COMPETITION COMMISSION

The role of competition in public policy

Supervision of competitive and regulatory processes: the role of legal frameworks

Robin Hood or Thomas Cromwell?

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Introduction

I have been asked to speak about legal frameworks in the supervision of processes. Legal frameworks are of course important but to understand why they might be so, it is necessary to consider the overall nature and purpose of the systems which they frame.

In this context it may be helpful to consider two models: let us call them the 'Robin Hood' model and the 'Thomas Cromwell' model.

Robin Hood was a well-intentioned, if somewhat undisciplined, skilled archer-cum-thief who, with his band of 'merrie men' robbed the rich to help the poor. In the words of the medieval ballad:[2]

> 'He was a good outlaw and did poor men much good'.

Or as Sir Walter Scott described him:

> 'King of Outlaws and Prince of good fellows'.[3]

The key feature of this early advocate of consumer welfare was that he was an Outlaw—he operated without the benefit of, and in opposition to, established legal frameworks, albeit 'doing good'.

Thomas Cromwell, famously, enabled Henry VIII to divorce Katherine of Aragon and marry Anne Boleyn, established the King as the supreme spiritual and temporal ruler and by organizing the dissolution of the monasteries presided over a major redistribution of assets from church to state.

But Cromwell, although socially an upstart, was not an Outlaw. He held numerous legal offices, including Master of the Rolls and Lord Chancellor and his measures were effected by scrupulous legal means, including the famous Act of Supremacy of 1534. Whether or not his measures were confiscatory, like Robin Hood's, they were carried out with the full authority of Parliament.

Let us now turn to current UK competition and regulatory practice, bearing these models in mind. Whether these models are sufficiently faithful to reality is a question we can perhaps

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[1]Chairman, Competition Commission (CC). All views expressed are personal to the author and do not necessarily represent the views of the CC.
[2]'A Gest of Robyn Hode' (c1475).
[3]Ivanhoe.

leave on one side. The point I want to bring out is that each of these figures intervened in other people's affairs. One did so outside the law; the other by scrupulously adhering to it, including the enaction of new laws where none existed. Which of them did more good is moot.

Current practice

The UK competition authorities currently operate under a system in which they have functional independence from the executive, have the power to make decisions in individual cases, are accountable to the courts and apply clear legal criteria which are competition focused. The criteria in the case of sectoral regulation are more numerous, if not more diffuse, and I will concentrate on the competition system for the moment, returning briefly to regulation at the end.

Prior to 1998, and certainly prior to 2002, the system was different. The authorities' role was a mix of advisory and determinative on issues, but not on cases, and decisions were taken by the courts for one part of the system and Ministers for the remainder. The legal criteria were much broader, with various matters grouped under the heading of 'public interest' albeit with a strong bias towards competition.

There were not many examples of anti-competitive agreements being approved 'in the public interest'.[4] But there were anti-competitive mergers that were cleared and a fair number of mergers with no obviously anti-competitive effects that were prohibited on wider public interest grounds.[5] Concerns with this practice led to the so-called 'Tebbitt' doctrine of 1984 under which the prime reason for applying merger control was competition.[6]

Reform of this endearingly British system came in two bites. In 1998 the control of restrictive agreements moved to a clone of the European system of prohibition. Subsequently in 2002 merger control was moved to an explicit competition or 'SLC' basis and, perhaps to the surprise of some, also the control of monopolies was relaunched as the market investigation regime, under a competition-focused 'AEC' test. In each case decisions on these matters were to be taken independently of Ministers by expert authorities.

And so we have happily proceeded for about a decade.

Going back to our two models; the period prior to 1998/2002 has elements of Robin Hood: serious attempts to 'do good' in the public interest; not exactly outside the law but with quite a lot of discretion. The current regime looks much more like Thomas Cromwell: An assertion of the state's authority within a clear legal framework.[7]

Current practice questioned

Now, perhaps, questions are being asked about this competition-focused system. Is it fit for purpose? Is it flexible enough? Is it too doctrinaire and dogmatic? One is almost tempted to ask, does it operate in the public interest?

