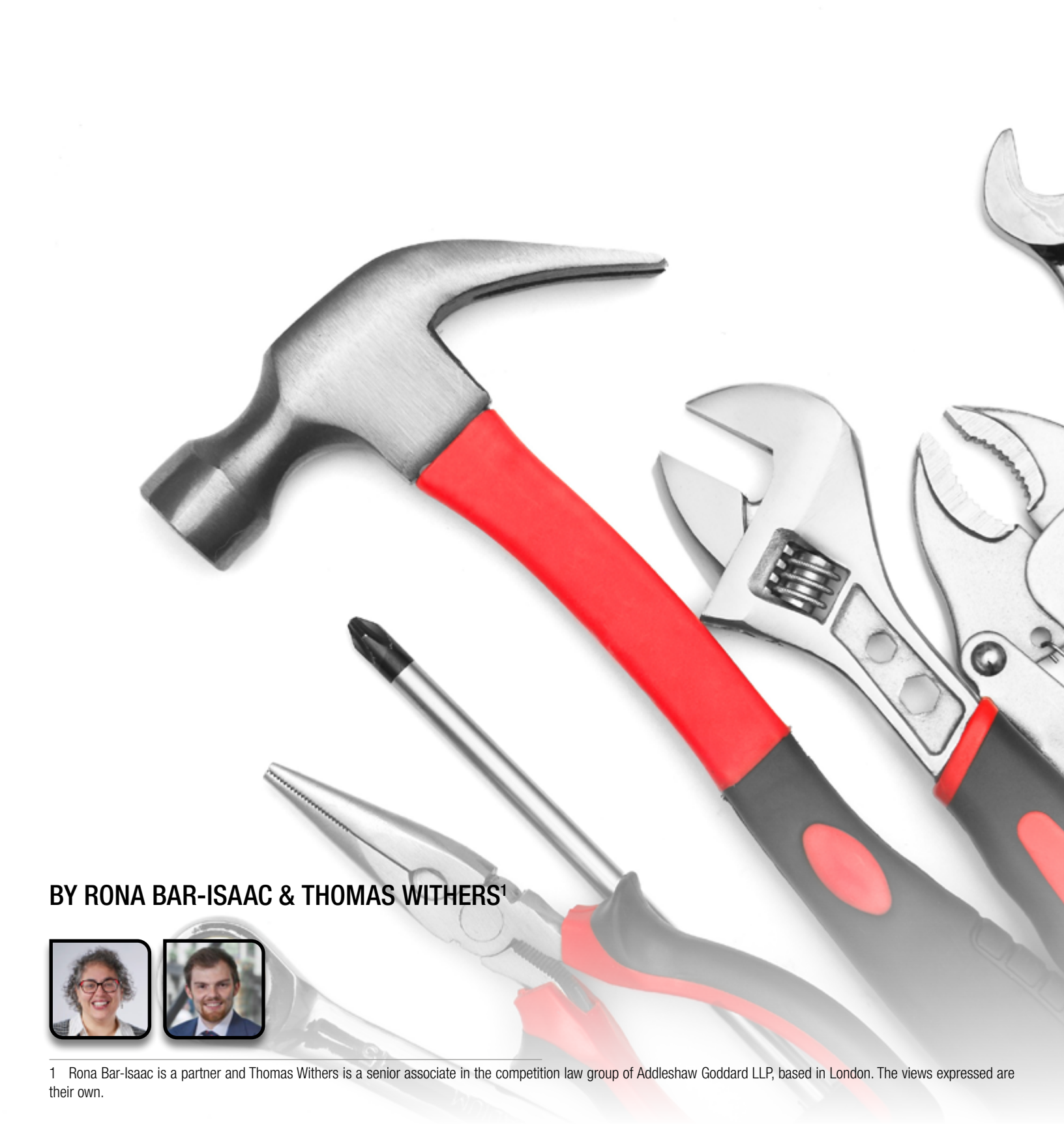
POSITIVE COLLABORATIONS: THE TOOLS AVAILABLE TO COMPETITION AUTHORITIES TO ENCOURAGE BENEFICIAL INTERACTIONS BETWEEN COMPETITORS



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POSITIVE COLLABORATIONS: THE TOOLS AVAILABLE TO COMPETITION AUTHORITIES TO ENCOURAGE BENEFICIAL INTERACTIONS BETWEEN COMPETITORS

