The future of section 60 CA98 post-Brexit

Observation on the Provisional Conclusions of the Brexit Competition Law Working Group

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Summary

In this paper I discuss the provisional conclusion of the BCLWG that section 60 CA98, which provides that so far as possible questions of UK antitrust law must be dealt with consistently with corresponding questions arising in EU law, should be amended and replaced by a duty to have regard to EU law. I conclude that the case for such an amendment (as opposed to the alternative of repeal of section 60) is less than compelling.

The Provisional Conclusion

The Provisional Conclusions (PCs) note that section 60 CA98 would, in its current form, be inconsistent with the government's intention to bring to an end the jurisdiction of the ECJ. Section 60 CA98 will therefore need to be amended or repealed on Brexit.

The PCs propose amending section 60 to impose a duty to have regard to EU Court judgments and EC statements and decisions.

What is a duty to 'have regard to'

In *R (on the application of The Governing Body of the Oratory School) v The Schools Adjudicator & others* [2015] EWHC 1012 (Admin) Mr Justice Cobb analysed the meaning of 'have regard to' in the context of a requirement for a faith-based school to have regard to Diocesan Guidance on faith-based school admissions. The judge reviewed relevant precedents and concluded

"'have regard' ... [means] take the ... Guidance into account and if they decide to depart from it, they must have and give "clear reasons" for doing so ...'have regard to' involves a greater degree of consideration than merely to 'consult' ... but plainly does not mean ... 'follow', or 'slavishly obey'… I would add that the "clear reasons" referred to ... must in my judgment objectively be proper reasons, or legitimate reasons. In considering whether a Governing Body has 'had regard' to the Diocesan Guidance, it needs to demonstrate that it has considered and engaged with the Guidance, not ignored it, or merely paid lip-service to it. The reasons plainly do not need to be documented (see Khatun), but it is preferable if they are. The Governing Body must further have a proper evidential basis for its decision to depart from the Diocesan Guidance…

It seems to me that it would be more difficult for an admissions authority to demonstrate a clear and proper / legitimate reason for departing from Diocesan Guidance where the proposed faith-based criteria: (i)Fundamentally undermines the core or underlying principles of the Diocesan Guidance;(ii)Is expressly forbidden by, or in conflict with, the Diocesan Guidance; or (iii)Is substantially different in a material respect from the Diocesan Guidance. As for the evaluation of the reasons for departing from the Guidance, in my judgment a Schools Adjudicator should: '…scrutinise the reasons given by the [addressee] for departure [from the Code] with the intensity which the importance and sensitivity of the subject matter requires' (per Lord Bingham in Munjaz at [21]). Where an admission authority departs from the Diocesan Guidance in a significant or extensive way, then plainly the scrutiny which will be brought to bear upon its reasoning will be greater than if the departure is minimal."

Cobb J said that when considering when and how a decision-maker can depart from guidance or a code to which it must have regard, the legislative background or context of the document under consideration is important. Greater deference would have to be paid to guidance that had, through consultation and parliamentary sanction, the force of statutory guidance. In *R v. Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte Munjaz* ([2006] 2 AC 148)

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statutory guidance was issued concerning the admission, detention and treatment in NHS hospitals of those suffering from mental disorder. Lord Bingham of Cornhill said:

"*It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so… In reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires.*"

Effect of such a duty under section 60

In the case of an amended section 60 a number of factors suggest that the test to justify departure from EU law might be at the higher end of the deference scale. In particular: the amended section 60 obligation would be imposed under statutory authority following (one assumes) wide consultation; it would concern issues of importance to business and the economy; it would relate to significant penalties that can result from infringement of the competition rules and the rules to which regard must be had emanate from a court and experienced competition authority.

A duty to have regard to EU judgments and decisions would therefore appear to give considerable weight to EU law in the decision-making practices of the CMA and UK courts. While departure from EU law would be possible this would have to be clearly explained and justified and the more significant the departure the greater the scrutiny. Parties to UK competition cases are likely to make arguments to the CMA or court on why EU law should (or should not) be departed from and the CMA will no doubt have to explain, and record, why it has (or has not) accepted such arguments. Whether the new duty has been properly complied with could therefore become an important feature of UK antitrust cases.

Reasons for imposing the duty rather than repealing section 60

1 A sharp divergence between the UK and EU principles is undesirable, at least in the short term. The new duty would help ensure clarity and continuity, particularly of benefit to businesses many of which will anyway have to continue to comply with EU law.

2 Brexit should not be the occasion for wider amendment of UK competition law than is absolutely necessary - there is not sufficient Whitehall or Westminster time or resource for broader changes. The fewer the changes the better at this point. The new duty would limit the extent of changes.

3 EU competition law is a global standard which has been applied in domestic UK law for nearly 20 years . There is substantive value in continuing to benchmark UK law against this standard.

Arguments against imposing the duty

1 There is no credible case for keeping section 60 in its current form (as the PCs point out). The provision will have to be amended or repealed and this will take government time. There is no reason to believe that amendment will be less time or resource intensive for government than repeal. Indeed amendment may be more resource intensive for government, the CMA and businesses given the need to fully understand the implications of the duty to have regard. In any event, in the context of the broader burden of Brexit required legislative change across the economy as a whole, this is unlikely to be a material additional burden.

