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Brexit – legal consequences for commercial parties

Gaining or losing the competitive edge? Implications for competition law enforcement

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Issue in focus

Now that the UK is on the path to an "in-out" referendum on 23 June, this paper looks at the impact of a Brexit on competition policy and enforcement in the UK, and generally in the European Union ("**EU**").

EU competition law applies to all companies operating in the EU single market. Companies, wherever they are based, are liable for large fines if they infringe the EU competition rules prohibiting anti-competitive agreements or abuse of dominance. Parties to major transactions have to notify Brussels if the thresholds of the EU Merger Regulation ("**EUMR**") are met. Thus, post-Brexit, any UK businesses wishing to offer their goods and services in the EU Member States will continue to find themselves automatically bound by EU competition law.

In addition, the UK has adopted its own national legislation in the Competition Act and Enterprise Act which is closely modelled on EU competition law. Brexit is unlikely to alter the fundamentals of competition regulation in the UK. However, if Brexit does take place, the EU would lose its legal jurisdiction over the UK.

Analysis

Cartels: parallel (but co-ordinated) probes?

Currently, where the Commission initiates an investigation, the competition agencies of EU Member States cannot also investigate the same alleged infringements. Post-Brexit this would no longer be the case for the UK, and businesses involved in a cross-border cartel covering both EU countries and the UK would face separate investigations by both the European Commission ("**Commission**") and the UK Competition and Markets Authority ("**CMA**") (or a UK sector regulator under its competition powers) and could face fines under both regimes. In cartel cases where the Commission is not itself investigating, EU Member States can at present carry out concurrent investigations. Brexit would therefore have no impact on this in principle. However, such investigations are currently co-ordinated under the European Competition Network ("**ECN**") and, after Brexit, the UK would cease to be part of the ECN and will lose the benefits of this co-ordination. In enforcement terms Commission officials would not have jurisdiction to conduct dawn raids on business premises situated in the UK. But the UK CMA has formidable inspection powers of its own. And in any event, post-Brexit the UK would still be likely to co-ordinate its enforcement activities with the Commission and the competition agencies of EU Member States, as it currently does with agencies outside the EU such as the DOJ and FTC in the United States. International bodies

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to which the UK belongs, such as the International Competition Network ("**ICN**") and Organisation for Economic Co-operation and Development ("**OECD**") facilitate cooperation between antitrust agencies around the world and Brexit would have no impact on the UK's membership of these bodies. Cooperation with the Commission and EU Member States would be particularity enhanced if the UK re-joined the EEA.

Merger control: a dual system?

As far as mergers are concerned, companies would need to take account of EU thresholds in the EUMR and would remain subject to EU regulation in cross-border deals. Particularly if the UK re-joined the EEA, very little would change in terms of the obligations of UK undertakings.

However, an important difference would be that the UK would no longer be part of the one-stop shop procedure for reviewing mergers. Currently mergers falling under the EUMR can be granted an EU-wide clearance. Following Brexit, mergers would need to be separately reviewed by the UK's CMA. If the UK were to re-join the EEA under a Norwegian-type solution, the UK could, like Norway, allow the Commission to adjudicate on its cases. However, with no British officials left in the Commission such a scenario may be unlikely. It is more likely that companies would have to undergo an additional merger review by the CMA as well as making a filing in Brussels, as happens currently, for example, with Switzerland. This would create an additional burden of cost, time and administration for merger parties, not to mention potential uncertainty.

Private enforcement: no real change?

With regard to private damage actions for breaches of competition law there is likely to be little change in the event of Brexit. In fact, in this area the UK is a leading light in the EU. A new Damages Directive is being implemented across the EU which is designed to make it easier to bring private damages actions and to harmonise the approach of national judicial systems to such actions. Many of the measures incorporated in the Directive are already an established feature of UK law and procedure (which is why the UK is so often chosen as a forum for bringing these actions). Indeed, the UK goes further than the EU approach in some areas. For example, with the Consumer Rights Act 2015, which took effect last October, the UK provides for opt-out class actions for competition damages claims: a step further than the purely opt-in regime contained in the Commission's recommendations for how EU Member States should implement collective redress regimes.

