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UK Competition Law After Brexit

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On 23 June, the British electorate voted by roughly 52% to 48% to leave the European Union (EU) (an outcome almost universally referred to as 'Brexit'). While the referendum was purely advisory, and so had no formal legal effect, the constitutional, political and economic impacts of the result have already been profound. Although it is not beyond the realm of possibility that the UK will ultimately reverse course and choose to remain in the EU, as both main political parties are currently promising to implement the referendum result the more likely outcome remains the UK's departure from the EU. Attention is therefore focusing on when this will happen, and on what terms.

A Member State is able to leave the EU only by formally invoking the withdrawal procedure provided by Article 50 of the EU Treaty. So far, the UK Government has declined to do this. This is presumably because notification of a Member State's intention to withdraw starts a period of up to two years for negotiation on the terms of withdrawal, with the country in question being automatically ejected from the EU if no agreement is reached within that two year period. While an extension is possible, this must be agreed unanimously by all remaining Member States. The consequences of this procedure for the UK's bargaining position in such negotiations are clear (hence, the UK's reluctance to start the process). So far, the EU is refusing to start any negotiations with the UK over the terms of withdrawal until the UK triggers the Article 50 procedure. As a result, there is currently a stand-off. Meanwhile, British politics is in a state of limbo following the resignation of the Prime Minister, David Cameron, with an internal Conservative party process currently underway to select his successor. For the time being, therefore, the UK remains a Member State of the EU and EU law continues to apply in full within the UK.

The UK has been a member of the EU and its predecessor organisations for the past 43 years and their respective legal systems have become tightly integrated in many areas. Competition law is one of the areas where EU and domestic law are most closely intertwined. The size of the task of untangling the two regimes, and the extent of the related legal disruption, depend on what arrangement replaces EU membership. Since this question was not on the referendum ballot paper, and the Leave campaigners appear not to have addressed it in their own minds, there are currently a range of possible outcomes. At the time of writing, these options boil down to a choice between membership of the European Economic Area (**EEA**), alongside non-EU EEA members Norway, Iceland and Liechtenstein and some form of looser bilateral arrangement, whether modelled on the current arrangement between the EU and Switzerland or a bespoke, more distant relationship.

Before considering how these options impact on competition law in the UK, it may be helpful to summarise the current position, against which the other options may be measured.

Current position

Antitrust

EU antitrust law (meaning the part of competition law concerned with the conduct of companies) comprises the EU Treaty's prohibitions of:

- anticompetitive agreements (as set out in Article 101 of the Treaty on the Functioning of the European Union (**TFEU**)); and

- abuse of a dominant market position (as set out in Article 102 TFEU).

At present, EU antitrust law interacts with the national competition laws of the EU's 28 Member States as part of a single, integrated system.

The UK Competition and Markets Authority (**CMA**) has the power to enforce EU competition law alongside the UK's domestic antitrust prohibitions, which are set out in the Chapter I and Chapter II prohibitions of the Competition Act 1998 (**CA98**) and closely mirror Articles 101 and 102 TFEU, respectively. In fact, the CMA is obliged to apply EU competition law to potentially anticompetitive agreements or unilateral conduct that may affect interstate trade. In practice, the CMA's choice of law makes little practical difference, since the substantive provisions of UK and EU antitrust law are essentially the same.Furthermore, the CMA and UK courts are under a legal obligation to apply UK competition law in a way that is consistent with EU law. In keeping with this principle, the CMA or a UK court may not use UK competition law to prohibit an agreement that is compatible with EU competition law and cannot find that an agreement is lawful under UK competition law if it infringes EU competition law. In addition, a finding by the European Commission (**EC**) that a company has infringed EU competition law is binding in UK court proceedings. Brexit would throw all of these elements into question.

Merger control

The EC has exclusive jurisdiction to review the impact on competition within the EU of cross-border mergers involving parties with substantial worldwide and EU revenues (in EU merger control terminology, such transactions have an ‘EU dimension') and all such transactions must be notified to the EC for clearance before implementation. This system provides an effective ‘one stop shop' for clearance of mergers falling within the scope of EU merger control.

