Looking forward to legal comity or divergence

La Ligue Internationale du Droit de la Concurrence

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1. A discussion of legal coherence and divergence seems a particularly relevant topic for an assembled group of competition and IP lawyers, economists, academics, and regulators.[1] We are certainly in a time of change as regards the application of the law in the fields of IP, personal data or competition. The law in these areas continues to be used to improve the functioning of markets and to preserve the value of rights, but is now being applied increasingly to further a much broader range of consumer protection objectives. With that widening scope comes at least the prospect of divergence in the future as conventional and innovative approaches struggle to co-exist, both within and increasingly as between, national jurisdictions.

2. This is not, of course, the first time that the law with which this conference is concerned has stood on the brink of change. The last time an LIDC Congress was held in this country was in Oxford in 2011. At that time the CMA was yet to be established, with competition enforcement split between the Office of Fair Trading and the Competition Commission. The Supreme Court was yet to hear its first case under the Competition Act 1998. In Brussels the Commission had just started to explore the option of a harmonised approach to collective redress, having concluded that the "*patchwork"* of divergent approaches across the Member States was creating a "*justice gap*" for consumers and businesses.[2] A justice gap that I know many of you are putting in long hours to fill for your clients.

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[1] I am very grateful to Kate Kelliher, Associate in the competition law practice group at White & Case for her help in preparing this speech.

[2] Directorate General for Internal Policies, Overview of existing collective redress schemes in EU Member States, Jul 2011, p.8.

3. Times were a changing then, but the regimes were moving together under the shared acceptance of EU legal supremacy and also with a shared acceptance that harmonisation and coherence were desirable goals and worth trying hard to achieve.

4. At this Congress, competition law is once again in flux. But the prospects for divergence rather than coherence are much greater as the realities of the post-Brexit architecture play themselves out in the enactment of past and present legislation as well as in the proceedings working their way through the courts and tribunals.

5. The enforcement of intellectual property rights is also on the move, so to speak. These rights find themselves increasingly scrutinised, not only in international trade fora, but also before the competition authorities. One only needs to see the €462m fine imposed on Teva by the EU Commission on 31 October to see the interplay between the two fields. In terms of jurisdictional reach, the arrival of the Unified Patent Court now sees a European court which can give injunctive relief over a population as large as the United States (and may extend even further in future). We also see the challenges of resolving international disputes involving issues such as standard-essential patents and FRAND licences through the employment of cross-jurisdictional anti-suit injunctions and interim licences.

6. So what are the prospects for the new legal order that is the subject of this year's Congress? Some might say that there are strong indicators in favour of continued comity. Competition law is after all one of the fields where UK, EU, and Member States' national laws are most intimately connected. Chapters I and II of the Competition Act 1998 were designed to ensure that domestic law aligned with Article 101 and Article 102 of the Treaty, something that was apparent from the original section 60 of the Act stipulating that "*questions arising under those Chapters should be dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law"* – a provision which was regarded as very innovative at the time.

7. Although we now operate independently of the EU institutions, there has so far been limited material divergence between the core concepts underlying domestic and EU competition regimes. But we have seen some instances already.

8. One of those areas, which I am sure will be ably explored by the panel that Christophe Rapin is chairing later today, is that of State aid and subsidy control. The legal basis for EU control in Article 107 of the TFEU has now been subordinated to the provisions of the

Trade and Cooperation Agreement concluded between the EU and the UK in April 2021. The TCA says that the EU and UK have a shared bilateral objective. This shared objective is expressed in Preamble 9 of the Agreement as the need for an ambitious wide-ranging and balanced economic partnership to be underpinned by a "*level playing field"* through, amongst other things, effective and robust frameworks for subsidies and competition.[3] The idea that an ambitious partnership can be underpinned by a level playing field strikes me as a mixed metaphor of which I think the British text negotiators can feel particularly proud.

9. It is true that our approaches to state aid still share common features in, for example, the principles for assessing whether a subsidy is compliant. But there is no denying that the means of achieving that common objective have now diverged. We have taken back control in the sense that it is now UK public authorities who are charged with assessing compatibility rather than the EU Commission. The routes for challenge are also very different. An affected party in an EU member state can complain to the Commission several years after a grant of suspect State aid. By contrast, challenges by those who feel they have lost out because of a subsidy under our domestic legislation must now bring an for judicial review carried out by the CAT. And the challenge must be made within one month of the impugned decision.[4]

10. The CAT's first chance to consider these provisions in *Durham v Durham* turned on its analysis of what amounts to an "enterprise".[5] That had a certain ironic echo which I'm sure was appreciated by the people in this room. This time ten years ago we would perhaps have been discussing a similar question as raised in *Eurotunnel II.* In *Eurotunnel II* the Supreme Court upheld the CMA's determination that the "embers" of SeaFrance S.A. were sufficient to constitute an enterprise for the purposes of the Enterprise Act 2002.[6] Just as the concept of an enterprise was a key consideration for the application of the merger control regime in *Eurotunnel,* so in *Durham* it was a determining jurisdictional factor.[7]

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3 TCA, Preamble 9.

4 Subsidy Control Act 2022, Section 70 (*Review of subsidy decisions)* and 71 (*Time limit for applications).*

5 *The Durham Company Limited (trading as Max Recycle) v Durham County Council* [2023] CAT 50.

6 *Groupe Eurotunnel SA v Competition Commission* [2015] UKSC 75, para. 42, citing *Eurotunnel II* [2015] CAT 1.

7 *The Durham Company Limited (trading as Max Recycle) v Durham County Council* [2023] CAT 50, para. 31.

