Shaping Brexit - Comments for the BCLWG[1]

We suggest that the BCLWG should have two main objectives:

- to support measures which ensure legal certainty in the area of competition law; and
- to promote measures which ensure the continued attractiveness of the UK courts (or enhance their attractiveness) as a forum for competition damages cases.

Legal certainty

The benefits of legal certainty are to a large degree self-evident (encouragement of investment, *etc*) and are not rehearsed here. Particular issues on which certainty will be required include:

(i) The status of EU block exemptions for agreements which affect trade within the UK (industry appears to find block exemptions helpful given the wide prohibition in Article 101(1)/Chapter I). Although the current EU block exemptions are not all perfect, and will be irrelevant to the UK insofar as they deal with restrictions on trade *between* EU Member States, they will be important for so long as our domestic regime mirrors the approach of EU law and does not move towards a Sherman Act 'rule of reason' approach. The latest government proposals under the so-called 'Great Repeal Bill' suggest that EU Regulations, including block exemptions will be adopted and transposed as necessary into domestic law and this appears, at least in principle, to be a pragmatic and necessary step to avoid any possible legal vacuum at the point of exit (we note one specific, but significant, problem with this proposal below);

(ii) The status of pre-Brexit case law as precedent for national competition law;

(iii) The appropriate agency or agencies to which merger notifications or leniency applications should be made.

Related to this is how the scope of UK competition law should evolve post Brexit. There has been no significant dispute over the past years as to the utility and scope of the (civil) competition laws as applied in the UK. While there may be arguments in favour of a lighter-touch, or more protectionist regime (*e.g.*, the ability to protect national champions against foreign takeover), or in favour of an earlier balancing of pro and anticompetitive effects (as familiar from the US approach), any benefits that such changes would achieve for business in the short term would likely be outweighed by the longer-term risks of UK competition policy becoming a political football. A strong divergence from the EU approach to substantive competition law issues[2] would, in the short term, be unlikely to serve the UK as a business hub for extra-EU investment, where a level playing field with (as near as possible) a single set of rules is more likely to encourage market confidence.

In any event, *incremental* change to substantive competition law will remain possible post Brexit. The CMA will remain able (as now) to set its own policy objectives and to shape competition law appropriately in that way.

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1 The comments below should not be attributed to any client of Bristows LLP.

2 Of course, assuming a 'hard' Brexit, the single market imperative will be irrelevant within the UK (except as between the increasingly devolved parts).

The only subsidiary (but practically important) point is that the CMA may well experience a significant upturn in its workload (and a shortage of experienced staff, given the likely pressure on the Civil service more generally, including government lawyers and economists, caused by Brexit).[3] This may lead to a situation where there is de facto under-enforcement of infringement cases in the UK, something which is already a perceived problem for unilateral conduct issues. Longer term, enhanced funding is likely to be needed for the CMA, in particular if political aspirations for further costly market investigations are maintained. Although the funding needs of individual government departments may be beyond the reach of the BCLWG, the importance of investment to maintain the position of the UK as a premier competition law jurisdiction, offering world class enforcement authorities and a robust and competitive judicial system (see below) cannot be overstated.

Maintaining the attractiveness of courts in the UK for competition claims

The first point above largely supports maintaining the status quo. We therefore focus on the second proposed objective.

The jurisdiction of England and Wales has been particularly attractive to competition damages claimants over recent years. Within the EU, such claims have clustered in three main jurisdictions (the Netherlands and Germany, alongside the English courts), although there are recent indications that other EU jurisdictions are also starting to see more claims (*e.g.*, Ireland – trucks cartels; Austria – Libor-related claim against RBS). Nevertheless, the English courts still appear to be particularly attractive for claimants, offering strong access to evidence through disclosure, and flexible funding options (something with which Germany, in particular, has struggled). The English legal system also offers great benefits to defendants, in terms of the perceived quality and neutrality of the judiciary. The reputation of the CAT as a specialist tribunal, and the reforms to its process, are also of benefit to both claimants and defendants.

Certain of those benefits may be eroded by the Damages Directive, which is due to be implemented by December 2016. Without Brexit, however, a rapid change to the preferred fora for competition damages claims was not anticipated. For example, the introduction of opt-out class actions makes England an attractive destination for claimants, and has yet to be replicated elsewhere in the EU.

Brexit thus clearly has the potential to threaten the English courts' "business". Some of the ways of helping to meet this threat are also relevant to the wider civil litigation landscape, and liaison with equivalent groups on matters such as accession to international treaties on jurisdiction and the recognition of judgments, and on transitional provisions may be helpful. While such other groups may have a broader focus, the BCLWG might play a particular role in promoting appropriate jurisdictional rules for tort claims, as these are generally of more relevance in competition cases than the enforcement of contractual choice of law clauses.

If the English courts are to remain an attractive jurisdiction for competition damages claims, the ability to claim pan-EU/EEA damages (including the UK) will be important.

Ways of maintaining the UK's position would include:

- <u>Retain the ability for claimants to rely on European Commission decisions relating to the infringement of Articles 101 / 102 TFEU</u>. These will no longer cover the territory of the UK (except for pre-Brexit decisions). However, claimants who wish to recover in respect

[3] Indeed, we understand that the CMA has internally estimated that if the one-stop shop rule had not applied, it would have had to handle circa 50 to 70 additional mergers in the last year.

of the UK will need to bring proceedings in the UK in any event. It will be of benefit to both claimants and defendants for all of their claims to be dealt with in case in a single jurisdiction.

