Stephen Hornsby– Written evidence (CMP0009)

1. I am a Partner at Goodman Derrick LLP and I have practised EU and UK competition law for over 30 years both in Brussels, at the EC Commission Competition Directorate, and in the UK at law firms, large, small and in-house.

2. The call for evidence by the House of Lords Select Committee comes at a delicate time. We do not know the terms of our divorce from the EU, let alone the terms of our future relationship. This has important implications for U.K competition law and what this enquiry can hope to accomplish.

3. Many things are not going to change as a result of Brexit. Post-Brexit, U.K companies carrying on business in the EU will have to comply fully with EU competition anti-trust law. They will have to have their mega mergers cleared by the EU Commission as they do now – even though they will need U. K approval as well. All that will change once we leave the EU is that our ability to influence the substantive and procedural regime will diminish as we leave the ECN.

4. So, (apart from state aids which is discussed below) the potential impact of Brexit on competition law will be at a local and sub-local level. In theory, the U.K. will now be able to prohibit what the EU permits (in fact of course until Modernisation, EU law actually permitted this). But even here, in practice the scope for any actual change depends upon the shape of the eventual arrangements with the EU. Only if there is no FTA agreed with the EU (and we fall back into the WTO), or alternatively, an unprecedented bespoke agreement is reached in which the UK will regain complete autonomy over the shape of competition law, will Brexit make any difference.

5. Brexit therefore in and of itself creates no really material opportunities or challenges for UK competition policy. Whether there are any opportunities or challenges depends entirely on what sort of Brexit and when it occurs. At the moment, a lengthy transitional deal is being spoken of in which minimal changes are to be entertained. This is an entirely sensible way of dealing with the overwhelming problems facing the withdrawal process but it does have the consequence of making the subject of this particular enquiry much less pressing than the Article 50 timetable might indicate.

6. When it comes to the eventual arrangements with the EU, most relevant precedents (such as the agreement with Switzerland and Ukraine) involve at the very least, strong approximation with EU competition rules, if not total alignment. If this is the way that we ultimately go, then there is very little that this enquiry will have needed to have considered and a great deal of time will have been spent discussing hypotheticals. This was the experience of the excellent Committee set up by Sir John Vickers and others which reached a conclusion that there should be some approximation of law with the EU competition law against a background in
which more than mere approximation might be required in any FTA with the EU.

7. The general question posed by the call for submission is what should competition policy in the UK set out to achieve is still relevant however. This question (which has no necessary link to Brexit) is particularly relevant at the moment; neither Labour or Conservative manifestos saw fit to mention the subject in any great detail and public perception of any policy favouring free markets in the current disrupted economic environment is not very positive.

8. In actual fact, membership of the EU (and also participation in FTA’s with the EU requiring strong approximation, if not alignment with EU competition law) is not exactly the straight jacket that is often said to be the case. There are at least two areas where the UK’s practice can and should change in my personal opinion.

9. The first is that UK authorities should no longer slavishly follow EU fining guidelines which have a disproportionate and adverse impact on small firms – see the attached article which was published in the Times on June 20th. Member states within the ECN (which the UK will be leaving) already take a different approach on fines. It is a reform that the UK would be entitled to make without risk of infringement procedures. I therefore believe, that the Competition Act 1998 and attendant statutory instruments should be amended to allow the CMA greater discretion to fine small companies proportionately.

10. As far as substantive competition law was concerned, it is of course completely out of date across the world and not fit for an economy characterised by monopsonies (not just online either). Solutions have been found for this in the past and need urgent attention now. Collecting societies in the music industry have been allowed to grow up and deal with preponderantly powerful purchasers and the overall effect has been that more has been produced as a livelihood of sorts for artists has become possible as a result of individual creativity being adequately rewarded.

11. Other actors in a similar situation in the cultural sphere have not been given such exemption from competition law. Britain’s cultural industries are quite strong ones and remuneration (and therefore incentives to innovate) are declining as a result of the purchasing power of online megaliths.