By Rona Bar-Isaac & Thomas Withers

Driven by a predisposition towards seeing competition as the solution to, and not cause of, economic and social challenges, competition law authorities have historically viewed interactions between competitors with some skepticism, applying a default assumption that rivalry is better than collaboration and then choosing to permit – but scarcely encourage or require – co-operation where this default assumption does not apply. Nevertheless, this article explores the levers that authorities (and policy-makers) do have at their disposal to permit, incentivize or mandate competitor initiatives that would have benefits for society. It discusses the circumstances in which each of these options has been deployed in the past, and the benefits and challenges that have arisen. It concludes that it is important for regulators not to view these options as purely interchangeable, and to instead think carefully about which would be most appropriate in a given situation in light of all relevant circumstances.

I. INTRODUCTION

Perhaps unsurprisingly, competition law is obsessed with competition. The structure of EU competition law and its national equivalents (including the UK) is predicated on the default assumption that, in most circumstances, better outcomes can be achieved through a process of rivalry between firms rather than of collaboration. Competition law reflects this through a focus on preventing harmful collaborations and interactions between competitors (via the general prohibition of agreements and practices between undertakings which restrict competition). This comes with caveats, and competition law does set out circumstances in which collaborations may be permissible, certain examples of which are explored elsewhere within this edition. But even here, more often than not, competition law retains the safety and the refuge of steering clear of competitor interactions altogether. The guiding principle remains "do no harm" – and if in doubt, keep your competitors at arm's length.

Nevertheless, this strong bias in favor of competition has its shortcomings. Stucke and Ezrachi have rightly articulated the concept of "toxic competition", in which unbridled competition causes harmful effects, such as 'races to the bottom' on quality or environmental standards or tendencies to over-promise and then under-deliver in public procurement markets.[2] There are also areas in which a single centralized solution, perhaps one that is industry-led, can be more efficient or better for consumers than a fragmented landscape of incomplete offerings. And more fundamentally, firms will compete most acutely with respect to parameters that are directly relevant to consumer purchasing decisions, with little incentive to compete in areas that are only distant considerations for consumers at the point of purchase. That is why competition is good at driving down price and costs, for example, but less effective at making meaningful contributions to macro-level issues such as environmental concerns or better working conditions.

While authorities in the EU have acknowledged the truth of this, most notably in the Commission's horizontal guidelines and national equivalents, they have historically been slow to take concrete action to encourage – or indeed require – competitors to collaborate where circumstances would suggest doing so would lead to better outcomes. Naturally, more often than not competition law authorities will have a bias towards seeing competition as a solution and not a problem; as Abraham Maslow wrote in 1966, "*it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.*"[3]

Nevertheless, this article seeks to explore the levers that authorities have previously turned to when looking to positively encourage or require competitors to work together to tackle issues. It focuses on three broad categories:

1. Caveats to the general prohibition of anticompetitive arrangements between competitors.
2. *Ex ante* regulation requiring undertakings to collaborate.
3. *Ex post* enforcement of harmful refusals to collaborate.

II. EXCEPTIONS, EXEMPTIONS AND DEFENCES

In seeking to facilitate beneficial competitor collaborations, the most common lever deployed by authorities is to work within the confines of what they know – the existing competition law framework – specifically by seeking to caveat, qualify or otherwise dial down the general prohibition of anticompetitive agreements and practices to accommodate competitor collaborations that would have beneficial effects.

This can take the form of binding exemptions which explicitly confirm that collaborations falling within a prescribed scope will not breach competition law. Some of these are merely temporary exclusions to allow competitor collaboration to facilitate industry-led responses to specific social or economic problems. For example, in response to the Covid-19 pandemic, the UK provided a series of competition law exclusion orders enabling competitor collaboration in specific sectors to enable industry-led responses to the challenges resented by the Covid-19 pandemic.[4][5]

2 Maurice E Stucke & Ariel Ezrachi, "Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants", Harper Collins 2020.

3 Abraham Harold Maslow, "The Psychology of Science: A Reconnaissance", Harper & Row 1966.

4 See, for example, the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, the Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020, the Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020, and the Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020.

