

THE COMPETITION LAW ASSOCIATION

THE 23rd BURRELL LECTURE

Monday 28 November 2022

The Hon Society of Gray's Inn

When government sets prices: what can history teach us?

The Rt Hon Lady Rose of Colmworth DBE

1. I am honoured to have been invited to deliver the Burrell Lecture this year.¹ I have attended this lecture many times in the past and realise that I have a lot to live up to. John Burrell QC in whose memory this lecture series is given was an expert in both competition law and intellectual property law and was a pioneer of EU law. His work as a chairman of the Plant Varieties and Seeds Tribunal spanned the period 1975 to 1977 and it is to that period of the early days of this burgeoning topic to which I am returning in this lecture.
2. Let me start with a quote from a statement from His Majesty's Government:

“The beginning of the “vicious spiral” of inflation is found in increased prices; these force a demand for increased wages which is generally followed by a further increase in prices and so on, indefinitely. It has always been found impossible to check inflation when it has gone beyond a certain stage. Consequently it is of the first importance to check it at the beginning. By creating insecurity and confusion it would impede our productive effort, give great opportunities to the profiteer and impose hardship on those who were not lucky enough to secure a share in the general advance of money incomes. People in receipt of old age pensions, insurance benefits or small fixed incomes would be able to buy less of the necessaries of life.”²
3. That sounds very familiar, but in fact is taken from a statement issued not by the Government of His Majesty King Charles III but that of King George VI in 1941. Three main methods were proposed for addressing this predicament. The first was what were described as “severe additional direct taxes” which should be imposed to restrict the spending of those most able to bear the burden. The second was rationing of foodstuffs and of clothing to conserve supplies and to ensure a fair distribution. The third was a policy of price control adopted through the Prices of Goods Act 1939 through the exercise of direct price fixing powers and through the grant of subsidies.
4. The idea of introducing rationing – at least as a formal government policy rather than Sainsbury's setting a 6 eggs per person limit – has not yet been canvassed. As to whether the recent Autumn Statement could fairly be described as imposing severe additional direct taxes

¹ I am grateful to my judicial assistant Nigel Mpemba Patel for their help in preparing this lecture.

² His Majesty's Government, *Price Stabilisation and Industrial Policy* (White Paper, Command 6294, July 1941).

on those most able to bear the burden, I couldn't possibly comment. So I am going to focus on the third means of controlling inflation, direct price fixing powers taken by government.

5. The Goods and Services ("Price Control") Act 1941 empowered the Board of Trade to issue Orders fixing the maximum prices that may be charged at any stage of production or distribution for goods specified in the Orders. Such Orders could require traders to take specified steps to make known to their customers the maximum prices fixed for goods sold by them. Similarly, power was given to the Board to issue Orders fixing the maximum charges that could be made for the performance of any specified service in relation to goods. The Board could also issue Orders forbidding the sale of certain second-hand goods, if the Board was satisfied that excessive prices were being charged. Other amending and supplementary provisions were concerned with preventing evasion of the Act, so that the transfer of property in price-regulated goods by barter was made unlawful and provision was made for the appointment of inspectors to enforce the Act.
6. But does government price setting work? Some theorists have said government price setting has never worked, others have argued that it has and that it did during World War II. Of course, before you decide whether government price setting has worked or not, you must decide what the purpose of government price setting is. Is it aimed solely at stopping price increases for consumers or can it be used to ensure reasonable prices for suppliers? But before getting into that let me recap on how competition law has approached price fixing more generally, both by the producers of the goods and by the government.

Price fixing – setting the scene

7. Back in 1776, Adam Smith made his famous observation: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."³ This view has been echoed down the centuries so that in his first speech as Attorney General of the United States of America in 1961, Robert F. Kennedy emphatically stated that he regarded price fixing violations as "serious reflections upon our morality and our integrity as free people".⁴ He referred in that speech to a recent antitrust case in the electrical goods sector which resulted in seven top executives being sent to jail (an outcome that might make our Competition and Markets Authority ("CMA") quite envious). These people, Kennedy said, were not hoodlums or gangsters but were highly respected in their communities. Yet, they got together in secret, in a classic conspiracy, to cheat their own government, the Army, Navy, the Air Force, the Department of the Interior and the Atomic Energy Commission, as well as their local governments.
8. The prohibition of price fixing is at the core of most systems of competition regulation. Agreements on prices by undertakings selling competing products have in fact been regarded as the "supreme evil" of competition law.⁵ There is no shortage of descriptions of what we would now refer to as the "theory of harm" of price fixing. In *Carte Bancaires* in 2014 the

³ Adam Smith, *The Wealth of Nations* (1776) Book I, Chapter 10, 129.

