Brexit Special Online Edition

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Editorial

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Brexit? Divergence and convergence in UK and EU competition law

The 10th Junior Competition Conference (the JCC), organised by the *Competition Law Journal*, was held on 15 April 2016 at the Competition Appeal Tribunal. The aim of the JCC is to give the junior end of the competition law community, from all professional backgrounds, a forum to express their views, exchange ideas, and get to know one another. Over 100 competition practitioners attended, from a wide range of law firms, chambers, economic consultancies and other organisations.

This year's JCC had two interrelated themes: 'Brexit? Divergence and convergence in UK and EU competition law' and 'Private Enforcement: calm before the storm?'. Six papers were presented at the conference, three on each theme. These papers demonstrate the depth of talent and legal and economic thinking among Britain's young competition practitioners. All six papers will be included in Issue 3 of the *Competition Law Journal*, which will be published in September 2016.

This special online edition of the *Competition Law Journal* brings together the three papers focused on 'Brexit'. The conference papers address the complex inter-relationship between UK and EU competition law and the ramifications that Brexit will have on the competition landscape. Nicholas Querée and Paul Johnson consider the possible impact of Brexit on cartel enforcement and merger control, respectively, and Anneli Howard considers how Brexit might impact competition litigation. These papers were presented, and therefore substantially written, before the EU referendum took place on 23 June 2016, in which a majority voted for Brexit. Although the authors have made changes to reflect the results, they should be read with this in mind.

As we write, the United Kingdom is now in a state of legal, political, constitutional and economic uncertainty. The Labour Party is in internal turmoil. A second referendum on Scottish independence might happen. And of course, this week, the Conservative Party appointed Theresa May as its new leader, and Prime Minister. She has perhaps the toughest mandate of any incoming Prime Minister. May was in favour of remaining in the EU, and many have questioned the credibility of a 'Remain' supporter negotiating the UK's exit from

the EU. However, May has made clear that 'Brexit means Brexit', and that she is determined to make a success of it.

And yet, we still do not know when, or following what process, the Government will serve the now infamous 'Article 50' notice to start the two-year period of negotiating the terms of the UK's exit and, possibly, a new agreement on the future UK/EU relationship. We also do not know what the Government's negotiating position will be, what the terms of those agreements might be and whether the courts might continue to rely on EU legal principles and case-law as a source of interpreting UK law. We do know that a legal challenge has been bought by Mishcon de Reya (on behalf of an anonymous group of clients) to ensure the UK Government will not trigger Art 50, and therefore the procedure for withdrawal from the EU, without an Act of Parliament. Anneli Howard is one of the barristers who has been instructed by Mishcon de Reya to advise on this case. However, the effect this legal challenge will have on the 'Brexit means Brexit' mantra is yet to be seen.

This uncertainty extends to competition law, across all its many facets. Regardless of how and when Brexit occurs, it will force yet more change on UK competition law. A Norwegian-style EEA arrangement might lead to little change in practice, but this appears unlikely for political reasons, since it would involve compliance with all internal market rules, including the politically unpalatable 'freedom of movement'. All other solutions, whether they be the 'Turkish', 'Canadian', 'Swiss' or 'WTO' models, or some other as yet unidentified solution, will inevitably lead to significant change to UK competition law, whether institutional, jurisdictional, procedural or substantive in nature. This uncertainty is of interest not only to UK practitioners and business: since the referendum, we have received numerous 'Brexit briefings' from firms in countries as diverse as Austria, Canada, India, Ireland and the US, to name but five.

Competition law is inherently international and UK competition law is heavily influenced by EU law. The Chapter I and II prohibitions of the Competition Act 1998 are modelled on and interpreted in accordance with Arts 101 and 102 TFEU. EU block exemption regulations apply to the Chapter I prohibition. Articles 101 and 102 are enforced in the UK courts and the Competition Appeal Tribunal, which have become destinations of choice for claimants in damages actions. Whilst UK merger control is not a replica of the EU Merger Regulation, both are built on common principles and EU decisions and Court case-law are highly influential sources of law. The 'one-stop-shop' principle underpinning the EU Merger Regulation has meant that the Competition and Markets Authority (CMA) does not review most cross-border and global mergers. The CMA is also a member of the European Competition Network and cooperates with the European Commission and its national counterparts across antitrust and merger cases. This will all change with Brexit.

We had, in common with most competition practitioners, hoped for a different outcome in the referendum. As it is, it will be interesting to see whether the predictions made by the authors of our Brexit articles come to pass and whether, if the UK is outside the EU, EU law and practice continues to influence its UK counterparts. Theresa May has already alluded to a potential shift in UK merger control policy, referencing the failed AstraZeneca/Pfizer deal and the need for a 'proper industrial strategy' to defend important sectors in Britain such as pharmaceuticals. Might this mean we see the introduction of a broader public interests test in the UK? It is too early to tell, but we are certainly facing interesting times.

One thing is clear – there will not be an immediate change to the way in which competition law is enforced overnight, nor indeed in the near future. However, the likelihood of a 'policy shift' over time cannot be ruled out. Co-operation, including exchange of information and mutual assistance between the CMA and other competition authorities will have to take place

through bilateral agreements, since the UK will no longer be part of the European Competition Network. The CMA may become more influenced by its counterparts in the US, and the economic thinking and approach of the Department of Justice. This may not necessarily be a bad thing in the long term. Indeed, future generations of UK competition practitioners may reflect on Brexit having been a turning point in UK competition law and policy. However, for those of us dealing with the aftermath, it remains to be seen whether UK and EU competition law becomes more divergent than convergent.

14 July 2016

The Editors of the *Competition Law Journal*

Brexit: exit stage left for competition damages?

Anneli Howard[1]

Introduction

The Winter's Tale is notorious for Shakespeare's most difficult stage direction. Antigonus, charged with the safe carriage of the royal new born baby, delivers the child to the shores of Bohemia, only to be pursued off stage and mauled by an opportunistic shaggy bear.

The EU's new wonderchild, the Damages Directive,[2] has had a difficult conception. Ten years in the making, it was finally delivered by the Commission in December 2014 and is due to be implemented by December this year. This development has been heralded as an important catalyst for private enforcement, levelling the playing field between national courts and shifting the balance of arms to make it easier for claimants to pursue their claims for redress.

Will Brexit render this initiative a 'lost child', like Perdita in *The Winter's Tale*, exiled from the royal kingdom and forced to survive on her wit and charm alone?

Or are these fears exaggerated? Private enforcement has been recognised by English Courts since *Garden Cottage Foods*[3] in 1983 – nearly 20 years before *Courage v Crehan*.[4] Most of the initiatives in the Damages Directive emanate from the UK regime, on which it has been modelled. The UK has gone even further with its collective redress model in the Consumer Rights Act 2015 (CRA 2015) with a proposed £19 billion opt-out class action in the Competition Appeal Tribunal (CAT) being publicised less than two weeks after the referendum.[5] Can UK competition litigation go it alone?

Immediate impact of Brexit

Article 50 of the Treaty on European Union (TEU) provides that once a Member State notifies its intention to withdraw from the EU, there will be a two-year negotiation period to reach withdrawal arrangements, after which (in the absence of an extension) the EU Treaties will no longer apply. So, if there is complete exit, Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) would no longer apply. Regulation 1/2003[6] would no longer be of direct application.

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1 Barrister, Monckton Chambers.

2 Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014) OJ L 349/1.

3 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130, [1983] 2 All ER 770, HL.

4 *Courage Ltd v Crehan* (Case C-453/99) EU:C:2001:465, [2001] ECR I-6297.

