The Law Society – Written evidence (CMP0037)

Introduction

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent its 170,000 solicitors, promoting the highest professional standards and the rule of law.

2. The Society negotiates on behalf of the profession and makes representations to regulators and Government both domestically and in the European Union. This response has been prepared by the Law Society with input from members of the profession in the Society’s Competition Section and on its EU Committee.

Executive Summary

3. Competition law is an area where the UK’s membership of the EU has a significant impact and there are a number of issues which will need to be resolved as part of both transitional arrangements and a final trading relationship. These issues include the need for protocols on the completion of competition investigations already underway and the jurisdiction which will determine them, and the future relationship between the European Commission and the Competition and Markets Authority (CMA). Domestically, the type of post-Brexit trading arrangements put in place will be key to determining the future role of the CMA and relations with the devolved administrations.

4. The Law Society echoes the Brexit Competition Law Working Group's (BCLWG) call for effective transitional arrangements to be put in place to facilitate coordination and cooperation between competition authorities in the UK and EU, and for practical procedures for transition, cooperation and coordination to be agreed as a matter of urgency.

5. We also support the call by the CMA to strike a deal with the EU on the exchange of confidential information in antitrust cases to ensure a smooth post-Brexit transition.

6. Clearly many of the Sub-Committee's questions are dependent on the type of Brexit agreed upon. Whatever the form of the UK's future trading relationships, UK competition law should be about maintaining and supporting efficient outcomes for consumers. It should not be geared to support an economic strategy in which the Government picks 'winners' in industry. In the short term at least, there is nothing to be gained from diverging from the current EU competition regime.

7. Minimising costs and burdens on business and ensuring legal certainty should also underpin the approach of the UK Government when negotiating future arrangements with the EU.

---

1 BCLWG conclusions and recommendations on the implications of Brexit for UK competition law and policy, July, 2017.
8. England and Wales is a leading global centre for competition law with a significant body of specialist competition practitioners, a respected judiciary experienced in international disputes, and, in English and Welsh law, a popular governing law for contracts. The Government should ensure that the status of England and Wales as a global legal centre is maintained through the Brexit negotiations. The importance of ensuring UK qualified lawyers have continued access to practise and establish within the EU after Brexit, have the ability to represent their clients at EU courts and institutions, and that their clients can continue to rely on legal professional privilege (LPP), will be key to achieving this.

**General**

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

9. UK competition policy should continue to be formulated to ensure the most efficient outcomes for consumers, including by ensuring that competition takes place on a level playing field best suited to delivering efficient market outcomes. Efficient markets result in increased choice and lower prices for consumers. Ensuring we retain an effective UK competition regime, properly resourced to guard against anti-competitive practices and mergers which distort markets and hinder economic productivity, and that we continue to promote and enhance the attractiveness of UK courts for settling competition damages cases, should guide the UK’s approach.

**Antitrust**

Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?

10. Both the physical proximity and legal similarities of the UK and EU provide a strong incentive to retain antitrust policy aligned with that of the EU, European Economic Area (EEA) and European Free Trade Agreement (EFTA). This would provide legal certainty to business and consistency with current legislation and approaches.

11. Certainly in the short term there is nothing to be gained from divergence on the interpretation of antitrust law. There may, however, be opportunities to consider the desirability of divergence in the medium and longer terms.

**Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?**

12. The Government should continue to encourage private actions for breaches of competition law as this enables effective enforcement which ultimately benefits consumers. English and Welsh law has been particularly attractive to competition damages claimants in recent years but over the past few years there has been growing arbitrage for claimants between different European jurisdictions seeking to attract antitrust private damages actions. The Netherlands remains the main competitor to the UK but others are now seeking to amend procedural laws to attract these claims. The
Government responded to these developments with the procedural changes in the Consumer Rights Act. In turn, the Netherlands is invoking further changes. England & Wales remains at the forefront for litigating these claims for the time being. The quality and neutrality of the judiciary, a nexus of leading global law firms with specialist practitioners in competition law, and the reputation of the Competition Appeal Tribunal as a specialist tribunal are among the reasons for this. Brexit is likely to have a profound effect on this work. The skills of the UK’s competition practitioners and specialist advisers are, of course, available to individuals and businesses throughout the EU and it is in their interest too that the UK’s leading role is retained. The Government should look for ways to mitigate the impact of European Commission infringement decisions no longer being binding on UK courts post-Brexit by retaining the ability for claimants to rely on Commission decisions relating to the infringement of Articles 101/102 of the Treaty on the Functioning of the EU. Absent that, the likelihood is that this work may move to other European jurisdictions. The Government should also ensure that the UK makes appropriate international arrangements relating to the allocation of claims where there is a *lis pendens* in a related claim in another jurisdiction.

