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From French limits on imports from Japan to promoting Global Britain after Brexit

Industrial Policy and National Champions?

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I well recollect a visit in 1995 from Claus Dieter Ehlermann, inviting support for a novel kind of competition law event in Europe: a gathering of specialists to discuss the leading problems of the day. Indeed, a rival for the preeminent competition event of those days, the Fordham Institute under the scholarly guidance of Professor Barry Hawk, a well-recognised September occasion in New York. Though the execution of the challenge was a trifle vague, the attraction of the venue was unquestionable: a Renaissance villa in the hills above Florence. So it took little persuasion to agree; and 25 workshops later, I think that Mario Siragusa and Jim Venit and I may have the highest frequent flyer credits. The speakers in those early days included distinguished professors, practitioners and enforcers (Michel Waelbroeck, Eleanor Fox, Herbert Hovenkamp, Robert Pitofsky, Mario Monti, Hew Pate, and lots of other luminaries).

As this gathering is celebrating 25 years, I have found it justifiable to look at history, including what were the supposed benefits of competition law, and record some past moments where industrial policy was invoked, usually to excuse a state sponsored constraint on competition, but also to frame the functioning of an effective market place.

In the 1990's, EU competition enforcement policy was dominated by a curious debate over procedure and theory: did an agreement which contained certain restrictive features, but which ought to enjoy recognition of its pro-competitive merits, fall to be first condemned and then

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blessed by the public authority, or could it be endorsed as legitimate by the enterprise without the need for official scrutiny? Were the objectives of EU competition policy appropriate? Would an independent competition agency do a better job than DG Competition? Was DG Competition effective in speaking out in favour of the merits of competition considerations when considering other policies? Was competition policy at the opposite end of the spectrum from industrial policy, or were they consistent? The theories as to possible penalties and the reality of daily enforcement practice were hotly debated. At the same time, competition policy was not universally supported as a pillar of national economic policy (indeed EC policies sometimes were tepidly consistent with notions of robust competition, such as the series of ferocious anti-dumping measures against many products from Japan, including typewriters, excavators, printers, forklift trucks, microwave ovens, cameras, ball bearings, DRAM semi-conductors and others). So there was plenty to discuss.

Policies and Objectives and Theories

A considerable gap between the grand rhetoric of competition law objectives and the reality of competition law enforcement can be observed around the world. American statutes, banning price discrimination, were rooted in populist policy objectives which have today become technically unfashionable, rather than economic ones. Accordingly, modern US antitrust policy doesn't aspire to pursue price discrimination cases, although that was a cause of popular discontent in the early days. It would be difficult to compel an authority to pursue an out of fashion policy. Barry Hawk observed that those who favour limiting competition law to pure economics as opposed to more flowery and uncertain considerations are not merely making a policy recommendation: they are suggesting as lawyers that "economics provides better tools within the legal system to decide a case when an economic law is being applied".[2]

The policy preoccupation of the European Commission with market integration, unique among competition agencies in the world, involved effectively per se prohibitions of geographical disincentives to cross border trade. Whereas US law attached no special significance to hindrances to trade between Nevada and California, in Europe explicit contractual prohibitions, even if

[2] Barry Hawk

forgotten and unenforced, attracted fines (Toshiba TEG[3]). Price structures which penalised exports were equally vulnerable (DCL/Bulloch[4]). By contrast, cartels were given a gentler ride, both in terms of frequency, level of penalty, and human resources in the enforcement agency. This mild approach did not betoken any enthusiasm for price-fixing, but reflected – probably – the need for the enforcement policies of the Commission to retain governmental favour, and the (related) sensitivities of national champions, and the (related) sensitivities of governmental endorsement or disfavour.

In those days., youngish practitioners and theorists were broadly sceptical and hostile to the concept of "industrial policy" as a respectable goal. But before looking at what were the respectable goals of competition policy, we should step back to the very beginning.

Industrial policy was at the core of the creation of the earliest steps towards a European Community. The Coal and Steel Community placed under a common authority energy and weaponry, or at least the means of producing them, and organised a functioning market for normalising trade. So although "industrial policy" got a bad name when it was synonymous with subsidising faltering companies, an industrial policy was the goal of the Treaty of Paris in 1951.