⁴ Address by Honorable Robert F. Kennedy, Attorney General of the United States to the American Society of Newspaper Editors (United States Department of Justice, 21 April 1961), available at <https://www.justice.gov/ag/rfkspeeches/1961/04-21-1961.pdf>.

⁵ *Verizon Communication Inc v Law Offices of Curtis V Trinko, LLP* 540 US 398 (2004).

European Court of Justice (“CJEU”) said that price being the main instrument of competition, price fixing collusion is ultimately aimed at inflating prices for the benefit of those taking part and above the level which would be determined by conditions of free competition.⁶ The European Commission (“Commission”) said, in its 2000 Competition Policy Report, that:

“[c]artel participants conspire to maintain an illusion of competition while in reality customers have no effective choice and pay higher prices. [...] Moreover, since cartel prices are commonly fixed in line with the costs of the least competitive producer, they create disincentives for the more efficient companies to improve quality, technology and generally rationalise production and sales methods.”⁷

9. So the idea that underpins this theory of harm is that if prices are fixed, they will be higher than they would be under conditions of free competition. This then leads to inefficient allocation of resources because purchasers have to spend more on the goods than they would have if the goods were priced competitively.
10. Presumably that is not supposed to be the case where it is the government that is controlling prices. Government price control has been implemented in various shapes and forms for centuries. From an article in 2008 on *The Theory of Price Controls* we learn that during the Middle Ages there was much talk among lawyers and theologians about a “just” price for goods.⁸ This price, they thought, was the value at which things ought to exchange for other things. “It was a ratio of exchange existing objectively, something outside of the will of the buyer or seller – something attached to the good itself. Hence, it was argued, it is the duty of the state, or town, or the guild, to determine what this just and reasonable price actually is, and then to enforce their decision in the market.”⁹
11. I must say, based on my experience, that any lingering idea I might have had that there is some objective value in an object was dispelled when I presided over a case about a painting that may or may not have been by Caravaggio.¹⁰ The painting had exactly the same brush strokes on exactly the same canvas but was worth either £40,000 or \$50 million depending on who painted it!
12. This brings me nicely to my first point, what is the theory of government price fixing? It has been described by proponents in the following terms. The central idea behind government price controls is that the free movement of certain prices can sometimes result in very bad outcomes. This can occur not only when the country is on a war footing, but also where free movement of prices works against the attainment of an important national goal like full employment without inflation or access to food for everyone. When that is the position, it is legitimate for the government to keep an eye on these prices and ultimately take steps to improve the situation.

⁶ Case C-67/13 P *Groupement des cartes bancaires v European Commission* EU:C:2014:2204, para 51.

⁷ European Commission, ‘XXX Report on Competition Policy’ (2000), 35, para 68 – 69.

⁸ Stephanie Laguerodie and Francisco Vregara, ‘The Theory of Price Controls: John Kenneth Galbraith’s Contribution’, (2008) 20 (4) *Review of Political Economy*, 569–593 is a fascinating article on this topic from which I have gratefully drawn much of this history.

⁹ *Ibid* 570.

¹⁰ *Thwaytes v Sothebys* [2015] EWHC 36 (Ch).

