prohibits multi-party behaviour which has as its ‘object *or* effect the prevention, restriction or distortion of competition’ – enlarges the scope of the prohibition to capture conduct which does not require proof of any actual or likely adverse effects on competition in the market. An agreement between competing undertakings

²² See section 2(c)(ii) of Chapter 2.

²³ When determining if a defendant’s use in comparative advertising of a registered trade mark with a reputation in the United Kingdom amounts to trade mark infringement under the statutory regime by “[taking] unfair advantage of... the distinctive character or the repute of the trade mark” under section 10(3) of the *Trade Marks Act 1994*, the ECJ has directed the English courts to evaluate the intentions behind the defendant’s conduct. For example, it was decided that “unfair” advantage had been taken of the reputation of such a trade mark where the defendant had deliberately adopted packaging for their products that resembled those of the trade mark proprietor, where the similarity “was created intentionally in order to create an association in the mind of the public” between their respective products. Courts are required to assess whether the similarities in the appearance of these products are “intended to take advantage, for promotional purposes, of the distinctive character and the repute of the marks” such that the defendant’s conduct can be regarded as an attempt to “ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation ... the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark”. See Case C-487/07 *L’Oreal SA v Bellure* [2009] OJ C180/6, [47]-[49].

²⁴ For a contrary view, that “the statutory competition torts should be categorised as intentional wrongs, just like the common-law economic torts” where such “intention is inferred from the fact that antitrust infringement affected a particular rival”, see Cristian Banfi, ‘Defining the competition torts as intentional wrongs’ [2011] 70 CLJ 83, 111. It is submitted, with respect, that this perhaps overstates the significance of intention as a defining feature of liability under the competition law regime because it does not adequately account for the very striking effects-based emphasis that characterises contemporary competition law jurisprudence.

to impede a common rival's entry into the market, even if it is unsuccessfully implemented, would be caught by the "object" limb of the prohibition.²⁵ While not, strictly speaking, prerequisites for liability, the intentions of the parties are still routinely used by the competition authority to identify unlawful forms of multi-party conduct:

The assessment of whether or not an agreement has as its object the restriction of competition is based on.... the context of the agreement and the objective aims pursued by it.... the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market... Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.²⁶

Secondly, the intentions held by the dominant firm are regularly scrutinised by competition agencies and tribunals when determining if the conduct it has engaged in ought to be regarded as an abusive practice that infringes the Article 102 TFEU prohibition.²⁷ More specifically, whether or not the dominant firm's actions were motivated by an exclusionary intent – to eliminate competition from smaller rivals by preventing their market entry or expansion – is factored into the legal analysis of instances of alleged predatory behaviour (below-cost predatory pricing and above-cost selective conditional rebates).²⁸ The intentions behind a dominant firm's conduct are taken into account during the legal assessment because they may be helpful towards predicting and understanding the economic effects produced by such conduct.²⁹ Just the anti-competitive objectives of a group of undertakings may be

²⁵ See Okeoghene Odudu, 'Interpreting Article 81(1): Object as Subjective Intention', (2001) 26 *European Law Review* 60, 70 where it is argued that "subjective intention is sufficient to satisfy the object requirement" of Article 81(1) EC.

²⁶ *Article 81(3) Guidelines* (n 6) [22].

²⁷ See section 3(e) of Chapter 3.

²⁸ See section 2(b) of Chapter 3.

²⁹ See section 3(b) of Chapter 4.

considered when establishing liability under the Article 101 TFEU prohibition, the dominant firm's intentions can thus be employed as a sort of proxy mechanism for identifying unilateral conduct that has created, or is likely to create, the sort of anti-competitive effects on the market that the Article 102 TFEU prohibition seeks to guard against.³⁰

2. Substantive Legal Issues arising from the Interaction between Competition Law infringements and the Economic Torts

The interface between the competition law rules and the common law of torts was discussed earlier in Chapter 3 in relation to the private enforcement of civil claims based on infringements of the competition law prohibitions before the English courts. Within the common law legal system, the tort of breach of statutory duty is the formal vehicle through which claimants injured as a result of conduct that falls within the scope of the competition law prohibitions may pursue private law remedies, though it is unclear to what extent the requirements for the traditional version of this tort have had to be relaxed when the tort has been invoked within the context of the competition law statutory framework.³¹ The discussion below will examine the interface between the competition law rules and the common law, focusing in particular on the economic torts that comprise the common law of unfair competition. The frontiers between both these legal frameworks will be explored by examining a selection of specific legal issues that require the simultaneous application of substantive principles from both branches of the law.

³⁰ See discussion above in section 1(a)(ii).

³¹ See section 2(c)(i) of Chapter 3.

(a) Private actions based on competition law infringements and the tort of causing loss by unlawful means

When private litigants first tested the waters of the competition law regime, it was not always entirely clear that the proper channel for them to bring actions of damages was the tort of breach of statutory duty.³² Legal commentators raised concerns about whether it was appropriate for civil liability based on competition law infringements to be imposed via a strict liability tort and whether infringing parties might be unfairly overexposed to such claims.³³ Instead, it has been argued that the more suitable vessel for launching such private actions for damages arising from breaches of the competition law rules was the tort of unlawful interference with trade – otherwise known as the tort of causing loss by unlawful means.³⁴ If the common law courts had chosen to take this path when developing this aspect

³² In *Application des Gaz v Falks Veritas* [1974] Ch 381, 396, Lord Denning observed that Articles 81 and 82 EC “created new torts or wrongs” that went by the names of “undue restriction of competition within the common market” and “abuse of dominant position within the common market”. However, in *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, 144, Lord Diplock regarded the contravention of Article 82 EC as giving rise “to a cause of action in English law... for breach of statutory duty”.

³³ See Mark Hoskins, ‘Garden Cottage revisited: the availability of damages in national courts for breaches of the EEC competition rules’ [1992] ECLR 257, 260, where the author has argued that, notwithstanding the statements made by Lord Diplock in *Garden Cottage Foods* (n 32), using the breach of statutory duty tort to frame actions for breaches of the competition rules would result in “indeterminate liability” for infringing parties and problems of “administrative practicality... due to the potentially infinite number of plaintiffs”. Hoskins has argued out that, because the test for causation used by this tort is a “very unsophisticated” test of factual causation “where the claimant must show that on a balance of probabilities the breach of duty caused or materially contributed to his loss”, there was a real danger that the availability of damages under this tort for competition law infringements could give rise to “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. Similar warnings were echoed by Whish about the dangers of “floodgates” being opened up against dominant undertakings if they were “liable to actions for damages on a very strict basis. See Richard Whish, ‘The Enforcement of EC competition law in the domestic courts of Member States’ [1994] 15 ECLR 60, 64

³⁴ Hoskins (n 33) at 262, has argued that the economic tort for “unlawful interference with the business of another” is a preferable channel for the recovery of private damages arising from breaches of the competition rules because of its stricter requirements – given that an intention to harm the claimant is required under this tort – and that, given the relative novelty of the tort of unlawful interference at the time (based on the then-contemporaneous comments made by the Court of Appeal in *Lonrho v Fayed (No 1)* [1990] 2 QB 479, 491 (Ralph Gibson LJ) about the tort) it “would clearly be easier to base the claim for competition damages on such a new and still developing tort, rather than seeking to ‘squeeze’ such a claim into the more concretely defined limits of a more established, and probably less suitable, cause of action, such as breach of statutory duty...”. Whish (n 33) at 64-65, has also argued that while the English courts have looked to the tort of breach of statutory duty as the leading “‘traditional’ peg on which to hang the action... a more discriminating cause of action might be the tort of wrongful interference” and that “[t]his approach may enable the domestic court to distinguish particularly reprehensible cases, where a plaintiff ought to be compensated by the defendant, from

of the competition law framework, the shape of the tort of causing loss by unlawful means might be very different from what it has become today.

In its present form, the tort of causing loss by unlawful means has evolved into a cause of action which requires an independently actionable wrong to have been committed by the defendant against a third party, where such conduct was intended to cause harm to the claimant, before any civil liability is imposed upon the defendant.³⁵ Not all instances of anti-competitive conduct that fall within the scope of the competition law prohibitions would fit within these narrow parameters, thus making this economic tort an unsuitable host for such private actions because *all* infringements of the competition law rules which cause economic injury should be capable of being translated into private civil claims for damages by these injured parties. For example, an abuse of dominance by below-cost predatory pricing would not satisfy the basic structural requirements of the tort of causing loss by unlawful means. The dominant firm does nothing unlawful towards the third party customers when he deliberately charges them lower prices in order to entice them to switch their orders away from the injured competitor-claimant.³⁶ The dominant firm's actions do not involve any unlawful interference with the third party customers' freedom to deal with the injured competitor-claimant – if anything, by enticing these customers with lower prices, the dominant firm empowers them with an opportunity to exercise their right to choose to purchase the dominant firm's goods on more attractive terms. On the other hand, a dominant firm which abuses its dominance by setting up exclusive dealing relationships with third

those where the harm suffered by the plaintiff is an incidental effect of the defendant's infringement of the competition rules".

³⁵ See section 2(b) of Chapter 2.

³⁶ The dominant firm has not, in the words of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1209, used a metaphorical "club" – "whether it is a physical club or an economic club, a tortious club or an otherwise illegal club" – to inflict injury upon the competitor claimant.

parties so as to impede market access by its rivals might implement its market foreclosure strategy by coercing third parties to cut off their dealings with the injured competitor-claimant. Where, for example, the dominant firm threatens to take unlawful action against these third parties if they do not commit themselves to an exclusive dealing arrangement, its abusive conduct could then fit within the three-party tort of intimidation, a species of the tort of causing loss by unlawful means.³⁷

(b) Competition law infringements as “unlawful means” for the purposes of establishing liability under the tort of causing loss by unlawful means

While it should be fairly clear that the competition law regime *cannot* rely on the common law economic tort of causing loss by unlawful means as the principal legal mechanism for translating all competition law infringements into civil wrongs that give injured competitors rights of private action, the more challenging question which remains unexplored is whether the “unlawful means” requirement of the economic tort can be satisfied by establishing that the defendant has infringed one or more of the competition law prohibitions in its dealings with a third party as a means of intentionally causing harm to the competitor-claimant. In other words, rather than using the unlawful means tort as a host for all private competition law infringement claims – which is not feasible, if the arguments made above are correct – could one recalibrate the legal analysis and characterise competition law infringements as the “unlawful means” upon which civil actions based on the tort of causing loss by unlawful means might be sustained? Within the context of the tort of causing loss by unlawful means,

³⁷ Other instances of the overlap between anti-competitive conduct that infringes the competition law prohibition against abuses of dominance *and* the common law framework of the economic torts have been discussed in sections 2(a) and 2(b) of Chapter 4.

could one argue that the “unlawful means” requirement may be satisfied by showing conduct by the defendant that contravenes the competition law rules?³⁸

According to the House of Lords in *OBG v Allan*,³⁹ the “unlawful means” element for the tort of causing loss by unlawful means requires the defendant to have committed an independently actionable wrong against a third party as a means of causing economic injury to the claimant, with the majority confining the scope of the concept to actionable civil wrongs.⁴⁰ Given that all competition law infringements are, in theory at least, capable of being translated into civil claims for damages actionable under the tort of breach of statutory duty, there do not appear to be any obvious reasons for adopting a definition of “unlawful means” that excludes such instances of anti-competitive conduct so long as the defendant’s actions towards a third party could have allowed the third party to pursue a competition law claim against the defendant.