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[4]Between 1956 and 1991 only 11 agreements out of nearly 10,000 registered satisfied the public interest gateways. See Richard Whish, *Competition Law*, Butterworths (third edition, 1993), p161.

[5]Monopolies and Mergers Commission (MMC) report, *Mr David Sullivan and The Bristol Evening Post PLC: A report on the proposed transfer of a controlling interest as defined in section 57(4) of the Fair Trading Act 1973* (May 1990); MMC report, *The enterprises of Alan J Lewis and Illingworth, Morris PLC, A Report on the Proposed Merger* (August 1983); MMC report, *A Alfred Taubman and Sotheby Parke Bernet Group PLC. A Report on the Proposed Merger* (September 1983); MMC report, *The Government of Kuwait and The British Petroleum Company plc. A report on the merger situation* (October 1988).

[6]Named after Sir Norman Tebbitt, then Secretary of State for Trade and Industry.

[7]The main difference is that in Cromwell's case the establishment of the legal framework involved splitting from Rome. In the current regime, much of the framework derives from a higher, European, authority.

It is usually hard cases which raise these questions. It is easy enough to have a sound policy provided it does not have to be applied.

Examples of recent queries include the House of Lords Communications Committee asking why the Secretary of State allowed the CC to prohibit project 'Kangaroo',[8] a joint venture involving BBC Worldwide, ITV and Channel 4, in a way the Committee judged detrimental to the interests of the British television industry; and the acquisition of Cadbury by Kraft Foods, giving rise to the suggestion by Cadbury's outgoing Chairman that the Government should identify, and take measures to protect, strategic industries from hostile takeover. I will come back to this case later.

These particular examples are in some ways just the tip of the iceberg. The financial crisis and economic recession have raised difficult issues for competition policy and the newly established independent decision making competition authority model has in some ways struggled to deal with crisis measures and mergers, where government has, of necessity, reasserted its influence.

It may be helpful to distinguish the so-called 'emergency' or 'crisis' issues, from the more general questioning of the utility of a competition system that is devolved to independent authorities but which is faced with a range of different policy imperatives.

In recent CC market investigations such as *Home Credit*, *Groceries* and *Rolling Stock leasing companies* (ROSCOs), the need to consider other public policy issues alongside the needs of competition has been shown very clearly. In *Home Credit*, the risk of cutting off the provision of a socially desirable, albeit expensive, form of small sum credit limited the scope for measures such as direct price controls. In *Groceries*, there was much argument and some scepticism about the effects that the 'competitive' retail market was having on the environment, the high street and on health and social policy. And in *ROSCOs* the scope for competition in rolling stock procurement was severely limited by the wider needs of the franchise system intended to deliver 'better railways' overall.

These cases are barely relevant to the recession in the way that *Lloyds/HBoS,* where the possible competition argument against a proposed merger was effectively overruled on other grounds, clearly was. Again, I shall come back to that case.

So with the current competition-focused system coming increasingly under scrutiny, let us see how resilient it is and whether the Cromwellian legal framework is taking the strain.

Some examples

Public interest considerations—national security

When the new merger control regime came in in 2002 most commentators gave little weight to the specific public interest considerations[9] which could come into play alongside competition. The two considerations specifically enacted in the Enterprise Act 2002 (EA02) were national security and plurality of the media. Significantly, there was provision for this list to be added to.[10]

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[8]CC report, *A report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector*, 4 February 2009; House of Lords Communications Committee First Report, The British Film and Television Industries (January 2010), paragraphs 274–279.
[9]For example, the Explanatory Notes to the EA02 prepared by the (then) Department for Trade and Industry focus on the move from a public interest test to a competition-based test with decisions taken by independent competition authorities.
[10]EA02 section 58(3).

The national security consideration may be seen as uncontroversial; on the one hand, it is known that security trumps other policies and, on the other, the Ministry of Defence is apparently a big enough customer to look after itself.[11] The various mergers allowed in reliance on this consideration, particularly those resulting from the Defence Industrial Strategy[12] have aroused little interest.

