CPI's Europe Column Presents:

UK Competition Policy and Brexit – Time for a Reset

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Brexit will not only affect UK competition policy but will also have an important impact on EU competition policy. The UK has been a frontrunner on the modernization of EU competition policy, on the criminalization of cartels, on the application of sophisticated economic analysis and on the claim of antitrust damages. EU competition policy is losing one of its best pupils. Oliver Bretz (Euclid Law) discusses how, if the UK resists the pressure to relax its competition policy to cushion a likely economic downturn, it can implement a more effective antitrust regime outside the rigid rules of the EU.

Listening to the UK Chancellor speaking about a "reset" of economic policy in the autumn, it suddenly dawned on me that I, along with most commentators, was missing a point on Competition policy and Brexit. Rather than worrying whether we will end up with a Norwegian or a Swiss model, we should see Brexit as an opportunity to "reset" our competition policy. Let me explain why: I am by no means asserting that we are doing a bad job in competition policy. In fact, I believe that the CMA and the sectoral regulators are doing a very good job, as is borne out in the international comparisons. However, our system is tailored to being inside the EU. The European Communities Act 1972 provides for a right of action through breach of statutory duty, Sections 58 and 60 of the Competition Act 1998 ensure that there is little divergence between UK and EU law, the UK is part of the one-stop-shop principle of merger control - and last but not least, the UK is subject to EU State aid control. We take all these things for granted but they are all up for grabs – and that is both a threat and an opportunity.

First the threat: a national regulator which is beholden to civil servants and politicians is less likely to take unpopular decisions, even if those are in the best interest of consumers. Imagine for a moment, that the economic indicators in the UK continue to decline, as is likely in a post-Brexit world. The pressure on the CMA to permit anti-competitive mergers or even crisis cartels will be immense – and that is even before we get to the risk of "bad" aid being given to national causes, such as the steel industry. It will be incumbent on the CMA and the sectoral regulators to resist those pressures.

However, the flipside of the coin is a great opportunity. Here is why: the UK will never be a regulatory Norway or Switzerland lining up patiently behind the European Commission, waiting for a Decision that can then be followed. The UK has always had a history of mid-Atlantic blue-sky thinking in competition policy and this is unlikely to change. One just has to look at the UK's flirtation with GUPPI and other strange fish in its merger guidelines to see that the CMA is unlikely to sit back and wait for direction from the EU. This is especially true as a withdrawal of the UK from the EU could result in a more Franco/German approach to competition policy, resulting in ordo-liberal decision-making and a possible reduction in the use of empirical economics at DG Comp. The CMA, faced with parallel proceedings in most cases, as is likely in a new post-Brexit arrangement, could carve out a more defined role for itself as the test-bed for new economic theories and methods.

One could also see the UK becoming a more sophisticated litigation venue. I accept that here are major areas that need to be worked through – EU Decisions will no longer be automatically binding and the direct right to bring an action for breach of statutory duty will disappear. But beyond that, the UK will remain the venue of choice for competition litigation due to its disclosure-friendly regime, the availability of an opt-out class action and the absence of formal regulation of litigation funders. To that list I would also add the sophisticated alternative dispute resolution mechanisms, such as mediation, where the UK is market-leading. Without the constraint of the Damages Directive, the UK could make its own choices on disclosure, based exclusively on comity principles. One can see how such a system could result in earlier disclosure, especially of the Statement of Objections and of contemporaneous documents.

So why a reset? My contention is this: most competition lawyers alive today to do not remember the time before EU Accession. We have grown up in a system which was effectively dovetailed into the EU system over the years with the repeal of the Fair Trading Act 1973 and the abolition of the Restrictive Trade Practices Act 1976 in favour of the Competition Act 1998 and eventually the Enterprise Act 2002. The latter added a criminal regime to our competition law and it would be open for the UK to start using that regime more aggressively for cartels that have an effect inside the UK. The absence of the European Arrest Warrant should not be a problem, as long as Heathrow remains a major international hub. One only has to look at the recent arrest of HSBC's global head of foreign exchange at JFK airport to understand how the UK could have significant impact in such a new world order. The challenge now is to find a way of operating our system outside the EU framework without compromising on its effectiveness.

Whilst this article is somewhat provocative in its outlook, it contains a very serious message, which is that the UK will always remain at the forefront of competition policy even post-Brexit. We have the tools to remain a major force in international competition enforcement – and there is no reason not to use those effectively.