There is some limited judicial authority to support this proposition, though these cases are not directly on point because they involved breaches of statutory provisions in older competition law statutes that bear little resemblance to the *Competition Act 1998*. In one decision, the New Zealand Court of Appeal held that the “unlawful means” requirement of this economic tort could be satisfied by an infringement of an statutory prohibition against anti-competitive conduct:⁴¹ the defendant trader procured a third party supplier to refuse to

³⁸ For example, in order to punish a particular customer for dealing with a rival supplier, a dominant supplier or a group of suppliers acting in concert with each other might engage in anti-competitive behaviour which targets this rival supplier, thereby driving the rival supplier out of business such that it is unable to supply this particular customer, ultimately causing the latter to suffer economic losses as a result. While the conduct towards the third party (the rival supplier) amounts to an infringement of the competition rules, could it be also argued that the economic tort of causing loss by unlawful means has also been committed against the targeted customer?

³⁹ [2007] UKHL 21. [2008] 1 AC 1.

⁴⁰ *OBG v Allan* (n 39) [49] (Lord Hoffmann).

⁴¹ *Fairbairn Wright v Levin* (1914) 34 NZLR 1.

make supplies to a rival trader, the claimant, where it was the third party's conduct that constituted an offence under the *Commercial Trusts Act 1910*.⁴² The defendant in this case had procured the commission of an anti-competitive act by the third party that was prohibited under a statute that criminalised such conduct.⁴³ The majority of the New Zealand Court of Appeal held that the provisions of the Act did not give any right of private action to individuals who have suffered damage as a result of the breach of any duty created by the Act.⁴⁴ However, the court unanimously held that the defendant's conduct, which amounted to the unlawful procurement of the commission of a criminal offence by a third party, was enough to constitute "unlawful means"⁴⁵ for the purposes of the tort of causing loss by unlawful means. The plaintiff's common law cause of action was premised on the invasion of his right to trade by the illegal means deployed by the defendant against him, even if no right of private action was created by the statute which declared such conduct illegal.⁴⁶

⁴² The statute was described as "An Act for the Repression for Monopolies in Trade or Commerce" which created six penal offences for various species of anti-competitive conduct.

⁴³ *Fairbairn Wright* [n 41] at 20. Section 4 of the Act provided that: "Every person commits an offence who, either as a principal or agent, refuses, either absolutely or except upon disadvantageous or relatively disadvantageous conditions, to sell or supply to any other person... any goods for the reason that the latter person... (b) is not or has not been, or will not become, a member of a commercial trust". The defendant was a member and the agent of a combination of sugar buyers who purchased sugar from the sole sugar manufacturer and supplier in New Zealand, the Colonial Sugar-refining Company. At the request of the defendant and the other members of the combination, the Colonial Sugar-refining Company refused to supply the plaintiff, who was not a member of the combination, with sugar except on very disadvantageous terms with the purpose of excluding the plaintiff from the sugar trade in New Zealand.

⁴⁴ *Fairbairn Wright* [n 41] at 26, where it was held that "the Commercial Trusts Act was passed in the interests of the public at large, and not in those of any particular class of persons. Section 4 appears to be intended to protect against the boycott any traders who are not members of any commercial trust, but this protection is given not in the interests of such traders, but in the interests of the public at large, and in furtherance of the general object of the statute to repress monopolies."

⁴⁵ *Fairbairn Wright* [n 41] at 30, concluding that "[t]he plaintiff's right is to carry on their business freely without interference by the use by rival traders of unlawful means. That right was infringed by the defendant procuring the Sugar Company to refuse to supply sugar to the plaintiffs on some of the grounds specified in section 4 of the Act. A refusal on any of these grounds is unlawful, and the defendant thus used unlawful means for the purposes of injuring the plaintiffs in their trade, and thereby caused them damage."

⁴⁶ *Fairbairn Wright* [n 41] at 18 (Stout CJ), where it was observed that "[i]f... the Commercial Trusts Act has declared that a certain method of trading is illegal, then this right of trading has been invaded because of an illegal means used. The statute enacts that certain means, if used in the sale of sugar... would be illegal."

This case is problematic because its fact pattern does not fit entirely within the definitional parameters articulated by the House of Lords in *OBG v Allan* for this economic tort. The House of Lords held that the “unlawful means” requirement for this economic tort requires a fact pattern in which a legal wrong is committed against the third party, and not against the claimant directly, and for it to be a civil wrong that is independently actionable by the third party against the defendant. Neither of these characteristics is present when the unlawful conduct of the defendant is the procurement of a criminal act by the third party. Without satisfying this particular conception of the “unlawful means” requirement, it is difficult to rationalise the imposition of liability under this model of the economic tort even if the defendant, whose criminal acts would indicate a significant degree of reprehensibility, had clearly intended to cause harm to the claimant through his actions.⁴⁷ What the defendant had essentially done in this case was to get the *third party* to commit an unlawful act – procuring the commission of anti-competitive conduct that was prohibited under the New Zealand competition law statute – that caused economic harm to the claimant, by. The character of the defendant’s actions in this case thus bears a closer resemblance to the conduct of a tortfeasor that has induced a third party to breach his contract with the claimant (secondary liability) or combined together with a third party to inflict economic injury upon the claimant (primary liability under one of the conspiracy torts).⁴⁸

⁴⁷ It should be recalled, however, the House of Lords has been prepared to accept that the commission of a crime might qualify as “unlawful means” within the context of another economic tort – the tort of conspiracy to injure by unlawful means. See section 2(c)(i) of Chapter 2.

⁴⁸ That the collaborative character of the relationship between the defendant and the third party could raise an arguable case for tortious liability under one of the conspiracy torts was recognised by the New Zealand Court of Appeal which briefly considered the defendant’s potential liability tort of conspiracy to injure by lawful means, *Fairbairn Wright* [n 41] at 28, but liability under this tort was ultimately rejected because it was “not suggested that the acts complained of were done by the parties concerned for the mere purpose of injuring the plaintiffs, or with any view other than that of advancing the interests of the members of the ring or combination.” For the possibility of framing an action under the other conspiracy tort – the unlawful means conspiracy tort – on the assumption that the “unlawful means” requirement for the purposes of the conspiracy tort is interpreted differently from the tort of causing loss by unlawful means, see discussion below in section 2(d).

In another case, the defendants were officials in a federation of newspaper retailers who, acting through the members of the federation, instructed third party wholesalers to stop purchasing the newspaper published by the claimant for a period of time.⁴⁹ The English Court of Appeal held that the defendant's actions contravened the *Restrictive Trade Practices Act 1956*,⁵⁰ even though the final decision on the unlawfulness of the defendant's actions rested with the Restrictive Practices Court, and that the interlocutory injunction awarded by the lower court ought to be upheld because such unlawful conduct qualified as the "unlawful means" necessary to establish the plaintiff's *prima facie* case that the tort of causing loss by unlawful means had been committed by the defendant.⁵¹ Once again, one of the main difficulties of fitting this fact pattern into the House of Lords' modern formulation of the tort lies in the "unlawful means" requirement – more specifically, the nature of the defendant's unlawful conduct *vis a vis* the third party. Strictly speaking, no civil wrong was committed against the third party,⁵² and the third party would not have had an independent cause of action against the defendant on this fact pattern, at least not under the competition law framework in existence at that time. However, if these facts were transposed into the present-

⁴⁹ *Daily Mirror Newspapers v Gardner* [1968] 2 QB 762. The defendant's boycott was part of a trade dispute between the newspaper retailers and the newspaper publisher, where the defendant's conduct was in retaliation to the latter's decision to reduce the margins they would receive from their newspaper sales.

⁵⁰ Under this now-repealed Act, the boycott arranged by the defendants was a restrictive agreement registrable under section 6(7) of the Act, and that such an agreement was, under section 21 of the Act, "deemed to be contrary to the public interest" unless one of the specific exceptions provided for in the Act was established. The defendant was unable to bring the agreement within any of these statutory exceptions.

⁵¹ *Daily Mirror Newspapers* (n 49) at 783 (Lord Denning MR): "I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough."

⁵² Even though the boycott agreement orchestrated by the defendants violated the provisions of a competition law statute, their unlawful acts did not give rise to an actionable wrong being committed by the defendant against the third party. As critics of this case have pointed out, the only legal consequence of infringing the *Restrictive Trade Practices Act 1956* was to render the agreement void and contractually unenforceable which, on the authority of the *Mogul Steamship* case (n 4), merely resulted in a contractual restraint of trade which, while contrary to public policy, could not constitute "unlawful means" for the purposes of imposing liability under the economic torts upon the defendants in favour of the injured claimant. See Philip Sales and Daniel Stilitz, 'Intentional infliction of harm by unlawful means' (1999) 115 LQR 411, 419.

day competition law framework, it might be possible to reconstruct a stronger case for imposing common law liability under the contemporary model of the tort of causing loss by unlawful means.

A group boycott orchestrated through the collective behaviour of competing newspaper retailers and upstream wholesalers to inflict economic harm upon a newspaper publisher might be regarded as an agreement that has as its object or effect the ‘prevention, restriction or distortion of competition’ that contravenes the Article 101 TFEU or Chapter I prohibitions. These are essentially buyers in a market working together with intermediary third parties – the wholesalers – to collectively punish a seller who has made an unpopular pricing decision. By acting in combination with each other, the buyers are able to exploit their collective market power in their dealings with wholesalers and upstream suppliers by restraining sellers from taking commercial decisions that are incompatible with their own economic interests. While the third party wholesalers are not themselves primary targets of the anti-competitive boycott spearheaded by the downstream retailers, they may have suffered economic losses from being compelled to discontinue their business dealings with the targeted seller – losses which may be potentially recoverable from the downstream retailers in a private action for damages arising from the anti-competitive agreement between them.⁵³ If the agreement between these retailers and wholesalers to engage in a group boycott against the seller is an infringement of the competition rules, and on the assumption that the wholesalers could have recovered civil damages against the retailers in a civil action

⁵³ By agreeing to suspend their wholesale orders of the particular newspaper targeted by the retailers, the wholesalers would suffer economic losses in the form of lost profits from diminished resale volume of these newspapers. Even though he is a co-contractor to an illegal agreement, a party to an agreement which infringes the Article 81 EC prohibition cannot be, according to the ECJ, automatically barred from bringing a private action for damages against the other contracting party in respect of that infringement. When deciding if the common law *ex turpi causa* or illegality doctrines ought to bar a claim made by one party to an illegal contract against another contracting party, English courts are required to take into account the legal and economic context of the agreement, paying particular attention to the relative bargaining positions of the parties to the agreement. See Case C-453/99 *Courage v Crehan* [2001] ECR-I 6297, [28] and [32].

based on these competition law infringements, then the injured newspaper publisher who was intentionally harmed by the retailers' conduct might be able to construct a case for itself based on the tort of causing loss by unlawful means.