Media plurality

The media plurality criterion is a different matter and this brings us to the *BSkyB/ITV* case.[13] In November 2006, BSkyB bought 17.9 per cent of the shares in ITV at a time when a tie-up between ITV and Virgin Media was being mooted. Although the cross media ownership rules in the 2003 Communications Act permitted BSkyB to hold up to 20 per cent in a commercial broadcaster such as ITV, the ordinary merger rules were a different matter. The Office of Fair Trading (OFT) examined whether the shareholding was sufficient to constitute a merger and whether there was a threat to competition. Ofcom advised the Secretary of State, who had issued an intervention notice under section 42 EA02, as to the effect on media plurality, in this case, whether there was sufficient plurality of persons controlling media enterprises that broadcast the news. The intervention notice had the effect of making the whole case a public interest case, just like the 'old days'. Both Ofcom and the OFT advised reference to the CC and the Secretary of State duly agreed.

The operation of the regime was not straightforward, and the system relatively untried. But it seemed to work.

What happened was that the CC found there was a merger situation (because of Sky's ability materially to influence ITV's policy), there was an SLC (because Sky and ITV were competitors), but there was *not* a threat to media plurality (because of the practical impossibility of Sky influencing ITN, in which ITV held a stake and which provided ITV's news).

The system provides that the CC's advice on competition is binding on the Secretary of State; on media plurality it is not. It was therefore open to the Secretary of State to take a different view on plurality. It was also open to him effectively to override the CC's competition finding and to allow the merger.

In the event, he accepted all of the CC's findings, and its recommendations as to remedies, which were, essentially, that Sky reduce its shareholding to '7.9 per cent or below', a level at which it could no longer materially influence ITV's policy.

I am not here concerned with the subsequent course of events. There were appeals by Sky and Virgin Media to the Competition Appeal Tribunal (CAT); further 'cross' appeals by these parties together with the CC to the Court of Appeal, which eventually confirmed the CC's original conclusions both on competition and on plurality; which meant Sky had to sell its shares; and which finally took place last month.

What interests us today is the legal framework. The case involved a specific, non-competition public interest test, as well as a competition test; but the Secretary of State did not choose to override the CC's view, and so the CC's media plurality 'clearance' became

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[11] Although in the civil system the NHS seems less able to do so.
[12] Competition Act 1998 (Public Policy Exclusion) Order SI 2008 No 1820 (nuclear submarines); SI 2006 No 605 (maintenance and repair of surface warships) and SI 2007 No 1896 (complex weapons and supporting technology).
[13] The OFT reported to the Secretary of State (BERR) on 27 April 2007 on the competition issues raised by the case. The CC sent its final report on the *Acquisition by British Sky Broadcasting Group plc of the shares in ITV plc* to the Secretary of State (BERR) on 14 December 2007. The CAT delivered its judgment upholding the CC's findings and Secretary of State's decision on competition grounds on 29 September 2008. The Court of Appeal decided on 21 January 2010 essentially to uphold the CC's original decision on the merger on all grounds, including the plurality aspects, [2010] EWCA Civ.2.

academic. The Secretary of State's decision was reasoned and published—and was an advance in this respect on pre-EA02 practice.

Financial stability

The Sky case should be contrasted with the *Lloyds/HBoS* merger.

The sequence of events was this: a possible merger between these two banks had often been considered, but hitherto been ruled out mainly on competition grounds, particularly after the CC's prohibition of the Lloyds/Abbey merger in 2001.[14]

On 18 September 2008, however, a possible merger was announced. At the same time Ministers stated that a new public interest ground of preserving financial stability would be introduced into UK merger control.[15] The Secretary of State subsequently issued an intervention notice under section 42 EA02 on the basis of this consideration, which, as with Sky, had the effect of rendering the OFT's role advisory rather than decisive. The OFT undertook a comprehensive but preliminary competition assessment, concluding on 24 October that the merger did raise competition issues, particularly in relation to personal current accounts, SME banking services and mortgages, which required investigation by the CC.[16] The Secretary of State considered that advice, along with advice on financial stability from the Bank of England, the FSA and HM Treasury, and on 28 October 2008[17] decided not to refer the merger to the CC.

On 28 November the Merger Action Group (MAG) applied to the CAT for judicial review of the Secretary of State's decision. Judgment was given for the Secretary of State on 10 December 2008 and the merger was subsequently completed.

