Response of Berwin Leighton Paisner LLP

Introduction

Berwin Leighton Paisner LLP ("BLP") has been advising clients on Brexit since the prospect of a referendum was first raised in 2013. Since the referendum result, we have advised clients across a range of sectors, including financial services, retail, chemicals and manufacturing, on the legal implications of Brexit and have worked with clients to identify the main risks and opportunities for their businesses.

BLP welcomes the opportunity to comment on the Issues Paper published by the Brexit Competition Law Working Group ("BCLWG") and would be interested in participating in roundtable discussions hosted by the BCLWG.

The views expressed herein do not necessarily reflect the views of any of BLP's clients.

PART A: IMMEDIATE ISSUES

Market Investigations

Prioritisation (2.6)

We consider that the CMA should take into account European Commission investigations when considering its own priorities in this area. However, rigid rules should not determine how a European Commission investigation in a given area affects the CMA's assessment of its own priorities.

The CMA's first priority must be to meet its statutory obligations. We then consider that it should use its resources in a way which it considers will have the greatest beneficial impact on competition.

Antitrust

Jurisdiction (2.9)

We consider that the European Commission should retain jurisdiction to investigate and impose sanctions in relation to any potential infringements (or parts thereof) affecting the EEA market (including the UK) where the conduct takes place before the UK exits the EU. The CMA retains the right to investigate and impose sanctions in relation to the UK aspects of any EEA-wide infringements where the conduct takes place before the UK exits the EU if the European Commission has not opened a formal investigation in relation to the same conduct. The CMA should have exclusive jurisdiction to investigate and impose sanctions in relation to any potential infringements (or parts thereof) affecting the UK market where the conduct takes place after the UK's exit from the EU.

We believe the above is consistent with the principles set out in the European Court of Justice's ("ECJ") ruling in *Case C-17/10 Toshiba et al*. While we agree with the principles set out in this judgment, we consider that this is not a matter which should be left to case law and believe that the withdrawal agreement between the UK and the EU should expressly set out the position adopted above. It is unavoidable and natural that there will be a number of infringements that are investigated by both the European Commission and the CMA (in relation to different periods) as was the case following the accession of several Eastern European states to the EU. We consider that the withdrawal agreement between the UK and the EU should furthermore contain provisions to address the cooperation mechanisms that the European Commission and

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the CMA will implement in the scenario where conduct potentially affecting the EEA market (including the UK) which took place before the UK's exit from the EU comes to light post-Brexit (and which has not been the subject of a formal investigation by the European Commission or the CMA). In such a scenario, we believe it is important that only one authority investigates the conduct potentially affecting the UK market.

Section 2.9.2 of the Paper asks whether the European Commission should start new investigations involving pre-Brexit conduct by British companies or which primarily affect the UK market. We believe it is important to note that the European Commission's discretion to investigate conduct taking place before the UK's exit from the EU (even if it commences such an investigation following the UK's exit from the EU) is not limited to conduct by British companies but relates to any conduct that may be relevant to the UK market regardless of the nationality of the company.

Legal Professional Privilege (2.9.6)

We believe it is important for the BCLWG to support the efforts of the Law Society and other professional bodies within the UK to ensure that advice provided by UK-qualified lawyers in EU investigations continues to be privileged following the UK's exit from the EU.

PART B: LONGER-TERM ISSUES

Market Investigations

Consistency of approach (3.5)

A consistency of approach between the CMA and competition authorities in other jurisdictions clearly reduces the burden on businesses which do business in the UK and those other jurisdictions. To enable this consistency of approach, we consider that close cooperation between the CMA, the European Commission and EU NCAs should be maintained. However, it would not be appropriate for the UK to commit to absolute consistency with the approach of other jurisdictions post-Brexit, for example in cases where the benefits of a different approach outweigh the increased burden for businesses in having to deal with potentially inconsistent regimes.

Antitrust

Status of EU case law (3.7)

We consider that EU case law should be considered persuasive following the UK's exit from the EU but should no longer be binding on the UK courts.

