

The implications of Brexit for UK and EU competition policy and law enforcement

Response to BCLWG October 2016 Issues Paper

I. Objectives of competition policy, regulation and the role of the state

Brexit raises many detailed questions on how the UK competition regime could move successfully towards full independence from the EU framework. The Issues Paper covers them comprehensively. Before attempting to answer them, some general remarks are necessary.

In the first place, both UK and EU competition policy and law enforcement reflect a fairly solid international consensus that open and competitive markets are the best (or least worst) way of delivering goods and services to consumers and citizens. But competition on some markets can be frustrated on the one hand by private action (restrictive practices and agreements, the abusive conduct of powerful large firms, the actual or potential concentration of market power in the hands of too few companies...) and the other hand by undue public intervention (undue subsidies, exclusive rights etc).

As reflected in the CMA's own mission statement, the UK's competition policy and law aim to maintain (and where possible promote) competitive markets, without the need for excessive public regulation. EU competition policy and law, together with control of state aids, share the same aim, and in addition are regarded as essential elements in the drive to create a single integrated market across the EU, where firms can compete without restriction across borders.

At the same time both EU and UK law have recognised that there are several sectors of the economy where competition cannot take place without a strong framework of regulation. This applies especially in 'network' industries such as telecoms, transport, energy and water, where there are 'natural' monopolies which can be better circumscribed through sectoral regulation and the action of sectoral regulators. Competition law may be the ideal and preferred way of tackling a competition problem but sometimes regulatory action is a better way to achieve results for consumers and for business. Mobile roaming charges and interchange card fees are two areas where regulation has been chosen as a better solution to the competition problem.

II. Brexit's messages

Against the background of this political and regulatory consensus, Brexit, whether 'hard' or 'soft,' comes with three political messages which, in the competition sphere as in others, need to be interpreted intelligently and faithfully given the clear result of the referendum:

- first we need to **'break free'** from EU regulations and trade policy so that UK can compete fairly and freely with other economies throughout the world;
- secondly the UK should **'take back control'** of its policies and legislation by withdrawing from the legal framework of the European Union,
- thirdly, as a consequence ***our primary concern should be the economy of the UK and the welfare of UK citizens***, and not wider than that.

III. Breaking free

With respect to the first prescription of 'breaking free', the major political concerns here would not appear to be primarily aimed at 'restrictive' EU regulation in the competition law field. After all, Regulation 1/2003 established a framework of solid partnership

between the Commission and national authorities in the competition law field and allows for considerable diversity between national regimes, and between them and that of the EU, as managed by the Commission. There are prescriptions relating to conformity with EU regulations and case law but these are sufficiently general to allow some scope for 'competitive' regulation, as illustrated by the UK's choice to pursue criminal, rather than administrative prosecution of cartels.

The EU Merger Regulation does nevertheless restrict the scope for assessing mergers on grounds other than their impact on competition. As indicated below, any broadening the public interest test for mergers would obviously be easier to implement post-Brexit at a national level as EU-wide agreement on the change would no longer be necessary.

If the UK chooses to disapply EU regulations in the competition law field, the initial impact will obviously be to amplify the focus of UK competition policy on the UK economy and UK consumers (the third main message of Brexit). However in practice, the most perceptible result will be to release (or exclude) the CMA from the framework of cooperation within the European Competition Network and to increase its own responsibilities in the investigation of EU-wide and global transactions and anticompetitive practices.

Given the importance of the UK economy globally, the CMA will undoubtedly be obliged to investigate anticompetitive conducts and practices on markets, which are defined as European or global but which have significant effects in the UK. Up to now, investigations of cases related to these issues tend to veer, within the ECN, towards the European Commission because they have effects in many EU countries and it makes sense for the Commission, as a 'regional' rather than national authority, to deal with them. As indicated in the Issues Paper, this has obvious consequences for the resources and enforcement priorities of the CMA.

At the same time, the UK competition regime, and especially the CMA, will have a much more direct and influential role in policing anticompetitive behaviour and structures at a European and global level.

On the other hand, the CMA will no longer exert direct influence on the development of EU competition policy and yet the EU without the UK is likely to remain a very significant competition jurisdiction for international corporations, on a par with the USA and China. Unless specific post-Brexit cooperation agreements on competition are concluded between the EU and the UK, the UK's, and specifically the CMA's influence on the policies of its European counterparts will remain limited. Norway is an observer in the ECN, but it is also a participant in the single market. It is possible but unlikely that the UK could have a similar observer status without corresponding obligations.

