Dr Bruce Wardhaugh – Written evidence (CMP0005)

Summary

In this submission, I make a number of suggestions regarding the possible shape of the UK’s post-Brexit competition policy. I suggest that the UK retain as a competition policy goal a primary, if not exclusive, focus on consumer welfare. This will ensure consistency with the competition laws and policies of other developed economies, including the EU and US. Related to this, I suggest that competition law and policy is not the appropriate locus for the pursuit of “national interest” goals. These goals are too easily “hijacked” by self-interested rent-seekers. If pursued, they should be pursued outside of the competition regime.

I suggest that to the greatest extent possible, the objectives of UK competition policy and the UK’s laws should remain aligned with those of the EU. Divergence in the two regimes leads to an extra layer of legal complexity in cross-border commerce, increasing transaction costs. These costs will, in turn, either be passed on to the consumer (in the form of increased prices) or (at the extreme) scuppering transactions.

Finally, I suggest that rather than using Brexit to explore new found “freedoms” to formulate divergent policy, HM Government’s priorities should be on negotiating and successfully completing international agreements needed to make the post-Brexit competition regime as effective as possible.

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Background

I am a Senior Lecturer in Competition Law at the School of Law, University of Manchester. I have authored numerous articles and a monograph on European and UK competition policy. My work has focused on the goals and objectives of UK and EU competition law and policy. I have appended an abbreviated version of my CV which details my publications and qualifications. This submission expresses my own views, and has been informed by my research on EU and UK competition law, policy and goals. I would be pleased to elaborate further on my submission, should the Sub-Committee so desire. I further declare that I have no financial or other interests which could influence my opinions on this matter.

General

What should UK competition policy in the UK set out to achieve?

It would be best to address this question from the perspective of the UK’s competition policy as it presently exists. At present, the UK’s competition regime is a reflection of the EU’s regime. The legal framework of the latter is set out in the European Treaties and in secondary legislation.1 EU
law imposes a duty on the courts and competition authorities of Member States not to take decisions which would run counter to a decision adopted by the European Commission. The interpretations of the European Court of Justice are therefore authoritative on matters of competition law; and these legal judgments are necessarily recognised as such by courts and tribunals in the UK. The result of this is an alignment of the goals of competition policy between the EU and the UK, with consistency being the paramount objective.

To determine possible post-Brexit goals of UK competition policy, it is appropriate to investigate the present European goals. This will inform our understanding of the now existing goals of UK policy, given the consistency of the two regimes. In understanding EU goals, it must be kept in mind that there are two institutions shaping competition policy through their interpretation of the Treaties. These are the European Commission and the European Courts (primarily the ECJ). Their interpretations are not necessarily consistent with each other.

A detailed analysis of the historical origins of EU competition law is not particularly relevant to present purposes. However, it must be noted that the European drafters of the Treaties were somewhat influenced by Ordoliberal thought, a German political and economic theory developed during the 1930s. A key tenet of Ordoliberalism is a fear of economic concentration and power—whether in public or private hands. To protect the individual, ordoliberal policy served to promote consumer sovereignty, not in the sense of consumer welfare, but a different sense of an abstract notion of market freedom.

It is also fair to say that until about 2002 there was a fair degree of congruence between the Commission and Courts’ interpretations of the goals of EU competition law, which included the integration of the

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2 Regulation 1/2003 (ibid) Article 16

3 See, e.g. the recent case of Streetmap.EU Ltd v Google Inc [2016] EWHC 253 (Ch)

4 Such can be found in my Cartels Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion (Cambridge University Press, 2014) pp 175 - 180 and the references contained therein.

5 Ibid p 177
European market through the removal of barriers to trade and to increase consumer welfare by prohibiting arrangements that impeded price competition. Commission practice in the 1980s and ‘90s permitted non-economic considerations such as industrial reorganisation, regional development, and the environment to be taken into account as part of the competitive effects of a given arrangement. However, since the Commission lost several cases in the Court of First Instance in 2002 it has adopted a so-called “more economic approach,” with a corresponding change in its view of the goal of competition policy. The Commission now takes the position that the protection and


10 On this see my "Crisis Cartels: Non-Economic Values, the Public Interest, and Institutional Considerations" (2014) 10 European Competition Journal 311 – 340.


enhancement of consumer welfare is the aim of the EU’s competition regime. There is academic discussion regarding the desirability of the Commission’s new approach and its consistency with the provisions of the Treaties.

