



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

Webinar: Modern Competition Law: where next post-Brexit?

Date: 14 July 2021
Speaker: Sir Christopher Bellamy QC

1. INTRODUCTORY REMARKS

- 1.1 Certain important features of UK competition law pre-date its membership of the European Union ("EU"). For example, the current market investigation regime stems from monopoly legislation dating back to 1948, and the definition of a "merger situation" has remained almost unchanged since its introduction under the Monopolies and Mergers Act 1965.
- 1.2 Following its accession to the European Communities in 1973, it took 27 years for the UK to harmonise its competition legislation with that of the EU through its introduction of the Competition Act 1998 and the Chapter 1 and Chapter 2 prohibitions.

2. THE ROLE OF POLITICS IN COMPETITION LAW

- 2.1 In the early 2000s, there was a general consensus in the international competition law space that politics should not play a role in determining the outcome of competition issues. For this reason, and with the enactment of the Enterprise Act 2002, the UK replaced the 'public interest' test with the 'adverse effect on competition' ("**AEC**") test.
- 2.2 This consensus prevailed for 10 to 15 years, and encouraged jurisdictions to implement similar regimes under the influence of international public bodies (such as the World Bank and the International Monetary Fund). However, in recent years, this view has been changing. Only recently, President Biden (at the signing of an Executive Order promoting competition in the US economy on 9 July 2021) remarked: "*We're now 40 years into the experiment of letting giant corporations accumulate more and more power*", scrutinising the way that competition laws and policies have been enforced.
- 2.3 The shift toward a greater political role being taken by governments in confronting competition law issues has been encouraged by a number of market forces (including tensions over trade and the emergence of China's economy). In particular:
 - (a) **COVID-19 pandemic:** government intervention in the UK (through the provision of furlough, business loans, and vaccinations) is suggestive of this political shift. Moreover, the pandemic has highlighted the need to produce strategically valuable goods domestically (as opposed to relying on imports).
 - (b) **Data:** governments and regulators are still grappling with the question of data usage and data privacy, and the relationship between GDPR legislation and the workings of competition law.
 - (c) **Climate change:** to the extent that corporations collaborate in the development of certain products (see, for example, the EU Commission's recent decision to fine Daimler, BMW and Volkswagen group EUR 875 million for colluding on technical



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development in the area of nitrogen oxide cleaning), questions are raised as to where the line is drawn in the event that such cooperation might combat climate change.

- (d) **State aid:** there remains the question of whether State aid and the Levelling Up agenda can be delivered in the face of competition.
- (e) **Foreign direct investment:** the introduction of major foreign direct investment legislation (which is rooted in concepts of strategic political strategy, defence and national security) adds a new dimension to merger control assessments.

3. HOW DOES COMPETITION LAW DEAL WITH THESE ISSUES?

- 3.1 In a modern world, competition law is independent of Brexit. Moreover, competition law and competition policy is not the right tool for dealing with those market forces outlined above.
- 3.2 In a recent report by John Penrose ('Power to the people: independent report on competition policy' published on 16 February 2021), he considers ways to improve the Competition and Market Authority's consumer protection powers, and suggests that many of the issues facing modern society would be better dealt with under consumer protection powers than under competition law powers. This is reflected in the emergence of new regulatory bodies, such as the Digital Markets Unit.
- 3.3 In a post-Brexit world, the UK has the opportunity to re-think issues posed by emerging market forces. Competition law enforcement should continue to be applied where strictly necessary. However, other tools must be used alongside competition law enforcement in order to tackle other major developments. The UK government should consider reforming the Enterprise Act 2002 to re-introduce the 'public interest' test alongside the 'AEC test'. This would give regulators a wider basis for tackling complex questions related to State aid, climate change, and data.
- 3.4 Therefore, it is now the right time to use Brexit as an opportunity to re-introduce public interest considerations into the competition law landscape.