12. The press is one particular example where small agencies and newspapers find themselves in a very difficult position – to the overall detriment of society. Germany is trying to deal with this by allowing specific exemption from competition law prohibitions for collective action by small publishers faced with powerful online buyers. There is a case for the examination of the need for a similar exemption in the UK. Once again, this is a national variant made by a country within the EU; no infringement proceedings would be likely to result from its adoption by the UK. The same argument for exemption might well be made for a new and reformed MMB whose
abolition has caused such harm to farmers (and the public purse).

13. Once the limitation of the Committee’s current Brexit brief is accepted, it is therefore to be hoped that the Committee will turn its attention to examining in depth what margin for manoeuvre currently exists to make UK competition policy focus more on those with market power and allow exemptions that will assist the development of countervailing power amongst sellers. At the moment SME’s get way too much attention from the CMA.

14. This leaves the one area that is undoubtedly affected by Brexit – namely the end of the obligation to notify state aid. State aid can seriously distort markets – as the BBC’ competitors would undoubtedly argue. The Charter and framework agreement that Ofcom is currently consulting on is a serious attempt to grapple with the issues caused by enterprises exceeding their public service remit and unfairly competing with others who are not in receipt of public funds. An economy wide regime needs to be set up to deal with this problem in other areas. The Vickers report chose not to discuss this very important issue and is a major one on which this Committee could profitably concentrate.

13 September 2017

Attachment

[Beresford … The Brief … comment … 20 June 17 … 500 words]

[headline]

The Competition and Markets (CMA) recent decision fining Pfizer £84.2 million and the relatively tiny company Flynn Pharma £5.2 million for charging excessive and unfair prices for phenytoin sodium capsules -- a decision that both companies are appealing -- is an acute illustration of the systemic disparity in treatment in competition regulator rulings.

Considering that the authority found that both companies were equally culpable how is it possible that Flynn Pharma -- with worldwide turnover of £52 million -- had to pay a fine pegged at 10 per cent of revenue, while Pfizer, with a turnover of more than £50 billion, had only had to pay a fine of £84.2 million that represents a mere 0.27 per cent of its total turnover?

The reason is that following the EU example, fines for intentional or negligent breaches are calculated according to a complicated formula in which the starting point for determining the seriousness of an offence -- and thence the eventual penalty -- is a percentage (up to 30 per cent) of turnover in the product or service market where the infringement occurs.

That figure is then multiplied by the duration of the infringement and this starting point is then subjected to a number of tweaks to arrive at a final number, which must never exceed 10 per cent of a worldwide turnover.
Following a European Court of Justice ruling, the CMA should not confer an advantage on the least diversified undertakings on the basis of criteria that are irrelevant in the light of the gravity of and the duration of the infringement.

But what has happened in Pfizer-Flynn is that the most diversified company is given an advantage as a result of the fining formula being followed. So, we end up with that result despite other ECJ cases that refer to the need for equal treatment.

This will strike the layman as bizarre; if this is the consequence of equality of treatment it is only equal in the most formal of sense that was rightly ridiculed in Animal Farm.

The CMA would doubtlessly say that it should follow the EU model; however, in practice not all member states do so. Indeed the formula the CMA applies was ignored studiously by its French counterpart in the recent high profile model agencies investigation where Italian and UK model businesses were fined up to the statutory maximum while French agencies received much lower fines based on no discernible rationale.

It is to be hoped that when the UK leaves the EU it will be adopt a more pragmatic and just system. Reform is vitally necessary because smaller businesses that often offer a much smaller range of goods and services have recently been the focus of the CMA’s “low hanging fruit” enforcement initiative.

Such companies, who are attracting fines of 10 per cent of their total turnover will be less willing to challenge controversial regulatory decisions than their more diversified counterparts as a result of the slavish implementation of the EU’s fining formula.

[sign-off] Stephen Hornsby is a competition law partner at Goodman Derrick, a City of London law firm

[comment ends]