One might imagine other scenarios with slightly different fact patterns where other potentially actionable competition law infringements are committed as a means of causing economic harm to a specifically targeted trade rival. For example, if the defendant newspaper retailers had entered into an exclusive dealing arrangement with a third party wholesaler to prevent them from supplying newspapers to a rival retailer – conduct prohibited either as an anti-competitive vertical agreement under the Article 101 TFEU or the Chapter I prohibitions, or as an abuse of a position of collective dominance under the Article 102 TFEU or the Chapter II prohibitions – the exclusionary foreclosure effects of this unlawful vertical agreement could cause actual economic injury to the rival retailer. Having suffered such economic harm, which is an essential element of a common law claim under any of the economic torts, though irrelevant towards establishing the competition law infringement itself, the injured rival retailer may be able to bring a civil action based on the tort of causing loss by unlawful means. This assumes, however, that the third party wholesaler who has been locked into the exclusive dealing arrangement *could* have, at least in theory, exercised its right of private action under the competition law regime against the defendants *if* it had suffered any economic losses as a result of being subject to the exclusivity restraints that require it to discontinue any commercial dealings it might have previously had with the injured rival retailer.⁵⁴

⁵⁴ Even if the third party had not suffered any economic losses that he could have recovered from the defendant, this would not be fatal to the claimant's action against the defendant based on the tort of causing loss by unlawful means. See 2(b)(i) of Chapter 2 at fn 19. It should be recalled that, under Lord Hoffmann's formulation of the "unlawful means" criterion which was adopted by the majority in *OBG v Allan* (n 39) [49], the independently actionable wrong that has interfered with the freedom of the third party to deal with the

The examples given above involve defendants entering into unlawful anti-competitive agreements with a third party so as to constrain the latter's liberty to trade with the targeted rival, conduct which should satisfy Lord Hoffmann's criterion for what sort of civil wrongs should count as "unlawful means" for the purposes of this tort since they are 'acts intended to *cause loss to the claimant by interfering with the freedom of a third party* in a way which is unlawful as against that third party'.⁵⁵

(c) Damages recoverable for private actions based on competition law infringements and civil claims based on the economic torts

If there are indeed circumstances where the defendant's anti-competitive conduct attracts liability under the competition law prohibitions while simultaneously also qualifying as "unlawful means" within the contemporary parameters of the tort of causing loss by unlawful means, the injured competitor may have the option of bringing an action under the tort of causing loss by unlawful means rather than pursuing a "standard" private action within the competition law framework. When given the choice between framing his claim under the tort of breach of statutory duty to sustain a private action for a competition law infringement, and launching a civil claim based on a common law economic tort such as the tort of causing loss by unlawful means, the injured competitor might regard the latter as a more attractive route to take compared to the former, both conceptually⁵⁶ and practically, particularly in view of the potentially stronger civil remedies available associated with the economic torts.

claimant "will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss."

⁵⁵ *OBG v Allan* (n 39) [51]. (Emphasis added).

⁵⁶ From a theoretical perspective, pursuing a private claim for damages under the economic tort of causing loss by unlawful means also avoids the conceptual difficulties associated with using the tort of breach of statutory duty, at least in its traditional form, as a vehicle for private actions based on competition law infringements. The theoretical snag lies in the problem of reconciling the legislative objectives of these competition law

Rather than pursuing his claim for damages via the tort of breach of statutory duty in a conventional private action in respect of a competition law infringement, it could be strategically more advantageous for an injured competitor-claimant to frame his cause of action under one of the economic torts and invoke the competition law infringement simply as one of the constitutive elements of that tort instead. While the English courts have expressed reluctance towards awarding damages other than on a strictly compensatory basis when private actions are pursued for infringements of the competition law prohibitions, there remains the distinct possibility that exemplary damages⁵⁷ may be awarded by the courts to claimants suing under the economic torts in limited situations of extremely reprehensible misconduct by the defendant.

With regard to a preliminary issue concerning the availability of exemplary damages to private claimants, who were vitamin purchasers overcharged by the members of a cartel, suing in a “follow on” action after the European Commission had fined the cartel members, the English High Court gave a number of reasons why it chose not to award such damages to the claimants at the end of the trial.⁵⁸ The main objection was based on the Community law principle of “double jeopardy”, where it would be unfair to punish the defendants twice with an award of punitive damages over and above the fines already levied upon them by the

prohibitions (to protect competition, rather than individual competitors) and the criterion which requires that the statutory duty breached was one owed to claimants like the injured competitor (that the losses suffered by the claimant were the type of economic injury that the statutory duty was designed to protect against). See discussion in section 2(c)(i) of Chapter 3.

⁵⁷ See *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, [51], where Lord Nicholls observed that “[e]xemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.”

⁵⁸ *Devenish Nutrition and others v Sanofi-Aventis and others* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637 [69] (Lewinson J).

competition authority.⁵⁹ Moreover, it was regarded as inappropriate for a national court to assess the adequacy of the fines imposed by the European Commission to determine if it was necessary to award exemplary damages to punish the defendants further and deter others from engaging in such anti-competitive conduct.⁶⁰ While acknowledging that English tort law did recognise the availability of exemplary damages in highly limited circumstances, and that the actions of the defendant cartelists in this case fell within the second category of cases identified by the House of Lords in *Rookes v Barnard*⁶¹ in which such damages may be available (where the tortfeasor acted with cynical disregard for his victims' rights and believed that the financial gains from his wrongdoings would have exceeded the probable compensation payable), it was held the fact that the defendants had already been fined by the competition authority was a powerful factor against the award of exemplary damages.⁶² Furthermore, there was the fact that the claimants were part of a larger class of victims affected by the wrongful conduct of the cartelists and would reap a windfall which would not

⁵⁹ *Devenish Nutrition* (n 58) at [52], citing the principle of *non bis in idem*. At [48], it was observed that “in anti-trust cases the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour.”

⁶⁰ Some members of the cartel had had their fines reduced or commuted under the leniency programmes offered by the European Commission in exchange for their cooperation in the investigation process. An award of exemplary damages would have to be justified on the basis that the fines imposed by the competition authority were insufficient to punish and deter such conduct, but doing so would be contrary to Article 16(1) of Regulation 1/2003 (*Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* [2003] OJ L1/1) which provides that “[w]hen national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.”

⁶¹ [1964] AC 1129, 1126. “Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.”

⁶² *Devenish Nutrition* (n 58) at [64].

have been available to other equally affected non-parties in other jurisdictions where exemplary damages were not available.⁶³

Such obstacles to an award of exemplary damages are less likely to be encountered if the injured competitor-claimant chose to sue under the economic tort of causing loss by unlawful means instead, particularly if the defendant has not already been fined by the competition authority for infringing the competition law rules.⁶⁴ Rather than having to navigate through the complexities of an additional layer of legal analysis regarding the compatibility of an award of exemplary damages for breaches of the competition rules with principles of Community law, an English court would just have to focus its attention on analysing the common law criteria for when such damages may be available: that the defendant deserved to be punished for his outrageous conduct, that an award of exemplary damages was required to ensure that the defendant was adequately punished, and that the defendant's conduct fell within one of the three categories defined by the House of Lords in *Rookes v Barnard*.⁶⁵ Where the defendant has caused economic injury to the claimant by deliberately engaging in anti-competitive conduct in order to advance its own commercial interests, it may not be too difficult to show that such behaviour falls within the second category of tortious conduct identified in *Rookes v Barnard*, while the other requirements –

⁶³ *Devenish Nutrition* (n 58) at [65]-[69], noting the problems of assessing damages in cases where there were multiple claimants who may have different entitlements because of differences in the gravity of the injury each has suffered as a result of defendants' conduct, an issue raised by Stuart-Smith LJ in *AB and others v South West Water Services Ltd* [1993] 1 QB 507, 527.

⁶⁴ The question of whether exemplary damages could have been awarded by an English court in respect of a breach of Article 81 EC *before* an investigation by the European competition authority was apparently posed by Mr Justice Lewinson during the course of the trial in *Devenish Nutrition* (n 58) but it was not, unfortunately, explored in his judgment. See Tony Singla, 'The Remedies (Not) Available for Breaches of Article 81EC', [2008] 29(3) ECLR 201, 203-204, where the author also concludes that this was an "easy case" for the English court to decline to make an award of exemplary damages because of the record-setting fines that had already been imposed by the European Commission on the members of the vitamins cartel.

⁶⁵ (n 61) at 1226-1227 (Lord Devlin). The three categories are (i) oppressive, arbitrary or unconstitutional action by the servants of the government; (ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and (iii) where exemplary damages are expressly authorised by statute.

that such conduct *deserves* a punitive response and to ensure that *adequate* punishment is meted out – could arguably be satisfied when the defendant has reprehensibly set out to financially ruin the competitor-claimant and eliminate the latter from the market, and when no penalties have been independently levied by the competition authority.

(d) The conspiracy torts and competition law infringements

Two significant issues arise from the interaction between the common law economic torts concerned with conspiracies to injure the claimant and the competition law prohibitions.

Firstly, what is the significance, if any, of the availability of competition law prohibitions against anti-competitive agreements (the Article 101 TFEU / Chapter I prohibitions) on the future role of the conspiracy torts, particularly the tort of conspiracy to injure by *lawful* means, in regulating concerted combinations between traders that target and injure their trade rivals? Secondly, echoing the discussion above concerning the connection between the tort of causing loss by *unlawful* means and the competition law prohibitions,⁶⁶ should it matter whether or not competition law infringements might qualify as “unlawful means” for the purposes of the tort of conspiracy to injure by unlawful means?