And then, some 25 years later, Etienne Davignon as Commissioner had to cope with an ailing coal industry and an ailing steel industry, industries which represented ways of life for hundreds of thousands of workers and their families. The same agonising choices faced the Thatcher government in the UK – the systemic decline of major industries with the associated vast social implications. So, once more, achieving those changes in the face of multiple pressures and conflicts involved the pursuit of industrial policy.

When Karel Van Miert was a candidate to be Commissioner, he said that as a Social Democrat he considered that government should police the marketplace by using competition law. His successor, Mario Monti, spoke rather of ensuring that there was a functioning marketplace.

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[3] Toshiba TEG

[4] Distillers Co v. Commission (Case 30/78) [1980] ECR 2229

Thus, in one sense an industrial policy (when young lawyers spoke of it disparagingly) could be the practice of exporting potential unemployment to another part of the EU by subsidising a failing producer of glass or coal, or by keeping open a large car plant, in the hope that electoral damage would be reduced. But it could also be the identification of a strategic sector, and pursuing measures which enhance the stability and prosperity of that sector, such as exploring how to mitigate dependence on fragile supply chains to deliver electronic or mechanical components made in China. But, sadly, industrial policy might also mean the right to enjoy economic and political "sovereignty" once freed from the shackles of the European Union. And that will bring us to Brexit.

There were certainly plenty of worthy goals which, according to the European Commission, could be enhanced/pursued/achieved by competition law. Among the alleged (asserted is more polite) objectives of European policy were protection of small and medium sized firms; consumer protection; promotion of European exports; employment; "competitiveness" of European industries involving the encouragement of cooperation or public subsidisation to help build, grow or protect a European world class competitor (Airbus was a success); environmental policy; and boosting European film production to resist Hollywood.

One consequence of having a long list of competition law objectives was the according of wide discretion to the enforcement agency, in choosing policy priorities, choosing which cases to pursue, and helping to shape the application of the rules. And we should recollect that from 1962 to 2004 the legal validity of tens of thousands of contractual agreements depended in theory, but not in reality, on the explicit or regulatory approval of the European Commission. However, I tend to think that the breadth of the supposed enforcement objectives did not actually have a big influence on enforcement. Instead, I suspect that once the authority had concluded that the arrangement under investigation was desirable, it did no harm to refer to cultural, industrial, environmental or populist considerations as unquantifiable ballast to justify a decision.[5]

[5] Legal certainty was a criterion frequently invoked during debates about how Article 85(1) of the Treaty of Rome should be interpreted. I felt, and still feel, that quite few business matters expect or demand pure legal certainty: Professor Hawk suggests that just as many sins have been committed in the name of Liberty, so it is with legal

Market integration as an industrial policy?

So, in the days when formal decisions by the Commission were few (sometimes as few as a dozen in one year), it is not surprising that the virtues of the policy were said to be broad and far reaching. The First Report on Competition Policy issued in 1972 mentions competition policy as an instrument for fighting inflation. The Second Report presented things more thoughtfully:

> The Commission's measures against restraints of competition liable to maintain prices artificially high are part of the policy which must be pursued both by the countries and at Community level to combat inflation. Seen from this angle, the competition policy is a tool that must be used to create conditions under which the monetary and budgetary policies can have their full effect. Its first objective is to ensure that the markets within the Community are opened up so that purchasers can operate throughout the Common Market.

> This is why the Commission has expressed its determination – noted by the Council – "to strengthen its action against restraints of competition which may derive either from horizontal price agreements, concerted practices with regard to prices and price discriminatory measures applied by undertakings in dominant positions or from market-sharing agreements or other restrictive practices pursued by undertakings the purpose of which is to maintain fragmentation of the markets, or from self-limitation agreements, wherever such agreements hamper the Community's commercial policy."

And the Fifth continued:

certainty, often invoked to resist the use of analysis of economic reality as opposed to purely textual examination of words on the page.

> Although competition policy can make only an indirect contribution to solving the economic difficulties now besetting the community – and then only if it achieves its objectives – there can be no solution without it.

All that said, the preoccupation with market integration dominated other objectives for about thirty years. The Ninth Report put it like this:

> The first fundamental objective is to keep the common market open and unified. The metamorphosis of a heterogeneous collection of isolated national markets into a single vast market could not succeed without the establishment of some basic rules.