Transactions that fall below the thresholds for EU merger control are reviewable by national competition authorities, applying national merger control law. For example, the UK CMA is able to review a merger if the target generates more than £70m in the UK or if the parties together consume or supply 25% or more of a particular product or service and this share is increased as a result of the merger.

National competition authorities may request that all or part of cases that would otherwise fall to be reviewed by the EC are ‘referred back' to them for review. In addition, merging parties or national competition authorities may ‘refer cases up' to the EC in certain circumstances, thereby enabling parties to elect to enjoy the benefits of the one stop shop provided by EU merger control.

State aid

Article 107 TFEU prohibits Member States from granting selective benefits to favoured companies (known as State aid), except to the extent that the aid falls within acceptable categories or is individually notified and authorised by the EC. The resulting system of State aid control reduces the ability of Member State governments to use subsidies or other favourable treatment to benefit domestic companies over their rivals from elsewhere in the EU, on the grounds that this would unfairly distort competition within the EU.

Competition litigation

Anyone who suffers loss as a result of an infringement of EU or UK competition law has the right to bring an action for damages or other relief before the courts of any EU Member State. Such cases are litigated as tort claims, with EU law claims being based on the tort of breach of statutory duty through a combination of Article 101 and 102 TFEU and the European Communities Act 1972. An infringement decision by the CMA or EC is binding on the courts as proof of the breach of duty. Where a claim for damages is

based on a prior infringement decision (known as a 'follow-on' claim), the claimant need only prove causation and quantum of its loss to bring proceedings.

The English courts have proved to be a popular venue for hearing such competition law claims, given the relative ease with which a claim may be initiated, access to innovative litigation funding models, a generous approach to jurisdiction, the ability for claimants to seek substantial disclosure from defendants and growing judicial expertise in the field. While some claims have been based on CMA decisions, the more consistent flow of international cartel decisions from the EC has proved to be a more productive basis for claims.

The UK Government recently implemented a number of measures to make the UK an even more popular forum for competition law claims, including introducing a form of class-action for suitable claims before the specialist Competition Appeal Tribunal (**CAT**). Further changes to the UK competition litigation regime are due to be made later this year, due to implementation of the EU Damages Directive.

EEA Membership

The EEA is essentially an extension of the EU, comprising the current 28 EU Member States plus Norway, Iceland and Liechtenstein (which are defined for these purposes as **EFTA States**). The EEA was created to provide an intermediate membership status to enable countries that did not wish to become full EU members (or whose electorates prevented this outcome) to participate in the EU's single market and certain other EU policies. All EEA members contribute to the common budget of the EU and must implement the main elements of EU law within their territories. As they are not EU Member States, however, EFTA States do not have a seat in the EU Council, do not appoint a Commissioner to the EC and their electorates are not represented in the European Parliament.

The EEA provides a parallel institutional structure to that of the EU, with the EEA Agreement replicating many of the core provisions of the EU Treaty and the TFEU. The EEA Agreement provides that all Contracting Parties (i.e. the EU Member States and the EFTA States) must guarantee the 'four freedoms' (free movement of goods, persons, services and capital) within the EEA and establish a system to ensure that competition within the EEA is not distorted. Within an EEA-specific context, the role of the EC is taken by the EFTA Surveillance Authority, whose actions are overseen by the EFTA Court in Luxembourg (performing a similar role to the European Court of Justice for the EU).

Antitrust

The EEA Agreement sets out prohibitions of anticompetitive conduct that mirror Articles 101 and 102 TFEU, with Article 53 of the EEA Agreement prohibiting agreements that adversely affect competition within the EEA and Article 54 prohibiting the abuse of dominance. EU law and the competition provisions of the EEA Agreement apply in parallel. As a result, an anticompetitive agreement that adversely affects competition across the EEA will typically infringe both Article 101 TFEU and Article 53 of the EEA Agreement. Since the EC is empowered to enforce EU and EEA competition law where there is an effect across the EEA (including to undertakings established in an EFTA State), EC infringement decisions are generally based on infringements under both regimes. (Thus, for example, an EC cartel decision will be explicitly made under both Article 101 TFEU and Article 53 of the EEA Agreement.) In cases where the effect on competition is limited to the territory of the three EFTA States, the EFTA Surveillance Authority has jurisdiction to enforce Articles 53 and 54 independently.

