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Sir John Vickers, Chair
Brexit Competition Law Working Group
c/o Kerstin Wachholz
Administrator
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By email: kerstin.wachholz@kcl.ac.uk

Dear John

Competition Law Issues Paper - October 2016

This paper is a very good summary of the issues to address as respects competition law as the nation readjusts its relationship with other European countries. I have a few comments, for what they are worth, following the paragraph numbering of your paper.

1.4 - I quite agree that the EU Treaty model of competition law works well – indeed rather than saying "it could be argued", I would say it is unarguable. Those of us who started advising on competition law when we had to apply the old Restrictive Trade Practices Act (RTPA) will remember how chronically inefficient that legislation was and how inefficient the Office of Fair Trading was bound to be, trying to control restrictive practices with such imperfect legislation.

I therefore also agree that not only should we preserve a system as close as we can to the current EU system but, on the basis that business needs simplicity, we should continue to align the Competition Act 1998 to it, so businesses still have one set of rules to observe. It would be worth, however, looking at section 60 of the Competition Act to see whether the terms of this might be softened a little to give United Kingdom courts greater flexibility to diverge from rulings of the CJEU.

1.7 – Government policy might usefully focus in some detail on how the EU rules on the extra-territorial effect of Article 101/102 work. It is worth rethinking how ICI, Dyestuffs, etc., will apply to things done in the United Kingdom but which have an effect on EU markets.

Conversely, thought needs be given to whether UK courts will apply the same principles to things done in EU member states, but having an effect on UK markets. Traditionally UK rules on extra-territoriality have been stricter.

2.4 (Mergers) – Ideally we need to have a mechanism in place which says that if a merger with European impact meets the threshold of the EUMR (including its turnover in the United Kingdom), the UK Merger Control Authority (the CMA or AN Other) will stand back unless a positive decision is taken to activate a UK procedure within a certain time.

2.5.4 – In order to ensure close cooperation between DG Competition and, say, the CMA in relation to a merger and its approval, we may need to look again to the powers of both bodies to be able to safely and confidentially exchange information. At present the ability to pass information to DG Comp may often depend on there being an obligation to disclose it under Community Law (for example under Section 240 of the Enterprise Act).

2.6 – The United Kingdom needs to preserve the flexibility to be able to deal prospectively with structural market weaknesses (market failure), especially where the behaviour cannot be brought within the straitjacket of the concept of "abuse of a dominant position". The distribution of beer, petrol stations, access to the national infrastructure (water, telecoms, roads, railways, etc.) or energy supply all come to mind. These are examples of issues which may need a case by case analysis based on the UK's national interest, followed by sector specific remedies.

2.8 – On exchange of information on a confidential basis, there is a concern that information given to the European Commission can then "leak" to any one of the authorities in 27 other member states. This needs to be addressed.

3.2 – If the UK is to continue to rely on the EUMR for the substantive control of major mergers with a European wide effect then I agree that we need to look again at the scope of Article 21; under current rules the United Kingdom can only call in a merger which is above the EU turnover thresholds on grounds of public security, independence of the media and financial stability. There are other areas where the government needs flexibility – for example, protecting the pharmaceutical industry, or protecting industries traditionally regarded as of strategic importance, such as the basic steel industry. A simple solution might be to enable the UK government to rely on the EUMR but with an ability within a fixed time scale to call in a merger where any issue of national interest arises.

3.12 – Some EU Commission actions, such as those against IBM, Microsoft, Google, etc, are perceived to have, and indeed may have, a hidden protectionist purpose. Yet some of these international investigations are based on a valid competition/economic efficiency analysis. There should be a mechanism for the United Kingdom to be able to say, based on the DG Competition's work, that a measure adopted by the EU Commission should also apply in the United Kingdom, i.e. a "me too" provision without needing to repeat the investigation. If the United Kingdom were to so ride on the coat tails of the work of DG Competition should the UK be invited to make a contribution to the cost of such investigations?

By parity of reasoning, does the United Kingdom need any specific powers to retaliate against any anti-trust finding of DG Competition which is protectionist of EU based undertakings and unfairly discriminates against UK based businesses?

3.7 – I am not sure that it is wise to "freeze" the binding precedent value of EU competition law cases just at the moment of Brexit. There may be some pre-Brexit judgments from which UK courts may wish to distance themselves; for example, a UK court may wish to follow more closely the US Supreme Court's ruling in Leegin and soften the approach to Retail Price Maintenance. Would it not

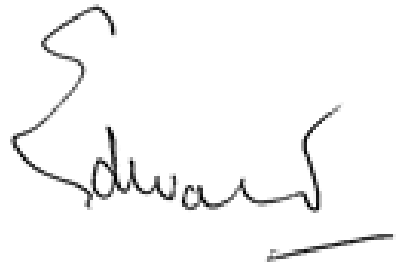
be better to simply adjust the wording of section 60 of the Competition Act 1998 so that when applying that act an English court is no longer quite so bound by a judgment of the CJEU, whether it pre-dates the moment of Brexit or comes afterwards?

No doubt others will have many comments so I will not burden you with any more from me.

With best wishes.

Kind regards.

Yours sincerely,



Edward Pitt