The imprecisely defined goals of competition policy, as well as the curious mystery about how Article 85(1) and (3) should be interpreted exposed the talented officials of DG competition to sceptical comment. At one of the early gatherings, the then Director General, Alex Schaub, said that one of my papers revealed a Chamber of horrors, an agreeably colourful compliment from an unexpected source.

The formidable non-contractual obstacles to cross-border trade and the formidable differences in market conditions were not denied, but the Commission consistently refused to let them be reinforced by private barriers. DG IV, in a sense, obliged private business reluctantly to participate in creating the common market by forcing it to ignore governmental barriers to trade and discrepancies in market conditions between different Member States. The profits of the supplier might be reduced if the parallel trader were allowed to buy in a cheap Member State and resell in a high-priced Member State without contractual interference from the supplier. The supplier could legitimately react to bringing the prices closer together, or by putting a volume ceiling on deliveries to the parallel trader, but it could not prohibit the trader from making supplies to the unwelcome exporter. A huge part of the Commission's enforcement efforts concentrated on making contractual barriers to cross-border trade imprudent and potentially costly.

I would suggest that as we can now observe it, the preoccupation with market integration (I am sure I called it an unhealthy obsession) was a successful policy, which made it almost as easy to trade between Exeter and Inverness as between Exeter and Dublin or Bordeaux. That ease of commerce contributed little by little, to the fall of the Berlin Wall in 1989. Yes, an unacknowledged industrial policy, but a successful one.

Two contrasting examples of industrial policy

According to cold-blooded economists, the absence of an environment that assumes and encourages vigorous competition ultimately weakens the enterprises that appear to be benefiting from the situation. The progressive feebleness during the 1980s of the French car industry demonstrates this phenomenon.

In 1979, the President of the French Republic, Giscard d'Estaing, announced at the Paris Auto Salon that imports of Japanese cars would be limited to not more than 3 per cent of annual new car registrations. The policy was never published or made part of the regulatory codex of France. It was enforced effectively but "informally". Great ingenuity was deployed by the French administration to maintain French roads largely free of French-registered cars made-in-Japan. The mechanism involved physically controlling the delivery of type approval certificates, without which no new car could be registered to drive on French roads. Each official importer knew how many cars should be imported in the coming month. If too many cars of one brand were registered in a particular month, the importer of that brand was punished the following month by having to wait a few extra weeks for its next type-approval certificate permitting, for example, a new design of carburettor, or by simply receiving no type approval certificates, and thus being unable to deliver any new car. Parallel imports from other Member States were administratively very difficult, and attempts to thwart the system were routinely unsuccessful.

This spectacular attempt to defy economic gravity seems to have done little good for Simca, Peugeot, Renault or Citroën, which were deprived of the stimulus to innovate and keep their customers happy because the big competitive threat, the Japanese export tide, was to be

diverted to other shores. The Japanese exporters sent their biggest and most richly configured models to France, very profitably.

Consumers and traders responded by deploying many ingenious schemes to bring cars into France from other Member States, including complaining to the European Commission. However, although the facts were notorious, the Commission was unable to achieve consensus to take public legal action against this gross distortion oaf the marketplace. The risk of losing a policy battle with the French authorities was too great, and despite efforts by officials like Colin Overbury and John Temple Lang, no formal public challenge was made by the Commission.

I offer a further historical example from the Japanese insurance industry in the 1980's and 1990's. The Japanese financial economy was hollowing out (like the industrial economy) following the appreciation of the yen. The Japanese politicians reacted to the crisis not by protective measures, which had failed in the past, but by adopting a plan which would allow the progressive emergence of tougher competitive conditions, permitting hungry foreign investment advisers to enter the market. After modest concessions in favour of foreign investment advisers, policymakers recognised that more radical steps were needed, covering the entire financial services sector. The foreigners did a better job of managing the assets with which they were entrusted than their Japanese rivals. The new entrants were better at judging market opportunities through their experience in a highly competitive marketplace in Europe, where profit margins were much lower.

Thus, in Japan, on the one hand we had an example of ferocious competition, totally deregulated, between the members of a strong domestic industry (consumer electronics and cars) exporting to Europe the products developed on the domestic battleground; and on the other hand a French car industry which actually suffered from well-intended protective measures, more than it benefited from them. And, later on, Japanese groups built production facilities in Europe to manufacture locally, partly due to the anti-dumping measures and partly to be closer to the customers.