5 For further detail, see "Covid-19 and relaxing competition law" 3 April 2020, available on the Addleshaw Goddard LLP website at https://www.addleshawgoddard.com/en/insights/insights-briefings/2020/competition/covid-19-and-relaxing-competition-law/.

The European Commission also responded to the pandemic with a "temporary framework"[6] that provided informal guidance on the application of Article 101 but was also paired with comfort letters providing non-binding assurance that enforcement would not be taken in certain areas. Other binding exemptions have somewhat more permanence, such as the block exemptions that exist in the EU and UK for collaborative initiatives, most notably those in place for R&D agreements[7] and specialization agreements,[8] which are generally put in place for longer durations and renewed (with alterations) at regular intervals.

Alternatively, attempts to de-risk certain kinds of collaboration can take 'softer' forms, such as guidance on the circumstances in which specific kinds of competitor collaboration are unlikely to give rise to competition law concerns. In the EU[9] and UK,[10] the most notable example of this is the overarching horizontal co-operation guidelines, which apply to a wide range of possible types of competitor collaboration including R&D agreements, production agreements, purchasing agreements, commercialization agreements and joint standard-setting. We have also seen specific guidance documents tackling specific forms of competitor collaborations, such as the UK[11] and other EU member state guidance documents on environmental and sustainability agreements, and the UK's specific guidance regarding higher education collaborations[12] and collaborations between medicine manufacturers in relation to making available combination therapies.[13]

Nevertheless, there are several weaknesses in using these kinds of levers to facilitate or encourage pro-consumer competitor collaborations.

First, the effectiveness of these measures is clearly linked to the strength of legal protection they provide, with 'harder' protections more likely to facilitate pro-consumer collaborations than weaker protections. Historically, authorities and policy makers have been reluctant to provide stronger protections – such as block exemptions, exclusion orders and comfort letters – preferring to fall back behind weaker measures such as guidance documents and prioritization statements, perhaps reflecting a reluctance to open the door too widely to unintended consequences. But these choices have a real impact on businesses' appetite to collaborate, especially where the commercial incentive to do so would otherwise be relatively limited.

There are subtle signs that this reluctance may be softening. For example, in the UK, the Covid-19 exclusion orders provided something of a precedent, with exclusion orders subsequently deployed to respond to fuel[14] and carbon dioxide shortages,[15] for the purposes of sharing information and optimizing supply of these critical inputs. Nevertheless, these temporary measures remain rare, and we have seen very few additions to the collaboration-related block exemptions which apply in the EU and UK over the past decades. Further, several of these block exemptions have in practice seen little guidance on how particular terms should be interpreted or examples of collaborations which would fall within their remit which have limited their usage in practice. For example, in a recent UK consultation on whether to renew the Rail, Road and Inland Waterway Transport Block Exemption,[16] the CMA received only 5 responses, none of which related to the road or inland waterways transport sectors, and noted a lack of awareness of the block exemption even within the rail industry. Other key collaboration-related block exemptions, such as the specialization agreement and R&D agreement block exemptions, do not have dedicated guidance documents explaining their terms, with some guidance provided in the horizontal co-operation guidelines but without the level of detail found in the guidance for the vertical agreements block exemption, for example, and with very little accompanying case-law.

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6 Communication from the Commission - Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020/C 116 I/02.

7 E.g. Regulation (EU) 2023/1066.

8 E.g. Regulation (EU) 2023/1067.

9 See C 259/1, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2023.

10 See CMA184, "Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal Agreements", August 2023.

11 See CMA185, "Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements", 12 October 2023.

12 See the CMA's 30 May 2025 blog post, "Supporting higher education providers through beneficial collaborations".

13 See the CMA's Prioritisation Statement on Combination Therapies, 17 November 2023.

14 The so-called "Downstream Oil Protocol", formally the Competition Act 1998 (Public Policy Exclusion) Order 2012.

15 The Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021.

16 See "The Rail, Road and Inland Waterway Transport Block Exemption Regulation Update Report", dated 10 December 2024. The block exemption provides specific exemptions for agreements relating to technical co-operation in the fields of rail, road and inland waterways and allows for the creation and operation of groupings of certain road and inland waterways undertakings

Second, even where substantial protections are being provided, these can be undermined by inconsistent approaches taken by overseas regulators. Take, for example, the differing approaches taken by the EU, UK and U.S. in relation to collaborations between competitors on environmental and sustainability collaborations. The EU and UK have recently published guidance documents on this topic which are broadly supportive of environmental collaborations but have key differences in scope; the UK provides for a concrete exemption for climate change agreements whereas the EU does not, and by contrast the EU's regime applies beyond purely environmental matters to cover wider topics such as working conditions and human rights. By contrast, the U.S. provides no safe harbor for environmental-related collaborations, with various enforcement actions brought against such initiatives. For global businesses seeking to tackle global issues (e.g. environmental concerns) across their entire organization, such inconsistencies often result in policies that are calibrated to meet the lowest common denominator of overseas protections.