However, if the UK were no longer part of the EU it is uncertain to what extent UK courts would have regard to Commission decisions and those of EU Member State competition agencies and for how long they would continue to follow judgments and findings of the EU courts in Luxembourg.

State aid: a big difference

One area of competition law and enforcement where Brexit would make a considerable difference is state aid. If the UK exits without any special trade agreement with the EU, then Brexit is likely to mean that the UK would be outside the state aid control system that entails the prohibition and repayment of any aid granted by EU Member States which is likely to distort market competition.

Technically this would mean that the UK Government would have greater liberty to give aid to UK businesses. It would also have more freedom to grant preferential tax treatment to international companies of the type that is being attacked by EU Commissioner Vestager under state aid rules in cases such as Starbucks, Fiat and McDonald's. However the reverse of this is that post-Brexit the UK would find it more difficult to complain successfully to the Commission about EU Member States distorting competition through similar state aid, although of course the Commission will continue to police the state aid rules, which will be binding on all remaining EU Member States. In contrast, if the UK wishes to negotiate an exit on terms that allow it to continue trading as part of the single market (or at least close to it), then the remaining EU Member States may well insist that it adopts equivalent state aid rules under national law to preserve a level playing field with EU-based competitors. In this scenario there may be little practical change in the short- to medium-term for companies wishing to benefit from UK Government support.

Shaping EU competition policy and laws: no further role

An obvious but important general point is that following Brexit the UK would have no role in shaping the competition legislation that implements the basic

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provisions of the Treaty, such as block exemption regulations, procedural amendments to the EUMR and so on. The UK would also be outside the decision-making process in individual competition law cases. It would no longer be a member of the ECN and would lose its position on the Advisory Committee of Member States, which is involved in the decision-making process in Commission cases.

The UK Government and UK businesses would therefore find it difficult to have an impact on EU competition decisions that might have profound implications on the operations of UK companies and the wider UK economy. There would be no UK Commissioner in the Commission and no UK officials either in DG COMP (the Directorate General dealing with competition matters) or elsewhere in the Commission to provide help on the UK background in particular cases. All this would make lobbying of the Commission by UK companies in EU competition cases that much harder. At the same time, UK businesses operating in EU Member States selling goods and services will continue to be subject to the full force of the competition rules including liability for high fines for infringements and the burden of the EU merger control regime on top of UK merger rules.

Conclusion

Because of the strong competition law enforcement regime in place in the UK as a matter of national law, Brexit may have less direct impact in the competition field than in other areas of the law (particularly, for example, in the important new area of private competition litigation). But, as in other areas, much may depend on the terms of any final agreement reached by the UK Government with the EU following the exit procedure and transitional period foreseen in Article 50 of the Treaty. If the UK were to re-join the EEA and have a status similar to Norway, it is likely that UK businesses would be more affected by EU competition law decisions, but without the UK being involved in the institutional process leading to these decisions being adopted. One area where the UK is likely to enjoy greater freedom is in the area of state aid control. But even this might be limited under the terms of an eventual agreement between the UK and EU.

The CMA is an active member of international bodies such as the ICN and OECD and is committed to cooperation with competition agencies around the world. Thus after Brexit the CMA would be likely to continue to cooperate with DG COMP and the competition authorities of EU Member States in enforcing the UK competition rules. But that cooperation would not be as close as that which currently takes place within the ECN, from which the UK will be excluded. Divergent enforcement policies and priorities could well emerge as the UK fashions its own competition policy outside the EU structure and processes. Furthermore, other UK national regulators with concurrent competition powers, such as the Financial Conduct Authority, OFCOM or OFGEM, may have different enforcement positions from those of the Commission and EU Member State agencies. The risk of divergence will likely lead to major uncertainty for UK businesses and international undertakings operating in the UK and EU markets.

This article is one of a series of specialist Allen & Overy papers on Brexit. To read these papers as they become available, please visit: www.allenovery.com/brexit.

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