13. Many economists would agree on the benefits of some form of government involvement in this situation; however, many would rule out price control as a viable policy option. An important proponent of price control, the American economist Professor J.K. Galbraith would make no such exclusion, saying that “we cannot exclude from use any weapon that is necessary [...] it would be reckless to decide in advance that price controls should not be used.”¹¹
14. J.K. Galbraith is perhaps the economist best known for being an advocate of price control. By price control, he did not simply mean the government fixing the price at which a particular good would be sold. There was a wide range of policies by which market prices which were considered problematic could be modified or influenced, such as setting a legal maximum, or imposing a temporary price freeze. In his book “A Theory of Price Control” first published in 1952, Galbraith recalled his experience as President Roosevelt’s price controller from the end of April 1941 (some months before America joined the War) until May 1943.¹²
15. Galbraith’s main message was that price control would check the inflation that was caused by a reduction in civilian goods – that reduction would result from the diversion of workers from making those goods to making armaments. Price control could achieve this without accidentally hampering the expansion of production or curbing the consumption of commodities that were still plentiful. The US Office of Price Administration was established in August 1941 with power to place a cap on all prices except agricultural commodities. But, according to Galbraith, each price fixing action took time; information about the costs of producing the commodity had to be obtained, meetings held (presumably then in smoke-filled rooms even though not actually illegal) and the results deliberated over.¹³ The number of commodities posing problems rapidly increased and although the Office of Price Administration expanded its personnel, the task of producing a fully reasoned price cap for each commodity which merited its attention was really not feasible.
16. Instead, a cap was imposed on all prices through the adoption of the General Maximum Price Regulation in the US on 28 April 1942. As from that date, no seller would be allowed to charge, for the same item sold to purchasers of the same class, more than the highest price he had charged during the month of March 1942. So in the original system, the burden of proof had been on the Office of Price Administration: if it wanted to impose a maximum price on a particular commodity, it had to give a well thought out argument for doing so. Now the onus would be on the particular seller: if he wanted to raise his prices and charge more than he had during March 1942, he had to give a convincing reason for doing so. Overnight the prices of 8 million products were fixed.
17. It appears that whether or not it achieved its economic goals, it did in fact work in practical terms. There has been much debate by economists as to why the task of fixing so many thousands of prices and then enforcing compliance turned out to be much less difficult than expected and why the suspension of market pricing mechanisms did not cause the chaos that some opponents of Galbraith had predicted.

¹¹ J.K. Galbraith, ‘The strategy of direct control in economic mobilization’ (1951), 33(1) *The Review of Economics and Statistics*, 12–17, 15.

¹² J.K. Galbraith, *A Theory of Price Control* (Harvard University Press 1952).

¹³ See J.K. Galbraith, *A Life in Our Times* (Houghton Mifflin 1981) 136.

18. One theory was that in fact the prices fixed by the Office of Price Administration were not being imposed on a competitive set of markets but on markets that were already characterised by monopoly and oligopoly. The gradual extension of market power in many commodity markets after the First World War meant that free market pricing mechanisms were already circumscribed.
19. Price control, if effectively imposed, was said to achieve several things. First, it can reduce or hold prices by curtailing producers' and middlemen's rates of remuneration and incomes. This also then reduces or keeps stable overall total money spending power and therefore the general price level. In other words, by reducing the income earned by sellers, you curb their own spending power and so relieve the upward pressure on prices.
20. Second, price control can be used to reduce prices in some sectors, through subsidisation, but increase prices in other areas. The increases in price can then be used to recover the subsidies granted for other goods. Thirdly, although price controls were regarded by many economists as distorting market signals and producing inefficiency in allocation, they had indirect, non-economic effects which were positive through their impact on morale and patriotism, for example. Price controls helped convince people that their savings would not be eroded by inflation, that profiteering was being contained and that the burden of war was being more or less fairly shared.
21. Some of that is starting to sound very familiar with echoes in the current discussions prompted by increases in inflation. The profiteering idea is relevant to current discussions of windfall taxes for energy companies. The complaint is that all energy companies benefit from the price rises for electricity prompted by the rise in oil prices, including those who generate green energy and so are not suffering the increased input costs. When a price is fixed for a particular product or commodity but the product can be produced by different methods with different cost inputs, that can lead to a perception of unfairness.
22. So far I have focused on war time price controls. But it is not only during war time that price controls or other kinds of sectoral management were devised and implemented – controls and restrictions that would be regarded as serious infringements if devised and implemented by agreement among the participants in the sector. Price controls have often been permitted when a country is going through some form of economic crisis. In many countries, depression cartels have been permitted in industries deemed to be requiring price and production stability and/or to permit rationalisation of industry structure and excess capacity. In Japan for example, such arrangements have been permitted in the steel, aluminium smelting, ship building and various chemical industries. Japan only abolished antitrust exemptions for rationalisation cartels and depression cartels in 1999.¹⁴ But on the other hand, we know from the judgment of the CJEU in the *Irish Beef* case in 2008 that a horizontal agreement among producers about the reduction of capacity will still be an object infringement of what is now