Most fundamentally, however, the core weakness of using any of these levers to encourage pro-consumer collaborations is that they are focused entirely on removing *dis*incentives to collaborate. They do nothing to actively *create* incentives – or indeed obligations – for competitors to work together where doing so would be beneficial, e.g. on an industry solution or minimum set of standards. They provide exceptions to the general rule that competition is king, but competitors remain free to refuse to work together to solve wider problems – and indeed, absent 'hard' legislative protections that are not undermined by differing approaches taken in other jurisdictions, this always remains the safest option available to them.

This is a critical shortcoming as, in many areas, competitors will have no inherent economic incentive to work together. In areas of zero sum competition, an undertaking will have no incentive to help a rival. Further, in many areas, there may be little pure economic incentive to work together to achieve progress, relying solely on the 'public conscience' of the firms involved, such as environmental matters or social protections.

III. *EX ANTE* REGULATION

A more directive option that is also available to authorities is to impose *ex ante* regulation requiring competitors to work together to solve particular industry issues.

By way of example, in 2017, following a market investigation into the retail banking market, the UK's Competition and Markets Authority ("CMA") imposed a measure which required the UK's nine largest retail banks to work together to implement Open Banking, a secure technology allowing third party providers to access financial data from banks via secure APIs.[17] More widely, there have been repeated calls in public discourse for big tech companies to be required to work together to create solutions on behalf of industry, including in relation to shared encryption and safety standards and age verification systems.

In practice, interventions of this sort by competition law authorities have been rare. A possible reason for this is that, for such interventions to be successful, authorities require a clear upfront vision of how that regulation will be structured, what it is trying to achieve, and the degree of burden to be imposed on industry that is acceptable to achieve these aims – and competition law regulators are not policy-makers. Indeed, while Open Banking has been a significant achievement enabling various other technologies and business models to open up, the way in which the CMA drafted and then imposed this remedy has been criticized for imposing overly complex and prescriptive requirements on the participating banks, the scope of which expanded over time, leading to a "lessons learned" review into the issues that had arisen by one of the CMA's independent non-executive directors which made several recommendations.[18]

This task has instead more frequently been left to legislatures, who have a public mandate to create regulation, are better placed to balance competing interests and determine optimal policy, and are also more experienced in drafting precise legal requirements. See for example the UK's upcoming plastic bottle Deposit Return Scheme, which mirrors similar schemes across Europe, or the EU's Common Charger directive[19] which requires most small electronic devices sold in the EU to feature a USB-C charging port by late April 2026.

Nevertheless, competition law authorities can still play an important role in making recommendations to Government as to areas in which *ex ante* regulation could support, or require, competitors to work together to tackle industry-wide problems. Competition law authorities have significant expertise in the proper functioning of markets, drawing on insights from one market to another to identify possible areas of improvement, and are also able to operate in policy makers' blind spots, suggesting interventions in areas which may not attract immediate public

17 The Retail Banking Market Investigation Order 2017.

18 CMA159 "Open Banking lessons learned review: Report by Kirstin Baker CBE", 27 May 2022.

19 Directive (EU) 2022/2380.

attention but do present an opportunity for positive change. Nevertheless, for authorities to perform these roles, they need the requisite tools to do so. In the UK, this is notably provided by the market study and investigation regime, which allows the CMA to undertake deep-dive investigations into markets and make targeted suggestions to Government on interventions that might improve outcomes for consumers; but equivalent tools are lacking in many EU Member States, and most notably at a supranational EU level. We have previously seen similar measures adopted as behavioral undertakings in the context of merger control reviews, though of course this form of *ex ante* regulation is reactive, remedying issues that would otherwise have arisen from that transaction.

