Brexit Competition Law Working Group: Issues Paper

Response from Compass Lexecon

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Non-Confidential

1.1 Compass Lexecon has been asked to respond to the Brexit Competition Law Working Group's Issues Paper of October 2016.

1.2 Most of the Issues Paper is – rightly – concerned with matters of legal process, on which law firms are better qualified to comment than are we, as economists. Our response is therefore quite short but we remain very supportive of the BCLWG as we believe that it is important that this debate be given the highest possible attention by policymakers.

1.3 We recognise that the Group has for now chosen to focus on core matters of law enforcement, rather than extending its scope to include State Aid and sector regulation and we understand the reasons for this restriction. Nonetheless, we believe the Group should not lose sight of the broader context of the threat to sound competition policy in the UK more generally. The political debate around Brexit (and more widely) seems increasingly opposed to principles supporting free competition. The Government is reportedly considering an activist industrial policy, and possibly agreement to allow some industries special access to the Single Market, while the Labour Party leadership sees no benefit in retaining State Aid rules[2]. Both in the UK and the rest of the EU, future trading arrangements are being presented in purely mercantilist terms. Access by competitors to the UK market is a benefit to be offered to or withheld from EU producers, it seems, rather than something sought for the benefit of UK consumers or a competitive UK economy. This chimes with a wider distrust of free trade elsewhere in Europe and the US.

1.4 The competition community needs to help counter all of this and make its case that free competition is in the UK's economic interest post-Brexit, just as it was before. The more suppliers competing on equal terms to serve UK consumers, the better. UK producers will not achieve any sustainable gains by being protected from such competition, or by receiving

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1 A draft of this note has been circulated within Compass Lexecon in Europe but it should not be held necessarily to represent the views of all experts employed by the firm.

2 See for example https://www.ft.com/content/e49dccf0-83ea-11e6-8897-2359a58ac7a5

special advantages to help to meet it. If the Group's work gains it access to policymakers, we hope that it will take the opportunity to emphasise the economic understanding that underlies competition law, as well as making points on the design of the law itself.

1.5 In the points below we respond to some specific questions in the Issues Paper. Most of our comments relate more to its Part B, on longer-term changes. Not being lawyers, we do not take a position on whether legislation is required to implement any of our suggestions, so we do not follow the Paper's Part A/B structure.

Mergers

1.6 The Issues Paper raises the question of whether the CMA should spend less time and resources on small mergers if it has to review mergers that are currently reviewed in Brussels. We think this would be a sensible approach. We recommend that it should be implemented by removing the share of supply test to create a single turnover test. The reasons are well-known: a share of supply test creates significant uncertainties for businesses, because the denominator in calculating the share is not necessarily known or agreed by all without investigation. The turnover threshold should not necessarily be increased, as at GBP70m it is high in comparison to other countries in Europe. Possibly, it could even be reduced, particularly if its scope is broadened from being just the 'target' to some measure of both merging parties' turnover.

1.7 As for whether merger control timetables should be aligned with those of the European Union, to make parallel investigation more efficient, we support the objective but we are not convinced that alignment of formal stages and deadlines would achieve this. DG Competition makes considerably more use of pre-notification discussion and of its powers to 'stop the clock' than historically the UK authorities have done, so the longer period nominally available in the UK does not translate into a longer effective period of scrutiny. The Group could usefully warn legislators against a naïve comparison of the timetables.

1.8 The Issues Paper asks "should the CMA be required to take into account of any additional 'public interest issues in its assessment, or should that be left to ministers?" The question is a little ambiguous. We see no reason for any additional public interest issues to be brought into merger control, as the Enterprise Act already provides for a transparent and very limited use of public interest considerations (and the Lloyds/HBoS merger demonstrated that the system is flexible). If the question more narrowly asks *which* public body should assess any public interest questions, we believe it should be central Government rather than the competition authority itself. Competition authorities perform well when they are applying clear economic and legal standards and we regard the specialised professionalism of the CMA as a strength of the system.

1.9 As for the relationship of the UK merger regime to that of the EU, we favour close co-ordination, possibly along the lines of the EU-Switzerland agreement. We note that the UK has taken a very positive approach to international co-operation in competition enforcement[3] and we believe it is important that this continue. Indeed in the present climate against

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[3] A matter that several experts now at Compass Lexecon emphasised in the WEF/ICTSD "E15" project, that recommended closer international co-operation.

globalisation it is more important than ever that the UK continues to support international solutions when dealing with matters that are inherently international in scope, even if Brexit makes it harder to do so. The UK's "gateway" legislation to share information already creates opportunities for deep co-operation, so a specific bilateral deal with the EU is not necessarily a large step for the UK to take (but would provide reassurance that the EU would reciprocally co-operate with UK investigations).