Annex XIV to the EEA Agreement applies the more detailed substantive provisions of EU competition law to the EEA, including extending the effect of EU block exemption regulations (which provide safe harbours from Article 101 TFEU for certain categories of agreement) to the whole EEA. Protocol 23 to the EEA Agreement provides for extensive cooperation and coordination between the EFTA Surveillance Authority and the EC, ensuring that the EFTA Surveillance Authority and national competition authorities of

the EFTA States enjoy similar rights to case information and to involvement in EC proceedings as are enjoyed by the national competition authorities of the EU Member States. This cooperation extends to the provision of mutual administrative assistance, which may include officials from the EC and EFTA Surveillance Authority undertaking joint dawn raids or one authority carrying out a dawn raid to gather information held in its territory at the request of the other.

While rather complex, the arrangements provided under the EEA Agreement effectively ensure that the principles of EU competition law apply across the entire EEA. In fact, the terms EU and EEA can generally be used interchangeably when advising on European competition law. As a result, the general competition law environment would remain materially unchanged in key respects, were the UK to opt for EFTA State status within the overall EEA framework. Thus, for example, the UK legal status of commercial agreements that currently comply with EU competition law should not change and the chance that companies would be subject to parallel investigations of the same conduct by different authorities would be minimised. UK competition lawyers could continue to advise clients under the protection of legal professional privilege and represent them in proceedings before the European Court of Justice.

Such a scenario would thus produce minimal disruption to antitrust enforcement in the UK. Unfortunately, opting for EEA membership raises political challenges for the UK government, primarily due to the requirement that signatories of the EEA Agreement guarantee rights of free movement to EEA nationals. Although the right of free movement conferred under the EEA Agreement is slightly narrower than the equivalent right conferred under the EU Treaties, and the example of Liechtenstein shows that limited constraints may be accepted, this could prove politically insurmountable. As a result, EEA membership cannot be guaranteed and it is necessary to consider the impact of other options.

Merger control

The EEA Agreement contains provisions for applying EU merger control within the EEA context, with the methodology for this being a little more complex than for antitrust. Put simply, the EC retains exclusive jurisdiction for reviewing mergers with an EU dimension, even where they have an impact within the EFTA States. Although the EFTA Surveillance Authority has the power to review mergers that have an ‘EFTA dimension' (i.e. the parties' revenues are sufficient in the three EFTA States, taken in isolation, to breach the EUMR turnover thresholds) but no EU dimension, the small size of the EFTA States means that there have been no such EFTA dimension cases to date and thus, in practice, the EC handles all qualifying cases.

Were the UK to adopt the EEA model, it is possible that the larger size of the UK economy would lead to a least some transactions being classified as having an EFTA dimension and thus being reviewable by the EFTA Surveillance Authority. Overall, however, there would be relatively little change in the merger control field under this scenario, with large, cross-border mergers being examined by the EC in the Brussels and the CMA focusing on domestic UK transactions and cross-border transactions lacking an EU dimension.

State aid

The EEA Agreement provides a parallel State aid regime, with Article 61 prohibiting State aid on similar terms to Article 107 TFEU. As a result, the EFTA Surveillance Authority oversees the granting of aid by the governments of Norway, Iceland and Liechtenstein in much the same way as the EC does for the EU.

Were the UK to opt for EEA membership, the State aid system would remain broadly similar to the current situation and the UK Government would still have limited scope to subsidise domestic industry.

Competition litigation

While a move to the outer tier of EEA membership would raise some questions concerning the effect in domestic law of EC infringement decisions, it is likely that the situation would remain broadly consistent with the current position. In fact, it is interesting to note in this context that the UK Government recently proposed giving the CAT the power to hear claims brought on the basis of Articles 53 and 54 of the EEA Agreement, in addition to its power to hear claims under Article 101 and 102 TFEU. While that move was designed to tidy up an anomaly between the CAT and High Court jurisdictions, this expanded jurisdiction could prove more relevant in the event of a future relationship governed by the EEA Agreement.

Alternatives to EEA membership

While there is range of alternatives to EEA membership, the arrangement between the EU and Switzerland, which is based on a complex web of bilateral agreements rather than a single over-arching treaty, provides one possible template.