IV. *EX POST* ENFORCEMENT

A targeted area where competition law authorities have felt more comfortable intervening to require competitors to work together is in the enforcement of abuse of dominance, specifically the case-law on refusals to supply and access restrictions.

It has long been established that, in certain circumstances, it can be abusive for a dominant undertaking to refuse to work with a competitor, e.g. by refusing to supply it with a crucial input or unjustifiably restricting this access. The underpinning logic has been that, in certain circumstances, forcing a dominant undertaking to come to terms with a rival would actually spur greater competition between them in the grander scheme; in other words, a targeted form of collaboration to achieve greater competition overall. But the law has also needed to strike a delicate balance in this area, acknowledging that too readily requiring dominant undertakings to supply or provide access to their rivals could deter innovation on both sides, with dominant undertakings disincentivized from investing in new creations through fear of subsequent free-riding by rivals, and rivals disincentivized from creating something truly new due to the ease of relying on the dominant undertaking's existing invention.

That is why, until relatively recently, the circumstances in which dominant undertakings were required to provide access to their inputs to rivals, and the extent of activity required by that dominant undertaking to facilitate access, were relatively limited. The seminal case of *Bronner*[20] established that a refusal by a dominant undertaking to supply an input to a rival would only be abusive where (i) that input is indispensable for the requesting undertaking to compete with the dominant undertaking downstream, and (ii) that refusal is capable of eliminating all effective competition on the part of the requesting undertaking.

However, recent case-law – and the European Commission's draft Article 102 exclusionary abuse guidance[21] – has seen the position set out in *Bronner* steadily erode, with dominant undertakings required to come to terms with their rivals in an increasingly broad set of circumstances. For example, *Bronner* has been disapplied in circumstances where the infrastructure being refused was developed using public funding,[22] where the refusal is selective, and/or facility or input is not being outright refused, but instead access is made subject to restrictive conditions that, in practice, impede downstream competition.[23] In areas where *Bronner* has been disapplied, the Commission's guidance suggests a far less circumscribed legal test should apply, namely that it is abusive to restrict access where doing so would be contrary to competition on the merits and capable of exclusionary effects – tests that have been widely criticized as representing a very low bar for abuse.

Further, the extent of a dominant undertaking's obligations to facilitate access also appears to have expanded in recent case-law. Historically, dominant undertakings' obligations have often been framed in quite passive terms; a requirement to supply, or to provide access, but without any concrete suggestion that the dominant undertaking must incur its own cost or resource or create something entirely new. Nevertheless, in *Android Auto*,[24] the Court of Justice concluded that Google's refusal to provide a third party electric vehicle recharging app access to its Android Auto operating system for cars fell outside of *Bronner* and was abusive. In doing so, the Court of Justice rejected Google's argument that a refusal was justified as the Android Auto operating system was intended for other types of third party apps (specifically messaging and media apps), effectively requiring Google to open up its creation to new potential markets. The Court of Justice also rejected Google's argument that a refusal was justified because a template for facilitating access did not currently exist; the Court concluded that Google had certain positive obligations to develop that template to facilitate access in a reasonable time period with reasonable recovery of costs.

20 Case C-7/97 *Oscar Bronner v Mediaprint* (1998).

21 See "Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings" (2024).

22 See Case C-42/21 *Lietuvos geležinkeliai AB* (2023).

23 See Case C-165/19 *Slovak Telekom* (2019).

24 Case C-233/23 *Alphabet v Autorità Garante della Concorrenza e del Mercato* (2025).

The Court of Justice provided some detail on the extent of these positive obligations. It stated that dominant undertaking that receives a request from a third party for access is not required to do so if this would "*compromise the integrity or security of the platform concerned*" or "*where it would be impossible for other technical reasons*" to do so. A dominant undertaking would also be allowed to "*devote a reasonable period of time*" to carry out the necessary developments. Reasonableness would depend on various factors, including "*the degree of technical difficulty*", internal constraints at the dominant undertaking (e.g. human resources), and external constraints acting upon the dominant undertaking (e.g. regulatory requirements that it must satisfy). A dominant undertaking would also not be required to front the full cost of allowing access, but would be allowed to require payment of an "*appropriate financial contribution from the undertaking which requested interoperability*" that is "*fair and proportionate*" allowing the dominant undertaking to "*derive an appropriate benefit*" from the development. Nevertheless, it remains clear from the judgment that a dominant undertaking could not be merely 'passive' in providing access to others, but will in certain circumstances be required to actively work together with potential rivals to make the access work – in other words, a much fuller version of "collaboration" with a competitor.