UK influence has so far been instrumental in moving EU competition policy towards a more economics- and effects-based analysis of anticompetitive conducts and agreements. Without a UK presence in the European Competition Network, one can expect (and there is already some evidence for it from current cases) some return to a more formalistic and rules-based approach in the ordoliberal tradition of German antitrust. While competition authorities in other countries such as France and Italy have shared the UK approach, they are unlikely to constitute an effective counterweight to German influence given the degree of interventionism of their national governments and their lack of weight at a political level. Absent an effects- and evidence-based approach to competition investigations, the consequence will be that there will in principle be less legal protection for businesses within EU-27 from unjustified public and private action against them.

IV. Taking back control

The second main Brexit message of ‘taking back control’ has important consequences for UK competition policy and law enforcement which go well beyond questions such as influence on EU policies. This is ***the intention to restore fully the sovereignty of UK institutions and courts*** and withdraw recognition of the decisions of supranational courts, especially the European Court of Justice and the General Court of the EU. If this principle is to be applied from the moment of an article 50 agreement, and is also applicable to transitional arrangements, it will make the transition between the current situation, with a considerable volume of pending cases, very difficult to manage. Recognition of the jurisdiction of EU courts over cases brought before the date of Brexit would be a ‘concession’ on the UK side that would in fact be in the UK’s own interest, welcomed by the business community and easier to manage by UK institutions.

The second ‘taking back control’ issue relates to merger control. ***The fact that the UK chooses post-Brexit to have all mergers with actual or potential effects in the UK vetted by its own national competition authority is a totally logical consequence of Brexit.*** Outside the EU, many countries of significantly less economic importance than the UK, have powers to vet international mergers.

It will certainly cost more for the CMA to administer the volume of mergers above the current EU turnover thresholds which will fall in its jurisdiction rather than be referred to Brussels. The parallel notification of mergers in London and Brussels will also add to the complication of regulatory approval of multijurisdictional deals. In Europe, the ‘one-stop’ shop becomes obviously a ‘two-stop’ one. However, while this will add to transaction costs, it is not likely in itself to be a major obstacle to business activity across frontiers (unless all other EU countries want to do the same as the UK...)

There is also scope for aligning UK and EU merger notification requirements, as well as for cooperating in devising and negotiating on remedies which make sense on UK and EU-27 territory. Provisions of this sort would make sense in a future UK-EU competition agreement which could be much more comprehensive than existing EU cooperation agreements, for example those with the USA and with Switzerland. (A similar argumentation is valid in relation to cartel leniency applications, which can at present be EU-wide, including the UK).

Whether the post-Brexit arrangements require a change in the UK merger notification thresholds requires some analysis of the size and volume of past cases and of the likely resources available to the CMA. Intuitively there would seem to be no case for the thresholds to be reduced. However the current debate as to whether current merger control rules worldwide are preventing authorities from investigating the takeover by big firms of small innovators and 'disruptors' implies a need to look at mergers below current thresholds. If merger control moves in this direction, it will undoubtedly put even more pressure on the resources of the CMA. In this context, prioritising large as opposed to small mergers without some preliminary examination of their competitive impact would not seem to make much sense.

A third aspect of 'taking back control' may relate to ***the substantive test for mergers***. At present the scope for assessment of mergers on the basis of public interest criteria is restricted within the EU Merger Regulation to matters relating to national security, media plurality and prudential rules. Any other intervention by governments has to be approved by the Commission. This is not an exclusively Brexit issue. Governments in Europe are increasingly concerned by the prospect of domestic companies being controlled by firms, and/or states headquartered outside Europe that may eventually choose to reduce their investment in physical assets and people in Europe. In

line with some European countries, the new US administration may move in the same way to tighten the controls exercised by its CFIUS committee on foreign investments. The CMA itself has recently submitted an opinion to government on the pros and cons of a wider public interest test for mergers.

That being said, any change in the criteria for assessment of mergers would naturally be easier for the UK to decide on and implement as there would be no need to get EU-wide agreement on the proposed amendments.

In relation to the prospects for further international convergence in the substance and processes of competition policy, there is no reason to believe that Brexit will act as a brake on the convergence which UK government and business would like to see achieved. The UK's active participation in the OECD's Competition Committee and the International Competition Network should ensure that further progress is made.