¹⁴ See Itoda Shogo, Commissioner of the Japan Fair Trade Commission, 'Japan Fair Trade Commission Barks: Yesterday, Today and Tomorrow: Competition Policy of Japan' (Chatham House, London, 22 February 2000), available at https://www.jftc.go.jp/en/policy_enforcement/speeches/1999/00_0222.html.

Article 101(1) TFEU even if it can be argued that its purpose was to rationalise the beef industry to make it competitive by reducing production overcapacity.¹⁵

A history of attempted justification of price fixing in the United Kingdom

23. For those of you with long memories, some of the justifications that have been put forward for government control of prices remind us of the arguments that were relied on to justify price fixing restrictions in the early days of the Restrictive Trade Practices regime.
24. The Statute of Monopolies 1623 introduced a general ban on monopolies “for the sole Buying, Selling, Making, Working, or Using of any Thing within this Realm”. The next positive anti-monopoly statute came over 300 years later in the form of the Restrictive Trade Practices Act 1956 (“RTPA 1956”). Prior to the RTPA 1956, the common-law controls over monopolistic practices, contracts, combinations or conspiracies intended to restrain trade were uncoordinated and largely ineffective. Only firms that had entire control of an industry were subject to the Statute of Monopolies and the common law prohibition on monopolies. These controls did not apply to firms with limited monopoly powers or to cartels. The freedom of contract imperative that helped to bring about industrial expansion and increased trade led some to consider that it was not the function of the law to intervene in market rivalries or combinations. The result was that, in the early twentieth century, trade associations of which all the main producers of a particular product got together dominated almost every UK industry.¹⁶
25. The RTPA 1956 grew out of a Monopolies Commission report into various restrictive practices such as collective resale price maintenance, collective boycotts, and aggregated rebates (that is to say where discounts and rebates were based on purchases from all the producers involved in the agreement).¹⁷ The majority of the Commission recommended that there be legislation prohibiting all such practices outright. They concluded that the practices generally operated against the public interest and so should be generally prohibited.¹⁸ In fact, the Government stopped short of that and chose to implement the recommendations of the minority. They thought that the evidence they had analysed about the referred practices did not justify so sweeping a condemnation. In line with the minority recommendation, the RTPA 1956 set up a registration system where agreements containing the specified restrictions were required to be registered and could then be examined by the Registrar who would decide whether they operated against the public interest.
26. This regime was carried forward into the Restrictive Trade Practices Act 1976 (“RTPA 1976”). The RTPA 1976 required registration of agreements in the UK if the agreement contained restrictions in respect to prices, terms or conditions, quantities or descriptions of goods, the process of manufacture, or persons or areas to be supplied. The term “agreement” was given a comprehensive meaning under the RTPA 1976, to include any arrangement between parties

¹⁵ Case C-209/07 *Competition Authority v Beef Industry Development Society* [2008] E.C.R. I-8637, EU:C:2008:643.

¹⁶ See the interesting analysis by Michael Conant, ‘British Antitrust in Action’ (1961), 59 *Michigan Law Review* 855.

¹⁷ Monopolies and Restrictive Practices Commission, *Collective Discrimination: A report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices* (Cmnd 9504 June 1955).

¹⁸ *Ibid*, para 246.

whether it was intended that such agreement would be enforceable by legal proceedings or not. Importantly, recommendations by trade associations to members to accept one of the listed restrictions would in most cases fall within the definition of an “agreement” because of a conclusive statutory presumption that the constitution of the trade association required its members to comply.¹⁹ The power to declare an agreement to be contrary to the public interest and hence void rested with the Restrictive Practices (“RP”) Court.