2 While the duty would make it harder for the CMA and the UK courts to depart from EU precedent, and therefore could give greater certainty to business than would full repeal of the section, one should not overstate this benefit. There will be a discretion to depart from EU precedent and, at least in the early days of the new provision, there will be some uncertainty as to how the CMA will exercise that discretion and how the courts will interpret the duty to have regard. Further, for those areas of EU

competition law most likely to be subject to challenge under a UK regime, there is also uncertainty over how the EU courts will develop the law, see for example the Intel case.

3 There is a risk that antitrust cases will become embroiled in discussions about whether the duty to have regard to has been properly undertaken, increasing the burden on the CMA in terms of its decisional practices, and leading to challenges before the courts.

4 More fundamentally, and as the PCs acknowledge, section 60 cannot remain in its present form because it would be inconsistent with government policy to bring an end to the ECJ's (and EC's) jurisdiction in the UK. Yet the proposed amendment would give considerable weight to the judgments of the court and the decisions of the EC, particularly where a proposed departure from EU precedent is more fundamental or results in a substantial difference between UK and EU law. The ECJ (and the European Commission) will therefore have great influence over UK competition law, particularly over proposed major changes. Is it appropriate, as a matter of policy, that a court with no UK judges and a Commission with no UK commissioners should exercise this influence?

5 The current government plans to enact a Great Repeal Bill to convert the body of existing directly-applicable EU law, as it stands at the moment of the UK's exit from the EU, into domestic law (Legislating for the UK's withdrawal from the EU, Cm 9446, March 2017). The Bill "*will not provide any role for the CJEU in the interpretation of [UK] law, and the Bill will not require the domestic courts to consider the CJEU's jurisprudence*". However, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day that the UK leaves the EU. Historic CJEU case law will be given the same precedent status as decisions of the Supreme Court. The antitrust provisions of CA98 are arguably not EU-derived law as described in the government's legislative proposal. Even if they were, there would be no case under the government's policy for future decisions of EU courts to be given special status.

6 Other countries which have adopted the EU model do not feel it necessary to impose a statutory obligation to have regard the EU's decisional practices. The UK has domestic precedents based on EU law which will remain relevant post-Brexit. It has a competition law bar and competition authority with great experience, and understanding, of EC law. In such circumstances there is less reason to specifically incorporate a duty to have regard to EU precedents than in the case of a competition regime that is adopting EU principles anew.

7 If section 60 was repealed it would of course be open to the CMA and UK courts to take account of EU precedents (as do other third countries) and it is likely that they would do so. It is almost certain that parties would seek to draw the attention of the CMA and the courts to relevant EU precedents.

8 There is a broad consensus around the world on how core antitrust issues, in particular cartels, should be dealt with and it is unlikely that the UK practice will diverge from international standards. There are a number of more marginal (though important) areas of EU law where it might be argued that the EU precedents are not in the best interests of consumers, for example the law on vertical restraints and on price discounting by dominant companies. There are other areas where post-Brexit there may be good arguments to depart from EU precedent, for example the territorial jurisdictional test for the application of competition law. There are arguments for and against change in these areas. It would seem unnecessarily burdensome to have the arguments on their merits distorted by a debate on whether the duty 'to have regard' had been properly fulfilled.

9 UK competition authorities and courts should have regard to international best practice in economic and legal analysis – whether from the FTC, the US Supreme Court, the European Commission, important EU Member States' national authorities (e.g. the BKA), the ACCC or others and also from academic commentary. Where there is divergence between EU and other international precedents there is no reason to believe that the EU precedent is 'better' for consumers or businesses than the alternatives. The new duty as proposed in the PCs would not prevent the authorities taking non-EU precedents into account but, by giving particular weight to EU law (and providing a basis for legal challenge for parties who believe that proper weight may not have been given to EU law), it could make it more difficult for the CMA and the courts to give the weight they believe appropriate to third country precedents.

Conclusion

The PCs are premised on an assumption of a 'hard Brexit' with the UK ceasing to be a member of the single market. The question is whether, for reasons of pragmatism, competition law and policy should nevertheless continue to have a strong formal link to the decisions of the EU institutions which, at that point, will be foreign state and judicial organisations. The argument for as much predictability and continuity as possible post-Brexit carries considerable weight though, given the inevitability of change in any event, there is a danger of overstating this benefit. On the other hand, the policy objections to giving statutory weight to EU decisions (or the decisions of any other non-UK competition authority or court) are clear. There is also a real risk that the interpretation of the new duty would of itself give rise to uncertainty.

It may be that under any UK-EU transitional arrangement, or a longer term post-Brexit agreement, provision is made for the alignment of UK and EU competition law and one can see the possible benefits of this. But that would be part of a wider policy and trade agreement. Absent such an agreement the case for imposing a duty to have regard to EU competition law would seem far from compelling.