However, in any economy, the strength of actual and potential competition on the market is arguably more important than the activities of competition authorities. Regulatory differences between countries discourage trade more than tariffs. Not being part of the EU single market could well reduce the number and size of potential entrants and consequently weaken competitive pressure on UK-based companies. In the energy sector, there is no doubt that the lack of adequate interconnection capacity has deprived UK consumers of access to much cheaper and more reliable sources of electricity than can be provided by domestic generating capacity. Before and after Brexit, there is a strong economic case for strengthening energy interconnections with neighbouring European countries, whether they are EU Member states or not. Continued application, at least for a transitional period, of EU energy directives and regulations could certainly provide a solid and predictable framework for any new links with EU and EEA countries.

Analogously, any significant barrier between the UK and EU-27 in air

transport and telecoms markets could, at least in the short term, weaken competition in the UK and damage the commercial position of UK-based companies in the rest of Europe. If, as is hoped, current EU-UK trade will be replaced quickly by other non-European trading partners, there will nevertheless be a corresponding need for transitional arrangements to allow existing revenue streams to be sustained while new ones are built up.

'Breaking free' from *EU state aid control* has some logic in the context of a more interventionist industrial strategy but is not consistent with the notion of the kind of free trade and cooperation agreements which many promoters of Brexit say would be a major advantage to the UK in a post-Brexit world.

Moreover, contrary to some impressions at a political level, EU state disciplines are already flexible enough to allow active support to infrastructure, to R&D and Innovation, to SME's to education and training and to regional development. The only aids that remain problematic are direct and permanent subsidies to ongoing business activities, where there is no real prospect of their returning to profitability. In reality, the criticism of state aid control is misdirected. It should be aimed more at the use, or lack of use, of trade protection measures, such as antidumping duties, which successive UK governments have been reluctant to support.

However even if EU state aid disciplines were no longer applied, WTO anti-subsidy rules would to some extent restore the straightjacket that EU state aid rules currently impose on EU governments. At the same time, measures taken to support UK-based firms may well incentivize other European countries, with less market-oriented public policy traditions, to press for wider discretion to support their own domestic industries. In his recent article in the Financial Times on Brexit and a two-speed Europe, Nicolas Sarkozy did not miss the opportunity to call for a more flexible EU competition policy. He meant of course EU state aid policy.

Matching foreign subsidies with domestic ones is also no sound recipe for the future competitiveness of the industries concerned. It is

likely only to entrench subsidy in key sectors and undermine competitiveness.

V. Renewed focus on the UK

With respect to the third Brexit message of increased focus on UK consumers and UK firms, a post-Brexit competition policy will inevitably eliminate any EU-wide implications of conducts and transactions and remove the commitment to EU single market integration. But the increasing integration of markets at a global level will require the CMA to follow market developments outside the UK and to involve itself in the negotiation of solutions and remedies to competition problems that cannot be easily compartmentalized behind national borders.

The single focus of UK competition law enforcement on domestic effects also raises the issue of the future attractiveness of the UK's highly competitive legal services market in relation to activities in the wider EU. The recently adopted EU Damages Directive was initially seen as offering considerable potential for the launch of private action relating to non-UK EU companies.

VI. Specific issues raised in the Issues paper

§2.5.1. The CMA's resources will inevitably need reinforcement in order to examine large international mergers which would pre-Brexit be referred to the European Commission. Precisely how many more staff would be required could be determined on the basis of an analysis of past transactions and cases. Some commentators have suggested that competition authorities of smaller countries could defer to the results of investigations by those in large jurisdictions such as the US or the EU. In a post-Brexit environment, it is unlikely that the UK authorities would wish to recognize any influence of EU competition authorities on their decisions.

The question of the rebalancing of the enforcement priorities of the CMA in the light of Brexit is closely connected with the case for an

overall increase in the resources of the CMA post-Brexit. Merger notifications have to be dealt with. So do leniency applications. The scope for any enforcement action beyond that must surely be made on the basis of the actual and perceptible benefits of enforcement activities for consumers and for business. It will inevitably put pressure on the resources available for market studies and investigations where their benefits may only be achievable in the medium to long term.

§2.5.2. The longer legal deadlines for review under UK merger control rules than under the EU regime are not likely to be significant from a business point of view. A more important advantage for business post-Brexit would be the alignment of the information requirements on notification.

In addition, cooperation on remedies design and implementation, post-Brexit. These could figure among the elements both of transitional arrangements and of a future permanent UK-EU cooperation agreement on competition.