In relation to the first issue, it should be recalled that the potential scope of the tort of conspiracy to injure by *lawful* means is heavily circumscribed by the formidable mental element required of the defendants before any common law liability is imposed upon them for the economic injuries they have collectively inflicted, without deploying any unlawful means whatsoever, upon the claimant. The claimant can succeed under this common law action if, and only if, he can show that the predominant purpose of the conspirators was to

⁶⁶ See section 2(b) above.

inflict such harm upon him.⁶⁷ It should also be recalled, on the other hand, that no equivalent mental requirement is necessary in order to fall within the scope of the competition law prohibition against anti-competitive agreements, making it relatively less challenging, on the same facts, for the injured competitor to construct a case for himself against the conspiring defendants under this legal framework instead of relying on the common law.⁶⁸ When the conspiracy to cause economic harm takes place within the context of trade competition between the defendants and the injured claimant, the likelihood of the latter succeeding under the lawful means conspiracy tort is extremely slim because of the near-impossibility of establishing the requisite degree of intention to cause harm to the claimant underlying the defendants' actions. This is because the defendants will, by virtue of their status as trade rivals engaged in competition against the claimant, always be in a position to argue that their otherwise lawful actions are motivated by a legitimate mercantile purpose – the advancement of their own commercial interests – which would then have the overall effect of “diluting” any intention to cause harm to the claimant they might also possess at the same time. The mental element required under the tort of conspiracy to injure by lawful means would only be satisfied in highly unusual cases where, for example, the defendants had a vendetta towards, or held some sort of personal vindictive grudge against, the targeted claimant such that their desire to cause harm to the latter could be regarded as the principal reason behind their actions. As such, the need to show that the defendants' intention to harm the claimant was their “predominant purpose” before any tortious liability can arise means that the practical utility of this conspiracy tort, when applied to rival trading parties in competition with each other, reaches a vanishing point. In these types of conspiracy cases, it would almost always

⁶⁷ See section 2(c)(ii) of Chapter 2.

⁶⁸ See the discussion in section 2(a) of Chapter 4 which illustrated the contrasting liability outcomes arrived at when the common law tort of conspiracy to injure by lawful means and the competition law prohibition against anti-competitive agreements are each applied to the same fact pattern involving members of a shipping conference who work together to drive a common rival out of the market.

be more viable for the injured competitor-claimant to frame his claim as a private action based on the defendants' infringement of the Article 101 TFEU / Chapter I prohibitions so long as it can be shown the latter's misconduct has had an appreciable adverse effect on competition in the market.

There might be exceptional situations where the tort of conspiracy to injure by lawful means could possibly play a meaningful role in providing relief to the injured victim of a commercial combination. If, for example, the defendants collectively enjoyed a near-monopoly position in the market while the claimant only possessed a very small market share and did not pose a realistic threat to the defendants' market positions, one could argue that the defendants' conspiracy against the injured claimant was in fact principally motivated by an intention to cause economic harm to the latter simply because any commercial gains they stood to reap from their conduct would probably have been negligible given their pre-existing positions of market strength. The defendants' conspiracy against such a commercially insignificant rival might be regarded as collective conduct that is driven by this objective, to such a large extent that it can be construed as the *predominant* purpose behind the combination, of inflicting economic harm upon this trade rival. In such circumstances, the defendants' could not have reasonably believed that their own commercial interests were realistically jeopardised by the business activities of such a small player in the market and it would be difficult for them to make a credible claim that their conspiracy to cause harm to the latter was predominantly motivated by some other purpose.⁶⁹ Having said that, the

⁶⁹ Where the economic harm inflicted upon the defendants' trade rival is manifestly disproportionate to any tangible commercial benefits that they might stand to make gain, a court could infer that the infliction of such injury was the predominant purpose of the defendants' conspiracy. See *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435, 447, where Viscount Simon LC concluded that a combination by trade unionists and mill owners to cause economic injury to another targeted mill owner was not tortious because "the predominant object... was to benefit their trade union members by preventing undercutting and unregulated competition, and so helping to secure the economic stability of the island industry" and that a combination with such an object was "not unlawful, because the object is the legitimate promotion of the interests of the combiners and because the damage necessarily inflicted on (the mill operator) is not... the real purpose of the combination". His

defendants might allege that their conspiracy against their targeted rival was, ultimately, motivated by the pursuit of their own self-interest because eliminating such a small trade rival from the market would send a signal deterring other potential competitors from contemplating entry into the market in the future. As such, while the tort of conspiracy to injure by lawful means might, at least in theory, be potentially invoked by the injured trade rival against the members commercial combination that have acted against him within this limited category of cases, its role would still be largely eclipsed by the Article 101 TFEU / Chapter I prohibitions to the extent that such conduct would clearly be regarded as a competition law infringement that the injured trade rival could pursue as a private action against these conspirators, as parties to an anti-competitive agreement,⁷⁰ though there may still be residual remedial advantages to suing under the economic torts in the appropriate factual circumstances.⁷¹

In contrast, the role of the tort of conspiracy to injure by *unlawful* means should remain generally unaffected by the co-existence of the Article 101 TFEU / Chapter I prohibitions because of their relatively more distinct spheres of application.⁷² These competition law prohibitions may be triggered regardless of whether lawful or unlawful

Lordship observed that while liability cannot be determined solely by “asking whether the damage inflicted to secure this purpose is disproportionately severe”, this disproportionality of harm “may throw doubts on the *bona fides* of the avowed purpose”.

⁷⁰ This assumes, of course, that the conspiracy to injure the targeted trade rival is regarded as having an appreciably adverse effect on competition. In other cases, the economic harm that has been suffered by the victim of the trade conspiracy is actionable, if at all, only under the common law.

⁷¹ See section 2(c) above.

⁷² Some areas of overlap between the competition law prohibition against anti-competitive agreements and the common law tort of conspiracy to injure by unlawful means are more visible than others. Bid-rigging activities, for example, may be actionable under both regimes because they involve collective action by undertakings who seek to deceive a customer into thinking that the tenders or offers made by the lowest bidder’s competitors are “genuine” bids when they are, in fact, deliberately pegged at a higher price level to enable a pre-designated undertaking to win the bid. The element of fraud and deception involved in such activities may thus qualify as “unlawful means” for the purposes of the unlawful means conspiracy tort, where the victim of the conspiracy is the customer who ends up paying more for the tendered services than if the participants to this concerted practice had submitted their bids independently.

means have been employed by the members of the combination so long as they have acted with the object, or if their collective conduct has had the effect, of preventing, restricting or distorting competition in the market. The tort of conspiracy to injure by unlawful means is probably a useful additional weapon in the arsenal of the injured competitor quite apart from the competition law prohibitions because of its potentially broader scope of application.

Unlike the competition law prohibitions which can only give rise to a right of private action if the overall effect of the combination produces an appreciable effect on competition in the market as a whole, the unlawful means conspiracy tort can be invoked so long as the intended victim of the conspiracy suffers economic injury as a result of the unlawful means employed by the defendants. Liability under this economic tort can thus arise even if the parties to the conspiracy are small enterprises with trivial market shares, whose conduct is less likely to come under the scrutiny of the competition law prohibitions, so long as their conduct involves some form of independent legal wrongdoing – such as collectively persuading a third party supplier or distributor to commit a breach its supply or distribution contract with the injured claimant (the tort of inducing breach of contract), or collectively pressuring a third party supplier or distributor with unlawful threats in order to discourage them from having future dealings with the injured claimant (the tort of intimidation, as a species of the tort of causing loss by unlawful means).

This brings us to the second issue concerning the scope of the “unlawful means” element of the tort of causing loss by unlawful means – does this requirement encompass conduct that is regarded as unlawful under the competition law prohibitions? In other words, can a breach of the statutory prohibitions against anti-competitive conduct amount to the necessary “unlawful means” for the purposes of establishing common law liability under this particular conspiracy tort? The English courts have not addressed this issue specifically, though they have indicated that the definition of what counts as “unlawful means” for the

purposes of this conspiracy tort is not constrained by the definition that is given to the same requirement within the context of the tripartite tort of causing loss by unlawful means.

Unlike the tort of causing loss by unlawful means which requires the defendant's conduct towards the third party to involve a civil wrong that is independently actionable by the third party against the defendant,⁷³ "unlawful means" for the purposes of the unlawful means conspiracy tort has been held by the House of Lords to also include both common law and statutory criminal offences.⁷⁴ Their lordships did, however, confess that this was a 'very tricky area'⁷⁵ and that judicial caution had to be exercised because '[n]ot every criminal act committed in order to injure can or should give rise to tortious liability to the person injured.'⁷⁶ Members of the House of Lords expressed different views as to what additional criteria had to be satisfied before a crime could be regarded as satisfying the "unlawful means" component of this conspiracy tort.

In Lord Walker's view, the criminal conduct had to constitute the *means*, or what Lord Nicholls in *OBG* described as the 'instrumentality',⁷⁷ by which the harm was inflicted upon the claimant;⁷⁸ this suggests that the criminal wrong must have been deliberately perpetrated as the means for achieving the defendants' ends of injuring the claimant. In Lord Mance's view, just as it was relevant in the context of the tort of causing loss by unlawful

⁷³ See section 2(b)(i) of Chapter 2.

⁷⁴ See section 2(c)(i) of Chapter 2 and *Total Network v Revenue and Customs* [2008] UKHL 19, [2008] 1 AC 1174 [45], [56], [95].

⁷⁵ *Total Network v Revenue and Customs* (n 74) [219] (Lord Neuberger).

⁷⁶ *Total Network v Revenue and Customs* (n 74) [119] (Lord Mance).

⁷⁷ *OBG v Allan* (n 39) [159].

⁷⁸ *Total Network v Revenue and Customs* (n 74) [95]-[96], where Lord Walker urged his peers to "clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means... of intentionally inflicting harm" while emphasising that "in the phrase 'unlawful means' each word has an important part to play. It is not enough that there is an element of unlawfulness somewhere in the story."

means, in determining whether civil liability should be imposed on the defendants under this conspiracy tort, there was ‘a legitimate objection to making liability “depend on whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant”’; such a concern would not arise where the criminal ‘offence exists in its very nature to protect the [claimant]’.⁷⁹ In Lord Neuberger’s view, the courts had to be mindful that, where the criminal offence was created by a statute, ‘it [was] not for the courts to create a cause of action out of... a criminal statute which Parliament did not intend to be actionable in private law’;⁸⁰ this objection could be overcome if ‘the crime involved... has as its purpose the protection of the victim of the conspiracy.’⁸¹ It was, however, unanimously agreed by the members of the House of Lords in the *Total Network* case that the common law crime of cheating the Revenue could be regarded as sufficient to satisfy the “unlawful means” requirement of the tort of conspiracy to injure by unlawful means because the ‘injury to the claimant [was] the direct, inevitable and foreseeable result of the conspiracy succeeding, and [the crime could] be said to exist for the protection of the victim.’⁸²

Competition law infringements are not generally regarded as criminal wrongs,⁸³ with the exception of the cartel offences that were introduced in the *Enterprise Act 2002*,⁸⁴ even

⁷⁹ *Total Network v Revenue and Customs* (n 74) [119], [120]. (citing Lord Hoffmann in *OBG v Allan* (n 39) [159]).

⁸⁰ *Total Network v Revenue and Customs* (n 74) [220] (citing Lord Hoffmann in *OBG v Allan* (n 39) [57]).

⁸¹ *Total Network v Revenue and Customs* (n 74) [221].

⁸² *Total Network v Revenue and Customs* (n 74) [224] (Lord Neuberger).

⁸³ See *Norris v Judgment – Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920 [52] where the House of Lords concluded, after a sweeping survey of the common law starting from the late 19th century and the legislative instruments that regulated anti-competitive agreements from the mid-20th century, that there had never been a common law or statutory offence of price-fixing until cartels were statutorily criminalized in 2002.