- This could be achieved by maintaining ss. 58A and 47A(6) of the Competition Act 1998, making competition "infringement decisions" binding on the courts ("infringement decisions" being defined as including European Commission decisions under Articles 101 and 102)[4]. S. 47A generally (permitting claims for damages etc) before the CAT in respect of infringement decisions, including those taken by the Commission, could also be retained[5]. Consideration could be given to expanding the reach of ss. 58A and 47A(6) to include decisions reached by EU National Competition Authorities under Articles 101/102 and potentially also decisions of the EFTA Surveillance Authority under Articles 53 and 54 of the EEA Agreement – although given the current focus on the importance of sovereignty this may not be politically feasible, even if desired by business.

- Ensure that the UK makes appropriate international arrangements in relation to determining the allocation of claims where there is a *lis pendens* in a related claim in another jurisdiction. This should ensure that England's advantage as a jurisdiction is not eroded by an inability to prevent duplicative proceedings from being launched. Our understanding is that, if no specific arrangements are made on Brexit, the relevant law will revert to the Brussels Convention of 1968 (together with the 1971 Protocol), as provided for by the Civil Jurisdiction and Judgments Act 1982, s. 2(1)[6]. This has the disadvantage of covering only some of the current EU Member States (as later joiners have only acceded to the later Conventions via being a member of the EU). It seems to us that a preferable approach would be for the UK to accede to the Lugano Convention[7].

  At the time of writing, plans have been mooted for a 'Grand Repeal Bill' which (if passed) would maintain all existing EU law until specifically repealed. Maintaining the Recast Brussels Regulation as part of the UK legal framework would give rise to significant problems. Taking this course would result in an asymmetric position whereby the UK is obliged (for example) to drop proceedings in favour of EU proceedings, but with no equal and opposite obligation on EU courts (as the UK would no longer be an EU Member State). This would not only harm the English courts, but would give scope for gamesmanship by litigants. For this reason also, it appears preferable to accede formally to the Lugano Convention without delay.

- Protect against significant divergences in limitation periods. Shorter UK limitation periods compared with the position in the EU would discourage claimants from favouring the UK

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4 A legal loophole may emerge in relation to the treatment of *non*-infringement decisions taken by the Commission (e.g. not to proceed; to adopt commitments, etc): while these would currently be interpreted in line with the obligation of sincere cooperation under Article 4(3) TEU and Article 16(1) of Regulation 1/2003, these obligations will no longer apply. This may be a concern to defendants in cases where there are parallel regulatory enquiries and pending damages actions. The impact of limitation periods may also need to be considered: the date for implementation of Article 10 of the Damages Directive will have passed before Brexit, so it is likely to be sufficient to maintain any resulting legislation.

5 The determination of which law applies is a complicating factor. Once the Rome II Regulation falls away, the relevant legal provisions establishing the applicable law for non-contractual obligations will be the Private International Law (Miscellaneous Provisions) Act 1995. This provides that the law will be that where the significant elements of the tort occurred – so the court would simply be applying Article 101/102 as the relevant 'foreign' law.

6 See Gerard Rothschild, "*Jurisdiction and Brexit: Back to the Brussels Convention by default?*", https://brexit.law/2016/07/08/jurisdiction-and-brexit-back-to-the-brussels-convention-by-default/

7 The UK may also wish to accede to the Hague Convention on Choice of Court Agreements. As such agreements are not always effective for competition law infringements, this is of subsidiary interest in this context.

as a jurisdiction. Subject to effective transportation of the Damages Directive into English law, and the continued recognition of foreign law limitation periods, this is unlikely to be significant in the short term. It is observed, however, that the current rules on limitation periods, in particular where there is a transitional period between an old and new system, as in the CAT rules, have the scope for generating significant uncertainty, which is harmful both to claimants and defendants. The loss of the ability to refer questions to the CJEU as to the interpretation of the Damages Directive could lead to a divergence in approach between the UK and the remaining Member States which has the potential to affect the attractiveness of the UK as a jurisdiction for claims. Clearly, the rights of defendants are paramount, but the impact on the attractiveness of the UK as a forum could well be affected if limitation periods in the UK become significantly shorter than those in the EU.

Even if the UK takes the steps mentioned above, there will be significant challenges to maintaining the current pre-eminence of the English courts for competition damages claims. Matters such as the territorial reach of relevant competition laws (recently in issue in the two *Iiyama* judgments[8]) and the ability of the English courts to adjudicate upon Articles 101 and/or 102 as a 'foreign' tort will have an impact. However, in our view, the steps outlined above would assist in redressing the balance in favour of the UK.

Finally, although an issue which goes beyond competition law, it is strongly arguable that focussed investment in developing the best aspects of our current court system will pay dividends in maintaining the UK as a centre for high value litigation and enhance its reputation as a competition law jurisdiction (with the attendant need for skilled support services far beyond the legal profession and consequential employment and revenue (tax) benefits). Areas for investment might include:

- Maintaining and enhancing the reputation of the judiciary for procedural acumen and case management skills as well for intellectual firepower (continuing efforts to draw the judiciary from a broader pool with a greater range of prior experience might assist with this);

- Supporting the judiciary with dedicated research and legal assistance to improve efficiency, similar to the clerking system in the US or the référendaires in the CAT;

- Adopting, as a general rule some of the procedural flexibility available in the CAT (and at the centre of recent proposals for short and flexible litigation put forward by Birss J and others); and

- Investing in better, larger and more flexible court rooms incorporating facilities for the standard use of effective technological solutions in document-heavy multi-party actions – including trial and case management software.

Bristows LLP
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[8] *Iiyama Benelux & ors v. Schott AG & ors* [2016] EWHC 1207 (Ch); *Iiyama (UK) Ltd & ors v. Samsung Electronics Co Ltd & ors* [2016] EWHC 1980 (Ch).