Brexit Competition Law Working Group Issues Paper

Response from Brick Court Chambers

1. This response is submitted on behalf of members of Brick Court Chambers practising competition law.

2. The comments set out below are addressed to the scenario (suggested by the Working Group) in which the UK does not remain within the EEA, a so-called hard Brexit.

3. Our comments focus on implications of Brexit for the antitrust rules.

Issues arising in the shorter term

4. As the Issues Paper points out, a number of issues will arise upon a hard Brexit and would therefore require a response from the UK Government in the short-term. These issues include:

   a. The extent and form of continued coordination of merger investigations between the CMA and the European Commission;

   b. The continued exchange of information between authorities in antitrust investigations and enforcement;

   c. Questions as to the continued application of arrangements presently facilitated by Regulation 1/2003 in relation to investigations or cases already in train;

   d. The application and scope of Block Exemption rules, leniency rules, or rules relating to legal professional privilege.

5. We anticipate that on most of these issues, the government's overall policy stance over the short term would be to seek to maintain immediately post-Brexit arrangements currently in place; this appears to be the general stance taken by the Government more generally, as indicated by its proposed "Great Repeal Bill".

6. Realisation of this objective will largely be a question of technical detail and the development of transitional provisions designed to minimise change over the short-term, while allowing for legal rules and administrative arrangements to then be altered gradually over the medium and longer term.

7. Under this approach one would expect to see, for example, the Commission and the EU courts continuing to have competence to deal with investigations or cases that

were already open, and/or for a fairly high degree of coordination on investigations between the CMA and the Commission to be observed.

8. There are however areas in which a more specific policy decision will be appropriate for the short term period in which Brexit occurs.

9. Section 60 of the Competition Act 1998 presently determines the status of decisions of the EU courts and the Commission, effectively requiring national courts to follow statements of legal principle made by the EU courts, and to have regard to statements by the Commission.

10. The Issues Paper identifies this as an issue arising over the longer term. It would seem to be necessary for this rule to be changed upon Brexit occurring (i.e. over the short term), given that litigants before UK courts and UK authorities would be outside the structure of the system of EU courts, and would be unable to bring proceedings or to seek a ruling before that system.

11. Analogous situation have arisen previously, such as on the establishment of the Irish Free State, and when former colonies or dominions of the British Empire abolished appeals to the Privy Council.

12. One possible solution would be for decisions of the EU Courts and the Commission (both pre- and post-Brexit) to be regarded as persuasive but not binding – an approach taken by the courts of some Commonwealth countries to English precedents and by the Irish Supreme Court.[1] Alternatively, domestic courts could be directed to have regard to decisions of the EU courts and the Commission, but leave questions of weight or persuasive value to the domestic court's determination. Either option would preserve a degree of continuity.

13. Sections 47A and 58A of the Competition Act 1998 would also seem to require amendment upon Brexit to remove the binding effect of Commission infringement decisions, which would no longer be appropriate upon the UK's exit from the EU regime. Consideration should be given as to whether there ought to be transitional arrangements for these sections to apply to cases the Commission has already opened.

Issues arising over the longer term

[1] *Irish Shell v Elm Motors* [1984] IR 200.

14. As the Issues Paper notes, a range of issues concerning mergers, market investigations, and antitrust enforcement will emerge over the longer term. Several of the longer-term questions relating to antitrust law that the Issues Paper identifies concern the status of EU case law under s.60 of the Competition Act; as set out above, it would be appropriate for the Government to consider some modification of this rule in the short term, upon Brexit taking place.

15. As regards the other longer-term issues, it is in our view more likely that the UK Government will turn to address these issues only at a later stage, given the very significant range of challenges raised by Brexit over the short term, and the reality that the immediate questions will most likely dominate the attention of those concerned for the time being.

16. The broader range of competition policy questions identified by the Issues Paper were to some extent already canvassed in the consultation undertaken by the Government prior to the enactment of the Enterprise and Regulatory Reform Act 2013 and the establishment of the CMA. That consultation considered some of the issues identified in the Issues Paper, including:

    a. The scope for merger investigations to take account of public interest considerations as well as strictly competition issues; and

    b. The timetable for reviews of mergers.

17. It also seems likely that the answers to the more substantial longer-term policy questions that the Issues Paper poses will be informed by developments in competition law and enforcement occurring after Brexit takes place. It may be appropriate, therefore, for these issues to be canvassed in the context of a more general review of the operation of the CMA and the continued existence of an administrative rather than prosecutorial regime, which one could expect to take place after around 10 years of its establishment.

Private actions in competition law

18. In our view, it is likely that – despite Brexit – London will continue to attract a significant volume of claims arising from competition law, due to the attractions that the English legal system holds for litigants.

19. There are several advantages to litigating in London that will continue despite even a hard Brexit:

a. The Competition Appeal Tribunal is now established as a specialist tribunal for determining both follow-on and stand-alone damages claims. Following enactment of the Consumer Rights Act 2015 it has a broad jurisdiction, with hearings before specialist judges and with considerable administrative resources.

b. The EU Damages Directive has drawn on a range of English-law procedures available in competition litigation, and requires their implementation throughout the EU by the end of 2016. These procedures, including for the disclosure of documents, are more familiar to English courts and counsel. There is moreover a possibility that the use of procedures from the Damages Directive before Continental courts will create uncertainty and result in time-consuming references to the Court of Justice of the European Union. It remains the case that litigants would seek to utilise these procedures in the courts most familiar with them.

c. Even if the UK no longer participates in the scheme of the Recast Brussels Regulation, it is most likely that English jurisdictional rules would continue to give the courts jurisdiction over alleged cartelists on a similar basis. In particular, as is the case now, if one defendant is domiciled in England, the court may exercise jurisdiction over other members of the alleged cartel. The courts can continue to apply EU competition law to the claim, in the way that foreign tort claims are frequently litigated in England.

d. Further advantages to claimants arise from the established English-law rules on litigation funding and the recovery of legal costs.

AIDAN ROBERTSON QC

HUGO LEITH

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Brick Court Chambers

7-8 Essex Street

London WC2R 3LD