So, again, we have the Secretary of State intervening, and the case transformed into a public interest case with competition as only one factor. The differences from *BSkyB /ITV* were first, the specific public interest criterion in question did not exist when the merger was announced and, *second*, the Secretary of State's decision was made pre-reference, ie without the benefit of a CC inquiry, which would of course have included consideration of financial stability. The justification for this was, of course, urgency and lack of time, with the stability of the banking system a pressing problem. But the Secretary of State relied in part on the fact that the OFT's competition advice was tentative and not definitive. He would not have been able to do that had the CC become involved, as the CC's findings on competition are binding.

This case is often described, including by me, as an example of the UK merger control system working. There was a process, a transparent decision and examination by the courts. But, as time passes, it becomes increasingly clear this was not UK merger control's finest hour, and, with hindsight, it is not clear that the need for haste was so paramount or that the merger was uniquely necessary to preserve financial stability. But then many things appear differently with the benefit of hindsight.

At least this pair of cases shows competition issues explicitly set alongside other potentially conflicting public interest criteria, and a reasoned decision.

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[14] CC report, *Lloyds/TSB Group plc and Abbey National plc: A report on the proposed merger*, July 2001.
[15] Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (SI 2008/2645, 10 October 2008).
[16] OFT report to Secretary of State, 24 October 2008.
[17] Decision under section 45 EA02.

Strategic industries

Kraft/Cadbury is a different matter again. Here we have a hostile takeover battle between two large, and conglomerate, international food businesses with the target, Cadbury, having some claim to iconic UK status as the heir to a tradition of kindly manufacture of chocolate from its Quaker family roots. This case was decided at EU level, and cleared, subject to some fairly modest conditions (divestments in Poland and Romania) at Phase I.[18] There was, it appears, no significant competition issue. Was there any other issue?

It was, perhaps, unfortunate that the completion of the merger coincided with Kraft's announcement that it could not, after all, keep open the former Fry's chocolate factory in Keynsham. That produced adverse comments from trade unions and politicians, including the usual calls for 'something to be done about this sort of thing' and some teasing references to a UK 'strategic chocolate' doctrine.[19] More seriously, Cadbury's outgoing Chairman, Roger Carr, a veteran of many mergers and acquisitions, called for clearer government policy on bids of strategic importance to the UK economy and measures to make hostile takeover offers harder to sustain,[20] and this call has been taken up in the recent Mansion House speech by Lord Mandelson.[21]

Whilst it is easy to dismiss talk of chocolate manufacture as strategic, the issue of whether foreign control of UK enterprises matters is a serious one[22] and we should remind ourselves that these concerns have a tendency to crop up with a certain degree of cyclicality. For example, in 1988 it was the Nestlé acquisition of Rowntree which threatened the future of the UK chocolate industry, and in the same year the (then) MMC examined the acquisition by the Government of Kuwait of a stake in BP of approximately 22 per cent.[23] In its advice to the Secretary of State (which he accepted) the MMC recommended a divestment of the Kuwaiti stake down to 9.9 per cent.

But let me return to the issue of foreign control today. The first point is obvious—this is a reciprocal game. You cannot protect domestic industries and not expect retaliation. But, say the critics, the playing field is already un-level and the UK market more open than others.

Second, there is the problem of definition. What is 'strategic' and by what criteria should strategic industries be protected? We already have three specific public interest criteria. Are we to add more, and if so, are these to be sectoral in nature (energy security or agricultural self-sufficiency) or across the board (the protection of UK food production, or of the UK environment)? There is nothing in the present system to prevent Ministers from proposing such criteria to Parliament and, if approved, invoking them. That there is some obvious reluctance to proceed in this way may be significant.[24]

The third point arises from this, and is in my view the most telling. Where would this process of adding new criteria end? If every merger that arouses political controversy, or threatens the closure of a plant or depot in a marginal constituency, leads to the introduction of a new