⁸⁴ See section 188(1) of the *Enterprise Act 2002* (c. 40) which provides that “[a]n individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or

though financial penalties may be imposed by competition authorities as part of the remedial measures that may be taken against those that have been successfully prosecuted for engaging in anti-competitive behaviour. To the extent that a competition law infringement gives an injured competitor an independent right of private action in the form of a civil claim under the tort of breach of statutory duty, such wrongful conduct might readily qualify as “unlawful means” under the narrower category of civil wrongs that was espoused by Lord Hoffmann in *OBG v Allan*. However, where the anti-competitive conduct in question does not, for whatever reason, give rise to a corresponding civil claim by an injured party, the interesting question is whether such infringing conduct can be used, given their status as “quasi-crimes” or statutory “offences”, as the “unlawful means” necessary to support an action under the tort of conspiracy to injure by unlawful means. These statutory prohibitions may not satisfy all of the different criteria, set out above, articulated by the judges in the House of Lords in the *Total Network* case for identifying which types of crimes ought to be capable of qualifying as “unlawful means” for the purposes of the unlawful means conspiracy tort. Many instances of anti-competitive conduct are motivated by exclusionary market foreclosure objectives and could satisfy the requirement that they have been used as the *means* by which economic harm is inflicted upon the targeted claimant. Moreover, there is no real objection on the grounds that Parliament did not intend for these statutory prohibitions to be actionable in private law given the availability of rights of private action within the competition law framework. However, one might not be able to confidently dismiss the assertion that the reasons why anti-competitive behaviour is regarded as unlawful, and hence wrongful, have ‘nothing to do

implemented, arrangements of the following kind [set out in section 188(2)] relating to at least two undertakings (A and B)”; the arrangements specified in section 188(2) include price-fixing arrangements, output restriction or supply prevention arrangements, market-sharing arrangements and bid-rigging arrangements.

with the damage inflicted upon the claimant' in all cases.⁸⁵ Unlike the common law crime of cheating the Revenue that featured in the *Total Network* case, it might be more challenging to establish the requisite nexus between the justifications for the legal prohibition against a particular instance of anti-competitive conduct and the economic harm that has been suffered by the injured claimant as a result of such conduct, particularly since these competition law prohibitions are generally regarded as more concerned with the protection of the competitive process rather than protecting the individual injured competitor.⁸⁶

If the tort of conspiracy to injure by unlawful means could include competition law infringements, even if only in some circumstances, as valid forms of “unlawful means” that could give rise to civil liability under the common law, the potential availability of this economic tort to an injured party, over and above whatever private remedy available to him from the competition law framework, could strengthen his legal position against those that have combined against him. It is clear from the judgments in the *Total Network* case that the House of Lords did not consider the unlawful means conspiracy tort to be simply a form of

⁸⁵ For example, the intended victim of the conspiracy may be an *individual stakeholder* who holds an economic interest of some sort in a *commercial undertaking* that has suffered business losses when its competitors conspire to commit a competition law infringement against that *commercial undertaking*. Even though the anti-competitive conduct that has occurred involves collective conduct that produces financially detrimental effects upon the *commercial undertaking*, the primary target of the conspiracy is actually the *individual stakeholder* who will suffer economic harm when the value of his stakeholding in the injured *commercial undertaking* is consequentially diminished. The anti-competitive harm caused to the *commercial undertaking* may thus be regarded as the unlawful means by which economic injury is inflicted upon the *individual stakeholder*. In such circumstances, however, the reason why the collective conduct of competitors towards the *commercial undertaking* is wrongful (i.e. the rationale underlying the competition law prohibition which regards such conduct as anti-competitive) is legally distinct from the reason why the conspiracy to injure the *individual stakeholder* in that *commercial undertaking* – the intended victim of the conspiracy – is wrongful (i.e. why the common law regards combinations between two or more parties to engage in reprehensible conduct that causes harm to another as tortious).

⁸⁶ This underlying tension between the underlying goals of the competition law framework and those behind the economic torts, and tort law in general, is also readily apparent within the context of translating competition law infringements into private actions based on the common law tort of breach of statutory duty. See section 2(c)(i) of Chapter 3.

secondary liability akin to the common law doctrine of joint tortfeasorship.⁸⁷ As such, the parties to an actionable unlawful means conspiracy, in coming together with each other where one or more of them engage in unlawful conduct as a means of inflicting economic harm upon a common target, commit a distinct legal wrong in the eyes of the common law against their the victim of their conspiracy quite apart from the legal wrong – the anti-competitive conduct that violates the competition law rules – that constitutes the “unlawful means” component of the tort.

If the claimant is injured as a result of an anti-competitive agreement or concerted action directed against him that amounts to an infringement of the Article 101 TFEU / Chapter I prohibitions, why might he bring an action outside of the competition law framework and, rather than bringing a private action under the tort of breach of statutory duty based on competition law infringement, consider pursuing a civil claim under the tort of conspiracy to injure by unlawful means instead where the “unlawful means” component consists of the competition law infringement? If the Article 101 TFEU / Chapter I prohibitions could be invoked on their own to give the injured party a right of private action against anti-competitive agreements and other forms multi-party conduct, would it be tautologous to frame the action as a conspiracy to injure the claimant by engaging an anti-competitive combination prohibited by the competition law rules?⁸⁸ Not if the unlawful

⁸⁷ *Total Network v Revenue and Customs* (n 74) [101]-[102] (Lord Walker), [116] (Lord Mance), [225] (Lord Neuberger). At [104], Lord Walker concluded that “any suggestion that the unlawful means conspiracy is a form of secondary liability, and must therefore have an actionable wrong as an essential ingredient, seems to me to be a circular argument which assumes what it sets out to prove.”

⁸⁸ An Australian Federal Court has held, albeit within the context of a preliminary issue of civil procedure, that it was “prepared to assume that it is permissible to charge a conspiracy to make an arrangement or enter into an understanding made unlawful by” section 45 of the *Trade Practices Act 1974*. In *Trade Practices Commission v Allied Mills Industries* (1980) 32 ALR 570, 578, an application was made to strike out part of a statement of claim that alleged, firstly, that the respondents had breached section 45 of the Act (which concerned “Contracts, arrangements or understandings that restrict dealings or affect competition”) by entering into arrangements to raise or maintain the price of liquid glucose, and secondly, that there was a conspiracy to make such arrangements that were unlawful under section 45 of the Act (as apparently provided for in section 76(1)(f) of the Act which states that “[i]f the Court is satisfied that a person... has conspired with others to contravene

means conspiracy tort is more than merely a form of secondary civil liability and actually comprises a separate legal wrong that the common law recognises to be distinct from, though inextricably dependent upon, the unlawful conduct that has been carried out as the means by which economic harm is inflicted upon the claimant.

By pursuing a common law conspiracy action instead of simply invoking a private action under the competition law framework, the injured party may be able to enlarge the circle of defendants upon whom legal liability might be imposed. Those individuals running the commercial undertakings that participated in the anti-competitive arrangements, corporate affiliates and other parties not directly involved in the execution or implementation of the anti-competitive conduct – but who nevertheless played significant “behind-the-scenes” roles in instigating or masterminding the attacks against the claimant – might be identified as the members of a conspiracy and made defendants in a civil action under the tort of conspiracy to injure by unlawful means. These individuals may not qualify as the sort of economic entities or undertakings that are subject to the competition law rules and could thus only be legally accountable for their actions, if at all, under the common law. The tort of conspiracy to injure by unlawful means does *not* simply extend liability for the competition law infringement to these members of the conspiracy. Instead, this tort imposes a legally distinct form of common law liability for combining together with the intention of causing economic injury to the claimant. Similarly, where a claimant is injured as a result of a dominant firm abusing its position of market dominance within scope of the Article 102 TFEU / Chapter II prohibitions, a case for the tort conspiracy to injure by unlawful means might potentially be constructed

[section 45 of the Act]...the Court may order the person to pay the Commonwealth such pecuniary penalty...as the Court determines to be appropriate....”). The second conspiracy-based claim was struck out because the particulars that were relied on to support the allegations of conspiracy were identical to the particulars alleging the breach of the Act by making the actual anti-competitive arrangement, such that the conspiracy alleged was described in exactly the same terms as the unlawful arrangements themselves and added nothing to the fact that the statutory prohibition had been allegedly infringed.

against the dominant firm *and* its corporate officers, thereby making the latter personally accountable for their role in directing the dominant firm to engage in anti-competitive behaviour as a means of causing economic harm to the claimant. There are, admittedly, additional conceptual difficulties in framing an action for conspiracy to injure by unlawful means when the unlawful means involves unilateral anti-competitive conduct by a dominant undertaking⁸⁹ that are not encountered in scenarios where the anti-competitive conduct involves an anti-competitive agreement or concerted practice involving multiple economic undertakings.

Finally, permitting competition law infringements to qualify as “unlawful means” for the purposes of the tort of conspiracy to injure by unlawful means could substantially alter the way in which the actions of trade combinations are evaluated in the eyes of the common law. When such collective commercial conduct is carried out to harm the economic interests

⁸⁹ It is unclear whether the courts would be prepared to allow a claimant to proceed against a dominant economic undertaking and one of its corporate officers in an action for conspiracy to injure the claimant by unlawful means. There is dicta from the High Court to suggest that the managing director of company who, acting bona fide within the scope of his authority, procures a breach of contract between his employer (the company) and a third person (the claimant), is not liable to the claimant in an action based on the tort of inducing breach of contract. In *Said v Butt* [1920] 3KB 497, 505-506, it was held that the servant who causes a breach of his master’s contract could not be held tortiously liable for procuring breach of contract because the servant was the “alter ego of his master” whose “acts are in law the acts of his employer”. This sort of reasoning could potentially be extended into the context of the unlawful means conspiracy tort which, by definition, requires two or more legally distinctive defendants to be identified as co-participants in the collective conduct that has caused harm to be inflicted upon the injured claimant. The other reason given by the High Court against imposing liability on the director of a company for procuring the breach of a contract between the company and the claimant was the concern that allowing such a claim to succeed would create an undesirable multiplicity of legal actions in such circumstances that would cause “the flood-gates of litigation [to]... be widely opened”: an action based on contract against the company for breach of contract, a second action in tort against director for procuring the breach of contract, and a third action against the company, based on principles of vicarious liability, for the tortious wrong committed by the director as its authorised agent. However, this policy-based concern was immediately qualified by the judge who chose to “abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person”, while explicitly recognising the application of the rules of joint tortfeasorship to “a director or servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like... [who would then be] liable in damages as a joint participant in one of such recognised heads of tortious wrong.” One could thus envisage a situation where a corporate officer knowingly causes the company to engage in unilateral anti-competitive conduct that abuses the latter’s position of market dominance in order to inflict economic harm upon an intended victim. In such a situation, the corporate officer may not be sheltered by the reasoning in *Said v Butt* and could, in theory, be held jointly liable with the company for the competition law infringement – either as joint tortfeasor for the breach of statutory duty or as a member of a conspiracy to injure the claimant by unlawful means.

of a trade rival, scrutinising the conspiracy to injure the targeted party through the lenses of the present-day competition law framework could lead the English courts to reinterpret what have been previously analysed as “lawful means” conspiracies (where liability is confined to very limited circumstances where the predominant purpose of the combination is to inflict harm upon the target) as potential “unlawful means” conspiracies (where the requirement of a shared intention to harm the target is less stringent) instead.⁹⁰ In *Mogul Steamship*⁹¹ for example, no conspiracy to injure by unlawful means could be established because the House of Lords could not identify any instance of unlawful conduct on the part of the defendants, the members of a shipping conference, who caused economic harm to a rival trader by coordinating their shipping schedules and freight charges in order to eliminate the latter from the market.⁹² Conspiracy to injure by lawful means was also not made out because the predominant purpose of the combination was to advance the defendants’ own commercial interests rather than to inflict injury upon the claimant. If, however, the actions of the members of the trade combination fell within the scope of the Article 101 TFEU / Chapter I prohibitions because of their market foreclosure effects and this competition law infringement was regarded as the “unlawful means” by which the injured party was targeted, then one could arguably recharacterise this sort of case as a conspiracy to injure by unlawful means that consists of an anti-competitive agreement between competitors to coordinate their pricing and output decisions in the market.