Antitrust Rules

1.10 The Issues Paper asks about consistency of antitrust rules between the UK and EU, particularly in the context of Section 60, along with the closely related question of the treatment of EU case law.

1.11 We believe this is potentially one of the few areas in which positive improvements can arise as a result of Brexit. Consistency – over time and between regions – is in our view best achieved through the consistent application of a sound analytical framework, based upon the likely effect of any allegedly anti-competitive conduct on economic welfare. Of course, businesses need some clear rules so they do not have to assess every decision that they take *de novo*, but this is best achieved through guidelines and sound precedential decisions.

1.12 Regrettably, the existing body of EU case law does not always provide such sound guidance, especially as regards abuse of dominance and vertical agreements.

a. The recent debates over the Intel decision, for example, have demonstrated that reliance on EU court decisions does not necessarily provide certainty. There has been debate around this judgement both about the specific application of Article 102 and the fundamental objectives of EU competition law. Even if the final decision turns out to endorse the more effects-based interpretation we favour, we believe that a clear statement of this approach as the basis of a new UK competition law would be better than reliance on this uncertain and complex structure.

b. Furthermore, EU case law does not always lead to consistent judgement on different forms of conduct that have exactly the same effect[4]. The European Commission has sought to improve matters through its Guidance Paper on Enforcement Priorities, but this does not have the status of law.

c. Finally, in pursuing the market integration objective, the European Commission and courts have frequently condemned behaviour (such as price discrimination between member states) that it has not shown to harm welfare: decisions that make sense only in a supranational regime which is specifically seeking to integrate national economies. While we support a natural process of (global) economic integration through the normal processes of competition, we do not see any value in maintaining precedents based upon the market integration principle.

1.13 We therefore see no particular reason, if the UK leaves the EU and the EEA[5], to maintain the deference to current EU approaches or past EU case law. True, UK firms do business in

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4 See EAGCP: "An economic approach to Article 82", July 2005, for examples.

5 Ie assuming a "hard Brexit". Were it possible to avoid this, continued use of EU case law would probably be a price worth paying to remain fully in the Single Market.

Europe but they also do business in other jurisdictions with different competition laws. We would not expect a free trade agreement with the EU to require consistency with EU competition law at this level of detail[6].

1.14 Given this view, our answer to the Issues Paper's question as to "whether the CMA should increase the number of effects cases" is rather obviously 'yes'. The Paper goes on to ask "what steps could facilitate this?". We recommend more consistency between use of the market inquiry and market investigations tools established by the Enterprise Act 2002 with those of the Competition Act 1998. For example, a Chapter II infringement of the Competition Act is decided by the CMA Board, subject to no statutory deadlines, and with the option of a full review by the courts on appeal. In contrast, an EA02 market investigation may deal with very similar matters of company conduct (as well as extending the scope to market structure and consumer behaviour), be decided by a CMA Panel on a strict statutory timetable and then subject to only limited judicial review (even when strong remedial powers are used).

1.15 The two sets of tools have been seen as very distinct, partly because they were enforced by separate bodies and also because the CA98 powers are seen as closely aligned with European legislation. Following the creation of the CMA and following Brexit, both reasons fall away so it will make very little sense to have such distinct processes. The Government should consider better aligning them, for example through the use of CMA panels to hear 'abuse of dominance' cases and by strengthening the appeals process and standard, so that findings of an adverse effect on competition can be more effectively challenged by parties adversely affected by the decision.

1.16 Underpinning all of this, a clearer statement of the welfare objective of competition law and its concern with economic efficiency could apply to all of the CMA's activities. This would help provide clarity and consistency in what seems likely to be an uncertain and potentially anti-business regulatory environment post-Brexit.

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6 Laprevote et al, in a survey of competition chapters of FTAs, note that "FTAs to which the EU or EFTA are party overwhelmingly reflect the language of or expressly refer to Articles 102 TFEU and 54 EEA, defining anti-competitive business conduct as including "abuses of dominant positions," or "abuse by one or more undertakings of a dominant position." With one notable exception, *[EFTA-Central America]* these FTAs do not, however, define the notions of "abuse" or "dominance." Neither do they list practices that may amount to an abuse of dominance." *http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf*