Post- Conference response to the Provisional Conclusions and Recommendations of April 2017 from the BCLWG ("The Report")

Summary of Response

- The assumption made in the Report is that Brexit will result in the UK leaving the EEA and the Single Market. The potential arrangements that will have to be put in place with the EU thereafter are not explored in any detail in the Report. Nor is there any detailed discussion of the implications of the fact that post Brexit, all UK companies doing business in the EU internal market will have to continue to assess their agreements, avoid abuses of dominance and notify EU dimension mergers as other companies from third countries have to do when carrying on business in the EU internal market.

- The omission of detailed discussion of the implications of continued applicability of EU competition law in the UK's nearest and largest marketplace undermines the Reports major substantive recommendationthat Section 60 of the Competition Act be amended so that UK institutions need only "have regard" to ECJ legal authorities and should therefore be free to depart from them (see paragraph 2.7 of the Report) .This recommendation is made from the institutional perspective. From the commercial perspective, it would require companies trading in the UK and the EU internal market to undertake two separate self assessments of their agreements and unilateral behaviour under the varying UK and EU regimes. In practice, in a globalised market where internet sales are constantly increasing, the only sensible approach to take to avoid risk of penalty from the EU is for companies selling in both the UK and EU markets to fully comply with EU competition law as laid down by the EU authorities as they do now. The recovery of sovereignty which the Report's recommendation would bring about for UK institutions is likely to be illusory and unworkable in practice.

- Were this practical objection not fatal to the Report's recommendation, there is nothing to justify any belief that a bespoke FTA deal with the EU might allow the UK to water down the need to respect the EU competition *acquis* in its entirety. The EU's FTA's with Switzerland and the Ukraine (which the EU is resolved never to replicate) might provide some sort of precedent, but both require a complete harmonisation with the EU corpus of competition law. In such a "soft" Brexit scenario, the UK's would have to accept that the ECJ (or some sort of joint court that somehow complies with the ECJ Opinion 1/91) would remain the ultimate legal arbiter of the compatibility of national competition laws with the FTA obligations and not merely a body whose decisions it was necessary merely to "have regard to". **The Report's major substantive recommendation is therefore commercially unworkable and likely to be politically undeliverable.**

- The major challenges ahead are not likely to be the areas so far covered by the Report - filling the post-Brexit agricultural and state aids black holes will be more pressing.

The continuing impact of EU competition law on UK companies; consequences for the Report's recommendation

1. It is trite law (as footnote 7 of the Report makes clear) that providing that jurisdictional requirements are met (an issue currently before the ECJ in the Intel case) all UK companies whose activities have a sufficient impact on the internal market will have to comply with EU competition law just as they must in other countries where they trade. This means that in carrying out self assessment of their agreements etc, UK companies must follow EU precedents; any divergence will be potentially dangerous as fines may be imposed on UK companies even though the UK is a non - member. The famous Dyestuffs case (where ICI was fined for cartel participation before the UK entered what was then the EEC) reminds us of this fact.

2. Once we leave the EU, UK companies and their advisors will not want to carry out two self assessments - one for the local market and the other for the EU - even if they do most of their business locally. Having regard to the very low threshold for EU jurisdiction under Articles 101 and 102 in terms of effect on trade, if an EU provision is stricter, the natural and prudent tendency will be for UK companies to follow EU precedents. This means that any developing UK "rule of reason" on say information exchanges or restrictions by object that might occur if the recommendation were to be adopted will not be exploited by UK companies in agreements with only even a national coverage. If geo-blocking were ever to be prohibited by the EU, it is difficult to see how any different UK position could be sustainable. The "wiggle room" created by the amendment proposed in the Report may therefore not exist in practice. If the EU law is more relaxed than the UK's, then indeed a measure of independence will be recovered; however this of course won't always be welcome. It follows that the recommendation in the Report does not appear to serve anything other than the political purpose of showing that the UK can "do things differently" post Brexit. In practice any such change would serve no practical purpose.[1]

Transitional Arrangements; is the Reports recommendation likely to be deliverable in such a scenario?

3. If the criticism made above were to be put aside, the question arises of whether there would be any external constraint on adopting it. The European Council has already published a draft of its negotiating position in relation to the process whereby the UK disengages itself from the EU pursuant to the Article 50 notification. It envisages a limited transitional agreement concluded as a result of qualified majority voting. There is some dispute as to whether this is going to take effect after the financial arrangements have been reached or whether they can be negotiated in parallel. There is also some dispute as to whether the long term FTA deal with the EU can be agreed in the same way at the same time or whether the

[1] Of course, post-Brexit it is unclear why EU competition law deserves special deference when better legal solutions may have been found in other jurisdictions on various issues (eg, predatory pricing).

three elements are sequential.

4. Once the posturing is over, it does not matter which of these eventualities comes to pass. It is clear that as far as the substance is concerned, any transitional agreement would involve the UK accepting the status quo as far as competition law processes are concerned. This means that there can be no introduction of a "double barrier" in relation to agreements exempted at EU level (should this ever happen). This also means also that the single market objective of competition will remain part of UK obligations. It also means that "public interest" (to the discomfort of many economists plays) may trump consumer welfare in individual cases under Article 101 and 102.[2] And it means that the Lilley doctrine on merger controls can't be resuscitated (if the will to do so existed). Finally, it means that the ECJ during at the transitional period at least will be the supreme body to determine disputes and its decisions on competition law matters will continue to be binding on the UK. During this period the UK could not introduce a test allowing it to depart from EU competition law principles so in this scenario (which some might characterise as "golden") the Report's recommendation could not be adopted.

The bespoke FTA agreement with the EU; could the UK regain some control of substantive competition law?

5. Much the same applies to any permanent FTA that might enter into force once the transitional agreement lapsed. Only this week, the head of DG Comp welcomed the fact that the EU's FTA's with Third Countries all contained competition law provisions. It follows that the UK will be required to reach agreement on the terms of such provisions with the EU in any FTA. Assuming (optimistically and positively) that the UK reaches an agreement with the EU in which there was some restriction on free movement of people, could it realistically hope for some " wiggle room " allowing it to only "have regard to" EU competition law and thus be free to develop in a different direction? One precedent for an agreement allowing restrictions on free movement is the agreement with the Ukraine. However the competition law provisions of this agreement require the Ukraine to adopt EU competition law principles lock stock and barrel. Failure to approximate law and practices can lead to the EU bringing the Ukraine before the ECJ whose opinion is binding on arbitrators.

6. The Swiss agreement is less invasive of Swiss sovereignty. The ECJ is wholly absent from the dispute resolution provisions and therefore meets one of the UK's explicit negotiating requirements. The current suggestion of some sort of joint court faces the difficulty of a potential divergence between positions taken by such a joint court and judgments of the ECJ itself that the ECJ effectively invalidated when the

[2] In practice, public policy concerns do play a part in UK competition law (despite protestations that consumer welfare is paramount) particularly in important cases. The Lloyds HBOS merger, the Open Reach BT "divestiture" and Ofcom's lax treatment of FAPL's sports live rights cartel amongst other important cases cannot be explained by sole reference to consumer welfare.

EEA was set up **(See Opinion 1/91)**. But in any event, in the Swiss agreement, the obligation to follow EU substantive competition law is the same and the rules are expressed in identical terms as in the EU Treaties. In practice, over the years, this has led the Swiss to change their law to allow first time offenders to be penalised (a gap that Hoffman La Roche took advantage of) and also allow mergers to be prohibited that merely strengthened a dominant position without actually creating a monopoly. The Reports' major recommendation to allow the UK to diverge substantively from EU precedents is most likely to be undeliverable even if it were desirable.

What needs to be done?