Translated from the jargon of economics, “consumer welfare,” means the advantages which a consumer gains from the purchase or use of a product or service. Typically this is expressed in terms of the difference between a consumer’s “reservation price” (the maximum price that a consumer would pay) and the price the consumer actually pays. These differences, aggregated over all consumers of a particular product or service, represent the gain in consumer welfare from a reduction in price. To the extent that the competitive process results in a reduction of prices, there is a resulting gain in consumer welfare.

The European Courts’ position is similar to that of the Commission. In early decisions the ECJ recognised the market integration goal of the Treaties, the European courts have subsequently recognised that other policy considerations are germane to competition matters. For instance, in 2009 it opined:

First of all, there is nothing in that provision [TFEU Article 81(1)] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.

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14 See, for example, my “Crisis Cartels: Non-Economic Values, The Public Interest and Institutional Considerations” (2014) 10 European Competition Journal 311 (available at: http://www.tandfonline.com/doi/abs/10.5235/17441056.10.2.311); and Witt (n 12).


16 See references n 6.

The significance of this is that though both EU institutions recognise consumer welfare as a competition policy goal; but to the court there are other goals.\textsuperscript{18}

In the UK, The Competition and Market Authority implicitly recognises consumer welfare as a competition policy goal. This implicit recognition can been seen in its Annual Plan for 2015-16 in which it stresses that the CMA aims to produce consumer benefits exceeding its annual spend.\textsuperscript{19} However, the CMA is best placed to provide evidence of the extent to which it regards consumer welfare as a goal (or the sole goal) of competition policy.

In addition, there is growing international convergence on the position that consumer welfare should be the goal of a jurisdiction’s competition policy. Recent decisions of the US Supreme Court have stated that this is the primary goal of US competition policy.\textsuperscript{20} It is no surprise that other jurisdictions adopt this standard,\textsuperscript{21} as the two templates of EU and US competition law tend to be used by jurisdictions formulating a competition regime.


\textsuperscript{20} \textit{Reiter v Sonotone Corporation et al} 442 US 330, 343, 99 S Ct 2326, 2333 (1979), “… Congress designed the Sherman Act as a ‘consumer welfare prescription.’” See also \textit{Arizona v Maricopa County Medical Society} 457 US 332, 367, 102 S Ct 2466, 2484 (1982); \textit{National Collegiate Athletic Association v Board of Regents of University of Oklahoma} 468 US 85, 107, 104 S Ct 2948, 2963 (1984); \textit{Brooke Group Ltd v Brown & Williamson Tobacco Corporation} 509 US 209, 113 S Ct 2578, (1993); \textit{Weyerhaeuser Co. v Ross-Simmons Hardwood Lumber Corporation} 549 US 312, 127 S Ct 1069 (2007)

In addition to consumer welfare, there are other values which a competition regime can promote. Total welfare, i.e. the sum of consumer surplus and producer surplus,\(^{22}\) is often mooted as an alternative goal for merger policy or indeed the competition regime itself.\(^{23}\) The difficulty with the total welfare standard is its distributive effects: as it is indifferent as to the gains between producers and consumers, and mergers (or other business practices) that result in gains to producers which offset consumer losses are acceptable under this standard.

As the OECD identifies, non-economic values such as “pluralism, decentralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values”\(^{24}\) along with “the promotion of employment, regional development, national champions (sometimes couched in terms such as promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation, the spread of ownership stakes of historically disadvantaged persons, security interests and the ‘national’ interest”\(^{25}\) have been incorporated into competition policy to promote the perceived public interest.

As mentioned, the EU has historically promoted market integration, protection of economic freedom, environment and regional development in its use of non-economic values in competition policy. Some may argue that Brexit provides an ideal opportunity for the UK to reformulate its competition policy by developing rules which will encourage export-industries and national champions. I suggest this would be a grave error.

At least three considerations point to this conclusion. First, a legal system that pursues a multiplicity of goals the system also needs some means to balance or resolve the competing interests. Further, any adequate resolution of conflicts is made difficult by the prima facie incommensurability of standards used in those who might value a

\(^{22}\) Producer surplus is the corollary of consumer surplus: it is the difference in the price obtained for a good or service less the cost of its production. Aggregated over a market, this is producer welfare.

\(^{23}\) This appears to be the case in Canada at least with regard to merger control, see Commissioner of Competition . Superior Propane, Inc (2003) 3 F C 529 (Fed Ct App), and the Canadian Competition Bureau’s Submission to the OECD Competition Committee Roundtable on Public Interest Considerations in Merger Control (14 June 2016), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04101.html . See also e.g Roger D. Blair and D. Daniel Sokol, “Welfare Standards in US and EU Antitrust Enforcement” (2013) 81 Fordham Law Review 2497 for an academic discussion.