⁹⁰ See section 2(c) of Chapter 2.

⁹¹ (n 4) above.

⁹² See (n 13) of Chapter 4 and accompanying text.

CHAPTER 6: COMPETITION LAW AND THE COMMON LAW OF UNFAIR COMPETITION: AN INTEGRATED PERSPECTIVE

1. The relationship between Competition Law and the Common Law of Unfair Competition

In the preceding chapters of this thesis, the relationship between the competition law prohibitions and the economic torts that comprise the common law of unfair competition has been examined by analysing the methodological approaches adopted by each legal framework, identifying and explaining the dichotomies that distinguish them from each other, and highlighting the thematic and substantive points of intersection between them. The discussion above has shown that anti-competitive behaviour that falls within the scope of the competition law rules is fundamentally different from unfair modes of competitive conduct that are actionable under the common law economic torts. Anti-competitive practices attract legal sanctions because they produce negative effects on the competitive process in the marketplace which, according to conventional economic wisdom, results in reduced levels of consumer welfare. Any economic injuries suffered by individual competitors may, at most, serve as proxy indicators of the wider harm that has been caused to “competition” in market-driven economies. Unfair competition, on the other hand, generates legal liability because it violates the prevailing social and moral norms of fairness embraced by the society in which the competitive activity takes place and is anchored upon the wrongful infliction of economic harm upon the claimant by his rival.¹ Thus, conduct that is prohibited for being anti-competitive can and should be clearly differentiated from acts of unfair

¹ Though there are some types of unfair competition which, strictly speaking, comprise unjustified acts of misappropriation by defendants where the crux of the “unfairness” lies in the gains they have made by free-riding upon the claimants’ efforts rather than any loss they have caused the latter to suffer. See section 3(a) of Chapter 1. However, in many of these scenarios, where the defendant and the claimant are in a competitive relationship with each other, the gains made by the former are at the expense of the latter because the misappropriative conduct in question diverts custom away from the latter.

competition; they are regarded as unlawful for entirely different reasons and subject to the distinct juridical techniques employed by each legal framework.²

Even though these two branches of the law have grown from different jurisprudential trees, their close functional proximity with each other – given that they are both responsible for regulating the behaviour of competitors towards each other in the marketplace – means that their respective legal canopies will occasionally overlap with each other. The concurrent occupation of this shared regulatory space means that the flora and foliage from one branch of the law might be obscured and overshadowed by the other, and vice versa. Areas of dense legal vegetation from one branch of the law may impede further growth in those areas where the other branch of the law is concerned. This could help explain the generally stunted development of the conspiracy torts, where such collective conduct might be actionable as an anti-competitive agreement or concerted practice against a targeted competitor if it can be recharacterised to fit the parameters of the relevant competition law prohibition. In contrast, the tort of passing off has flourished spectacularly over the years to address a wide expanse of unfair competitive behaviour in the absence of parallel controls on such conduct from the competition law regime. To the extent that some areas of the existing overlap between these branches of the law are

² For a contrary view, see Cristian Banfi, ‘Defining the competition torts as intentional wrongs’ [2011] 70 CLJ 83, 84-87, which postulates “that intentional conduct has to be taken as the underlying foundation of the competition torts, in the same vein as the economic torts”. Essentially, the argument made by Banfi is that “competition torts” – private actions based on competition law infringements brought by injured competitors using the English tort system – should be regarded as “inextricably intertwined with the economic torts around intention” rather than purely strict liability torts, such that the English courts “can apply antitrust tort liability with the same circumspection towards competitive freedom as that customarily observed by the judiciary vis-à-vis the economic torts”. However, with respect, this view seems to unjustifiably conflate the roles of the common law economic torts with the competition law prohibitions and fails to adequately appreciate a fundamental difference between their respective objectives and functions – one protects competitors against economic harm inflicted upon them in certain ways, while the other confers instrumental rights of private action upon injured competitors in order to protect competition, or the competitive process, from anti-competitive practices.

substantial enough to render one of them otiose, one might consider pruning the feebler limb and allowing the other to expand itself to more fully inhabit that space exclusively.

However, this option should not apply to a substantial part of the different economic torts that comprise the spectrum of common law actions against unfair competition. Many of the individual economic torts are concerned with particular types of egregious behaviour that are not subject to equivalent legal regulation within the competition law framework. In many instances, unfair competitive conduct which harms the economic interests of a competitor-claimant will not be regarded as anti-competitive because the requisite adverse effects on the competitive process in the market as a whole are absent. Thus, one of the principal conclusions of this thesis is that there is ample room for the common law of unfair competition to continue to expand without intruding upon the regulatory space occupied by the competition law prohibitions. Competition law co-exists with the common law of unfair competition in a complementary, rather than competitive, relationship. The legal prohibitions found in one legal framework are not, as a competition lawyer might put it, effective substitutes for those found in the other.

Having said that, one of the other goals of this dissertation was to highlight the commonalities between these two legal sub-disciplines beyond their parallel functional roles as legal frameworks that impose restraints on how trade rivals behave towards each other in the course commercial competition. To return to the botanical analogy used earlier, even though these branches of the law have grown from different jurisprudential trees, they nevertheless display common leaf structures and patterns. These similarities lie in various facets of the methodological approaches taken by each legal framework when distinctions are drawn between lawful and unlawful modes of competitive conduct. For example, both these branches of the law

employ proxies or legal shorthands in their respective analytical frameworks, using these benchmarks as convenient substitutes for engaging in more difficult and imprecise assessments of the impugned conduct that would directly address their actual underlying policy concerns.³ Just as some areas of the competition law framework have evolved to associate certain forms of behaviour with harmful anti-competitive effects by presumptively declaring such conduct to be unlawful *per se*, the common law economic torts have also developed their own respective criteria to serve as objective indicators of the defendant's degree of moral reprehensibility that justify the imposition of civil liability.

Similarly, both branches of the law employ modes of legal reasoning which require opposing factors to be balanced against each other when determining whether or not the impugned conduct has crossed the line separating lawful actions from unlawful behaviour.⁴ When the competition law prohibitions are applied to instances of allegedly anti-competitive conduct, competition authorities and tribunals are frequently required to balance, on the one hand, the actual and likely adverse ('anti-competitive') economic effects produced by such conduct against, on the other hand, the beneficial ('pro-competitive') economic effects that may also be generated in the process as well. In the same vein, when evaluating the legality of a defendant's conduct towards his competitor under one or more of the various economic torts that comprise the common law of unfair competition, the courts have to, at least implicitly, weigh the interests of the injured claimant in obtaining redress for the misconduct that has been committed towards him, against the value of preserving the defendant's liberty to inflict economic injury

³ See section 1(a)(i) and 1(a)(ii) of Chapter 5.

⁴ See sections 3(a) and 3(c) of Chapter 4.

upon his rivals as part of his freedom to further his own commercial interests by aggressively pursuing competitive strategies in the marketplace.

Another thematic facet shared by both legal frameworks, albeit with varying degrees of visibility, includes the attention that is paid to the culpability of the defendant as one of the ingredients of legal liability.⁵ This is far more apparent in the case of the common law economic torts which all require the presence of some species of intention behind the actions of the defendant before the economic harm he has caused the claimant to suffer attracts civil liability. Thus an intention to cause harm to the claimant is required for some of these actions, while a lesser intention to engage in a particular act may be adequate for other actions where there are other aggravating elements present that offset the lower degree of culpability associated with the absence of an intention to cause harm. Where the competition law prohibitions are concerned, the intentions of the defendants play a less prominent, but still important, role in shaping the content of these legal rules. Whether or not they were motivated by an anti-competitive “object”, or if they acted with an exclusionary intent towards their actual or potential competitors, are salient considerations that go towards establishing infringement liability under the relevant competition law prohibitions against anti-competitive conduct. While competition lawyers who are devout followers of contemporary microeconomic theory may balk at any suggestion that the moral culpability of the defendant is relevant to an assessment of his liability under the competition law regime, such considerations are indispensable in the administration of any legal framework that can substantially curtail the commercial freedom of competitors in their dealings with and against each other. Fairness, that omnipresent life-force animating all branches

⁵ See section 3(b) of Chapter 4.

of the law, including Competition Law, requires that those who have consciously set out to inflict harm upon their rivals should be subject to greater legal scrutiny than those who have acted in a less blameworthy manner.