7. If the Report's major substantive recommendation will not fly, what needs changing as a result of Brexit on anti-trust? Apart from the many sensible suggestions made in the Report on the mechanics of transitions etc, the answer is nothing much of interest to the private practitioner requires change as a result of Brexit. Doubtless post Brexit, there will be more mergers for the CMA to deal with but the Report's suggestion (see paragraph 9.14) that this can be financed by increased fees for the biggest mergers will be very unwelcome as these are already far too high for smaller ones. Charges should only be levied on provision of a public good if they are cost related and this principle is not observed as it matters currently stand across government (e.g court fees) Companies will be charged for something they currently get free from the EU - apart from legal fees of course - so this will be criticised and may lead to the need for increased resources for the CMA which may not be available. In such an event, some internal efficiencies will need to be found

8. The concern that London may lose its lucrative position in the "follow on" market hinted at in the Report will be a worry for practitioners obviously. It appears that some continental firms are already gearing up in expectation of some more work. But a drain of lucrative work in all sorts of areas was always a risk in leaving the EU and the idea that the EU will care at all is unrealistic. Similarly, the hope expressed in the Report that somehow the UK can remain part of the ECN pursuant to some sort of association agreement (see paragraph 8.5) seems unjustified. We cannot remain part of the EU jurisdictional framework and enforcement framework if we leave the EU. Indeed the ECN has so far failed to bring about any meaningful substantive or procedural convergence so loss of membership is not necessarily to be lamented.[3]

[3] As to substantive divergence see the various hotel price parity cases. For procedural divergence, see the French, Italian and UK model agency financial penalty decisions where each national authority used fundamentally different yardsticks (or in the case of France, no discernible yardstick at all).

The case of agriculture: any removal of the exemption needs a detailed and integrated approach.

9. Whilst agriculture is not discussed in detail in the Report, apparently the removal of the current limited exemption will be recommended. This is a big step. For example, the removal of the labour exemption in the Competition Act 1998 has had a serious impact on earnings of providers in cultural industrial labour markets where self employment is the norm which was not intended but which stemmed from following the Irish IPA/Equity case precedent. The removal of the agricultural exemption and the application of competition law to agricultural co-operatives even if mitigated by the application of a "workable competition" yardstick could be worse and indeed might even be fatal to farmers in the UK and unduly favour buyers - at least in the short term. Any recommendation to remove the exemption cannot properly be separated from a full integrated review of what is to happen to the agricultural sector post-Brexit and should therefore not form part of the final report.

Headwinds facing competition law worldwide - and more locally

10. If nothing major needs to be done or can be done to UK c anti-trust law as a result of Brexit, that is not to say that if nothing needs to be done by interested parties. The appetite for a strong enforcement of the rules of competition worldwide and particularly in the US is at its weakest for sometime. It may well be that a more mercantilist anti-trust competition law policy is on the horizon with more protectionism in its wake. Certainly, the slew of anti dumping cases in the US and budget cuts for the enforcement agencies cannot be merely be straws in the wind ; international cooperation between agencies even on cartels cannot be guaranteed if the US follows through on its criticisms that its multinationals (Apple, Google and the rest) are being singled out for scrutiny.

11. There are other headwinds too. Much depends on upon the extent to which the present Government or the future Government of the UK prioritises competition law. There does not seem to be much political support of the work of the competition enforcement agencies which must be demoralising. Lack of competitiveness and low productivity is certainly accepted as a problem for the UK economy, but the lack of demonstrable impact of well resourced public enforcement competition policy on these notorious problems will not have escaped attention. Moreover the belief of some elements in the Conservative party in the "protective state"- a concept which is hostile to market forces - suggests that to the extent that it has control over its own destiny, UK competition policy is more likely to go into the doldrums than thrive.[4] Whether or not it does so its fate will

[4] See William Davies: Home Office Rules LRB 3 November 2016 for an analysis of how May's "protective state" differs fundamentally from market based approaches.

have nothing to do with problems arising from Brexit. Now that competition law will no longer be gold plated by international obligations, it will need defending, at some point and the state aid area is likely to raise the most urgent problems post-Brexit not anti-trust which is the subject of the Report.

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