27. The focus under the RTPA 1956 and the RTPA 1976 was more directly on the public interest as compared with the more nuanced Article 101(3) TFEU and s. 9 of the Competition Act 1998. Agreements were deemed to be contrary to the public interest unless the RP Court was satisfied that one of a number of defences was made out. The one most relevant for our purposes was s. 10(1)(b), which provided a defence if the parties could show that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods any specific or substantial benefits or advantages. Other defences focused more specifically on whether the removal of the restriction would be likely to have a serious and persistent adverse effect on employment or reduce exports.
28. Many industry-wide price fixing agreements were presented to the RP Court as operating in the public interest and, in light of the experience during the War, these arguments might have appeared to have more credibility than they do to more modern ears. Indeed, the potential defences included in the RTPA 1956 and the RTPA 1976 reflected some of the justifications that had been put forward by the Government for controlling prices itself.
29. Price stabilisation was the most frequently argued benefit from price fixing, being pleaded in five cases before the RP Court. I’m going to focus on a couple of particular attempts at justifying pricing setting. The first is the setting of prices for standard bread, by the Scottish Association of Master Bakers.²⁰
30. This is an interesting example, because it seems to have grown out of the price controls on bread set during the War. The price recommendations set by the Association for its members were based on information received from the Scottish Bread Costings Committee. That Committee had been set up in 1941 to consult with the Ministry of Food about bread subsidies. When the bread subsidy was finally abolished in 1956 and controls on the price of bread lifted, the Costings Committee morphed into the vehicle by which the manufacturers continued to control prices themselves. The Committee investigated the changes in costs of the ingredients of representative samples of bread and other products twice a year. From that information, the Costings Committee advised the Association what recommendation it should issue as to the minimum retail prices of bread and the Association then decided whether to pass that recommendation on to its members.
31. The industry was largely dominated by five groups of large producers and, perhaps unsurprisingly, the price of bread was reasonably stable.
32. The Association put forward four justifications for the pricing recommendation. First, the stabilisation of the prices of standard bread at known and established levels. Second, it was said that prices in the long run were lower than they would be if the recommendations were

¹⁹ RTPA 1976, s.8.

²⁰ *In re Scottish Association of Master Bakers’ Agreement* [1959] 1 W.L.R. 1094 (RPCt).

withdrawn. Third, the price fixing was said to avoid the dangers of undue concentration of production and the disadvantages of monopolistic control in particular geographic districts and, fourth, it was said that price fixing led to the maintenance and improvement of the quality of bread and the standards of service to customers. (I'm not quite sure what service you require to buy a loaf of bread but perhaps it was a more exciting transaction in those days.)

33. The RP Court comprehensively rejected all these arguments both on the facts and, more importantly, as a matter of principle. The law report notes that at the hearing, counsel for the Registrar was not called upon. The Court remarked on the sincerity of the opinions expressed by the trade witnesses called – a feature that many in the room will have noted in the course of acting for those taking part in cartels and for dominant undertakings. The RP Court wisely said that as a general rule, price stabilisation as an alternative to a free market is not a benefit to the consuming public. Indeed, it may prevent or delay the introduction of progressive methods in the industry and so in fact actually have an adverse effect on consumers. The RP Court recognised the historical circumstances on which the Association relied, namely that there had been a long history of government price control because bread is an essential commodity. But, the Court held, for the most part that price control was exercised by outside authorities and was not directed from within the industry itself as under the system being scrutinised by the Court. That, of course made, a crucial difference.
34. The RP Court then turned to the argument that because the price recommendations were based on costing information, reductions in costs were automatically and quickly passed on to consumers. The Association argued that if the restrictions were removed, the public throughout the whole country would be deprived in the long run of prices as low as they would be if the system of restriction is retained. Again, the RP Court thought that because the system was controlled by the industry itself, this was not likely to be the case. Given that the recommendations made by the Costings Committee were based on average cost, this led to high profits being available to low cost producers with no way for them to pass the benefit of their higher efficiency to the consumer in the shape of lower prices for standard loaves. The RP Court also spotted that the Costings Committee had recently recommended that prices be reduced by one halfpenny but this advice had not been taken by the Association and passed on to members. The explanation given? The bakers said they thought it was not a good idea to drop their prices during the course of the RP Court's proceedings. That as a reason did not strike the RP Court as either sufficient or even relevant.
35. Most but not all agreements met the same fate as the Master Bakers'. However, books and branded over-the-counter medicaments were historically the two main goods which were exempt from the ban on resale price maintenance.
36. For the younger members of the audience, the Net Book Agreement was an agreement between The Publishers Association and booksellers which fixed the retail price of books. In 1962 the RP Court found this price maintenance agreement was beneficial to the general industry.²¹ This was because it meant that publishers could use the money made from selling popular books to subsidise the printing costs of less popular books – presumably the less popular books being the ones that the members of the RP Court thought they were more likely