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[18]Comp/M.5644 *Kraft Foods/Cadbury*. Decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) ECMR, 6 January 2010.
[19]See Martin Wolf, *Financial Times*, 28 January 2010. It will be recalled that France had at one step described yoghurt as an industry worth safeguarding.
[20]ft.com, 9 February 2010.
[21]Lord Mandelson—Mansion House Speech, London, 1 March 2010.
[22]Although a study by Colin Mayer and Wendy Carlin indicates that the location of head offices does not correlate well with the location of investments in production. See *Financial Times*, 'Britain should not fear foreign ownership', 22 February 2010.
[23]MMC report, *The Government of Kuwait and The British Petroleum Company plc*, op cit.
[24]In the Mansion House speech referred to, Lord Mandelson said '(t)he rules are not immutable but we must not get dawn into a narrow debate about foreign ownership'.

specific public interest criterion that enables the Minister to reclaim the case from the competition authorities, why bother with the present merger control system at all?[25]

We have the present system precisely because the then Secretary of State[26] (who interestingly was the same person as now) wished to take Ministers out of merger control and leave the task to independent competition authorities who would be less subject to political pressure and lobbying. And that argument remains just as strong today.

The role of competition authorities

So if we try to stick to a system under which competition is weighed against specified non-competition issues, the question that arises is who analyses the non-competition issues. It would be an odd situation where carefully articulated competition arguments were weighed against less well explained 'other policies'.

To some extent competition authorities already are required to consider non-competition matters. In the *BSkyB/ITV* case, for example, the CC, as well as Ofcom, examined media plurality.[27] In *Lloyds/HBoS*, financial stability advice came from the tripartite authorities, but had the case been referred to the CC it would have examined this also.

It is not clear that anyone weighed up strategic industry issues in *Kraft/Cadbury* as there was no process that required it to be done.

Before 2002 the CC and its MMC predecessor were willing to look at, and weigh up, the other public interest issues within their remit. In the *KIA/BP* case that I mentioned earlier, the MMC undertook a very wide balancing of relevant public interest issues. It concluded that the strategic and economic importance of oil together with the different interests of Middle-Eastern oil producers and oil-consuming countries (including those with dwindling oil reserves) would increase the likelihood of future conflicts of interests between the Government of Kuwait on the one hand and the UK and BP on the other hand.[28] The MMC considered a whole range of public interest factors in some detail. Overall it thought that the mere size of the holding would influence the decisions made by BP's management and that a future Kuwaiti Government might not necessarily consider itself bound by any deeds or commitments attached to the current transaction.

But that was a recommendation. The decision in *KIA/BP* was taken by the Secretary of State. It is not obvious that competition authorities ought to be given decision making power over policies outside their main sphere of expertise. This strains the system of accountability. It is true that in specific regulatory fields they may in effect have such a power, but they are not in expert. And the sectoral regulators habitually weigh up and decide on a range of policy factors. But somewhere, the Parliamentary system, holding Ministers accountable, has to come into play and it would be better if such balancing decisions were taken by Ministers.

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[25]Richard Lambert, *The Times*, 3 March 2010, described the old regime as 'random decisions shaped more by political whim than by economic judgment'.

[26]Lord Mandelson. As Secretary of State for Trade and Industry in 2001, after the *BSkyB/Manchester United* merger, he encouraged moves that resulted in the new merger control regime in EA02.

[27]Although the House of Lords Communications Committee in its report *The Ownership of the News* (June 2008) in paragraph 271 recommended that this role should cease as the CC was not 'expert' in media matters—which rather missed the point of the CC's involvement.

[28]These include, for example, the status of BP, the maintenance of a competitive world market for oil and oil products, the possibility of a cutback in BP's exploration and oil production programme, conflict of interest at a time of emergencies, the research and development activities of BP, BP as a potential purchaser of Kuwaiti crude oil, the risk to commercially and politically sensitive information, and potential adverse effects on the City of London.

Summary

In my view, what these three case studies show is that:

Frameworks do matter. It is much better to have a system which requires a reasoned decision explaining how competition issues should be set against or alongside other policy issues, than not.

Competition is not everything. It is naïve to assume that other policies do not matter. In some cases they will trump the competition argument; in others they may be exposed as damaging to competition and the wider interests of the economy and therefore needing to be changed.