5 Walter Merricks has stated he will launch an opt-out collective redress action on behalf of UK consumers against MasterCard in respect of interchange fees for payment cards: 'MasterCard faces £19bn lawsuit over claims it ripped off shoppers', *The Independent* (6 July 2016), available at http://www.independent.co.uk/news/uk/home-news/mastercard-19bn-lawsuit-over-claims-it-ripped-off-shoppers-a7122136.html. The claim has yet to be filed at the CAT. The first application for an opt-out collective action – in respect of a much smaller claim – had been lodged earlier in 2016 (Case No 1257/7/7/16 *Dorothy Gibson v Pride Mobility Products Limited*).

6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

That is not to say that the UK would revert to the 1950s' heyday of court-enforced resale price maintenance. Due to the EU's extra-territoriality doctrine, companies established in the UK would still face investigations and penalties by the European Commission if their practices affect trade in the EU.[7] If the UK joins the EFTA/EEA, there are identical prohibitions in Arts 53 and 54 of the Agreement on the European Economic Area (EEA Agreement) and the equivalents to Regulations 1/2003 and 773/2004[8] and accompanying Commission Notices have been incorporated into the Protocols to the EEA Agreement. Within the UK, the Chapter I and II prohibitions contained within the Competition Act 1998 (CA98) are mirror images of Arts 101 and 102 TFEU, so, in practice, there will be little substantive difference.

Regardless of the Leave vote, implementation of the Damages Directive is still required in the UK.[9] In its recent consultation, the Department for Business, Innovation and Skills (BIS) envisages 'gold-plating' the Damages Directive so that a single regime applies both to EU and domestic law infringements.[10] So following implementation it will form part of domestic law that will continue to apply to infringements of the Chapter I and II prohibitions, regardless of any future repeal of s 2(1) of the European Communities Act 1972 (ECA 1972).

The future of the Damages Directive will depend on the precise model selected to govern the UK's relationship with the EU and, in the event of complete withdrawal, the 'regulation fest', whereby the UK Government will decide whether to keep or jettison some or all of its provisions. BIS does not intend to implement the Damages Directive via a single enactment but will weave the changes into a tapestry of primary and secondary legislation including the CA98, the Limitation Act 1980, the Civil Procedure Rules and the CAT Rules 2015.[11] So it unlikely that all the provisions of the Damages Directive, once embedded in domestic procedural law, will be burnt on the Brexit bonfire.

For example, it is unlikely that material changes would be made to disclosure (especially as the Damages Directive has been modelled on the UK regime which is far more extensive). As a matter of public policy, even if the UK operates outside the EU, there will need to be protections in place to limit disclosure of confidential information and to protect leniency statements. However, some of the more complex provisions (such as the presumptions of harm and carve outs from joint and several liability for immunity applicants) are more unfamiliar for UK lawyers and could be amended or removed in future.

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7 For recent examples, see the Commission's investigations into allegations of price signalling by container liner shipping companies based in China, Taiwan, South Korea, Japan and the UAE (Case AT.39850 *Container Shipping*) and Japanese and Korean producers in the power cables investigation (Case AT.39610 *Power Cables*).

8 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (2004) OJ L 123/18.

9 The incorporation of the Damages Directive into the Protocols in the EEA Agreement is still under discussion but implementation is expected to follow approximately a year after the EU deadline of 27 December 2016.

10 Department for Business, Innovation and Skills, 'Implementing the EU Directive on damages for breaches of competition law' (January 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf.

11 Competition Appeal Tribunal Rules 2015 (SI 2015/1648).

What will happen to private damages claims in a Brexit world?

At the moment, the UK is enjoying a private enforcement 'sweet spot' where it is attracting claims from claimants from all over Europe against defendants from all over the world. According to Theresa May, 'Brexit means Brexit'[12] – but that begs the question of what exactly does Brexit mean? And what does that mean for the UK's damages scene?

Cause of action

Once the UK withdraws from the EU, claimants will no longer have a cause of action based on Arts 101 and 102 TFEU as a breach of statutory duty under s 2(1) of the ECA 1972. Similarly, it does not seem likely that ss 47A(6)(c), 58A and 60 of the CA98, which refer to the binding nature of Commission infringement decisions, will survive. Those provisions will, most likely, be repealed as a direct consequence of withdrawal. Claimants would not be able to invoke directly Arts 101 and 102 TFEU in damages claims, since they could be regarded as 'foreign' law relating to public policy which the English courts would not readily apply or enforce. That risk could be mitigated if the UK entered into a trade agreement with the EU, which specifically provided for the application of EU competition rules in cases where common trade between the UK and the EU is affected.[13]

Alternatively, if the UK were to join the EEA, then a substitute enactment to s 2(1) of the ECA 1972 could incorporate the provisions of the EEA Agreement, including Arts 53 and 54 EEA, although they would not have direct effect in the same way as provisions of the EU Treaties. The EFTA Court has recognised the public policy in encouraging private enforcement as a means of ensuring the effectiveness of competition law and has followed *Courage*,[14] *Manfredi*[15] and *Donau Chemie*[16] in its case-law.[17]

In the absence of such alternative arrangements, the statutory cause of action based on the Chapter I and II prohibitions in the CA98 will continue to apply, under s 47A of the CA98, but only in respect of trade within the UK. The scope of damages claims are likely to become more parochial, limited to national, regional or local commercial practices.

Follow-on or standalone or something in between?

The repeal of ss 58A and 60 of the CA98 would probably mean that the extent of follow-on litigation in the UK would shrink in both nature and extent. True follow-on actions would be limited to infringements established by the UK's competition authority and sectoral regulators. Outside the EFTA/EEA model, it is not clear that claimants would be able to recover damages for losses suffered across the EU in one set of proceedings. For EU-wide

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12 See 'May promises to make Brexit "a success"', *Financial Times* (11 July 2016), available at https://next.ft.com/content/7939901e-4756-11e6-8d68-72e9211e86ab.

13 See, for example, Article 35 of the EU/South Africa Trade, Development and Cooperation Agreement (1999) OJ L 311/03.

14 *Courage Ltd v Crehan* (Case C-453/99) EU:C:2001:465, [2001] ECR I-6297.

15 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (Case C-295/04) EU:C:2006:461, [2006] ECR I-6619

16 *Bundeswettbewerbsbehörde v Donau Chemie AG and others* (Case C-536-11) EU:C:2013:366.

17 *DB Schenker v EFTA Surveillance Authority ('DB Schenker I')* (Case E-14/11) [2012] EFTA Ct Rep 1178, paras 132 and 189.

cartels, claimants may prefer to bring such global claims in other jurisdictions such as Germany and the Netherlands.

But, on a positive note, standalone or hybrid litigation may *increase* in the UK as claimants seek to rely on findings made in Commission decisions against addressees or other parties in the same industry in the UK. National courts will be asked to extrapolate the Commission's findings in a Decision and apply those to participants or geographic markets that go beyond its original scope.

Arguably, claimants may seek to rely on infringement findings in decisions from the Commission as the evidential and legal basis for their case under the CA98. However, those decisions would not be binding in the same way as the EU doctrine of supremacy would no longer apply. Undoubtedly, English judges would 'have regard' to them, in the same way as a decision from the US or Australia, but they are likely to carry less weight in the UK regime. The exact weight given to decisions of the Commission and other European national competition authorities would be up to the discretion of the national judge, who would be free to depart and substitute his or her own assessment of the evidence and interpretation of the law, as he or she saw fit. That may allow for creativity on the part of claimants to seek damages from non-addressees or in related markets or to seek umbrella damages. On the other hand, it may work to the advantage of defendants, if they want to expose the Commission's economic analysis to more rigorous scrutiny or to rely on more recent evidence.

