

Brexit Competition Law Working Group – Issues Paper

Thank you for sending me the Issues Paper (“Paper”) the British Competition Law Working Group (“BCLWG”) has published and for offering me an opportunity to comment on it.

I offer my comments below in my personal capacity. They do not necessarily reflect the views of any organizations with which I am or have been associated, or any of their clients.

I welcome the Paper, and commend the analysis and thought that has clearly gone into its preparation. I think it identifies the key issues in a comprehensive and balanced fashion.

Resolving the issues that the Paper raises will undoubtedly be even more challenging than identifying them in the first place. As the Paper recognizes, the resolutions will inevitably be heavily influenced by the overall stance that the UK Government takes in relation to Brexit - whether Brexit is "hard" or "soft", and how "hard" or "soft". UK competition law does not, of course, operate in a vacuum currently; nor will it relation to Brexit.

I hope that in determining its overall stance in relation to Brexit, the UK Government will take account of the impact on competition law and policy - not for some lofty, idealist reason but because an effective and efficient competition law regime is, of course, a very important determinant of an innovative and well functioning economy. The two go hand in hand.

In that connection, I suggest that it would be useful if the Competition and Markets Authority (“CMA”) and, where appropriate, also the European Commission were requested to provide case/investigation statistics to answer several of the key questions and assumptions that the Paper refers to. In that way, decisions about the future of the

UK competition law regime will be able to be made on as fully informed a basis as possible.

I have three further observations to offer.

First, whatever legal and institutional competition regime is adopted for the UK post Brexit, it is essential that it continues to be predictable, transparent and subject to judicial oversight. These are hallmarks of the current UK competition regime. They create confidence in the regime for all parties subject to it, and especially for businesses (domestic and international) considering whether to invest in the UK. This will be as important after Brexit as it is today. Any initiatives to introduce new or extended "public interest" considerations into the UK regime should be particularly mindful of these considerations.

Second, I am less pessimistic than the Paper seems to be about the role that the UK could continue to play as a thought leader in the global competition world if the UK is no longer a member of the EU. I am also less pessimistic about the CMA's ability still to have highly effective cooperation with counterpart competition agencies around the world (including the European Commission) that are investigating the same matter. This is based, in particular, on my experience as Special Advisor, International to the US Department of Justice's Antitrust Division from 2010 to 2013. Like the Office of Fair Trading and the Competition Commission, the CMA is a highly regarded competition agency - in its own right and not simply because the UK is currently an EU Member State. I believe that this could continue to be the case in the future - if the CMA has the appropriate mindset, resources and political encouragement to fulfill that role.

Third, that role will, however, undoubtedly be diminished if the UK's competition regime starts to diverge from that of the European Union ("EU") after Brexit. With so many newer and emerging competition regimes around the world based on, or influenced by, the EU model, that, in itself, gives the European Commission and EU Member States (including the UK) with similar systems a front seat as influencers of other competition

agencies around the world. That consideration should also be kept in mind when determining the future of the UK competition regime.

I mentioned some of these issues when I participated in a Global Competition Review roundtable in September 2016. That roundtable focused only on mergers but I believe that similar issues apply to the full spectrum of competition law. A copy of the roundtable discussion is attached.

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