From this anecdotal account of past efforts, I suspect that most economists would say the use of industrial policy to build national champions seems to yield more failures than successes. There was an attempt, about ten years ago, to launch a scheme to encourage the development of European capacity in the immensely costly sector of semi-conductors. It is not clear that that venture into modern industrial policy has been a success, yet recent reports suggest a revival of something similar.

While I am no economist, I submit that the application of competition law has delivered better results in terms of prosperity and employment that its non-application. I could stop there and merely express the hope that competition lawyers have won the argument, and that we can sit back with dignity watching our heirs apply well established principles. Unfortunately, the phenomenon of policy incoherence has again presented itself. More specifically, the challenge of Brexit has emerged as an improbable threat, prospered, and arrived as a policy, a political reality, and a lamentably confused execution.

Brexit, sovereignty, freedom and state aids

There is an extensive literature about Brexit. Internal schisms within the Conservative Party led to Prime Minister Cameron's reckless bet that the English nationalist faction of his Party could be appeased and defanged by the holding of a referendum on continued British membership of the European Union. It is easiest to understand the Brexit phenomenon if one treats the calling of the referendum as a means of protecting the mainstream of the Conservative Party against the populist and – at the time - successful UK Independence Party led by Nigel Farage, a man who, though never elected to the Parliament of the UK, has had an immense impact on the modern constitutional history of the UK. Some of the features of the referendum campaign and its aftermath have relevance, curious though it may seem, to how competition policy will apply to the United Kingdom and to Scotland, and to what extent that may affect what might be called UK industrial policy.

Satisfactory referendum campaigns present the population with a binary choice between two sharply identified policies often involving a moral choice (assisted dying, gay marriage, town

planning norms). The problem of referenda on wider topics is that commonly the voters respond on the basis of how they feel about other questions, such as how the government of the day is performing. A French friend says that when his compatriots have a referendum vote to cast, they reply first of all "No". And then ask "What is the question?" While countries such as Switzerland have a long experience of successfully resolving contentious issues (tobacco advertising was a recent example) by the route of a referendum, the danger of offering a binary choice on a complex matter is that extraneous considerations will shape the public response.

The Brexit referendum campaign was painfully simplistic in that it presented a profoundly complex set of alternatives as a simple choice, between blissfully prosperous peaceful cooperation and bold liberation from alien bullying and intrusiveness. In the same way as answering yes to the question "shall we emigrate?" presents a host of subsequent delicate choices (to which country, under what conditions, with whom in the family), so, saying yes to "shall the UK leave the European Union?" answered one question and thereby raised dozens of others. Political leaders unwisely assumed that the population would not vote to endanger forty years of steadily constructed collective stability.

It was tempting but misleading to present the question as being a simple choice between (say) freedom and subjugation, or bureaucracy and independence. Deeply inappropriate during the campaign were the confident predictions of a smooth, frictionless Brexit with minimal complications, costs or formalities. The coarsening of the discourse was a further cause for concern, as it made the debate ugly and even more simplistic and polarised. I and others said to the contrary that Brexit would be not an overnight act but a long drawn out process, lasting years, with intermittent crises during a period of slow, grinding, grumpy negotiations on the establishment of obstacles, but not intolerable obstacles, to trade which was hitherto free. The political act of leaving the EU was only the first step – electorally rewarding but uncertain and even dangerous until many other issues were resolved.

Competition as the happy exception?

I and other speechmakers said that if we were going to do a Brexit, it ought not to be executed until a number of crucial issues had been properly recognised, addressed and resolved. Now, although it was easy to identify problem areas (fisheries, police cooperation, judicial cooperation, documentation delays at the port of Dover, traffic between Northern Ireland and the Republic of Ireland, rules of origin as to cars and aircraft, to name but fifty!), I usually added that there was a happy exception to the doom-fraught predictions of the dangers of an unplanned – or no-deal - Brexit. Competition, I argued, was the happy example where the UK had a long history of being sceptical about state subsidies, cartels, the promotion of national champions, and the distortions which industrial policy would inflict on economy policy. From the elimination of resale price maintenance in the days of Edward Heath to the de-politicisation of merger control some thirty years later, the UK had shown that it favoured rational enforcement of competition rules, and it certainly favoured cooperation between agencies. So, we hopefully speculated, competition policy would continue to prosper after a Brexit. Why not, since the fundamental policies were parallel or identical on both sides of the Channel? Sadly, we cannot any longer be confident. As the practical inconveniences of Brexit are being noted and experienced, commensurate merits are being sought out and trumpeted. A common articulation of a success of Brexit is the recovery of "sovereignty". On this theory, entering a treaty is a loss of sovereignty, and exercising pooled sovereignty by regulating in parallel with 27 other countries was the loss of the UK's independence.