Consistency or divergence?

Over time, the UK competition law regime could start to diverge from EU competition law as national courts will not be bound by rulings of the European courts. There may be a 'North Atlantic drift', as, free from internal market policy considerations, English judges could adopt different positions on, for example, parallel imports, e-commerce restrictions and geo-blocking, territorial restrictions and fidelity rebates. They may equally have regard to developments in South Africa, Canada, Australia, China or Singapore in addition or in preference to the EU.

The Damages Directive establishes minimum standards for private enforcement, but many of its provisions are obscure and it is not clear how they will be applied in practice. Key issues such as limitation periods, the presumption of harm for indirect purchasers, quantification of the overcharge and pass-on and the factors determining joint and several liability are pencilled in skeletal outline and will need to be resolved at a later date via preliminary references to the Court of Justice. Post-Brexit, the English courts will not have the right to make preliminary references to the Court of Justice and there will be limited opportunity to shape and influence the development of the EU case-law.[18] Equally importantly, preliminary references will continue to be sent from the other 27 Member States, but the UK Government will have no right to intervene in those proceedings.[19]

Although, if the UK were to be a member of EFTA and a party to the EEA Agreement, the English courts could make a reference to the EFTA Court, there is no binding obligation to

[18] Under the EEA Agreement, the English Courts would be able to make preliminary references to the EFTA Court. Although there is a provision for references from national courts to the Court of Justice in Article 107 EEA, it has never been used and is regarded as something of an anomaly.

[19] Note that, under the EEA Agreement, the UK Government and interested third parties would still have the right to intervene in preliminary references and direct actions before the EU Courts and the EFTA Court.

do so, even for the Supreme Court as a court of last resort.[20] The ruling from the EFTA Court is merely advisory and there is, strictly speaking, no obligation for the national court to take it into account in its final judgment.

One thing is certain: there will be an increased risk of divergent rulings and multiple proceedings. Outside the EU, however, English courts would no longer be subject to the duty of cooperation under Article 4(3) TEU or Article 16 of Regulation 1/2003 and would not have to ensure consistency or avoid conflicting rulings with the Commission or the EU Courts.[21] That means they could proceed with the case in parallel even though the matter was still being investigated by the Commission or subject to appeal before the EU Courts. They could pre-empt the Commission's ruling with their own contrary determination, resulting in further appeals.

There remains considerable room for 'conflict of laws' between the EU and the UK. On a worst case scenario, that increased uncertainty and complexity may not give claimants and funders the comfort they require to commit to the litigation in the first place. A shift in the costs/risk ratio could undermine claimant confidence and litigation funding incentives, including for the fledgling collective actions brought under the CRA 2015.

But, doom and gloom aside, is there a way in which the English Courts can be used to a litigant's advantage?

Jurisdiction

Divergences between legal systems mean one thing in practical terms: forum shopping. Even a relative small procedural difference (eg length of limitation, award of compound interest or the extent of disclosure) can make a substantial difference to the quantum of the claim. Will the UK be able to maintain its top-slot as a 'one-stop-shop' for damages litigation?

After withdrawal, whether on full exit or the EEA model, the Recast Brussels Regulation (RBR)[22] will no longer be directly applicable in the UK. If the UK becomes a remote outlier, which is not subject to the EU's private international law rules, then we can expect more jurisdictional challenges and concurrent proceedings, increasing litigation cost and uncertainty. Importantly, the attractiveness of a UK judgment (despite its high quality) will be diminished if it cannot be easily recognised and enforced in 31 different countries across the EU and EEA.

It will therefore be imperative to have some jurisdictional arrangements in place. Absent some agreement to observe the RBR provisions in the UK, the UK could ratify the 2009 Lugano Convention, either as an EFTA State or a third state, along with Iceland, Norway, Liechtenstein and Switzerland. That would provide certainty with ongoing jurisdiction before the English Courts through the domicile of an anchor defendant with the ability to bring in related third parties. It would also provide for courts to stay proceedings or decline

[20] Article 34 of the Surveillance and Court Agreement (Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice) (1994) OJ L 344/1. See Case E-18/11 *Irish Bank* [2012] EFTA Ct Rep 592, para 57.

[21] Note that, under the EEA Agreement, national courts are under similar duties of 'homogeneity' (akin to uniform interpretation) and 'reciprocity' (effective judicial protection).

[22] Regulation 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) OJ L 351/1.

jurisdiction for *lis alibi pendens* and related proceedings as well as the recognition and enforcement of English judgments in 31 States.[23]

Failing that, the UK could have to reinvigorate its signature of the old Brussels Convention or resort to the Hague Convention on Choice of Court Agreements 2005 (akin to the US and Singapore) or else return to the old common law. Although esoteric, there could be advantages in the old common law. Arguably, the old doctrine of '*forum conveniens*' may provide a broader range of connecting factors justifying the assumption of jurisdiction by the English Courts and recourse to anti-suit injunctions could rise again. Conceivably, if the English Courts could circumvent the next five years of uncertainty and preliminary references regarding the interpretation and application of the Damages Directive, we would have the benefit not just of the 'English torpedo' but also the 'English supersonic jet', resulting in faster, procedurally efficient and pragmatic outcomes for litigants.

Conclusion

Private enforcement in the UK is not going to die an untimely death and the immediate fall out from Brexit is likely to be minimal in the short term. However, over time, divergences may appear between the UK and the rest of the EU in terms of litigation practice or substantive competition law. Brexit could lead to a significant long-term reduction of global follow-on claims being heard in London if legal uncertainties unpick the vital toolkit of private claims and undermine the confidence of litigation funders in the UK.

Alternatively, such pessimism may prove unwarranted. Standalone and hybrid litigation could increase in the UK, with its procedural reforms and specialist judges that are well-equipped to create new precedents on novel complex issues. Divergence might actually make the UK a more attractive forum than the rest of the EU, particularly if other Member States are distracted in the detail of the new Damages Directive for the next five years. Much will depend on whether s 60 of the CA98 is repealed and on the approach adopted by English judges to developments across the Channel and elsewhere.

What is clear is that the current surge in competition litigation and the fledgling development of collective actions depends on the oxygen and momentum provided by litigation funders. Their commitment is reliant on legal certainty, procedural efficiency and volume of traffic. It would be a shame if competition litigation in the English Courts became a 'lost child', displaying inhibited growth and immaturity, which prevented it from making the most of its opportunities. Let's hope, as in *The Winter's Tale*, that there is some reconciliation after separation and all's well that ends well.

[23] There would be some disadvantages as the new provisions in the RBR dealing with jurisdiction clauses, Italian torpedoes and related proceedings in third party States would not apply.

Brexit: the implications for EU and UK merger control

Paul Johnson[1]

On Friday 24 June 2016, the results of the UK's much anticipated European Referendum were announced, with 51.9% of the UK electorate voting to leave the EU. The economic, legal and constitutional implications of this decision are likely to reverberate for years to come.

This article explores what the new relationship between the UK and the EU might look like, and considers what impact such new relationships could have on UK and EU merger control.

The implications

Whilst the result of the referendum is not legally binding, the UK electorate's vote has placed political pressure on the UK Government to present its application to withdraw from the EU in accordance with Art 50 of the Lisbon Treaty. It is expected that, at some point in the near future, the UK Government will trigger Art 50 by notifying the European Council of the UK's intention to leave the EU.

