

David v Goliath: does competition law provide a “sling and a stone” for small businesses?

By Jennifer Skilbeck

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“David prevailed over the Philistine with just the sling and the stone. The stone sank deeply into his forehead, and he fell down with his face to the ground. David ran and stood over the Philistine. He grabbed Goliath’s sword, drew it from its sheath, killed him, and cut off his head with it. When the Philistines saw their champion was dead, they ran away.” (New English Translation, 1 Samuel 17)

The appeal of the small and just prevailing over the large and strong is universal. But it is rare for the individual or small trader to have the determination or the resources to take on the Goliaths of the commercial world. Two have recently done so in major competition litigation and both have been unsuccessful. Both claimants were providing a good and potentially competitive service, but competition law failed to provide them with protection from the lack of the business skills necessary to compete with the commercially more sophisticated.

The question remains as to what extent the interests of competition might require small businesses to receive some appropriate protection, and to what extent such protection already exists. Such protection can provide choice and lower prices for the consumer in circumstances where the combination of lack of business skill and the absence of any market power would otherwise ultimately deprive the consumer of an expert and efficient product or service.

In the first of the two cases, *Arkin v Borchard Lines*, Arkin had sought to compete with two shipping conferences, and had in fact established a 10-12% market share at rates approximately 20% lower than those offered by the conferences. Arkin’s main business was buying older tonnage, using it for freight in competition with newer vessels, or reselling it, and his prices reflected this differential. His withdrawal from the market has resulted in the loss of a useful low-priced service.

In a familiar story, at least in the Chancery Court, Arkin had employed family members to run part of the business, subsequently removed them and found that they were then employed by a new company, a competitor to both Arkin’s operation and those of the conferences. It was this new company that posed serious competition to the conferences, and, in an environment of excess capacity, prices began to fall. Arkin became caught up in the price war, and began to drop his prices to

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levels described by the judge as suicidal, eventually withdrawing with substantial debts. In an agreement with the liquidator a case was brought on a conditional fee basis.

Colman J held that Arkin had never been a target of exclusionary behaviour, and that the practice of "fighting ships" (lowering prices in only those areas in which there was competition) was no more than an acceptable response to the new entrant from a dominant conference – its prices had not been intended to undercut Arkin, nor to do more than win back some of its customers. The conferences therefore had not abused their dominant position (Article 82), and as regards the co-ordinated conduct between the conference members, that came within a block exemption (Article 81).

In the second case, *Courage v Crehan*, the Crehans had taken tied leases of *The Phoenix* and *The Cock* in Staines. The real mischief of the contracts lay in the over-optimistic forecasts of turnover, and the high rent to be paid, in the light of the subsequent competition from a free house (and the significantly lower rent that was offered to subsequent lessees). The question was whether the agreement which required the lessee to take the major part of his requirements from a named source, rather than at the heavily discounted prices available to the free houses, was contrary to Article 81 (generally speaking the higher tied prices were reflected in appropriately lower rents). In what many regard as a surprising judgment Park J disagreed with the European Commission's conclusion in a similar case (for reasons set out at some length in the judgment) and held that there was no breach of Article 81: the UK beer trade was competitive and beers and lagers from non-member states had easy access to it.

The law will not relieve a party from a bad bargain, unless it has the effect of restricting or distorting competition, or is part of a network which has that effect. That left the Crehans without a remedy, though not before winning a landmark victory in the European Court by obtaining the right for a party to an unlawful agreement to obtain damages, at least in circumstances in which that party was not substantially responsible for the agreement's negative effect on competition.

The mantras of Chicago economics are now so firmly embedded in competition law that it is not competitors but the competitive process that is invariably protected. That was not always the case, and the discussions in the US Senate at the time of US trust busting activity at the beginning of the twentieth century provide another appropriate metaphor from the Old Testament: "The Trust wave swept over the country like a terrible cyclone, causing greater loss accumulated by individual effort than all of the storms and cyclones that have occurred since the flood". That led to a certain amount of what has been described as "fuzzy thinking" in the courts, which sometimes resulted in the sacrifice of low prices for the benefit of small businesses. Resistance to the "fuzzy thinking" has in turn led to the abandonment of the protective principle.

But when Arkin and Crehan lost their businesses it was not in any real sense the loss of an uneconomic small competitor. Their customers lost, respectively, lower shipping tariffs and a landlord that the judge found had successfully improved previous pubs under his management. It is not rocket science to acknowledge that competition may sometimes be preserved only by preserving the competitors, and there is plenty of evidence to support that approach in the decisions of the regulatory authorities.

In its supermarket investigation the Competition Commission found that selling some items below cost by supermarkets "damaged smaller reference stores and non-reference grocery outlets. This would in turn impact adversely on consumers, in particular the elderly ...". In addition a Code of Conduct was introduced for supermarkets in its dealings with suppliers to give the suppliers greater certainty, if not better terms, in their contractual arrangements (its effectiveness is the subject of current investigation by the OFT).

A number of the block exemptions typically have the intention and effect of protecting small traders and the undue pressure that results from engaging in business principally with one

supplier or customer. It was alleged some years ago (and may still be the case) that one of the motor manufacturers would not permit any distributor to hold more than five distributorships in order to prevent it from acquiring market power.

Some of the provisions of the Motor Vehicle Block Exemption are couched in terms that expressly address the unequal bargaining power of the parties, and thus protect the weaker party from provisions which on their own would frequently be regarded as fair competition in other contexts, at least absent dominance. The new block exemption, Regulation 1400/02, repeats the intentions of the earlier block exemption and include measures "to strengthen the independence of distributors" (Recital 9) and to "prevent foreclosure of independent repairers" (Recital 26). Similarly, Regulation 1017/68 (the block exemption for rail, road and inland waterway transport) specifically permits agreements that would otherwise be regarded as anti-competitive, if implemented by small or medium sized undertakings.