It is not always clear who is best placed to conduct the balancing of one policy against another. Democratic accountability suggests this role should normally fall to Ministers, but there is scope for competition authorities to do some of this also, possibly more in the framing of advice rather than in making final decisions.

I see these cases as tending to represent the Thomas Cromwell rather than the Robin Hood model. It might be tempting to 'do good' to protect Cadbury from Kraft, or more precisely to protect Cadbury employees from losing their jobs to lower-paid workers in another country. But stating the issue reveals its futility. Under what legal framework could this be done? Would it not, in its turn, amount to simple robbery outside the law?

Regulation

I have not had time to say much about economic regulation and I apologise for this at an RPI/CCP event in which regulation features prominently.

But pursuing our examination of legal frameworks, we see again the need for a system that allows potentially conflicting factors—in this case the now numerous regulatory objectives—to be weighed up in a transparent and accountable manner.

This task is regularly carried out in large part at the level of the sectoral regulators as I said earlier. I am sure they would not want to be identified in any way with the Robin Hood model (other than their skill at hitting the bulls eye)—doing good without regard to the law—but would probably also feel slightly uncomfortable with aspects of the Cromwell model, although they might recognize the scenario of the progressive expansion of legislation to give effect to the wishes of the state.

Where regulatory tasks fall to the CC, either in the context of a market investigation that involves a regulated sector (quite common) or a 'normal' price control or licence modification, the CC takes the consideration of different, contrasting or overlapping, factors very seriously. In *ROSCOs* the CC was acutely sensitive to the policy objectives of rail franchising, as well as the adverse effects on competition; in *BAA* (now sub judice) the overall regulatory framework was identified as a 'feature' affecting competition. Importantly, EA02 requires the CC to have regard to regulatory objectives when framing market investigation remedies.[29] And it is surely ironic that the CC is, under a complex legal framework, currently considering three price control cases (at the behest of the CAT) that derive from the undertakings given in 2005 by BT to Ofcom to avoid a CC market investigation and (as they saw it) possible structural remedies.

[29] Section 168(2) EA02.

Conclusion

So, how is the competition system faring? Is it proving resilient to the change in the economic cycle, to the pressure of events and to the increasing challenge of other policies? Is Robin Hood raising his handsome head or does the grimmer but more efficient Thomas Cromwell's approach still prevail?

I think it is not easy to be sure about this. At one level, the benefit of operating a clearly understood system within a proper legal framework with an agreed policy focus—competition—is not seriously in doubt. In most cases it still works pretty well.

However, when a situation comes along where other considerations weigh heavily, it is then more debatable whether the system is holding up and, more particularly, what the value of having a legal framework is. There are obvious similarities between a system where new legal public interest criteria can be added by Ministers to respond to the needs of the time, and the Cromwellian approach of a new statute to meet the King's current pre-occupation whether it be divorce or ownership of church lands. In each case, the law provides a mechanism and a cloak of legitimacy.

But what recent experience has shown is that whilst the legal framework does indeed provide a mechanism by which policy issues can be assessed and the resulting decisions can be made, it does not make the policy itself any easier to work out. Whether a UK confectionary company should be bought by a 'foreign' based corporation, and whether it 'matters', are policy questions in which a number of factors will need to be assessed and a decision made. The framework can identify the questions but does not resolve them.

Competition authorities can help here. As in *BSkyB/ITV* or as they might have done in *Lloyds/HBoS* they can advise as to the relative significance of different criteria. But I doubt they should go further.

It is not clear that it is acceptable within a parliamentary democracy for decisions on such matters to be devolved to authorities—even expert authorities—and in my view the task should remain where it belongs—with Ministers.

As a footnote, it may be observed that Robin Hood has become a popular figure with whom it is easy to identify. The romantic taunting of established authority touches the popular nerve just as much today as in Medieval times. Thomas Cromwell's popularity is more doubtful. Even his meticulous adherence to carrying out his King's wishes within the law did him no good in the end as he had made too many enemies. However, it is said that the King subsequently missed his diligent presence and regretted having had him executed. I am sure Cromwell derived much posthumous comfort from that thought.