When Art 50 is triggered, this notification will set the timer on a two-year countdown within which the UK and the remaining EU Member States (the EU27) will have to negotiate a withdrawal agreement. This two-year period can, however, be extended if there is agreement between the UK and the EU27. Given the mutual importance of the relationship between the UK and EU, it seems highly likely that the UK government will reach an agreement with the EU27 to establish a new relationship between the parties. What this agreement will include, and how negotiations will progress, is unclear at this stage.

The result of the referendum is, by its very nature, binary. It simply states what the UK electorate wants. The referendum did not ask the UK electorate whether it favoured any alternative types of relationships with the EU, nor did it address how any new relationship might work in practice going forward.

The UK Government and Civil Service will have to create a framework to enable the UK to withdraw from the EU but continue a relationship in some other form. Before the referendum, little consideration was given to these issues, and there is still no agreed consensus within the 'Leave' camp as to what this relationship should be. The mechanics of any new relationship are likely to take months, or even years, to develop.

Importantly, during the two-year negotiation period, EU laws will still apply to and in the UK, and the UK will be able to continue participating in other EU business during this time. However, in terms of the parties to the negotiation of the UK's withdrawal, the UK will be one party, and the EU27 will be the other party, with the UK having no part in the EU27's discussions. Any final agreement concluded at the end of the two-year process would need to be ratified by the remaining (EU27) Member States by way of a qualified majority vote (of at least 72% of the remaining Member States comprising at least 65% of the EU's population), after obtaining the consent of the European Parliament by a simple majority. Any agreement is also likely to require the approval of the UK Parliament.

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[1] Senior Associate, Baker & McKenzie, Brussels. The assistance of Julian Godfray, Trainee Solicitor, Baker & McKenzie, London is gratefully acknowledged.

The UK's relationship with the EU: possible models

It is generally accepted that there are five distinct models which may be used as a basis point for the UK's post-Brexit relationship with the EU.

The first of these involves the UK adopting the 'Norway model' through membership of the EEA and EFTA. Transition to the Norway model is likely to be the most straightforward option. The UK would maintain its access to the EU's internal market, and the current free movement of goods, persons, services and capital between the UK and the EU would continue to apply. The UK would have to contribute to the EU budget and adopt EU laws in return for maintaining its access to the EU internal market. A common external customs tariff would continue to be applied by the UK and the EU. Having left the EU, the UK would have limited rights to participate in EU legislative processes and trade policy development. The UK would also not be bound by common agricultural and fisheries policies (CAP and CFP), the common energy and transport policies, or the Common Foreign and Security Policy (CFSP).

It is currently unclear as to the effect of an Art 50 withdrawal from the EU on the UK's membership of the EEA. An argument does exist that if the UK applies to withdraw from the EU under Art 50, that process would not automatically cause the UK to withdraw from the EEA. This is because the UK is a separate signatory of and contracting party to the EEA Agreement, and so withdrawal from the EU may not result in an automatic withdrawal from the EEA. However, staying in the EEA may not be easily compatible with a vote to leave the EU and, as such, the UK government may be required, as a matter of politics, to simultaneously withdraw from the EEA Agreement under its Art 127.

The second option would involve a customs union, also known as the 'Turkish Model'. This would involve no tariff barriers on goods and certain agricultural products, and a common external tariff applying to the EU and UK. The UK would be able to export goods to the EU without having to comply with customs restrictions or tariffs. The UK would also not have to contribute to the EU budget and would not have to accept free movement of people. However, the UK would likely need to negotiate access to the EU internal market for services.

The third option would be a set of bilateral agreements between the UK and EU, known as the 'Swiss Model'. This would require the UK to negotiate individual sector-by-sector bilateral agreements with the EU, and free trade agreements with EFTA countries. Switzerland currently has around 130 separate bilateral agreements with the EU, illustrating that this option would likely involve a significant amount of work and a great deal of time to replicate. In addition, UK businesses would not automatically be entitled to full access to the EU internal market for goods or services. There would be no free movement of people and the UK would not have to contribute to the EU budget. There would also be no common external customs tariff around the UK and EU and, as such, the UK would need to negotiate independent free trade agreements with third countries.

The fourth option is the Free Trade Agreement (FTA) model. Under this model, the UK would have to negotiate independent FTAs with third countries, and an FTA between the UK and EU. It is unclear at this stage what an FTA between the UK and EU would contain, and how it would work in practice.

The fifth option would involve a 'total' Brexit, with the UK only relying on the rules of the World Trade Organisation in respect of its relationship with the EU and separate EU Member States (the WTO Approach). If the UK adopts the WTO Approach, it would not enter into any new agreements with the EU or with separate EU Member States, and the WTO rules

would apply to the UK's right to trade with the EU in respect of both goods and services. However, it is likely that negotiations over a new Schedule of Concessions would be necessary. There would be no free movement of people, the UK would not have to contribute to the EU budget and the UK would not have any say in the EU legislative process. UK exports to the EU would be subject to EU import tariffs, and the UK would have the right to impose most favoured nation (MFN) tariffs on exports from the EU27. Under this approach, the EU would be very unlikely to waive duties on imports from the UK, since if the EU waived such duties, given the MFN principle, all WTO Contracting Parties would have the right to ask for similar treatment.

Finally, the UK could also adopt an unknown hybrid model, incorporating different elements of the aforementioned models.

The UK's relationship with the EU: implications for merger control

Whilst each approach would result in a different outcome for UK and EU businesses in general, with respect to merger control, the approaches can be put into two broad categories: the Norway model on the one hand and all other models on the other hand (eg the Turkish, Swiss, FTA or WTO models, or an unknown UK model).

The European merger control regime is a 'one-stop-shop'. If the EU Merger Regulation's turnover thresholds are met, the parties are required to notify the proposed transaction to the European Commission (the Commission), and they are not required to notify individual National Competition Authorities (NCAs) within the EU. If these turnover thresholds are not met, national filing thresholds then have to be considered. If these local thresholds are met, such as turnover and effect on the local market, the transaction must then be notified to individual NCAs within the EU. The UK's NCA, the Competition and Markets Authority (CMA), has a voluntary filing regime.

If the UK remains a member of the EEA post-Brexit (eg the Norway model), mergers that meet the EU Merger Regulation's turnover thresholds would continue to be notifiable to the Commission (and, in certain limited circumstances, to the EFTA Surveillance Authority) under the 'one-stop-shop' principle. A transaction not meeting these thresholds would have to be assessed to determine if it meets any national filing thresholds, including in the UK. As such, the impact on merger control if the Norway model is adopted would be limited, and little would change in the short term.

The other non-EEA models have no formal competition element, and unlike under the Norway model the EU's 'one-stop-shop' principle would no longer apply. Parties to the transaction would therefore have to consider the application of both UK and EU merger control rules to the proposed transaction.

Transactions that fall within the scope of both the UK and EU merger regimes would consequently face the prospect of concurrent merger filings. This would lead to increased costs and complexity, and would raise the possibility of divergent decisions with respect to the same transaction, thereby increasing uncertainty. The impacts of a full Brexit may become more substantial over the next decade, as the EU and UK merger regimes are likely to gradually diverge. These potential impacts are discussed in further detail below.

Brexit: impact on M&A and merger filings

It is difficult to estimate the precise impact that Brexit will have on M&A activity, but the financial markets have been volatile since the result was announced, and it is likely that political and economic uncertainty may hamper appetite for M&A activity in the short to medium term. However, the fall in value of sterling against the dollar and the euro could also result in an increase in cross-border acquisitions, as the price of UK target companies may fall accordingly.

Post-Brexit, merging parties will have the additional burden of having to prepare separate merger filings with different information requirements, which is likely to result in an increased cost for the merging parties with respect to time taken to prepare the filings, legal fees and filing fees. This may result in delays, as the merging parties will have to obtain separate merger control clearances with different procedural processes, including with respect to pre-notification and the time taken to review and issue a merger decision.