11. *Eurotunnel* and *Durham* have at least one more feature in common. They both involved a review of the extent to which two different bodies had correctly interpreted the statutory language applying competition law concepts. With over 16,000 standalone subsidy awards enumerated so far on the Subsidy Control database, that is a task that is clearly facing public authorities on a regular basis.

12. The "coherence" or "comity" referred to in the title of today's Congress is perhaps shorthand for alignment, consistency, parallelism. Those ideas inevitably raise the question of the status of The Court of Justice's jurisprudence in our courts and how that will play out as a factor in any potential divergence going forward. The Court of Justice provides over 70 years of jurisprudence on EU law often touching on what are common concepts which are still very much integrated components in the fabric of UK domestic doctrine and principles.

13. Since Brexit, the status of Court of Justice decisions in UK Courts has been a topic of debate at the political level. Ultimately the UK has tried to address the point head-on, in particular in the raft of complex domestic legislation. The Supreme Court was charged with trying to unravel some of that complexity in *Lipton v BA Cityflyer,* in which we handed down our judgment on 10 July this year.[8]

14. Picture Mr and Mrs Lipton standing disconsolate at Milan airport, joining the long queue of people clutching their coupon for a free cup of tea - a cup of tea to which they had as at 5 pm on 30 January 2018 an accrued directly effective right under an EU promulgated directly applicable regulation. Little did they know that they were destined to join the likes of Flaminio Costa who refused to pay his ENEL electricity bill[9] or Stergios Delimitis the landlord of the pub in Frankfurt who refused to meet the minimum purchasing requirement under his tied house agreement[10] – destined to join them in the annals of famous EU law cases. Or perhaps actually they aren't. Because we had to recognise in the *Liptons* case that the law we described in that judgment was just a snapshot – a mere moment in time in the rapidly evolving mass of post Brexit legislation defining, redefining and re-redefining the key concepts. Whether anything of what we said in *Lipton* is still relevant in light of the Retained EU Law (Revocation and Reform)

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8 *Lipton v BA Cityflyer* [2024] UKSC 24, on appeal from *Lipton v BA Cityflyer* [2021] EWCA Civ 454.

9 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

10 Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR-I 935.

Act 2023, which received Royal Assent in June 2023, is no doubt perplexing lots of people. Our judgment may already have been consigned to Trotsky's famous dustbin of history. But we did at least, I hope, highlight some of the important points that need to be addressed when considering the landscape.

15. That shifting terrain has caused me personally to grit my teeth over the last few weeks. Some of you may know that the Supreme Court is in the process of revising its rules and practice directions in anticipation of the launch of our online platform to be known as the portal. The portal will enable everyone to file their proceedings and serve other parties by uploading documents to the portal in a thoroughly modern and efficient manner. May I take this opportunity to encourage you all to become portal account holders when that day comes.

16. The 2024 Supreme Court Rules have been laid before Parliament and will come into force on 2 December, the day on the portal will start operating. The new rules anticipate another important development in the story of divergence and continuity, namely the new reference jurisdictions conferred on the Supreme Court. These were to be introduced by new sections 6A, 6B and 6C inserted into the European Union (Withdrawal) Act 2018. They enable courts and tribunals to refer questions about assimilated case law (formerly known as retained EU case law) that have arisen in proceedings before them to the Supreme Court for our determination – in effect setting us up as a quasi-Luxembourg court to decide whether to depart from CJEU jurisprudence.

17. Those new sections also confer a more unusual power on law officers across the UK to refer a question to us that arose in proceedings where the proceedings have concluded without that question needing to be decided but to which the law officer thinks it would be useful for everyone to know the answer.

18. We have some new rules to facilitate our role in helping with coherence or divergence if asked to do so. But though those new sections were all set to come into force on 1 October this year, [11] the rug was pulled out from under them when the commencement of those sections was revoked just two weeks before that date.[12] In an open letter from the Department for Business & Trade to The Bar Council the government has confirmed that

[11] The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) Regulations 2024. (SI 2024/714)

[12] Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) (Revocation) Regulations 2024, 17 September 2024. (SI 2024/976)

instead now "intends to look at this issue again in the wider context of its work to reset UK relations with the UK".[13]

19. Another important part of the changes to be made if and when section 6 of REUL 2023 is commenced is also highly relevant to today's topic of coherence and divergence. Had the proposed regulations been enacted this would have introduced a new test for us to apply in deciding whether we should depart from previous CJEU precedent. The current test is based on the 1966 Practice Statement[14] but will be replaced by a list of more bespoke factors including "the extent to which the retained EU case law restricts the proper development of domestic law".[15]

20. It remains to be seen how these factors will be applied in practice, and how much difference the reformulation of the test will make. As to the application of the present test, you may well be exploring the few cases in which the Court of Appeal has been asked to depart from CJEU precedent during the past couple of years. In one trademark case the Court did depart from a CJEU decision[16] and in one IP case, where I was on the panel, we declined to do so.[17]

21. As you embark on your discussions today, you cannot know of course whether the first time you advise a client or draft a pleading or rise to your feet in court, you will be the person trying to persuade whatever court you are in front of to diverge from EU law or whether you will be arguing for continued adherence to EU precedent. I am sure your discussions today will help you put your best foot forward whichever way you end up having to argue a case.

22. I wish you a successful day and I look forward to reading or hearing your future submissions about whether we should diverge or cohere in these continually fascinating areas of the law.

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13 Department for Business & Trade, Letter to the Bar Council 26 September 2024.

14 Practice Statement [1966] 3 All ER 77.

15 Retained EU Law (Revocation and Reform) Act 2023, section 6(3), amending section 6(5) of the EU Withdrawal Act 2018.

16 *Industrial Cleaning Equipment (Southampton) v Intelligence Cleaning Equipment* [2024] EWCA Civ 1451.

17 *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, para. 73 *et seq.*