

BRIEFING NOTE ON PUBLIC POLICY GOALS AND COMPETITION LAW REFORM

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A quick checklist of issues around public policy/CSR considerations in competition law (in the context of anti-competitive arrangements, not mergers):

a. Clarifying the relevance of public policy in competition law is urgent and important:

- i. UK OFT (to become the CMA) have a duty to balance public policy in competition law (see (b) below).
- ii. So how can they do it? This affects the CMA's:
 1. institutional design (should it be independent)
 2. staffing requirements (should it principally recruit just 'technical economists').
 3. relations with others, the OFT/CMA might get public policy expertise from other departments, like the Dutch Competition Authority does, for example.¹
- iii. If UK moves to a prosecutorial system, the issue will keep coming back, but then in the courts and this is even more costly for firms.
- iv. This is inline with a corporate social responsibility agenda.
- v. The UK OFT and the EU Commission need to get on with explaining how companies and other interested parties should take these goals into account.

b. Legally, public policy goals are already relevant in EU and UK competition:

- i. In EU competition law:
 1. Clauses like Article 11 EU Treaty "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities [competition policy is one of these]..." were designed to inject public policy concerns into, amongst others, competition law;
 2. The Member States have specifically said this.²
 3. The EU Courts regularly take public policy into account there, even recently.³
 4. The EU Commission says:
 - a. only consumer welfare is relevant in a notice,⁴
 - b. but considers public policy in its decisions.⁵
- ii. In UK competition law
 1. Section 60 Competition Act 1998 brings EU competition law interpretations into UK law (unless there are relevant differences):
 - a. Especially important are EU Court judgments;
 - b. Regard must be had to EU Commission notices (a lower standard).
 2. Section 60 was designed to bring public policy goals into UK law:
 - a. The point was debated extensively in Parliament, especially HL.⁶
 - b. The proponent of the Bill, Lord Simon, explicitly relies upon a report that the Department of Business commissioned on the relevance of

¹ See NMa, *Annual Report 2009: weighing interests*, page 28 on health care mergers, for example http://www.nma.nl/en/images/NMa_Jaarverslag_2009_EN23-156707.pdf

² Council Decision, *on cross-border fixed book prices in European linguistic areas*, OJ 1997 C305/2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:042:0003:0003:EN:PDF> Article 128(4) EC Treaty, now Article 167(4) TFEU is similar to the article quoted at (b)(i)(1) above.

³ Townley, C., *Article 81 EC and Public Policy* (2009) Hart Publishing, Oxford, pages 55-70.

⁴ Commission Notice, *guidelines on the application of Article 81(3) of the Treaty*, OJ 2004 C101/97, paragraph 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427%2807%29:EN:NOT>

⁵ Townley, C., *Article 81 EC and Public Policy* (2009) Hart Publishing, Oxford, pages 111-95.

⁶ For further information see Townley, C., *The Goals of Chapter I of the UK's Competition Act 1998* (2010) Yearbook of European Law 307. Also available from chris.townley@kcl.ac.uk

public policy goals in EU competition law. Professor Whish, the report's author, agreed with (b)(i)(1) and (3), above.

- c. It is morally right that we *allow* firms to reduce competition to achieve public policy goals when this is inline with EU or UK optimal policy:**
- i. Note that this offers firms a power to make these agreements, not a duty, so firms will complain less of uncertainty (although see (a)(v)).
- d. Important recent examples of when it would have been important (and socially helpful) to consider these public policy goals in the UK are:**
- i. environmental protection, e.g. plastic bags and supermarkets; or slow steaming by cargo ships (that saves enormous amounts of fuel); and
 - ii. health (binge drinking; or food portion size).⁷
- e. Other issues:**
- i. It should not matter if firms make a profit doing this as long as they are achieving the right result (from a UK/EU perspective). If we want them to do things where they will not make a profit then we may now make competition legislation clearer or introduce some form of authorisation process limited to CR-related voluntary agreements.
 - ii. This is not a licence for firms to eliminate competition:
 1. This is explicitly unacceptable under EU/UK competition law;
 2. The OFT/ Commission can decide whether the 'price' of the reduction in competition out-weighs the public policy goal.
 - iii. The lack of collaboration between small and medium size businesses (e.g. joint procurement), because of concern about competition law, should be examined by UK Dept for BIS/ DG Enterprise & Industry and partner organisations.
- f. What UK Government/ Dept for BIS can do:**
- i. Ensure the OFT publicly acknowledge that public policy goals are relevant in EU and UK competition law, see (b), above.
 - ii. Complete work on updating UK BERR Guidelines (2008)⁸. This guidance should provide greater clarity as to when no regulation, self-regulation, co-regulation or regulation is the most appropriate approach.
 - iii. Ensure OFT/CMA reforms introduce a small, specialist unit to balance competition and wider public policy goals, refining existing tools (or enters into relations with other government departments to get this expertise).
 - iv. Identify funding to develop an online register for present and future public interest driven voluntary agreements that enables:
 1. Full transparency.
 2. Application of best practice in developing agreements (i.e. ISEAL Alliance Code of Good Practice⁹).
 3. Capture of insights and feedback from stakeholders supportive or against an agreement either when it is at the proposal stage and/or during its active life.
 - v. Work with the OFT/ CMA to promote to UK business the Short Form Opinion processes for initiatives seeking greater certainty; as well as encouraging DG Comp to introduce a similar process at an EU level.
 - vi. Sector regulators (e.g. OfCom) are much more familiar with balancing competition with cultural issues, for example, than the OFT. BIS could encourage a joint

⁷ For a specific discussion of this issue and its relevance in EU competition law, see Townley, C., *Is Anything more Important than Consumer Welfare (in Article 81 EC)?: reflections of a Community lawyer*, (2008) Cambridge Yearbook of European Legal Studies. Similar arguments are relevant in UK competition law too.

⁸ <http://www.bis.gov.uk/files/file45711.pdf>

⁹ <http://www.isealliance.org/code>

consultation or training etc. by regulators on how to balance public policy and competition factors.

g. What EU DG Enterprise & Industry can do:

- i. Ensure that implementation of recommendation 5 in the new EC CSR strategy: “Launch a process in 2012 with enterprises and other stakeholders to develop a code of good practice for self- and co-regulation exercises, which should improve the effectiveness of the CSR process.” builds on existing frameworks and institutions such as the ISEAL Alliance.
- ii. Encourage DG Comp to introduce a similar process at an EU level to the UK OFT’s Short Form Opinion processes for voluntary initiatives seeking greater certainty.
- iii. Support dialogue with DGComp and other stakeholders around implementing the OPEN:EU recommendation that: “In accordance with existing EU Court case law, DGComp should launch a specialist unit to assess the public benefit of voluntary agreements that enable organisations to take collaborative action to internalise external social & environmental costs. When the benefits of such cooperation agreements that cross-European national boundaries outweigh the costs of reduced competition the agreements should be formally authorised by DG Comp.”
- iv. Explore whether a potential UK online register for present and future public interest driven voluntary agreements should actually be implemented at an EU or global level. This would ensure voluntary agreements transparency and encourage development of agreements to best practice codes, such as those of the ISEAL Alliance. DGComp should consult and involve DGsanko, DGClm, DGMove or DGMarket as required depending on the content of the voluntary agreement.

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