For transactions already requiring notification and clearance in a large number of jurisdictions (eg more than 15), an additional filing requirement in the UK may be unlikely to significantly alter the parameters of the deal. However, the impact is likely to be much more noticeable on transactions that previously would have had only a single EU filing, but will now have two filing requirements.

At first, Brexit may only have a limited impact on how mergers are assessed by either the UK or EU. The EU's approach to competition law is very influential internationally; numerous jurisdictions around the world are heavily shaped by the EU and its policies and decisions. In very broad terms, the EU's approach is followed in countries that a post-Brexit UK might hope to develop trade agreements with, such as India and China. The UK's approach to competition law and policy is also influential within the EU, and also in other jurisdictions, including Australia, New Zealand and Singapore. At this time, it is unlikely that the CMA will suddenly adopt a very divergent approach to that of the EU, but this may potentially happen over time, with the CMA's approach to mergers possibly becoming more heavily influenced by the Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) and more prosecutorial in nature.

Brexit: impact on the UK merger control regime

To understand the impact that Brexit may have on the UK merger control regime, recent trends in UK merger control, and how these might change as a result of Brexit, should be considered.

As set out above, the EU's 'one-stop-shop' may no longer apply. As such, it seems likely that more mergers will be notified to the CMA. The CMA is likely to receive an increase both in the number of mergers notified but also the size and complexity of the cases, eg, deals with a strong UK focus such as Hutchinson's proposed acquisition of O2. As such, an increase in the number of Phase 2 investigations by the CMA can also be expected.

The CMA is a well-regarded NCA. In February 2016, the National Audit Office concluded that the CMA's approach to mergers is innovative and efficient.[2] As a result of Brexit, it seems likely that the CMA's mergers unit will have an increased workload. This may cause

[2] National Audit Office, 'The UK Competition Regime', HC 737, Session 2015-16, 5 February 2016, available at https://www.nao.org.uk/wp-content/uploads/2016/02/The-+UK-Competition-regime.pdf. See also the CMA's press release welcoming the Report, available at https://www.gov.uk/government/news/cma-welcomes-nao-report.

the CMA to reduce resources in other parts of its work; eg, there may be fewer market investigations as more resources are dedicated to mergers. Alternatively, the CMA may obtain additional resources in order to respond to the increase in merger workload, although one way to address this might potentially be to share resources with other concurrent regulators on sector specific mergers; this possibility is considered below.

In March 2016, the CMA announced plans to streamline its merger review procedures.[3] In particular, the CMA committed to: clarify existing guidance notes to make it easier for companies to understand its information requests; hold pre-notification meetings with the merging parties in order to understand the markets earlier in the process (if appropriate); and publish additional guidance on the CMA's approach to derogations from initial enforcement orders, so that companies have a greater understanding as to when these might be used.

The CMA has implemented new deadlines on the formal stage of merger review, bringing the CMA's process closer to that of the European Commission.[4] However, like the Commission, informal pre-notification discussions are becoming increasingly lengthy, and this is unlikely to change post-Brexit.

The Commission and the CMA are dedicating more resources to reviewing complex deals, and complex deals are now under ever increasing scrutiny. The result is that markets, and particularly segments within these markets, are looked at in depth. In the UK, the CMA has looked closely at a diverse range of narrow markets, including personal lubricants,[5] rendering,[6] discount retailers[7] and chilled savoury pastries.[8] The Commission is also dedicating resources to complex cases and is looking closely at narrow segments, eg, financial trading markets.[9]

The CMA and Commission are also increasingly focused on the issue of closeness of competition, which arguably makes market definition less important. Furthermore, the Commission is increasingly relying upon internal documents for its case assessment, making the analysis increasingly 'case specific', moving the procedure further away from the more form-based approach taken in the past. This is a trend that has been occurring for a number of years, but is likely to continue in the future, irrespective of Brexit.

An area that might see development post-Brexit is the influence on the CMA of the approaches taken by the DoJ and FTC, in particular the US authorities' use of economic tools. This trend already exists, and the Office of Fair Trading (now replaced by the CMA) was heavily influenced by the DoJ and FTC's use of the gross upward pricing pressure index

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3 CMA, 'Review of the Use of the Merger Notice and Initial Enforcement Orders' (21 March 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509211/Review_of_the_use_of_the_Merger_Notice_and_IEOs.pdf.

4 See s 34ZA of the Enterprise Act 2002, as inserted by the Enterprise and Regulatory Reform Act 2013.

5 *Reckitt-Benckiser/K-Y Brand*, CMA Final Report, 12 August 2015, available at https://assets.publishing.service.gov.uk/media/55cb3230ed915d5343000026/Reckitt_Benckiser_-_K-Y_brand_final_report.pdf.

6 *Linergy/Ulster Farm By-products*, CMA Final Report, 6 January 2016, available at https://assets.publishing.service.gov.uk/media/568d2311e5274a112c000002/Linergy_and_Ulster_Farm_final_report.pdf.

7 *Poundland/99p Stores*, CMA Final Report, 18 September 2015, available at https://assets.publishing.service.gov.uk/media/55fc0337ed915d14f100001c/Poundland_-_99p_Final_report.pdf.

8 *Pork Farms Caspian/Kerry Foods*, CMA Final Report, 3 June 2015, available at https://assets.publishing.service.gov.uk/media/556eea94e5274a150e000001/Final_report.pdf.

9 Case COMP/M.6116, *Deutsche Börse/NYSE Euronext*, Article 8(3) decision of 1 February 2012, available at http://ec.europa.eu/competition/mergers/cases/decisions/m6166_20120201_20610_2711467_EN.pdf.

(GUPPI) in their 2010 Horizontal Merger Guidelines.[10] The CMA uses GUPPI as part of its toolkit when undertaking a Phase I analysis, and it is one of the factors that the CMA uses when filtering out cases to be referred to a Phase II investigation. In contrast, the Commission has not updated its guidance on market definition since 1997, and it can be argued that the Commission (at least publicly) does not use GUPPI (or equivalent tools) to the same extent as a filter when compared to the CMA.

In addition, the CMA is increasingly advocating the use of behavioural economics to inform its analysis.[11] Following Brexit, the CMA's approach can be expected to continue to shift closer to that of the DoJ and FTC.

The respective substantive tests of a substantial lessening of competition (SLC) in the UK and a significant impediment to effective competition (SIEC) in the EU are unlikely to change. In practical terms, this is unlikely to lead to a significant difference in results, but in very limited circumstances, a transaction reviewed by both the Commission and the CMA might be deemed to raise no issues under one test, but to raise issues under the other test.

In contrast to the Commission and many NCAs of other Member States, the UK has sector-specific concurrent competition regulators in airports and air traffic services, telecoms, post, broadcasting, spectrum, energy, water and sewerage, rail (in Great Britain), healthcare services (in England), financial services and payment systems.[12] These regulators currently have either no merger control powers, or merger control powers that are limited and only used in specific circumstances. For example, Ofwat must provide an opinion to the CMA during Phase 1 investigations into water mergers[13] and the CMA will ask Ofcom to provide a local media assessment for media mergers.

Brexit may lead to concurrent regulators gaining a greater role in merger control for UK mergers. A major advantage that concurrent regulators have is their expertise in a given sector, which should give them the ability to quickly assess cases that may give rise to competition issues, eg the Financial Conduct Authority (FCA) reviewing mergers in the UK financial services sector. It could be argued that concurrent regulators should have a greater role in those cases that are likely to raise an SLC, and that they should be involved early on in the process in order to assist the CMA's assessment with their sector-specific knowledge. Indeed, the National Audit Office recently suggested that one option for improvement of competition policy in the UK could be the 'greater pooling of competition enforcement resources across the concurrent regulators'.[14] Brexit may be the triggering event for such a change, in particular if the CMA now has to review a greater number of complex merger cases, although such a sharing of resources could have been established prior to Brexit for mergers without an EU dimension.