13. More broadly, the Government should make the retention of the UK’s status as a global legal centre a priority. The evidence for the economic benefits to the wider UK economy derived from the UK’s role as a jurisdiction of choice is clear. The UK legal services industry employs over 380,000 people across the UK, generating a trade surplus of £3.4 billion, and contributes £25.7 billion to the UK economy (equivalent to 1.5 % of Gross Domestic Product (GDP)).

14. The current EU regulatory regime also means that UK lawyers can practise and establish their practices throughout the EU through the Lawyers’ Services Directive and Lawyers’ Establishment Directive, and ensures rights of audience before the Court of Justice of the European Union (CJEU) and LPP for communications in EU cases. The current framework enables UK lawyers to provide legal services and establish law firms with few restrictions. All EU lawyers benefit from this simple, predictable and uniform system of presence in other member states, and UK lawyers are able to service the cross-border needs of their clients from offices in the EU and through fly-in, fly-out (FIFO) services. For many commercial law practitioners these are regular features of their practices, and the cross-border and multi-jurisdictional nature of many competition cases means retaining the current framework is a key concern for many of them. The Law Society urges the Government to ensure these rights are maintained following Brexit through any new UK-EU agreement.

15. UK lawyers also currently have the right to appear in front of EU courts including the CJEU and the European Commission. UK competition lawyers and their clients are likely to have ongoing and long running cases where they may still need to appear in front of EU courts. The Government should take steps to retain the rights of audience in EU and member states courts for both a transitional period and in any final agreement.

16. Clients of UK qualified lawyers should also continue to benefit from LPP in proceedings before EU courts. Currently, the privileged nature of lawyer-
client communications is recognised by the Court of Justice of the European Union (CJEU) and the General Court of the European Union (GCEU) on account of the UK lawyers being regulated by a professional body in an EU/EEA member state. The Government should take steps to ensure that LPP for UK qualified lawyers and their clients is retained after Brexit, both to ensure that they can continue to effectively represent the needs of their clients, and for the significant contribution the legal sector makes to the UK economy.

Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?

17. There is a high likelihood of this. Where the facts of the case and the degree of UK impact suggest, the CMA will want to review UK interests when the EU or another national competition authority undertakes a major investigation. New bilateral or multilateral arrangements will be required in order to retain the existing investigative and information sharing provisions between national competition authorities established by EU regulation.

18. Minimising increased costs and regulatory burdens for business from parallel investigations by the European Commission and the CMA should be a Government priority. There will also be resource implications for the CMA and the Government should ensure it is appropriately resourced to carry out its post-Brexit responsibilities.

Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK’s withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

19. A competition cooperation agreement covering the secure, secret and timely exchange of information is in the mutual interest of the UK and the EU. The European Commission and European national regulators can currently share confidential information collected in antitrust cases. Ensuring the UK remains a part of this arrangement should be a priority for ensuring a smooth transition to the post-Brexit UK competition regime. Consideration will also need to be given to clarifying the position of pending cases where conduct occurred while the UK was a member of the EU, and transitional arrangements will need to establish jurisdiction and answer case management questions. We were pleased to see the Government’s inclusion of competition and antitrust proceedings and mergers procedures in its list of administrative procedures where transitional arrangements will be need to be agreed with the EU.3

---

How will Brexit affect the CMA’s ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK’s influence in developing global competition policy?

20. The EU currently has agreements with a number of non-EU competition authorities for which the UK should seek appropriate bilateral agreements to ensure effective cooperation after Brexit. The CMA is a key player internationally in bodies such as the International Competition Network (ICN) and the OECD. The CMA should also seek to retain its membership of the European Competition Network (ECN), in order to maintain strong relationships with the European Commission and EU Member States.

**Mergers**

What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?

21. The Government’s priority should be to keep the UK open to global business. The UK currently benefits from a regime which maximises efficiency in the interests of consumers and this should be the aim in future. The Law Society does not believe the UK should aim to diverge from EU competition law, at least in the short term.

How burdensome would dual CMA/European Commission merger notifications be for companies?

22. The ending of EU merger control will inevitably lead to more mergers being notified to the CMA (and potentially also to other EU national authorities) resulting in increased regulatory burden for companies. There is also a possibility of divergent outcomes. Dual merger notifications can add to significantly higher legal and business costs, while divergent outcomes may lead to businesses reconsidering investment options where uncertainties over merger control arise.

How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?

23. For the majority of cases, parallel merger reviews will probably not lead to divergent outcomes once the UK has left the EU if the systems remain broadly similar. However, there must be a concern that for those cases which raise the most substantive issues in the UK, parallel merger reviews could produce this result. This is most likely to be the case for those current EU mergers which meet the threshold for an Article 9 reference back to the UK (whether or not such requests would today be granted).

Do either the CMA or the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?