²¹ *In re Net Book Agreement 1957* [1962] 3 All E.R. 751 (RPCt).

to want to read themselves. The Net Book Agreement operated in the UK from 1900 for about a century. In 1997 the RP Court ruled that the Net Book Agreement was against the public interest and therefore illegal.²² So it had already met its demise by the time the Competition Act 1998 was enacted.

37. The exemption of medicaments from the general prohibition on resale price maintenance allowed manufacturers and wholesalers to fix minimum prices for over-the-counter medicines. The RP Court granted the exemption in 1970 in order to protect small dispensing chemists from price competition.²³ In 2001 the RP Court eliminated the exemption for medicaments²⁴ – a decision that had almost immediate effects on pricing. In the hours following the RP Court’s decision, some supermarkets announced price cuts of 25 to 50 percent on leading branded products such as painkillers, cough remedies and vitamins.²⁵ “Each percentage point off average prices was estimated to have saved consumers £16 million per year”.²⁶

Government-imposed restrictions on competition

38. Let me now turn to the approach that competition law has taken to government-imposed restrictions on competition. Although Articles 101 and 102 TFEU apply only to undertakings, Member States have a duty under Article 4(3) TEU to refrain from any measure which could jeopardise the attainment of the Union’s objectives. And one of the objectives of the Union identified in Article 3(3) is the establishment of an internal market. Further, Protocol No. 27 of the TFEU and TEU confirms that the internal market includes “a system ensuring that competition is not distorted”.
39. On the basis of those provisions and their predecessors in the Treaty Establishing the European Community, the EU Courts have held that Member States must refrain from enacting or enforcing national laws which could jeopardise the effectiveness of the rules on competition. That duty was first expressed by the Court of Justice in *INNO v ATAB* in 1977.²⁷ In that case it was argued that Belgian fiscal legislation setting excise duty for tobacco had the effect of compelling manufacturers and importers of tobacco products to fix retail prices. They had to pay tax on the retail selling price of the product so they had to stick a label on the packets. It was forbidden by the legislation for the retailer to sell the product at a price higher or lower than that on the label.
40. The Court of Justice recognised that the fixing of the retail price as the maximum was understandable in fiscal terms because it was designed to stop producers and importers from undervaluing their products for the purposes of paying the taxes. The requirement to treat the price as a minimum price was not for fiscal reasons but was imposed for socio-economic

²² *In re Net Book Agreement 1957* (No 3) [1998] I.C.R. 741 (RPCt) and *In re Net Book Agreement 1957* (No 4) [1998] I.C.R. 753 (RPCt).

²³ *In re Medicaments Reference* (No 2) [1970] 1 W.L.R. 1339 (RPCt).

²⁴ See *In re Medicaments and Related Classes of Goods* (No 2) [2001] 1 W.L.R. 700 (RPCt) and *In re Medicaments and Related Classes of Goods* (No 3) [2001] I.C.R. 306 (RPCt).

²⁵ Organisation for Economic Cooperation and Development, *Competition Law and Policy in 2001-2002* (Annual Report of the United Kingdom), available at: <https://www.oecd.org/unitedkingdom/2489084.pdf>. See also Organisation for Economic Cooperation and Development, *Policy Roundtables: Resale Price Maintenance 2008* (Comp 37, 2008), available at: <https://www.oecd.org/daf/competition/43835526.pdf>.