In a quite different context, the liberalisation of the utilities generally has been achieved by taking express account of the difficulty of entry by relatively small competitors and the need for their protection if liberalisation is to be achieved at all. For example in telecommunications, until there is sufficient competition, small and large firms compete on terms which are precisely calculated to remove the advantage of scale economies enjoyed by the original incumbent. The same access is not so willingly granted by the courts in the normal course of business in respect of "essential facilities".

By contrast, the OFT has presided over the final dismantling of protection which had been aimed precisely at the kinds of small businesses that many people like to see in their neighbourhoods through the abolition of both the net book agreement and resale price maintenance on OTC medicines. But the government has intervened to prevent the abolition of the restricted licensing of pharmacies recommended by the OFT: "Community pharmacies play a vital role, particularly in rural and poorer areas, and we will do nothing to jeopardise their position." The laissez-faire approach of the competition authorities has also been effectively restrained by the planners, who are now controlling the growth of supermarkets to the extent that Safeway has commented that Morrison should increase its bid by £500m on the grounds that the 53 stores it will be required to sell will, for this reason, fetch a premium price.

The European Commission has introduced a Directive respecting unfair contract terms (Directive 93/13/EEC), but it is restricted to consumer contracts, although small traders may well be regarded as being subject to the same "significant imbalance in the parties' rights and obligations arising under the contract..." which forms the basis of the Directive. The European Court has applied the Directive to exclude a jurisdiction clause favouring a seller (Cases C-240/98 to C244/98, *Oceano Grupo* [2000] ECR I-4941).

There is not surprisingly very little explicit protection for small businesses to be found in the judgments of the Courts. However collective agreements between small undertakings that might otherwise have been contrary to Article 81 have been regarded as lawful in both joint selling (Case C-265/97 *VBA v Florimex* [2000] ECR I-2061) and joint buying (Case C-250/92 *Gottrup-Klim* [1994] ECR I-5641). In an Italian case the European Court upheld the Mayor's power to grant the licences required by new retail outlets according to perceived local needs (Case C-142/94 *DIP* [1995] ECR I-3257).

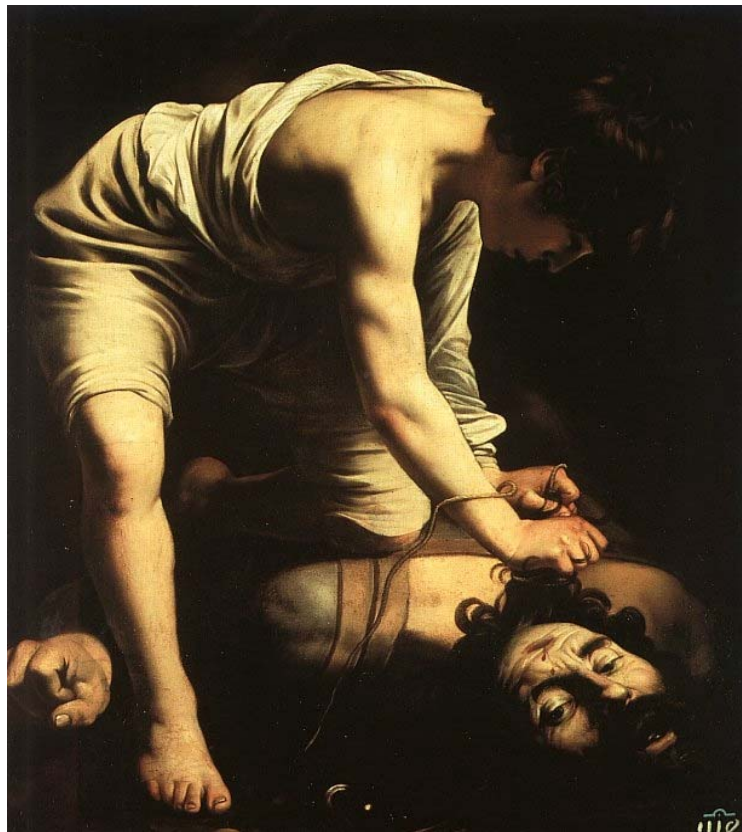
With these few exceptions small businesses have to rely on special investigations by the OFT or the Competition Commission, which may not be actionable under Article 82 (or Chapter II). Where they exist, block exemptions can also assist.

The OFT does not appear to have any particular policy with respect to maintaining competitors either as a means of supporting competition or satisfying the wider public interest, such as is reflected in the planning policies that are seeking to reverse the decline of city centres. In an understandable attempt to use its resources to maximum impact, it is in

some cases taking action for the benefit of large organisations, such as the NHS, which has its own professional staff engaged for the purpose of protecting its procurement interests. On this basis, the small firm has, in most cases, neither a cause of action in the courts nor a champion in the regulatory authorities, even where its interests coincide with that of free competition, consumer choice and low prices.

As with David and Goliath, the victory for the small competitor comes from surprising quarters. Jude Law, Nicholas Hytner and Joan Bakewell, amongst many others, drove Starbucks away from Primrose Hill when it was feared it would threaten the local small independent cafes. But perhaps the first prize should rest with Michael Ward who as MP for Peterborough introduced as a Private Members' Bill the only legislative protection for small businesses in the UK, The Unfair Contract Terms Act of 1977.

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David and Goliath, CARVAGGIO, undated
Museo del Prado, Madrid