24. Yes, both the CMA and the Commission cooperate on a regular basis with non-EU competition authorities on merger reviews. The terms and scope of
cooperation between different authorities vary and are sometimes reflected in bilateral agreements, and the CMA is able to cooperate with other regulators without formal cooperation agreements while benefiting from its links to non-EU jurisdictions via the European Competition Network (ECN), the OECD, and the International Competition Network (ICN). The ECN framework ensures close cooperation including the sharing of confidential information among EU national competition authorities where merging parties agree to a waiver of confidentiality.

Will it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK’s departure from the EU? If so, what transitional issues would such an arrangement need to address?

25. Yes, agreeing a transitional arrangement for merger control should be a priority. We recommend that cases already notified to the EU at the point the UK leaves should continue to be dealt with by the European Commission. A protocol under which CMA requests for referrals from the European Commission are automatically granted during a transitional period should also be considered.

State Aid

Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?

26. It seems likely, based on recent precedents, that state aid rules will form a component of a future trade agreement between the UK and the EU. The EU’s recent trade agreement with Ukraine includes a requirement for them to implement state aid rules based on EU precedents and guidance.

27. We also note that the UK could be seen as being in a different position to most of the jurisdictions that have negotiated trade agreements with the EU in that it already fully conforms to EU state aid rules. This is likely to make it harder for the EU to justify a decision not to require the UK to continue to abide by these rules.

Will the UK require a domestic state aid authority after Brexit?

28. This will depend on the nature of the state aid regime that is agreed by the UK and EU. If a UK-EU trade deal were to follow the Ukrainian example, then the UK would need to set up a domestic authority as this agreement contains a specific requirement to do so. In any event, a state aid regime that is based on the EU model, under which it is possible to apply for discretionary exemptions from the state aid prohibitions, would as a practical matter require a designated body that was empowered to grant such derogations. For countries abiding by the WTO anti-subsidy rules (which do not contain any provision for discretionary exemptions) there is no requirement for a state aid authority.

What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU?
Would WTO anti-subsidy rules restrict the UK’s ability to support industries, or individual companies, through favourable tax arrangements?

29. In the absence of a trade deal with the EU, the WTO rules on subsidies (as set out in the Agreement on Subsidies and countervailing measures⁴) would still apply to the UK. The WTO rules only apply to goods, not services, but the substantive provisions are otherwise in many ways similar to the EU rules. Our understanding is that they can encompass measures in the form of tax arrangements.

30. As noted above, the WTO regime differs from the EU regime in that there is no provision for discretionary exemptions.

31. The most significant difference is in the approach to enforcement under the EU and WTO rules. Under the EU regime complaints about breaches of the state aid rules can be raised by individual businesses, either in national court proceedings or before the European Commission. The WTO rules, by contrast, are enforced at an inter-state level and therefore an aggrieved business would need to persuade its national government to take up its case. The UK Government would therefore need to take on a role for UK businesses that (at least in relation to the EU) it currently does not need to do.

How will the Government’s industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission’s state aid policy limited interventions that the UK Government may have otherwise pursued?

32. A trade deal with the EU would likely impose some limits on the UK's freedom of action (e.g. to build up subsidised “national champions”). State aid rules don't, however, proscribe all support for industry and the EU regime recognises that there are circumstances where state aid can be beneficial in helping to tackle market failures.

33. State aid rules do however, impose controls on the manner in which particular policy initiatives are implemented, for example by requiring aid to be kept to the minimum necessary, for interventions to be proportionate to the intended goal, and for distortions of competition to be minimised.

What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?

34. Any state aid regime should apply on a uniform basis across the UK to support economic efficiency and the UK internal market. However the UK Government should consider a role for the devolved administrations in establishing post-Brexit state aid arrangements.

Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK’s withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?

35. Yes, transitional arrangements for state aid matters will be required. There are three key issues that an arrangement will need to address:

---

⁴ https://www.wto.org/english/tratop_e/scm_e/scm_e.htm
Ensuring that the existing regime will be preserved in an effective manner. The general prohibition of state aid in article 107(1) of the Treaty on the Functioning of the EU is directly effective and so would be preserved by the European Union (Withdrawal) Bill as currently drafted. However, Article 107(3) TFEU, which is the provision that allows for exemptions to be granted by the EU from the prohibition, is not directly effective and therefore wouldn’t be preserved under the Withdrawal Bill. Additional measures will therefore be required in order to ensure that the preserved regime is not, as a result of the loss of the scope for exemption, more restrictive in its effect than the current EU regime.

Agreement with the EU will be required on a protocol for cases that are already underway, or under appeal, at the moment the UK leaves the EU. Consideration will also need to be given to the enforcement regime for commitments that have already been agreed with the European Commission (and which in some cases could continue in force for a long time after Brexit).

In the event that the UK introduces its own standalone state aid regime, it is likely to be necessary to include some form of grandfathering for existing state aid approvals to avoid the need to re-review of arrangements that have already been approved under EU rules.

5 October 2017