²⁶ *Ibid* 8, para 46.

²⁷ Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] E.C.R. 2115, EU:C:1977:185.

reasons. By eliminating the possibility of discounts on sales to consumers, it aimed to support a certain retail selling structure and prevent the retail sector from becoming concentrated to the disadvantage of small retailers. It was to protect the little kiosks from aggressive price competition from the supermarkets – this of course was at a time when sales of tobacco products were not as strictly controlled as they are now. There are echoes here of the same kind of argument that was used before the RP Court in the *Medicaments agreement* case.

41. The challenge to the legislation was based on what was then Article 86 EC, now Article 102 TFEU. The Court of Justice held that whilst it is true that Article 86 is directed at undertakings, it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness. Whether or not that was the case was for the national court to decide.

42. In later cases, the European Court has been prepared to be more conclusive. In particular, the Court has had occasion to deal with situations where the Member State requires or encourages the adoption of anti-competitive agreements which are contrary to Article 101 or where it enacts legislation or regulatory rules which are in effect the enactment of an agreement concluded between private undertakings. So, in *Bureau national interprofessionnel du cognac v Guy Clair*, it was held that:

“By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market.”²⁸

43. Although that line of cases has been developed since *INNO* it still appears to be the case that the mere fact that national legislation has the same anti-competitive effect that would be illegal if it was arrived at through an agreement between private undertakings does not make that legislation unlawful.

44. The Court has therefore held that national legislation fixing price controls is not caught by the Treaty. Thus, in *Buyys*,²⁹ France had issued a Ministerial order that the prices of certain products were frozen between 15 September and 31 December 1976. The Court said that national rules freezing the prices of products which cannot be regarded as an agreement between undertakings, or a decision or concerted practice, are not covered by Article 101.³⁰ More recently – though not very recently – in 1987, a similar point arose in a preliminary reference from France about Ministerial Orders fixing a retail margin for the retail sale of beef and veal.³¹ The Court confirmed that since it was not the purpose of the rules to compel traders to conclude agreements or to take any other action of a prohibited kind, the rules were not unlawful. What matters was that the pricing decisions were taken by a public authority and not by the traders. The relevant Treaty provisions for assessing the legality of the measures were therefore the free movement provisions not the competition provisions. The fixed

²⁸ Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] E.C.R. 391, EU:C:1985:33, para 22.

²⁹ Case 5/79 *Procureur général v Hans Buys, Han Pesch and Yves Dullieux and Denkvit France SARL* [1979] E.C.R. 3203, EU:C:1979:238.

³⁰ *Ibid*, para 30.

³¹ See Case 188/86 *Ministère Public v Lefèvre* [1987] E.C.R. 2963, EU:C:1987:327.

margin might be incompatible with those if it did not allow for transport costs which took account of the costs of importation actually incurred by retailers.

45. Let me turn finally to some particular sectors of the economy where there has been a history of price regulation either at the EU or national level.
46. At an EU level, one immediate effect of Brexit has been that we no longer benefit from price controls on roaming charges for using our mobile phones. The Roaming Regulation³² was adopted in 2007 to control the rates that companies could charge for international mobile voice calls within the EU. It was such a hit with the public that it was rapidly followed in 2009 by further regulation lowering the voice price cap and extending the caps to SMS and data roaming services. As Viviane Reding, the then Commissioner in charge of telecommunications said, “[t]he roaming rip off is now coming to an end thanks to the determined action of the European Commission, the European Parliament and all 27 Member States”.³³ The Roaming Regulation was challenged by phone companies in judicial review proceedings in the English High Court, which referred the question of the legality of the measure to the CJEU.³⁴ The case was not a competition law challenge since the main issue was whether Article 114 TFEU provided an adequate legal basis for the measure.³⁵ But the reasoning is interesting because part of the justification for the adoption of the measure by the EU was the perceived risk that Member States might individually adopt price control measures. In other words, the prospect of the Member States individually controlling prices, whilst not illegal in itself, might give rise to distortions of competition and that was part of the justification for an EU-wide measure. Some had hoped that the case would be an opportunity for the CJEU to give some guidance as to how a government body should go about setting price controls. But, in fact, there was very little reasoning as to how the price should have been set – the Court was happy just to endorse what the Commission had done.
47. Another sector where governments have traditionally been very involved in price setting is the UK pharmaceutical sector. The Competition Appeal Tribunal (“CAT”) has described the mechanisms used to regulate drug prices as complex and of course those mechanisms have been examined closely in the recent *Flynn Pharma* litigation about phenytoin sodium in the CAT and in the higher courts as well.³⁶
48. An argument that is often raised against government price regulation in relation to pharmaceuticals is that it stifles research and development and creates barriers to entry into the market. Again, this echoes the arguments made to the RP Court by the Yarn Spinners in the *Cotton Yarn Spinners’* cases. The Yarn Spinners alleged that their agreement not to sell certain yarn below a specific price was in the public interest because it encouraged the industry to invest in research and modernize their processes. Like the bread cases I mentioned earlier,