Lord Cockfield, a minister in the Thatcher government before becoming a Commissioner (and then the father of the 1992 programme to achieve the Single Market) said that sovereignty was like energy in that it could change its shape but could not be destroyed. Thus pooled sovereignty through the making of rules multilaterally involved a change in how power was exercised, not subjugation to foreign power. The topic acquired potent significance during the referendum campaign ("Take Back Control" as a seductive slogan) and has indeed acquired weight since then, since hunting for the benefits of Brexit has yielded scant prey thus far.

In speeches, I would invite hearers to imagine that the UK would take the whole tangled corpus of European law and plunge it into a bath decorated not with 12 stars but the Union Jack. The UK would have the choice of incorporating into national law an EU rule (headlights, animal welfare, chemicals) or adopting a new rule, or deregulating that topic. There were tens of thousands of pages of EU legislative and regulatory texts covering a host of topics, from animal welfare to arrest warrants. Repealing them was unrealistic, so they were rebranded as "retained"

EU law. The EU (withdrawal) Act of 2018 plucked the whole tangle of legislative wiring out of the Official Journal and called it "retained EU Law" from January 1, 2021 onwards.

For the sake of stability, the Withdrawal Act provided that EU Law would override inconsistent prior UK law, notwithstanding political withdrawal from the EU. So EU rules on equal pay for men and women would prevail against older UK provisions. This would correspond to promises made about preserving workers' rights after Brexit (since these rights are in large measure shaped by EU law and court cases). However, as the political fortunes of the government waned, a fiercer defence of nationalism over reality became necessary. The excitement over technical standards offers another example. EU technical standards govern clothes, food, chemicals, electrical plugs, for the protection of our health and safety. UK manufacturers have played an important role in their drafting. As a proof of sovereignty, the government has pursued the drafting and adoption of different technical standards; and, predictably, UK industry has opposed the idea of a UK standard since one single standard for the UK and EU27 is better than two standards.

As a succession of ministers fell out of favour, new blood was recruited who would show tough resilience against malign Europhile officials. Thus Lord Frost arrived, an ex-diplomat and ex leader of the Scotch Whisky Association (who had in that capacity argued strongly against Brexit). He favoured reducing the influence of EU law on domestic UK law. To this end, the government "intends to remove the special status of retained EU Law" and is considering giving ministers the power to amend or repeal retained EU Law, apparently without the need for legislation. Thus, divergence is being regarded as a welcome badge of sovereignty. And this brings us to the possibility that the UK will discover the attractions of an independent, sovereign competition policy which will favour British national champions.

In "Benefits of Brexit" the government described the numerous advantages of leaving the European Union. The chapter headings are optimistic and include such titles as "Leading from the front", "Recognising what works" and "Making our businesses more competitive and our people more prosperous". As the Prime Minister put it : "We got Brexit done to take back control…". The achieved benefits of Brexit included allowing pub operators to mark beer glasses with a crown, reviewing Standard Essential Patents, protecting geographic descriptions of origin on British foods, and sending an aircraft carrier to Asian waters. These heterogeneous notions

give an appearance of incoherence. It is of course understandable that there is an element of spin and of optimism. Thus "A 4-6 billion pipeline of supply chain investments made in this parliament was catalysed by the Rules of Origin we agreed with the EU." One could also note that these rules of origin make it more difficult for cars to be made in the UK while retaining duty free access to the EU27, in that in the past, the incorporation of components from Birmingham or from Wiesbaden or Łodz was equally advantageous. In future, percentages will limit the amount of "foreign" added value.