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[10] Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines, available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[11] D Currie, *Homo Economicus and Homo Sapiens: The CMA Experience of Behavioural Economics* (21 April 2015), available at https://www.gov.uk/government/speeches/david-currie-speaks-about-the-cma-experience-of-behavioural-economics.

[12] CMA, *Annual Report on Concurrency* (28 April 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519739/Annual-_-report-on-concurrency-2016.pdf.

[13] Ofwat's approach to mergers and statement of methods (October 2015), available at http://www.ofwat.gov.uk/wp-content/uploads/2015/10/pap_pos20151021mergers1.pdf.

[14] National Audit Office, n 2, above, at p 11.

With respect to the impact of Brexit on UK process and policy, the CMA's current regime has almost become mandatory and suspensory in practice, particularly for transactions that may give rise to competition concerns. The CMA has enhanced powers to prevent companies from integrating until its investigation has been completed, and it is increasingly willing to use these powers. Post-Brexit, as a result of the 'one-stop-shop' principle no longer applying and large transactions (by turnover) being reviewed by the Commission, the CMA's merger review process might become a non-voluntary suspensory regime (similar to the vast majority of regimes around the world) in order to ensure that all relevant transactions are reviewed by it. Alternatively, the UK may decide to take a less interventionist approach (as discussed further below) and adopt a lighter touch in its approach to using its powers to prevent mergers from closing and in its review of mergers.

With respect to merger control policy, as with its approach to market definition, it is likely that, no longer being a member of the European Competition Network, the CMA will be increasingly influenced by the US agencies rather than the Commission in developing its views. In such a scenario, whilst the Commission would remain highly influential on competition policy around the world, a trend may develop in which the US approach to merger control becomes increasingly influential.

Furthermore, the result of the referendum has prompted increased expectation of a renewed bid for Scottish independence, and the possible EU accession of an independent Scotland. The impact that this would have on the EU and UK merger control regimes is also significant, not least through the likely establishment of a Scottish competition authority in an independent Scotland.

Brexit: impact on the EU merger control regime

The likely evolution in the CMA's approach to merger control post-Brexit (with respect to market definition and analysis, the role of concurrent regulators, process and policy) may also have an impact upon the Commission.

It is difficult to predict whether Brexit contagion will spread to other Member States, but a risk of a break-up of the EU cannot be entirely discounted. Research by the University of Edinburgh found that 53% of respondents in France were in favour of holding a referendum on EU membership, and in Spain, Germany and Sweden, more people were in favour of holding a referendum than opposed.[15] Clearly, a distinction must be made between a desire for a referendum and any result of such a referendum, if held. However, it is very possible that voters in other Member States may want to leave the EU.

The remaining Member States may view Brexit as an opportunity to take a more protectionist approach to merger control, favouring the creation of national or European champions, which could itself have a greater influence on the approach taken by the Commission

In such a scenario, the Commission could be put under pressure by Member States to use the merger review process as a broader trade tool to protect EU interests, to ensure either the protection, or the creation, of European champions, and limit foreign investment in certain sectors. In fact, the president of France, Francois Hollande, recently stated that the remaining EU27 should consider 'adapting' competition law. However, this eventuality could require difficult EU treaty changes.

[15] J Eichhorn, C Hübner and D Kenealy, 'The View from the Continent: What People in Other Member States Think About the UK's EU Referendum' (University of Edinburgh, 10 March 2016), available at https://www.aqmen.ac.uk/sites/default/files/TheViewFromTheContinent_REPORT.pdf.

Brexit could also impact upon the EU's merger control thresholds. The first threshold was agreed in 1989[16] and the second was added in 1997.[17] They have not been amended since. During this time 13 countries have joined the EU[18] and the rate of inflation during this time period was approximately 1.7% per year. Despite this, the EU Merger Regulation thresholds have not changed. Therefore, given this lack of change over the last 26 years, it appears unlikely, at first glance, that they will change as a result of Brexit.

The Commission has, however, in recent years at least raised the possibility of a change in the thresholds, or an introduction of additional thresholds. With the departure from the EU of one of its largest economies, the Commission may revisit the EU merger filing thresholds and propose reducing them. If not, the Commission may see a reduction in the number of transactions meeting the thresholds and requiring clearance.

Changes to notification thresholds could also prompt the Commission to revive its proposal for a requirement to notify acquisitions of non-controlling minority shareholdings, which has not to date been pursued by Commissioner Vestager.[19] The Commission may also consider introducing other new thresholds, such as deal valuation or market capitalisation, in order to ensure that deals in the technology sector and/or high value deals are reviewed appropriately, following concerns raised by the *Facebook/WhatsApp* merger.[20]

Are changes needed in any event?

However, irrespective of Brexit, should the Commission undertake a more in-depth review of the effectiveness of the EU Merger Regulation, given that it is now more than 25 years since the original Merger Control Regulation came into force?

We now have a substantive body of case-law that enables firms to determine, with a degree of predictability, the likely outcome of merger review, particularly those transactions that are unlikely to raise any issues. Indeed, over 6,000 mergers have been notified to the Commission; only 25 have been prohibited, and remedies have been imposed in only 378 cases. Given the very low number of transactions that raise any competition issues, is it now time to consider a move to at least a partial self-assessment system in European merger control, similar to the move to self-assessment in behavioural cases that occurred in 2004? The aim behind the move to self-assessment and the modernisation programme in behavioural cases was to free up resources to focus on genuinely important cases. This is still the same message today, with the Juncker Commission's stated aim of being 'big on big things and small on small things'. Should this not also happen in merger control, to enable the Commission to focus only on the limited number of merger cases that raise competition concerns?

As part of the move to self-assessment, the Commission could remove the obligation to notify and the prohibition against closing prior to clearance. An EU self-assessment merger regime could ensure that the Commission retains the right to review a transaction for a set

16 Council Regulation (EEC) No 4064/89.

17 Council Regulation (EC) No 1310/97.

18 On 1 May 2004, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia joined. On 1 January 2007, Romania and Bulgaria joined. On 1 July 2013, Croatia joined.

19 M Vestager, *Refining the EU Merger Control System* (10 March 2016), available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en.

20 Case COMP/M.7217, *Facebook/WhatsApp*, Article 6(1)(b) decision of 3 October 2014, available at http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf. This merger did not have an EU dimension and was referred to the Commission pursuant to Art 4(5) of the EU Merger Regulation.

time period, eg within six months of the Commission becoming aware of a transaction, similar to the provisions in the UK. In order to ensure that the Commission becomes aware of a transaction, and for the review period to start, the parties could have the option of notifying the Commission by way of a much shorter form (a 'Form SCO') which would only require limited details to be provided, eg the parties' names, a copy of any press release announcing the deal and relevant internal documents (the precise scope of which would need to be determined but would likely be based on the current Art 5(4) and be in line with the US Hart–Scott–Rodino Antitrust Improvements Act). The submission of this Form SCO could then start a one-month review period, during which the Commission could either clear the deal or extend the review period for a further five months if competition concerns are found. The Commission would of course retain all of its existing powers during the review period, including the ability to prohibit the transaction and unscramble a deal where it has not been notified.

Conclusion

The UK's impending departure from the EU promises to catalyse a wide range of changes in UK and EU merger control. The full implications may take months or years to emerge. Companies should monitor the situation closely and stay alert to the changes.