³² Regulation 717/2007 on roaming on public mobile telephone networks within the Community [2007] O.J. L 171/32 (“Roaming Regulation”).

³³ European Commission press release, ‘End of ‘roaming rip-off’: cost of texting, calling, surfing the web abroad to plummet from today thanks to EU action’ (IP/09/1064, 1 July 2009).

³⁴ *R. (on the application of Telefonica O2 Europe Plc) v Secretary of State for Business, Enterprise and Regulatory Reform* [2007] EWHC 3018 (Admin).

³⁵ Case C-58/08 *Vodafone Ltd and Others v. Secretary of State for Business Enterprise and Regulatory Reform* [2010] ECR I-4999, EU:C:2010:321

³⁶ See *Flynn Pharma Ltd, Pfizer Inc. v Competition and Markets Authority* [2018] CAT 11, paras 19 onwards and *Competition and Markets Authority v Flynn Pharma Limited and Pfizer Inc.* [2020] EWCA Civ 339.

this private price fixing agreement also had its origins in the War when cotton prices were fixed by government. Nonetheless, the RP Court rejected these arguments and concluded that the benefit of modernisation was not substantial enough to justify the price fixing.³⁷

49. Even before the *Flynn Pharma* decision, the Health Service Medical Supplies (Costs) Act 2017 gave the Government broad power to control the price of unbranded generics and is intended to enable it to step in when an unreasonable price is being charged. This closes what was perceived to be a 'loophole' in the existing legislation that barred it from controlling the prices of unbranded generics supplied by companies that were members of the voluntary Pharmaceutical Price Regulation Scheme.

What do we learn from the history of price controls?

50. So let me try to draw these threads together to consider what can we learn about the history of price control. If J.K. Galbraith were with us today, he might ask us the question: is competition always preferable to price control? There is a tension between free markets and stable prices that any price control measures must contend with. It is difficult to imagine the kind of granular control that was introduced in the UK and the US during the War being introduced today - one might say that it could not possibly work in practice now, but then people said that then as well. Although of course the War created an extraordinary situation, the pressures that were created by full employment once armament production was ramped up, leading to everyone having more money to spend, leading to higher prices when the increased spending power could not be matched by increased volume of goods for sale can happen even if this country is not at war. The goals of governments which have introduced price controls either across a wide range of products or more targeted controls are familiar goals. They include reducing inflation, of course, but also eliminating profiteering and encouraging or forcing people to save more of their income. But there are also goals that might be achieved which were not in the minds of those earlier generations, such as striking a balance between relying on rising prices (e.g., for electricity) to push consumers towards more efficient consumption that helps combat climate change whilst, on the other hand, recognising that there is an irreducible minimum of consumption that people need – particularly the elderly or those with health problems.
51. Whatever economic course is charted it will be interesting to see how many of the old public interest benefits which were relied on during the War, but which seem to us so laughable in the context of justifying private price fixing, start to be mentioned again over coming months.

³⁷ *In re Yarn Spinners' Agreement* [1959] 1 All E.R. 299 (RPCt).