The UK and EU digital markets regimes provide another alternative avenue for these kinds of requirements to be imposed on dominant undertakings – specifically, large tech firms – to open up their platforms and products to rivals. See, for example, the requirement in Article 7 of the EU's Digital Markets Act for gatekeepers to make their messaging services interoperable with rival messaging apps.

The core issue in using *ex post* enforcement to require dominant undertakings to open up their inventions and infrastructure to third parties is that, with *ex post* enforcement, comes the suggestion that behavior has been unlawful and worthy of sanction. However, the tendency of an undertaking not to work together with a rival and provide it with a competitive 'leg up' is entirely natural; it is the essence of the idea that a process of rivalry can lead to better outcomes, and abuse of dominance case-law has consistently established that it is not unlawful for a dominant undertaking to compete. *Ex post* enforcement also risks leaving unanswered questions as to the precise scope of an undertaking's obligations, as seen in *Android Auto* where the extent of Google's positive obligations to work with third parties was expressed only in high level terms. Of course, *ex post* enforcement also only works in circumstances where dominance can be established; but in reality, there are many circumstances in which requiring greater interoperability between a series of non-dominant undertakings, for example, could be highly beneficial too. *Ex ante* regulation offers a possible avenue to solve these shortcomings but, as above, only where authorities actually have the requisite tools to identify these opportunities for improvement and make targeted recommendations to policy makers.

V. CONCLUDING THOUGHTS

It is clear that there may be circumstances in which collaboration between competitors, as opposed to pure rivalry, may be beneficial to consumers and society as a whole. Nevertheless, competition law's mechanisms for recognizing this have to date been quite limited.

We have seen areas of legislative intervention to permit targeted forms of collaboration to address urgent economic or social issues, such as the Covid-19 pandemic and shortages of key resources, but these tend to be strictly time-limited. We have also seen some targeted examples of block exemptions providing more lasting protection for collaborations falling within certain parameters, but there are questions about how widely these block exemptions are well understood and used. More commonly, we have seen authorities resort to guidance explaining the circumstances in which collaborations may be beneficial, but these instruments are not binding and often heavily caveated. For each of these measures, the fundamental weakness is that the authorities actions seek only to remove barriers to collaborations that competitors are otherwise incentivized to enter into; but they do not create active incentives or even obligations to act.

More rarely, we have seen attempts to impose regulation on firms to require industry-led solutions. Where this regulation has come from competition law authorities themselves, issues have arisen as authorities step uneasily into essentially a policy-making role. Certain jurisdictions provide mechanisms through which competition law authorities can make recommendations and lend their expertise to policy-makers who are better placed to act, but other key jurisdictions (notably the EU) have no such tools, and in any event any action taken by policy-makers requires significant effort and political will to bring into effect.

The rules regarding abuse of dominance have evolved to recognize a limited form of mandatory "collaboration" between a dominant undertaking and its rival, where doing so would foster greater competition between them. Historically this form of "collaboration" has been viewed quite narrowly as a passive obligation to allow a rival to purchase or access an input or facility controlled by the dominant undertaking, but recent case-law has suggested that a dominant undertaking may be required to effectively undertake a joint project with the rival(s) to facilitate access, and incur a portion of the costs in doing so. The central problem in using *ex post* enforcement to impose these requirements is the punitive implications that come with a finding of abuse of dominance, effectively concluding that a dominant

undertaking was in breach of the law for failing to work with a competitor even though its understandable instincts may have been to refrain from doing so.

In summary, authorities – and policymakers – have the potential to identify key areas where competitor collaboration could create positive outcomes, and to be prepared to work closely with industry to actualize these initiatives. But in doing so, authorities should be mindful of the regulatory tool that is used to ensure those benefits are most effectively realized having fully understood industry's incentives, economic interests and risks. Failing to do so risks sending very mixed messages to businesses on the extent to which they should keep their competitors at arm's length, and the circumstances in which it may be better to work together to tackle wider problems.

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