Rip it up and start again? Cartel regulation post-Brexit

Nicholas Querée[1]

On 23 June 2016, the people of the United Kingdom voted to leave the European Union. The significance of this development cannot be overstated. The aftershocks of this momentous decision reverberated throughout the political institutions and financial markets of the UK, Europe, and further afield. They will no doubt continue to do so for some time.

The impact on competition law and policy of a possible Brexit has, perhaps understandably, not played a central role in the public debate on the subject.

Competition law and policy is an area which has seen high levels of activity on the part of the EU institutions.[2] The consequences of the UK being a member of the EU for competition law and policy have, as with all Member States, been legally profound, in particular in relation to how the UK regulates anti-competitive agreements between undertakings, including cartels.

This article will address what Brexit could mean for cartel and antitrust enforcement. In particular, it will consider whether Brexit will provide an opportunity for competition law regulators in the UK to take a lead in cartel enforcement along a more traditional 'Anglo-Saxon' line, that is more prosecutorial rather than administrative in character and with a greater emphasis on using existing criminal powers to regulate cartel conduct.

The options

Identifying what cartel enforcement could look like post-Brexit is complicated by the fact that there are a number of possible options that the UK could adopt once the (now (in)famous) procedure under Art 50 of the Lisbon Treaty[3] is activated, leading to the UK leaving the EU. These options have been the subject of extensive debate following the referendum result.

Option A is the so-called 'Norwegian' approach. Here, the UK would leave the EU, instead joining the European Free Trade Association (EFTA) and remaining a member of the European Economic Area (EEA).[4] Alongside Norway, this is the position adopted by Iceland and Lichtenstein.

This option would not result in any marked changes to competition law enforcement in the UK, in relation to cartels. The EEA agreement replicates the competition law provisions that are applicable to EU Member States, and to which the UK is presently subject.[5]

In cross-border cases, the European Commission (the Commission) would retain jurisdiction in exactly the same manner as it does at present.[6] In the event that a cartel's impact was

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2 See generally, J Goyder and A Albors-Llorens, *Goyder's EC Competition Law* (2008, 5th edn), amongst other texts.

3 (2012) OJ C 326/47, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

4 Agreement on the European Economic Area (the EEA Agreement), available at http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

5 Ibid, Part IV, Chapter 1.

6 Ibid, Art 56(1)(c).

limited only to the EFTA States, or predominantly in the EFTA States, it would be subject to the jurisdiction of the EFTA Surveillance Authority (ESA),[7] The ESA is the body established to ensure that the participating EFTA States – Norway, Iceland and Liechtenstein – respect their obligations under the EEA Agreement,[8] subject to the superintendence of the EFTA Court.[9]

Undertakings would remain able to apply for leniency under the Commission's leniency regime, in cases where the Commission retained jurisdiction.[10] The ESA also operates its own leniency regime for undertakings that wish to report a cartel whose impact is believed to be limited only to EFTA States.[11]

Whilst nothing can be ruled out, it remains to be seen whether the UK will pursue the Norwegian approach. EFTA States are required to comply with much of EU law without being able to influence its course. Importantly, EFTA States must respect the free movement of workers.[12] Given that immigration was acknowledged – by most, if not by all prominent advocates of the UK leaving the EU[13] – as one of the key driving forces behind the 'leave' victory in the referendum, it is unlikely that a post-Brexit settlement in which the UK is permitted to remain in the EEA notwithstanding being permitted to apply a restriction of the free movement of workers will be possible.

Option B is for the UK to adopt the approach taken by Switzerland. Switzerland is not a member of the EEA, although it is a member of EFTA. Its relationship with the EU is governed by a number of bilateral treaties.

For present purposes, what is important is that the Swiss have not agreed to be bound by EU competition law, save for a 2002 agreement directed at ensuring free competition in the civil aviation market.[14] The Swiss Competition Commission (COMCO) retains jurisdiction to investigate undertakings for alleged anti-competitive conduct. A detailed agreement on the exchange of information between the Commission and COMCO only came into force in 2014.[15]

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7 Ibid, Art 56(1)(a) and (b).

8 Ibid, Art 108(1). For a summary of the ESA's competition law powers, see http://www.eftasurv.int/about-the-authority/the-authority-at-a-glance.

9 Ibid, Art 108(2).

10 European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006) OJ C 210/2, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC0901(01)&from=EN.

11 EFTA Surveillance Authority, Notice on Immunity from fines and reduction of fines in cartel cases (2014) OJ C 48/6, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:E2014C0220(01)&from=EN.

12 EEA Agreement, n 3, above, Part III, Chapter 1.

13 Compare Johnson, 'I cannot stress too much that Britain is part of Europe – and always will be', *Daily Telegraph* (26 June 2016), available at http://www.telegraph.co.uk/news/2016/06/26/i-cannot-stress-too-much-that-britain-is-part-of-europe--and-alw/ with Fox, 'An optimistic post-Brexit vision for Britain', *Financial Times* (5 July 2016), available at https://next.ft.com/content/874bdbaa-41f5-11e6-9b66-0712b3873ae1.

14 Agreement between the European Community and the Swiss Confederation on Air Transport (2002) OJ L 114, available at http://ec.europa.eu/competition/international/legislation/ch_2.pdf.

15 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A1203(01)&from=EN.

The Council of the European Union has criticised this complex web of treaties as 'creating legal uncertainty'.[16] There is little to recommend it. Again, the Swiss are required to ensure that much of their legal system is harmonised with that of the EU as a price for participating in the internal market, including the free movement of persons. The result of a recent Swiss referendum advocating immigration restrictions has been described by the EU as being incompatible with Switzerland's access to the internal market.[17]

That leaves Option C, best described as 'legal detachment' – a catch-all expression that includes the various possible compromises, negotiating positions and grand ambitions that are, at the time of writing, the subject of the keenest political debate both within and without Westminster. Option C may take one of a number of different forms: an express customs union; a free trade agreement; or a simple, 'straightforward' World Trade Organisation approach.

Legal consequences

It is not likely that, in the short to medium term, this legal detachment would result in any marked change in how the UK understands and defines cartel conduct. After all, the prohibition against anti-competitive agreements set out in Chapter 1 of the Competition Act 1998 would (presumably) remain in place, as would the various decisions of appellate courts giving guidance on how the terms of that prohibition are to be understood.

In the longer term, it is more difficult to say what will happen. Following Brexit, subtle, yet important, distinctions may begin to take shape in how the UK understands and identifies possible anti-competitive conduct. Whether an undertaking has engaged in 'price signalling', or participated in a 'hub and spoke' cartel, for example, may depend on who is asking the question, and where they are. How these issues may manifest themselves – if at all – may reflect a differing philosophical approach to competition in a post-Brexit UK.

Jurisdictional release

Whilst it is not anticipated that this 'legal detachment' will produce a paradigm shift in the substantive law applicable to cartel enforcement, the jurisdictional and procedural reforms that are an inevitable consequence of that detachment are likely to be significant.

First, Brexit would result in a number of procedural changes. The Competition and Markets Authority (CMA) would not remain a member of the European Competition Network (ECN) and would lose the benefits of international cooperation under the aegis of that organisation. Accordingly, undertakings suspected of anti-competitive conduct in the UK market would not be able to participate in the ECN's 'one stop' leniency scheme, adding an additional layer of both risk and cost for undertakings considering disclosing an existence of a cartel. The current allocation of investigative and information sharing powers between the UK national competition authorities (including the CMA and sectoral regulators such as the Financial Conduct Authority (FCA), etc)) and the Commission would cease to apply; no longer would the Commission be able to exercise its EU law investigative powers in the UK.[18] Therefore,

[16] Council of the European Union, Council conclusions on EU relations with EFTA countries (14 December 2010), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf.