Finally, it is readily apparent that broader public interest and policy considerations are factored strongly into the legal analyses carried out by both these branches of the law when they demarcate their respective zones of unlawful competitive conduct. That robust competition in the marketplace advances consumer welfare and, by extension, public welfare on the whole is quite obviously a common theme that resonates clearly across the methodological approaches associated with both legal frameworks. As one commentator has observed, '[m]easures designed to control anti-competitive and excessively competitive conduct seek to make the market as near to perfectly competitive as is consistent with other public policy goals', and that '[b]oth the statutory and the common law of tort play a part in preventing distortions in competition... [b]oth the courts and the legislature need to draw a line between fair and unfair competition'.⁶

However, there is at least one striking difference between how the public interest in protecting and promoting competition manifests itself in each of these legal frameworks. Under the competition law regime, legal liability is created in order to protect the public interest in competition from being harmed by the private actions of the infringing parties. Competition is invoked as the regulatory basis for imposing legal restraints on the infringing parties' freedom of conduct. In contrast, where the economic torts are concerned, the public interest in competition

⁶ Peter Cane, *Tort Law and Economic Interests* (2nd edn Clarendon Press, Oxford 1996), 484-485. Professor Cane describes the common law's approach as one which focuses "in terms of the nature of the defendant's conduct by means of concepts such as intention and recklessness, unlawfulness, misrepresentation and combination", while "[c]ompetition... legislation adopts open-textured tests of uncompetitive behaviour and leaves it to various bodies to apply these tests in disputed cases" before concluding that "[w]hatever the technique used, the ultimate aim is the same".

is used by the courts to justify the opposite conclusion – that no civil liability should be imposed so that competitors have as much latitude as possible to compete aggressively with each other. The antithetical impact of what at first glance looks like the same public policy consideration suggests that, perhaps, different conceptions of “competition” have been applied by each legal framework.⁷

Where the competition law regime is concerned, the promotion and protection of “competition” is analysed from a market-wide perspective, where any harm to the competitive process is really an injury to the way market-mechanisms are expected to function in capitalistic societies based on conventional economic theory. “Competition” in this sense is directly pursued as a legitimate public policy objective and is regarded as the core regulatory goal of this legal framework. On the other hand, when any consideration is given by the courts to the public interest in “competition” when analysing whether or not the impugned conduct should fall within the scope of the common law economic torts, the value of permitting robust competition is substantially aligned with the private interests of the defendant and *his* liberty of action as an individual competitor. After all, the methodological focus of the common law is, ultimately, on adjudicating the respective rights and responsibilities of the immediate parties to the dispute – the injured competitor and the trade rival that has inflicted that injury. When this litigant-centric approach is coupled with the degree of discomfort that common law judges have traditionally expressed towards evaluating public policy arguments in general when deciding whether civil liability ought to be imposed upon an individual competitor, one can see why “competition” has been understood in a narrower sense compared to how it is regarded within the competition law

⁷ See section 3(c) of Chapter 4.

regime. Looking at the evolutionary trajectory of the common law of unfair competition as a whole, it seems a lot more judicial effort has gone into articulating the “unfairness” dimension of these civil actions rather than developing a specific “competition”-based context for these torts. This is reflected in the diverse range of cases from which the common law of unfair competition has evolved, where judicial attention has focused primarily on determining when certain forms of “unfair” conduct are sufficiently reprehensible to attract civil liability, regardless of whether the parties to such disputes are trade rivals, militant labour unions and their representatives or simply hostile individuals with an axe to grind and enough economic clout to inflict harm upon their intended targets.

The commonalities and dichotomies between these two branches of the law that have been highlighted above are not set in stone. Just as the European competition rules that were transplanted into the English legal system had to be assimilated with domestic regulatory features, both pre-existing and subsequently-enacted,⁸ before evolving into the unique legal hybrid that is the legislative framework currently in force, one can reasonably expect local soil conditions to continue to influence the evolutionary trajectory of the English competition law regime. As more competition law cases find their way to the English courts, either on appeal from the decisions of the relevant regulatory agencies or as independently-pursued private actions, this branch of the law will be repeatedly exposed to the primordial common law methodological impulses that nourish the soil of English jurisprudence, including the various

⁸ These include the statutory provisions found in sections 131 and 188 of the *Enterprise Act 2002* which, respectively, confer market investigation powers upon the English competition authority (where there are “reasonable grounds for suspecting that any feature, or combination of features, of a market... prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services”) and criminalise the most serious forms of cartel behaviour (where an offence is committed by an individual who “dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements” that involve price-fixing, output-limiting, market-sharing and bid-rigging).

juridical techniques discussed above that are used within the economic torts to differentiate between permissible and prohibited modes of competitive conduct. Opportunities for further cross-fertilisation between these branches of the law could thus present themselves down the road. In the course of articulating and developing the substantive legal principles that underlie the English competition law framework, legal counsel and judges trained principally in the common law tradition can be expected to, consciously or otherwise, draw upon their experience and familiarity with the analytical approaches and patterns of reasoning associated with the common law of unfair competition. Conversely, as common law-trained commercial lawyers become more sophisticated in their understanding of the role and scope of the competition law prohibitions, their awareness of, and sensitivity to, the distinctions between these two branches of the law could be heightened to the point where they might consciously adopt more distinctive and precise legal formulations when making legal propositions under each legal framework.

2. The interaction between the competition law prohibitions and the common law economic torts

Analysing the interaction between the competition law prohibitions and the economic torts from a comparative perspective which focuses on the methodological approaches or techniques that each body of law deploys, when determining if legal liability should be imposed upon those who inflict economic injury upon their competitors, yields valuable insights into the inner workings of each branch of the law. In his analysis of the interaction between tort law and other segments of the law that protect economic interests, three different kinds of interaction between these distinct bodies of the law were identified by Professor Cane: they may reinforce one another in some ways, interlock with each other in other respects, and overlap with one another in some

instances.⁹ This trilogy of interactions is discernible when the competition law prohibitions are examined in conjunction with the common law economic torts and provides a helpful analytical structure for examining the different ways in which these adjacent areas of the law co-exist with each other. A fourth kind of interaction, concerned with the different kinds of interconnections that may be forged between these two legal frameworks, will also be added to this list.

(a) Reinforcing

Competition law facilitates the competitive process by helping to eliminate those forms of private conduct that appreciably impede the freedom and the ability of others to compete in the marketplace. On the other hand, by setting out the moral or ethical parameters within which competitors are allowed to conduct themselves, the common law economic torts place legal restraints on their freedom and ability to inflict economic injury upon each other in the course of competition. Despite this apparent tension between them, both these legal frameworks provide mutual support for each other insofar as they both unequivocally champion the public interest in having rival traders engage in “ordinary” or “normal” forms of competition in the marketplace – where commercial success is achieved by rival traders competing on the price, quality or other merits of the goods or services they offer to their customers.¹⁰

Both legal frameworks reinforce each other to the extent that they proscribe particular forms of competitive conduct detrimental to consumer welfare in some way or form because they undermine some aspect of the integrity of the competitive process in the marketplace. Consumer welfare is protected, albeit indirectly, by the operation of the competition law prohibitions

⁹ See Cane (n 6) at 491.

¹⁰ See section 3(d) of Chapter 4.

against anti-competitive conduct that eliminates or stifles competition between actual or potential competitors in the marketplace. Conduct that attracts legal liability under the competition law framework appreciably, and unjustifiably, interferes with the ability or freedom of individual competitors to compete against the defendant, thereby diminishing the availability of choice to consumers in the market. Fewer choices translate into higher prices for consumers and, according to conventional economic theory, erodes consumer welfare given that these markets operate less efficiently than they otherwise could have in the absence of the anti-competitive behaviour. Similarly, the common law economic torts proscribe different types of misconduct that distort particular facets of the competitive process that may have an adverse impact upon consumer welfare, understood in its broadest sense. Torts which protect the contractual expectations of claimants and third parties indirectly protect the expectations of consumers who may have, in turn, contracted with the former. Torts which prohibit misleading conduct or the spread of misinformation in the marketplace enable markets to function more efficiently by enabling consumers to make rational purchasing decisions that are not clouded by confusion or deception. Torts which impose liability for reprehensible forms of misconduct, such as where unlawful acts are committed against third parties as a means of causing harm a competitor, buttress societal norms of civility and decency that are valued by all market participants, including consumers.

(b) Interlocking

The interlocking interface between the competition law prohibitions and the common law economic torts manifests itself in the way one legal framework may impose liability upon a competitor that has caused economic injury to another when the other legal framework does not. Such contrasting liability outcomes, and the rationale underpinning them, were systematically

explored in an earlier chapter.¹¹ This particular form of interaction between these two branches of the law deserves closer analytical attention by their respective segments of the legal fraternity and the legal tribunals responsible for adjudicating claims made under these legal frameworks. A clearer picture of where the common law actions end and where the competition law prohibitions begin would enable each branch of the law to develop itself without being unduly concerned about illegitimately overreaching into the terrain of the other. This dissertation has sought to take a principled approach towards exploring where each of these areas of the law *should* end, and begin, by looking at *how* they go about identifying instances of unlawful competitive conduct that fall within the scope of their respective prohibitions. By understanding the reasons underlying the methodological approaches associated with these bodies of law, a map of the outer boundaries of each legal framework begins to emerge and reveals the unregulated territory between them.

Many forms of competitive conduct will not be subject to legal sanction even if they have been calculated to injure, and have actually succeeded in causing economic harm to, rival traders in the marketplace. Such is the inevitably brutal nature of the competitive process. Competition law provides no redress where the magnitude of the overall impact on competition in the market is not appreciable enough, or if they have been outweighed by other pro-competitive effects. The common law does not impose legal liability if the gravity of the misconduct does not cross the various objective thresholds employed by the different economic torts as benchmarks for identifying unlawful behaviour. The distinctive legal criteria employed by each legal framework in the design of their respective liability fenceposts means that there are substantial

¹¹ See section 2(a) and 2(b) of Chapter 4.

tracts of prohibited conduct enclosed within each that are unlawful exclusively under one regime but perfectly legitimate under another. This interlocking interface between these two legal frameworks has potentially important practical implications for both injured competitors contemplating legal action and potential defendants whose actions have caused, or are likely to cause, economic harm to their rivals – the absence of an arguable case under one branch of the law does not preclude the would-be claimant from recharacterising his complaint into an actionable claim under the other branch of the law.

(c) Overlapping

In some specific scenarios, rather than interlocking against each other, parts of these two branches of the law overlap with each other instead. Where such overlapping takes place, the same fact pattern gives rise to more than one cause of action because the requisite sets of criteria for the prohibitions found in both legal frameworks have been met. For example, conduct that qualifies as an actionable unlawful means conspiracy may also fall within the scope of the Chapter I / Article 101 TFEU prohibition against anti-competitive agreements if the economic harm that has been inflicted upon the claimant also has had the effect of appreciably restricting competition in the relevant market as a whole. Similarly, a dominant undertaking that seeks to foreclose the market from competition by compelling third parties to deal exclusively with it, thereby infringing the Chapter II / Article 102 TFEU prohibition, may also attract tortious liability if unlawful means have been used against these third parties to secure their compliance. In theory, the commission of *any* of the economic torts by a defendant that also enjoys a position of market dominance can concurrently qualify as an abuse of dominance if the relevant market has also been foreclosed by the defendant's activities and there is a causal connection between

the tortious conduct and the appropriate exclusionary effects that have been produced on the relevant market.

Overlaps of the sort envisaged above require the presence of a fairly specific combination of factors and are thus confined to a narrow sphere of conduct that straddles both these branches of law. However, such overlaps deserve greater attention from both competition lawyers and tort lawyers because of their practical ramifications on claimants who have a choice as to which of these two legal frameworks to invoke as the basis for their cause of action, or if they should contemplate bringing concurrent actions under both legal frameworks simultaneously. The differences between the substantive and procedural facets of each legal framework mean that important strategic considerations have to be factored into the legal advice offered to potential claimants and defendants in such circumstances.¹² Legal advisors to such parties could thus benefit greatly from an integrated perspective of both legal frameworks in order to evaluate the full range of options for legal relief available to those who have suffered economic injury as a result of the aggressive modes of competition deployed by their trade rivals against them.