\(^{24}\) Organisation for Economic Co-operation and Development (n 21), p 2, quoting Secretarial Note of May 1992 (DAFFE/CLP (92)2/REV1)

\(^{25}\) Ibid p 3
particular goal. For instance, how is pride in a national industry to be weighed against the additional costs a consumer may pay for the product of that industry? And, third, the process which seeks to resolve the conflicts through such balancing is susceptible to capture by rent-seekers, who argue that the “public interest” is what is identical to the rent-seekers’ interests when they seek a monopoly for themselves or protection for their industry.

The OECD has noted that as economies develop, their competition policies tend to shift away from promoting “public interest” goals along with (or at the expense of) non-core competition goals. This provides evidence of the sub-optimality of the use of the competition regime (as opposed to other governmental programmes) to promote these goals, at least in the case of developed regimes.

I suggest that post-Brexit, the UK formulate its competition policy so that consumer welfare is its primary—if not sole—goal. The clear advantage of this is that this retention will continue the alignment of UK and EU competition law goals, and remain consistent with the competition policy goals pursued by other, developed economies. Given the difficulties in balancing of goals, I suggest that other non-economic goals not be included in objectives advanced by competition law and policy.

Pursuing consumer welfare as the sole goal of competition policy will have the effect of enhancing vigorous price competition for the benefit of consumers. If Brexit fuels inflationary tendencies, consumer welfare-focused competition policy may mitigate these tendencies. If there is no, or negative, inflationary effect from Brexit, then such a consumer welfare-focused competition policy may be a positive aspect of the UK’s new status.

I wish to emphasise that I am not advocating that post-Brexit, HM Government should not pursue non-economic, public interest goals of the sort mentioned. Indeed, it may be the case that the social, economic and industrial policies facing the UK in the post-Brexit era mandate that these considerations be on the Government’s agenda. I merely suggest that these sorts of goals, if they are to be advances, are best advanced through specialised programmes and remain independent of competition concerns.

What guiding principles should shape the UK’s approach to competition policy after Brexit?

I submit that the UK’s post-Brexit approach to be competition policy should be shaped for the following principles:

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26 Ibid pp 3 – 8

27 Ibid p 4
1. The incorporation of consumer welfare as the regime’s sole goal. My argument for this is provided above.

2. Little to no reliance on other, so-called “public interest” considerations as part of competition policy. Again, my arguments for this are above.

3. UK competition law should remain as consistent as possible with EU law. My arguments for this are below.

Antitrust

Post-Brexit to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law?

Post-Brexit, the UK will still trade with the remainder of the UK, UK and EU enterprises will still operate within each other’s territories (thus governed by the respective competition regimes), and enterprises located outside of Europe will continue to do business in both the UK and the EU. In their activities, businesses are complying with the presently existing legal regimes, namely those of the EU and a UK regime which is consistent with the former.

To the extent that, post-Brexit, the EU and UK regimes differ, this difference is likely impose an additional layer of complexity in a cross-border matter. Such complexity will involved costs (in economists’ terms “transaction costs”) will either be passed on to consumers, or—if they are sufficiently large—will thwart an otherwise optimal transaction. In merger situations the stakes are higher. Given that merger control authorities of every jurisdiction in which a relevant merger situation (as defined by that jurisdiction's laws) occurs must approve the merger, one jurisdiction’s blocking will scupper a globally significant transaction.

What opportunities might greater freedom in antitrust enforcement afford the UK?

“Anti-trust enforcement” cannot be spoken about in abstraction. Rather, we must distinguish among private enforcement, public enforcement by administrative bodies with fines meted out to undertakings, and criminal enforcement where individuals are the subject of sanctions.

Likewise, the word “freedom” is vague. It could mean “the ability for the UK to formulate its own enforcement objectives, independently of the goals or objectives of another’s influence.” Alternatively, it could be taken to mean something to the effect of “the ability to greater enhance the UK’s regime, to make it more effective for UK consumers, and a

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28 This consequence of transaction costs is well known in the so-called “law and economics” approach to legal analysis. The seminal work is Ronald Coase, “The Problem of Social Cost” (1960) 2 Journal of Law and Economics 1
jurisdiction of choice for other litigants.” For reasons articulated above, I submit the first sense of “freedom” should be rejected. Rather, I suggest the focus of the design of a post-Brexit competition regime should be on improving the efficacy and attractiveness of that regime.