[17] 'EU tells Swiss no single market access if no free movement of citizens', *The Guardian* (3 July 2016), available at https://www.theguardian.com/world/2016/jul/03/eu-swiss-single-market-access-no-free-movement-citizens.

[18] Competition Act 1998, Part II.

new agreements would need to be struck, and whilst there are precedents, the terms of those agreements are difficult to foresee.

Secondly, and critically, Regulation 1/2003[19] would no longer apply in the UK. The CMA and other UK sectoral regulators would now be empowered to investigate those cartels impacting on trade between the UK and EU Member States.

What does this mean in practice? Put simply, the CMA and other UK competition authorities will have the opportunity to investigate many more alleged cartels. Figures from the Commission website state that, as at December 2015, over the past decade the Commission has dealt with 297 cases, while the UK has dealt with 81.[20] Given the size and importance of the UK economy within the EU, and the fact that many EU cartel investigations have had a UK dimension, it is fair to infer that the UK authorities could have had jurisdiction in many of these cases.

Business is unlikely to consider this arrangement particularly attractive. This will mean a whole new front on which to fight, and, in theory, the possibility of conflicting findings by regulators in the EU and the UK notwithstanding that both will, at least for the time being, be applying the same legal principles. For the CMA and other competition regulators, however, this could present a welcome opportunity.

One of the criticisms directed against the CMA, most recently in the National Audit Office report, is that its enforcement record scores poorly in terms of activity.[21] Yet, Regulation 1/2003 having been torn up, suddenly the UK competition authorities would be presented with a new work-stream of complex, multi-jurisdictional cartel cases to investigate.

Tackling multi-jurisdictional, complex cartel cases is demanding work, and it is right to recognise that the CMA's cartel function will need to be further resourced to deal with this increased workload. If provided with that support, what opportunity would this increased activity present to the UK competition authorities?

The first and most obvious point to make is that a greater number of live investigations would follow – presumably – a greater number of fines, and a greater presence for the UK competition authorities in the cartel space in relation to international, as well as national, markets. If so, this would bolster the credibility of the UK domestic authorities. Combining this increased visibility with the availability of the UK's leniency scheme, it is not fanciful to suggest that, through this virtuous circle, the CMA may reap the reward in terms of greater numbers of undertakings voluntarily disclosing the existence of a cartel with both a UK and an EU nexus.

This could be even more likely were the CMA to leverage this increased work stream in relation to its criminal investigative and prosecutorial powers. Following the removal of the requirement to prove dishonesty as an essential element of the criminal cartel offence,[22] it is

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ 2003 L 1/1, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN.

[20] European Commission, European Competition Network, Statistics, available at http://ec.europa.eu/competition/ecn/statistics.html.

[21] National Audit Office, Report by the Comptroller and Auditor General, 'UK competition authorities – The UK competition regime' (HC 737, 5 February 2016) at para 15, available at https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf.

[22] The Enterprise and Reform Act 2013 amended the criminal cartel offence (section 188 of the Enterprise Act 2002) to the effect that, from 1 April 2014, it is no longer necessary to show that an individual entered into an agreement to fix prices, share supply, or rig bids *dishonestly*.

now possible to cast the net wider in relation to potential suspects and, to continue the fishing analogy, the CMA will be sailing in wider seas.

The CMA has invested heavily in its capacity to take on and prosecute criminal cartel cases.[23] The increased work stream presented by being released from the jurisdictional rules of Regulation 1/2003 would potentially provide fertile territory for the criminal team to explore.

This greater possible activity would give the CMA, and the sectoral regulators, greater scope to set and pursue their own enforcement priorities, and play a more active role in the regulation of their markets. I am thinking in particular of financial services. I recently spent some time on secondment in the Enforcement Division of the FCA. The FCA is palpably excited about using its new powers, having dramatically 'upskilled' and invested in this area. Following Brexit, the FCA will, for example, be able to take a lead role in relation to investigations such as that presently being conducted by the Commission in relation to suspected misconduct in the European sovereign debt markets. This will, in turn, prompt some interesting questions about where cartel conduct ends and market abuse begins.

Looking further ahead, one possibility would be a move towards a more Anglo-Saxon, prosecutorial model of cartel enforcement.

Some commentators have already argued, even before the prospect of Brexit was raised, that the administrative enforcement system is flawed and should be reformed.[24] This is not only in the context of the UK response; the same criticisms have also been directed at the Commission.[25] Those making them have argued that a prosecutorial model is fairer and (in some cases) have argued that it is capable of achieving a fairer outcome. This, of course, is the system which prevails in the United States, which has enjoyed marked success in antitrust enforcement.

Here, Brexit would be the opportunity, not the legal basis. Many EU Member States operate a prosecutorial system in compliance with Regulation 1/2003, Ireland being a notable, but not exclusive, example. Indeed, a move towards a prosecutorial system was considered, and rejected, by the UK Government in its 2011 White Paper.[26]

A move towards a prosecutorial system would represent a clean break from the European model, and arguably engender a new cultural approach to competition law enforcement.

This prosecutorial model might employ the use of criminal sanctions, as opposed to civil penalties, to regulate cartel conduct on the part of corporates (as opposed to individuals). This option would only be possible in a post-Brexit environment, at least insofar as criminal penalties were to be used to penalise undertakings guilty of anti-competitive conduct concerning one or more EU Member States. In the 14 years since the Enterprise Act 2002 came onto the statute books, and coming up to 20 years since the passing of the Competition

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[23] See, eg, S Blake, 'The UK steel tanks criminal cartel trial: implications for criminalisation and leniency' (13 November 2015), available at https://www.gov.uk/government/speeches/stephen-blake-on-the-uk-steel-tanks-criminal-cartel-case, citing increased funding for the CMA's criminal cartel investigative, intelligence gathering and prosecutorial functions.

[24] A Riley, 'Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement', in B Rodger (ed), *Ten Years of UK Competition Law Reform* (2010).

[25] D Anderson and R Cuff, 'Cartels in the European Union: Procedural Fairness for Defendants and Claimants' (2011) 34 *Fordham International Law Journal* 385, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2285&context=ilj.

[26] Department of Business, Innovation and Skills, 'Growth, Competition, and the Competition Regime: Government Response to Consultation' (2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf.

Act 1998, we have seen the increasing emphasis on using criminal sanctions to combat corporate economic wrongdoing. The Bribery Act 2010 is perhaps the best example.

The UK Government considered this possibility when it consulted in 2001on the creation of the criminal cartel offence, but then rejected it.[27] This position is unlikely to change anytime soon, even in the heady days of Brexit. Most would agree that the criminalisation of corporate cartel conduct would in all likelihood lead to fewer enforcement cases, rather than more, given the higher standard of proof attendant on criminal prosecutions. Still, it is worth recalling that in the United States, it is a punitive criminal regime that has led to the real success of that jurisdiction's leniency programme.

Conclusions

In the short term, the prospect of Brexit will have little impact on the regulation of anti-competitive agreements. In the medium to long term, however, the ramifications for how cartels are investigated and sanctioned in the UK could be highly significant. Much will depend on the nature of agreements struck between the UK and the EU. What remains to be seen is the extent to which Brexit will provide the opportunity for a reimagining of domestic cartel enforcement in the UK and for the resurgence our national competition authorities.

[27] Department of Trade and Industry, 'A World Class Competition Regime' (Cmnd 5233, 2001), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265534/5233.pdf.