Antitrust

Since Switzerland is not a member of the EEA, EU competition law does not apply within its territory and there is no formal linkage between the EU regime and domestic Swiss competition law. Nevertheless, in 2014 the EU and Switzerland entered into an agreement providing for a high level of cooperation in the competition law field. This agreement provides, for example, for mutual notification and coordination of enforcement activities and extensive sharing of case information.

While the EU/Switzerland cooperation agreement does not provide for any alignment in substantive law between the two regimes, the agreement does note that "the competition enforcement systems of the Union and of Switzerland are based on the same principles and provide for similar rules". In fact, the regimes are so closely aligned that the Swiss competition authority has effectively imported elements of EU competition law into Swiss competition law, enabling it to take enforcement action against companies that prohibit resellers based in the EU from selling into Switzerland.

The Swiss example provides a potential model for future cooperation between the CMA and EC. As noted above, the UK CA98 closely mirrors Articles 101 and 102 TFEU and the CMA is already used to working closely with the EC within the European Competition Network (**ECN**). While removal of the UK from the institutional framework provided by the EU would end the formal obligation for consistency between the two regimes, old habits developed through historic institutional cooperation would continue and it is likely that the regimes would continue to be closely aligned on substance. There would nevertheless be a higher risk under this scenario of companies being subject to parallel investigations of similar facts by the CMA and EC. There would also be greater scope for substantive divergence between the two regimes, given the loss of the formal review mechanism provided by the ECN and the lack of any common judicial framework for review of enforcement decisions.

The inherently international nature of many competition law infringements means that even a relationship between the EU and UK that is more distant than the Swiss arrangement is likely to see some form of competition law cooperation between the CMA and EC. At a very minimum, such cooperation would involve sharing of non-confidential information, sharing of general experience and minimal co-ordination of enforcement activity, as is the case for example with the Memoranda of Understanding in place between the EC and the competition authorities of Brazil, China and India. Alternatively, the Cooperation Agreements between the EU and the governments of Japan and Korea provide a model for more extensive co-operation (albeit falling short of the Swiss model).

EU block exemption regulations would cease to apply in the event that EEA membership is not retained, which would create potential uncertainty over the legal status of agreements falling with the safe harbours they create. In such circumstances, the UK could quite easily create new domestic block exemptions that mirror the terms of their EU counterparts, as was the case before the modernisation of EU competition law in 2004. That example shows the potential for diverge at the margins, however, since the pre-2004 UK block exemption for vertical agreements was more generous in scope than the EU block exemption, as it did not impose a market share cap.

Merger control

Any alternative existence outside the EEA would see EU and UK merger control operating independently of each other. In such a scenario, it is quite possible that parties to large, cross-border transactions would face parallel merger investigations by the EC and UK CMA. The fact that UK merger control does not oblige parties to reviewable transactions to notify them would soften the impact of this, as would the high degree of alignment in how both authorities assess the impact of mergers on competition.

It is highly likely that the officials at the CMA and EC would seek to co-operate to help ensure alignment in their reviews of high profile mergers, as is currently the case with mergers that are simultaneously reviewed by US and EU authorities. Such a scenario would nevertheless create a resourcing challenge for the CMA and inevitably increase the risk that businesses would face additional costs and uncertainties due to overlapping reviews. It would also remove the possibility of using the ‘referral up' procedure to enable parties to benefit from the ‘one stop shop' provided by EU merger control. While the CMA may welcome having a more independent voice on larger, cross-border deals, it is questionable whether it would be prepared in practice to take a position on a merger that diverged materially from the view taken by the EC on the same transaction.

State aid

While the UK would in principle be free to grant subsidies to its domestic businesses if it chose to remain outside the EEA, it is unlikely that the EU would permit the UK to have access to the single market while favouring its businesses in this way. The Swiss example provides some guidance in this area, with the 1972 Free Trade Agreement between Switzerland and the EU including a prohibition of State aid that is similar to Article 107 TFEU.

In practice, enforcement under this provision has been limited. It is likely that the EU would draw conclusions from this experience and seek to provide for a tighter and more effective State aid regime to limit the ability of the UK government to subsidise British businesses that wish to continue to sell their goods and services within the EU.