(d) Interconnecting

Finally, doctrinal interconnections may be made between these two branches of the law which raise interesting legal issues that have not been specifically considered by the courts or the existing legal literature in these fields. One such issue arises from a key feature of the internal architecture of the common law of unfair competition that employs the unstable concept of “unlawful means” as an objective and externalised criterion for the determining the existence of

¹² See section 2(c)(ii) of Chapter 4.

tortious liability for conduct which causes economic harm to others. This raises the tricky question of whether competition law infringements ought to qualify as “unlawful means” for the purposes of the economic torts that require it as an ingredient of liability and, if so, what impact this will have on the scope of these torts and the ways in which they might be deployed in practice to create opportunities for injured competitors to seek legal redress.¹³ Even though the injured competitor’s right to pursue a private action under the current competition law regime is clearly established, either as a follow-on action from an infringement decision of the competition authority or an independent cause of action for breach of statutory duty, there are procedural and remedial advantages¹⁴ of characterising the action as an economic tort that might encourage adventurous litigants to explore such non-conventional approaches towards framing their cause of action. Once again, this is where a holistic understanding of both legal frameworks could add depth to the legal analysis of the legal options open to would-be claimants who have been injured by their competitors.

Other linkages between these bodies of the law are more abstract and are more accurately described as thematic parallels that link both legal regimes together rather than doctrinal interconnections. These linkages were discussed above in the context of the relationship between the methodological approaches utilised by the competition law rules and the common law economic torts when demarcating the legal boundary between permissible and prohibited modes of competitive conduct.¹⁵ These common facets – utilising proxy-devices as legal criteria, balancing opposing interests against each other (freedom or liberty to compete and inflict harm

¹³ See sections 2(b) and 2(d) of Chapter 5.

¹⁴ See section 2(c) of Chapter 5.

¹⁵ See text accompanying footnotes 3 to 5 above.

upon others in the process of competition, versus being held to behavioural standards in which particular norms have been enshrined and so forth) – reveal a deeper kinship between these two branches of the law that would not have been previously apparent to lawyers working in these fields and highlight the potential for further cross-disciplinary research into the internal workings of each legal framework. Integrating the study of competition law with more than just a superficial awareness of the common law of unfair competition, and vice versa, will not only facilitate the exploration of these commonalities but also have the very valuable side-effect of clarifying, and perhaps refocusing, their respective goals and roles in regulating competitive behaviour in the realm of commerce.

3. Charting the future of the laws of competition

Taking an integrated perspective of the competition law framework and the set of economic torts that comprise the common law of unfair competition also yields a few insights into how each of these areas of the law could, or should, develop as a deeper understanding of the complexities of their co-existence permeates across the legal system. Analysing these legal frameworks side-by-side brings into focus their respective strengths and weaknesses, sharpening the distinctions between their functional roles, while shedding light on where they have room to grow and how that growth might take place. The evolutionary trajectories of each legal framework explored below are intended to be heuristic, rather than prognostic, and are intended to offer suggestions as to how and why these areas of the law might develop in these directions.

(a) The competition law prohibitions against anti-competitive conduct

While many different socio-political forces have had a hand in moulding the United Kingdom's competition law regime into its current shape and form, none has had as palpable an impact as the incorporation of economic theory and reasoning into the analytical framework used by the legal community to interpret the competition law prohibitions. The scope of these legal prohibitions has, to a very significant extent, been influenced by prevailing economic theories of what sorts of behaviour have what sorts of adverse effects on economic efficiency and welfare. This phenomenon is reflected most clearly in the shift away from form-based approaches to the prohibitions, where emphasis is placed on the legal characterisation of the impugned conduct, to the effects-based approaches that have been more recently adopted by the European Commission.¹⁶ It should thus be fairly clear that economic thinking will continue to play a substantial role in determining the scope of these prohibitions and that tribunals are likely to become increasingly dependent on economic consultants as expert witnesses to assist them in administering the competition law framework.

However, one should not lose sight of the fact that the competition rules prescribe categories of unlawful behaviour which attract potentially severe sanctions.¹⁷ These rules embody legal standards that must, ultimately, be consistent with basic notions of justice and fairness – the cherished ideals of any civilised legal system. Only the most hard-core utilitarian-positivist or dyed-in-the-wool instrumentalist would regard the existence of these rules as nothing more than a legal means to economic ends. A just and fair set of rules which attract

¹⁶ See *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7.

¹⁷ Substantial fines may be imposed by the competition authority, on top of which compensatory damages may be awarded by the courts if successful private actions are brought against the infringing party. See section 2(c) of Chapter 3.

penalties for non-compliance would demonstrate both certainty and flexibility in its scope of application. Legal certainty is achieved to some extent through the use of *per se* rules as proxy-indicators of competitive harm, while considerable flexibility is readily apparent in the open-textured character of the statutory language used to frame the principal competition law prohibitions. Commercial undertakings who plan their competitive strategies around the *per se* rules could thus avoid engaging in the most harmful forms of anti-competitive conduct, while those who stray too close to the types of anti-competitive practices understood to fall within the scope of the competition prohibitions might find themselves on the wrong side of the boundary between lawful and unlawful conduct.

Apart from the operational structure of these rules, substantive justice and fairness generally requires legal liability to be imposed only upon the blameworthy. This typically requires consideration to be given to factors such as the *mens rea* of the alleged wrongdoer and is reflected in the elements of the competition law prohibitions that are concerned with the intentions of the parties involved in the allegedly infringing conduct. So even though the focus of the competition law framework is primarily on the effects of an undertaking's conduct on state of competition in the market, one should not regard it as a form of strict liability that completely ignores the objectives behind the conduct in question. A close analysis of the existing jurisprudence suggests that part of the legal assessment does already include an evaluation, at least implicitly, of the culpability of infringing party's behaviour by combining an assessment of the harm produced by its conduct with an inquiry into its underlying intentions and motives.¹⁸

¹⁸ See section 3(e) of Chapter 3.

Admittedly, questions relating to the culpability or, more abstractly, the “fairness” of the conduct which the parties have engaged in sit uncomfortably within the analytical tradition that has developed around the competition law prohibitions and, looking ahead, are likely to occupy a peripheral, if not diminishing, role as the law in this area continues to evolve. Concerns associated with the “fairness” or “unfairness” of one competitor’s behaviour towards another might gravitate away towards other areas of the law responsible for regulating competition in the marketplace, such as the common law of unfair competition, because of their closer proximity to the analytical focal points of these other legal frameworks. The common law economic torts might thus alleviate these sorts of pressures on the competition law framework if the courts were prepared to expend greater judicial effort into scrutinising the moral culpability of parties involved when evaluating the legality of the defendant’s alleged acts of “unfair” competition.

(b) The common law prohibitions against acts of unfair competition

In its present state, the common law of unfair competition has been developed in uneven and uncoordinated pockets of caselaw, with no entirely unassailable theoretical backbone to unify the different economic torts that belong to this body of law. However, one recurrent theme that has permeated across this legal framework is the generally high degree of judicial restraint exercised by common law judges in confining the scope of these torts, particularly the tort of causing loss by unlawful means, within narrow limits by interpreting their constituent elements fairly restrictively. The most frequently invoked justification for this cautious stance is that the task of demarcating the boundary between “fair” and “unfair” competition belongs to the legislature rather than the courts. However, it is submitted that such judicial conservatism is unwarranted

and has unduly limited the growth of the economic torts because the existing statutes which comprise the competition law framework do not perform this task either. Neither can they be expected to because these statutes have assumed a regulatory role that is quite distinct from that carried out by the common law economic torts. Furthermore, Parliament is quite unlikely to ever take upon itself the task of comprehensively legislating every instance where a particular mode of competition crosses the boundary between “fair” and “unfair” competition given that a mind-boggling level of omniscience would have to be demonstrated by the draftsman. Any attempt at drafting such a statute would inevitably produce legislative provisions framed in broad and flexible terms that the courts will end up having to interpret in a manner which would, ultimately, resemble the line-drawing exercise that they have had so many reservations about when dealing with the economic torts in cases involving trade rivals.¹⁹ The key strength of the common law is that it empowers the courts to examine each dispute on a case-by-case basis, and on its own merits, before deciding whether, on balance, the interests of the litigating parties and the wider public favour granting relief to the injured competitor-claimant and castigating the defendant for engaging in illegitimate or “unfair” methods of competition.²⁰

In many ways, the common law economic torts already address the “unfairness” of the defendant’s conduct when they evaluate, whether directly or indirectly, the reprehensibility of his

¹⁹ See the discussion in section 3(a) of Chapter 1, particularly the text accompanying (n 38) to (n 40), which explains how Trade Mark Law requires the English courts, when interpreting the broadly-worded statutory provisions found in the trade marks statute, to grapple with the specific “unfair competition” policy concerns that underlie this legislative framework and may involve judges deciding, in some instances, if, an alleged trade mark infringer has acted “ in accordance with honest practices in industrial or commercial matters”.

²⁰ In the words of Pollock C.B., in *Egerton v Earl of Brownlow* (1853) 4 H.L.C. 1, 151 [10 E.R. 359, 419], “it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it.”

conduct towards the claimant.²¹ The nexus between tort law and morality²² means that such inquiries into the culpability of the defendant when determining the lawfulness or unlawfulness of his actions are entirely legitimate and, indeed, core facets of the analytical framework for this branch of the law. Viewed in this light, the economic torts could have the potential to serve a bigger role as legal vessels through which the moral and social norms of society may be projected into the common law marketplace where trade rivals strike mercilessly at each other on the battlefield of commerce. To move in this direction, the English courts might have to relax their grip on the definitional parameters of some of the key criteria they have developed as ingredients for civil liability under the various economic torts, as they have done in their development of the tort of passing off,²³ to give these causes of action the flexibility they need to respond to the variety of ways in which “unfair” methods of excessive competition might violate the behavioural norms that are expected of all members of a civilised capitalist society – including the most hard-nosed trade rivals bent on slugging it out with each other in the ruthless realm of business competition. While we must accept that competition in a capitalistic market-driven economy will be unforgivingly brutal, this does not necessarily mean that the law should have to countenance the ultra-hostile actions of competitors who, as part of their struggle for commercial success in the marketplace, cynically inflict economic injuries upon their trade rivals in ways that are unforgivably brutish.

²¹ See section 3(c) of Chapter 2.

²² Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, Oxford 1997), 25-27, drawing upon Tony Honoré, ‘The Dependence of Morality on Law’, (1993) 13 OJLS 1. See, also, *Smith New Court Securities v Scrimgeour (Asset Management) Ltd Vickers* [1997] AC 254, 280, where Lord Steyn observed that “the law and morality are inextricably interwoven” such that “to a large extent the law is simply formulated and declared morality.”

²³ See section 2(d)(i) of Chapter 2.

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