Consistency of approach (3.8)

As noted above, a consistency of approach between the CMA, the European Commission and EU national authorities reduces the burden on the significant number of business who are active in the UK and the EU. To enable this consistency of approach, we consider that close cooperation between the CMA, the European Commission and EU NCAs should be maintained. We understand that it may not be politically desirable for the UK to commit to absolute consistency with the approach of the European Commission post-Brexit. However, we consider that an inconsistency of approach, especially in relation to law governing distribution agreements, would result in many businesses incurring significant additional burdens and costs.

Cooperation (3.11.1)

We would expect the CMA, the European Commission and EU national authorities to continue to cooperate closely post-Brexit to reflect the general increase in international competition enforcement. We consider

that the CMA should seek to adopt cooperation mechanisms with the European Commission and EU national authorities that are similar to those it has with the authorities in the United States, South Korea and Japan

Private Litigation

Remaining a forum of choice (3.15.1)

The UK should encourage claimants to continue to bring private actions for breach of the EU competition rules in the UK.

Status of European Commission decisions (3.15.1)

UK competition infringement decisions should remain binding. Subject to some proposed transitional provisions (set out below), decisions of the European Commission (where the geographic scope of the infringement includes the UK market), whilst no longer binding, should have persuasive effect.

Timing of changes:

- *European Commission Infringement Decisions made prior to Brexit*: We consider that European Commission decisions made prior to Brexit, whilst the UK remains subject to EU competition rules, should remain binding in the UK (even following Brexit).
- *European Commission Infringement Decisions made post Brexit, relating to anti-competitive behaviour post Brexit*: As noted above, our view is that these decisions should not be binding in the UK.
- *European Commission Infringement Decisions made post Brexit, relating to investigations commenced prior to Brexit*: We consider, where the CMA was unable to investigate an infringement (prior to Brexit) because the European Commission was doing so, it would seem reasonable that potential claimants should retain the ability to rely on the European Commission infringement decision post Brexit for the purposes of follow-on claims (although of course, the right to commence a stand-alone claim would remain). As such, we would advocate such decisions being binding. If this is (for whatever reason) untenable or unpalatable we would advocate the creation of a rebuttable presumption that the decisions are binding, such that the burden of proof is on defendants to prove they did not infringe competition law. In the absence of such an approach, UK claimants would be at a competitive disadvantage if there were unable (unlike their European competitors) to pursue follow on actions.

Status of the European Commission in national proceedings (3.15.2)

Brexit may result in the divergence of competition rules between the UK and EU. If there is no continued relationship between the UK and EU competition rules, we do not consider that the European Commission should have any special status or standing in national proceedings, save for in relation to those Decisions (explained above) that we suggest should continue to be binding.

Damages Directive (3.15.3)

In practice, the UK regime already complies with much of the Damages Directive (prior to implementation). As regards disclosure, we consider the UK should ensure that the protection against disclosure of leniency documents should remain in force post Brexit. We consider this is important to protect the leniency programme. Whilst the removal of such protections may boost the UK as forum of choice, it would have a potentially detrimental impact on the CMA's leniency regime. This issue may be covered by a broader Memorandum of Cooperation between the UK and EU.

PART C: AREAS OUTSIDE THE FOCUS OF THE REPORT

Securing the benefits of EU frameworks in the regulated industries (4.3)

We consider that there are two ways in which the UK could seek to secure the benefits of the various EU regulatory frameworks that apply to the regulated industries.

First, the UK could seek to establish an international treaty between the EU and the UK Government, whereby the UK adopts specific sectorial regulatory frameworks. Such an agreement would need to include a legally binding mechanism for the mandatory adoption by the UK of new relevant EU regulations. In turn, businesses established in the UK and active in the relevant regulated industries would have the absolute right to trade with, and have access to, the pan-European framework.

As an alternative, businesses established in the UK may seek to restructure their ownership and/or obtain their relevant operating, appointment and regulatory licences from an EU Member State so as to continue to benefit from the relevant regulatory frameworks. However, should headquarters and operational control move overseas, this would have a significant impact on the UK skills base and UK employment.

Berwin Leighton Paisner LLP

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