BCLWG - Brexit Competition Law Working Group

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Dear Sir/Madam

Brexit and Competition Law. Response to BCLWG October 2016 Issues Paper.

This letter is a purely personal response to the open invitation to comment on the BCLWG Report on Brexit and Competition Law. In particular, it is a response to the question posed in paragraph 5.1 of the Report on whether the right questions have been identified. In summary, whilst I don't disagree with any of the points made, I believe that a more fundamental review should be undertaken: if it is not, then some more modest suggestions are highlighted below for consideration.

Background: expansion of jurisdiction will need more resources and therefore justification

A "hard" Brexit ought to provide a opportunity for the UK to ask itself fundamental questions about the past performance of competition law enforcement agencies in this country. Once jurisdictional maps are redrawn as a result of such a Brexit, the responsibilities of the UK agencies will be increased and their scope for manoeuvre will be widened. In a submission to the FCO Competencies Review several years ago, I was one of the few to argue that all jurisdiction over mergers affecting the UK market should be removed from Brussels and relocated to the UK. So I generally favour the outcome of Brexit for control of UK mergers. The same goes for all aspects of competition law where increased UK jurisdiction can be welcomed.

However, the general increase in UK jurisdiction that will result from Brexit (and the attendant demand for extra resources) has to be seen in the light of the record of public enforcement of competition laws over the last 10 years in the UK. The fundamental question is whether the UK public enforcement institutions are, (or are likely to be) up to the task they will face when their jurisdiction widens. Do they deserve the extra resources they will require on the basis of their use of resources to date? This question is bound to be asked at some stage by parties who are not necessarily well disposed to competition law; so it must be confronted head on. An answer to this question requires some performance analysis from the outside.

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Some past enforcement deficiencies highlighted

Ofcom

- Ofcom spent over 10 years pursuing a case against Sky for abuse of dominant position in premium sports rights which merely facilitated BT's entry to that market.
- During this period, Ofcom has failed to deal with BT's Openreach monopoly, by genuine divestment - the only real remedy. It decided that it would be too "disruptive" to do so (in passing, it should be noted that "disruption" is perceived as a "good thing" these days unless it occurs in industries on which the government depends for delivery of a key policy commitment). Ofcom's recent announcement that it is seeking a structural separation of Openreach does not go far enough as Openreach would remain within the BT corporate group - a remedy that does not have a great track record. But even this will prove a struggle as its Chairman (ex KPMG) has signalled.
- Lately, after an investigation lasting nearly two years, Ofcom has capitulated to the Premier League and Sky and accepted (with trivial modification) a classic restriction of output of live premier football games that is accepted in no other jurisdiction. Doubtless, the lobbying on this issue was brutal - as it was the last time the matter was considered in Brussels but Ofcom's overall policy appears incoherent.

Other Sector Regulators

- The criticism of the passivity of these regulators is too well know to require much repetition here. Ofwat's conduct of the Albion Water case was very unsatisfactory. Ofgem's see recent commitment decision on SSE hardly deters the practices that were investigated. **In the light of the above, and irrespective of the form it takes, Brexit should provide an opportunity to merge the sector regulators with the CMA which should then be re-branded as it lacks public recognition.**

The CMA.

- The statutory audit report started under the Competition Commission ended up with no effective remedies. This was greeted with a shrug of the shoulders by many who believe that the major accountancy firms are the high priests of corporate capitalism and that the Civil Service is highly dependent on their consultancy services for delivery of government policy.
- The major investigation into retail banking resulted in a set of "transparency" remedies that has been severely criticised by Andrew Tyrie's committee. Again, the only effective remedies appear politically incorrect bearing in mind HMG's shareholdings. "Transparency" remedies will doubtless be the first and last port of call when the super-profitable fund management oligopoly is subjected to CMA examination. Indeed, the markets' relaxed reaction to the FCA's recent announcement, suggests that they believe that there will be nothing to worry about here.
- As to electricity (another industry on which the HMG depends for delivery of a key policy)

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it is quite possible that the CMA did not receive the full picture. Had it done so, it might have resisted the ferocious lobbying which successfully watered down its original remedy package.

- In Galvanised Steel, the CMA failed to convince the jury of the criminality of individual cartel organisers. The Criminal Bar's leading practitioners are known to be confident of winning any jury case even without a "dishonesty" requirement.
- The CMA failed to persuade the Government that "in the market" competition in the bus sector was a value that was worth protecting. The huge amount of enforcement effort put into this sector over the last 20 years has arguably been wasted.
- As a result of the criticism of the National Audit Office about the lack of the through-put (a misconceived criticism which the CMA accepted far too readily), a number of cases have been opened in pursuit of "low hanging fruit" (SMEs). Some of these SMEs are so "low hanging" as to be virtually sub-terranean (in administration or thereabouts). One decent intervention taking several years is far better use of public money than a few economically insignificant "quickies". It is disappointing that the CMA did not make this point but it is telling that it chose not to. Clearly it lacks confidence.

Whilst this track record has been evolving in front of a largely cynical and uninterested public, the European Commission and other authorities have successfully brought proceedings against international cartels. Now it may well be that cartels are less prevalent in the UK than in Europe (30 years experience causes me to doubt this) but although there have been some successes (pharmaceutical products), some of which are not well known, the UK agencies' intervention record ("hard" and "soft") is not a particularly good (or encouraging) one. It is hard to believe that the enforcers themselves are particularly satisfied with it.

The dangerous revival of "public interest" criteria.

The lack of perceived impact of public enforcement of competition law is a matter of great concern, as alternatives (national champions "public interest" and all the rest) are once more being mooted as solutions to the UK's lack of competitiveness, low productivity etc, etc. Anyone over a certain age knows that these tools have failed in the past and will fail again. It is an indictment of the relative failure of public enforcement of competition law (or, more fairly, the political will on which it depends) that these false gods are being given new garb and are being brought out of the dustbin to which they had properly been consigned.

A significant difficulty has arisen because when major reform was introduced, "competition" was held to be a value that was more predictable than "public interest" and that therefore business would like it. However, the economics profession is held in low esteem by the public since 2008. Moreover, it seems we have the wrong sort of predictability as a result of "capture" by major corporations. The powerful seem to escape censure (let alone effective remedies) and enforcement policy seems to support the cynical conclusion that competition law compliance is for little people - rather like the payment of tax.

Brexit provides an excellent opportunity to address at least one aspect of this disparity of

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treatment between major corporations and SME's by replacing the current fining guidelines which favour conglomerate infringers to the commercial detriment of their single product SME competitors. SME's should also not be fined where they have made a serious attempt at self assessment.

The Brexit challenge for competition policy - ending corporatism

The country needs a competition policy fit for genuine entrepreneurial capitalism rather than the managerial lobby - riddled corporatism (which I fear competition law public current enforcement can only reflect). But corporatism is not just a UK disease - indeed much of it is inspired and encouraged by Brussels. Brexit's potential increase in autonomy provides an opportunity for a fresh start to be made in the correct direction if an honest performance appraisal precedes it. If this does not happen, post-Brexit competition law enforcement could wither on the vine leaving an old failed ideology to fill the vacuum.

Yours sincerely

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