The extent to which a post-Brexit competition regime could enhance private enforcement will, to a significant extent, be dependent whether or not plaintiffs can rely on Decisions of the Commission and EU Member States’ Competition Authorities in follow-on actions before UK Tribunals. If such decisions cannot be relied on, plaintiffs will need to relitigate liability issues, raising their costs (perhaps making the proceedings unaffordable) and risking inconsistent legal findings.

Additionally, any increase in private antitrust enforcement opportunities for plaintiffs using UK courts will depend on the extent to which judgments of a UK Court or Tribunal are enforceable within the EU, post-Brexit. Accordingly, to enhance the efficacy the UK’s post-Brexit competition regime, it will need to conclude inter alia an agreement on the mutual recognition and enforcement of judgments with the EU and its Member States replacing the existing Regulation. 29 Further, the legal status—post-Brexit—of the Taking of Evidence Regulation, 30 and the Rome I 31 and II 32 Regulations must to be clarified, which will likely require international agreements.

In the EU, the administrative enforcement of antitrust laws has relied upon the authorities’ ability to obtain information which points out the existence of a cartel, typically through a cartel member’s confession of membership and application for leniency. 33 This is also true in the UK. 34


34 See e.g. CMA Online Sales of Posters and Frames Case 50223 (12 August 2016) para 2.1. Non confidential version available at: https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf.
There is a difficulty with the relationship of leniency programmes and civil enforcement in that leniency programmes require complete cooperation (disclosure) to the competition authorities, but the fear of leniency applicants is that such disclosure will end up in the hands of plaintiff’s counsel. The EU’s Damages Directive was implemented to mitigate this difficulty, and has been transposed into UK law. To ensure that the UK’s regime remains effective, the UK will need to enter into agreements with the EU and its Member States to ensure continuity in the protection of information resulting from leniency applications.

Given that large, international cartels operate across borders, investigations of these matters require the coordination and cooperation between authorities. In particular, authorities may need to coordinate their investigations and the timing of their inspections (“dawn raids”), exchange information, and do so in a manner which does not prejudice the other’s investigation. To ensure the continuity of effective antitrust enforcement (particularly of international cartels), the UK will need to enter into agreements with the EU and with those other jurisdiction with which the EU presently has such an agreement. The agreement which the EU has with Switzerland comes first to mind. However, agreement for such cooperation is often made within the context of trade agreements which the EU has negotiated with trade blocs or individual countries. Over 130 different countries fall within the scope of such agreements.


37 The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 SI 2017/385


my suggestion that post-Brexit (or, pre-Brexit, to the extent legally permissible), the UK commences such discussions and concludes them with cooperation agreements. This, I submit, would provide far greater benefit to UK consumers than a focus on some vague sense of “freedom” to pursue its own aims.

The UK has a criminal cartel offence contained in ss 188 – 202 of the Enterprise Act 2002. At present, the UK authorities’ investigation of large cartels is constrained by the UK’s obligation not to interfere with the Commission’s investigation of the same infringement. After Brexit, this obligation may cease to exist, thus presenting the UK authorities an opportunity to “flex their muscles” with the criminal offence.

However, several points may militate this optimism. First, any “freedom” which the UK may gain through Brexit may be lost when it enters into needed post-Brexit cooperation agreements. Existing agreements may preclude the exchange of information which could be used to impose sanctions (e.g. criminal penalties) on individuals. For instance, the EU-Switzerland agreement contains such a provision. And there is a strong likelihood that existing agreements may be used as templates (or “off the shelf” solutions) for future agreements.

Second, though the UK may have a criminal sanctions for cartel activity, such sanctions are only effective if individuals can in fact be prosecuted. In the absence of agreements on investigation, judicial cooperation and extradition, any attempt to expand the use of this provision will be limited.

Finally, the efficacy of the criminal cartel offence will, to a significant extent, be related to how well the investigating authorities are resourced. There is no guarantee of additional funding for these sorts of investigations. This is exacerbated by other post-Brexit resource demands. In particular, there will be demand for resources as a consequence of additional need to vet mergers which would, pre-Brexit, be within the European Commission’s mandate.

40 Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of their Competition Laws (n 38) Article 8(3)
Mergers

What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions?

Presumably Brexit could present a great opportunity for the UK to revise its national interest criteria in merger control.

What might the advantages and disadvantages of this be?

I can see no good coming from such a revision. As noted above, the appropriate legal space in which to advance these national interest concerns is not competition law and policy. These concerns are properly addressed by other, separate legal and political regimes. Those who would legislate to incorporate “national interest” criteria into any legal regime must do cautiously so as not to allow the private interests of rent-seekers to become the so-called “national interest.”

12 September 2017