Now, from the point of view of constitutional principle, there had been careful discussion about which UK courts could "disapply" European Court jurisprudence, by maybe giving lower courts encouragement to do so; yet the withdrawal Act denies litigants the right to challenge "retained EU law" on the grounds that it is void;. So the EU constitutional right of a litigant to challenge the validity of an EU act is removed (lest, one supposes, the advantage of European law might be too evident). Since this is perhaps an overly dramatic presentation of the question, let us begin with recent UK policy on state aid. The UK was traditionally a supporter of strict rules on state aids, while at the same time being a low spender on permissible state aids. Oxera, the economic consultancy[6] reports that the UK spent less than half what France and Germany spent on state aid per capita in the 6 years running up to 2015 and the Brexit vote. The UK's use of state aid "was consistently and considerably lower that the EU average as a percentage of GDP, throughout the period 2010-2016"[7]. I can anecdotally confirm that during my time as a judge, numerous challenges to decisions about state aid measures came before the Court as to other EU countries, few as to the UK.

So there was logic behind the posture of the government of Prime Minister May when it announced an intention "to preserve the EU state aid rules and to give a UK body the power to preserve these rules". Accordingly, the UK would follow – independently but sincerely – the same state aid concepts as EU 27, so as to deliver "uniform implementation, application and interpretation" of the principles. This would have given UK companies protection in the sense of being able to complain about excessive subsidisation by an EU27 government. While that may be not impossible even post-Brexit, it would seem likely that there will be a weakening of the clarity

[6] Chapter 5 of Brexit and Competition Law, Barry Rodger and Andreas Stephan

[7] p84: Rodger: Brexit and Competition Law

of UK policy in this sector. It was of course easy to mock the idea that the UK had escaped the shackles of EU state aid rules to accept that it would independently follow a parallel state aid discipline. The Johnson government has opted – one supposes – for the WTO language about subsidisation, which places much more limited constraints upon state aids granted by trading partner governments. Thus, the Trade and Cooperation Agreement refers to subsidy control rather than state aid. That implies that if a UK producer feels that a German state aid gives an unfavourable advantage to its rival, the recourse is merely to complain to the UK Government or the Commission, and not to challenge the measure judicially.

I take comfort from the remarks of Andrea Coscelli of the CMA, to the effect that the agency would maintain "strong, mutually beneficial and cooperative relationships with an overseas counterparts", and that the EU27 and the UK with remain "next-door neighbours". I take comfort from the long institutional memory of the civil service and from the UK's tradition of being a well-governed and rationally governed democracy.

I have difficulty in deciding whether the CMA is going to serve as a heeded voice, speaking out for competition and recommending against subsidies, or whether the government is going to be different, in order to be different, and to flaunt its supposed sovereignty. The imprudence of a contemplated course of action is, sadly, no guarantee that it will not be pursued.

Concluding thoughts

I end with a cultural remark. In the entrance to the Gneral Court of the EU sits a sculpture by Edoardo Paolozzi: a massive human figure reflecting on the universe, echoing in a sense the Rodin Thinker at the entrance to the Court of Justice. Paolozzi was born in Scotland of Italian parents, who were treated as enemy aliens at the outbreak of war. He was briefly imprisoned and two relatives died when the ship carrying them to internment was torpedoed. A child of Europe, a child of war, a perfect artist for a European institution. The sculpture echoes artists of past centuries. It was lent at the instance of the Scottish government, and the First Minister has expressed the hope that it will still be there when there is a re-joining of all or part of the UK to the EU. There are grounds for hope that the worst will not happen, that good sense will be

important and that non rivalrous enforcement of established principle will confound the pessimists.

I regarded Brexit as a grave historical error, but the vote was taken and the parliamentary processes were followed. I regret that the negotiated implementation of the political will to do Brexit opted for differentiation, confrontation and "sovereignty", rather than continuity, stability and prosperity.

I hope that when next we discuss here "industrial policy" we will be reviewing not the propping up of electorally sensitive industries but rather the collective identification of rational strategies to resolve a collectively recognised problem, along the lines of what the drafters conceived in 1951. The UK is a rational place, with a talented civil service and independent judges. If we are guided by the sweep of history, and not by the last five years, there are good grounds for optimism.I have learned much from participating in these events in glorious surroundings with lively minds and distinguished visitors. I am delighted that the fog of Covid is lifting and I hope that future gatherings will take us back to the good old days, with lively debate, courteous disagreement and improbable new insights.