Competition litigation

Under a looser bilateral relationship with the EU, EC infringement decisions would be unlikely to be binding on UK domestic courts. As a result, pure follow-on claims would be possible only on the basis of UK law infringement decisions by the CMA. There is also uncertainty over whether claimants could still base English claims on breach of the TFEU competition provisions or claim damages for harm suffered outside the UK.

While it is likely that claimants would still seek to rely on EC infringement decisions as persuasive evidence of a breach in UK proceedings, the fact that EC decisions would continue to be binding before the courts of the EU's remaining 27 Member States is likely to make those courts marginally more attractive. As a result, claimants are likely to switch to alternative claimant-friendly jurisdictions such as Germany or the Netherlands. Given the long lead time between infringement decisions and damages claims being brought in the courts, however, the impact of Brexit on claims levels in the UK is unlikely to be felt until several years after the UK has actually left the EU.

Conclusion

It may be seen from the above that the choice of replacement trading model will have a significant impact on the UK competition law framework. That choice is now a political matter and the ultimate outcome remains highly uncertain at the time of writing. It is nevertheless possible to offer some observations.

First, it is likely that the substance of UK competition law will remain largely as it is now, with a CA98 regime based on prohibitions

that closely mirror Articles 101 and 102 TFEU, combined with the continued existence of a parallel market investigations regime that pre-dates the UK's EU membership. It is also likely that CMA officials will continue to apply a broadly consistent approach to the EC when analysing cases, and that the CMA and courts will continue to refer to relevant EU case law as precedent or at least helpful guidance when enforcing UK law. (As an example of how this may play out in practice, it is notable that the approach of the (non-EEA) Swiss competition authority when resolving its investigation of the impact of hotel best price guarantee clauses was consistent with that taken by most competition authorities within the EU, with the greatest divergence being between individual EU authorities.)

While there is a question mark over how far EU competition law cases influenced by single market considerations should be applied in a domestic context, the Swiss example concerning parallel trade bans suggests that the CMA would have no problem incorporating EU law principles into domestic law. Thus, the CMA would presumably continue to rely on EU cases and principles forbidding restrictions on cross-border sales to justify enforcement action against companies seeking to prevent resellers from selling online. It also seems unlikely that the CMA would substantially alter its balance of cases, for example by choosing to take enforcement action against large, global cartels, which currently tend to be investigated centrally by the EC.

While the CMA would regain the power to make formal non-infringement decisions in more cases, rather than being limited to deciding that it has "no grounds for action" as is the case at present, the practical impact of this change may be limited. Nevertheless, removal of the UK from the productive exchanges with officials from the EC and other national authorities that currently take place within the ECN, together with a potential loss of foreign talent from the CMA's staff, could see a reduction in the quality of CMA decision making or at least a substantive divergence on points of detail.

To assess the impact of Brexit on competition law more fully, it is necessary to widen the perspective. On the one hand, the loss of the UK's influence on EU competition policy could lead to a less economics-focused and more interventionist approach by the EC. Indeed, it is notable that the French President has already expressed a desire to "adapt" the way in which EU competition law is enforced, post Brexit. Such a shift in guiding philosophy would have a substantial impact across a range of policy areas. It is notable that UK businesses that wish to continue selling into the EU will remain subject to EU competition law and a less predictable legal environment would be a problem for them, as well as for the rest of Europe.

Closer to home, it is quite possible that the nationalist and isolationist sentiments that appear to have motivated many ‘leave' voters will lead to the UK government adopting more protectionist and interventionist industrial policies, especially if the eventual departure of the UK from the EU is effected on terms that further exacerbate the economic impact that is already being felt in the UK. While such a development may not have a direct impact on CMA enforcement, it could lead to more indirect political interference in CMA strategy and potentially reduce the CMA's influence as an advocate of competitive markets. In the meantime, the CMA will be keen to ensure that UK businesses do not respond to the economic shock of the Brexit vote by aligning their commercial behaviour in a manner that itself infringes competition law. In this febrile and unpredictable atmosphere, the only certainty is that the uncertainty described in this briefing will continue for some time to come.