§2.9.1 and 2. Antitrust action (investigations, statements of objections, decisions and remedies...) that is initiated pre-Brexit involves effects in the UK should be followed by the CMA, including the possibility that the CMA decides to discontinue the cases concerned.

§2.9.4. Insofar as the Great Repeal Act brings over Block Exemptions into UK law, they should remain in force until such time as the UK legislator decides that they should be modified or lapsed.

§3.6-8. The logic of Brexit implies that there should be no duty on the CMA to deal with questions in a way which is consistent with EU competition law. However, it would equally be logical to recognize that pre-Brexit judgements validly took account of the precedent value of EU law and that post-Brexit appeals in relation to pre-Brexit judgements should have regard to EU case law. With respect to post-Brexit judgements by the CMA and UK courts, references to EU jurisprudence could be relevant to cases, just as US judgements on the same issue may be. However, these references would arguably only

be a major significance if there were pre-Brexit agreements or conducts which could legitimately have relied on EU competition policy and case law.

§3.15.2. It would make sense for any future UK-EU cooperation agreement to envisage the possibility for the European Commission, on the one side, or the CMA on the other, to make submissions, or be asked to make submissions before authorities and courts in their respective jurisdictions.

§3.15.3. Protecting leniency statements under the EU Damages Directive would be good for competition enforcement throughout Europe.

VII. Conclusions

- 1. Although UK and EU competition laws policies are strongly aligned, there is every reason to believe that the CMA post-Brexit will be able to maintain and strengthen its position as one of the leading competition authorities in the world.***
- 2. Because of their international dimension, a significant number of mergers, cartels and cases linked to abuse of market power by large firms have been dealt with by the European Commission, rather than by national competition authorities within the EU (On the basis that it can take a Europe-wide view and negotiate on a par with major jurisdictions such as the US and China). Post-Brexit, these cases will also be subject to investigations by the CMA, in parallel to those of the Commission. This can only enhance the influence of UK in the handling of competition issues on world-wide markets.***
- 3. At the same time, outside the EU, the UK (the CMA) is bound to have less direct impact on the development of EU competition policy, which is likely to revert to being more***

influenced by German and formalistic antitrust traditions. The UK can nevertheless continue to exploit the potential for international convergence in the substances and process of competition policies through the work of the OECD Competition Committee and the International Competition Network.

- 4. The substantially increased responsibilities of the CMA and related UK institutions post-Brexit, will require a correspondingly substantial increase in its staff resources. It is unrealistic to imagine that the increased workload can be dealt with significantly by a change in the CMA's enforcement priorities. With unchanged staff numbers, its future involvement in international mergers, cartels and antitrust cases could well eliminate any possibility for it to engage in market enquiries and consumer protection work.*
- 5. The need for the CMA to scrutinize transactions and agreements that are currently handled by European Commission, on behalf of the EU as a whole, also implies an increase in the costs and administrative burden imposed on companies, whether UK- or foreign-based. This will not necessarily be a decisive factor in decisions by companies as to where and how much they invest. But business will be keen to see the UK and EU-27 converge their rules and cooperate together as much as possible (See scope for a UK-EU Cooperation Agreement on Competition below).*
- 6. Detailed transitional arrangements will be needed to deal with pipeline cases where timetables straddle the formal date of withdrawal from the EU. It makes sense for the CMA to handle all cases post this withdrawal date. However, it would make equal sense for investigations and decisions on cases relating to pre-Brexit conditions for the UK to acknowledge both the validity of EU case law and the role of the European Courts. For cases post-Brexit, there should also be the*

opportunity for UK authorities to invite evidence and opinion from EU institutions, just as US courts are frequently willing and interested to have amicus curiae submissions from EU bodies.

7. For the longer term, there is every interest in negotiating an UK-EU cooperation agreement in the competition field, on the lines of the EU agreements reached with the USA and Switzerland, but arguably a much more comprehensive one, given the proximity of UK to continental EU markets and the longstanding close cooperation between UK competition authorities on the one hand, and the Commission and other EU national competition authorities on the other. This agreement should focus on: -

- Maintaining and strengthening convergence in policies and processes;*
- Facilitating parallel investigations and negotiation of remedies for mergers and antitrust cases;*
- Cooperation on cartel investigations and the handling of leniency applications.*

8. Withdrawal of the UK from the EU single market in goods, transport, energy and services could well reduce competitive pressure on UK domestic firms and lead to more calls not only for CMA intervention but also for regulation. Every effort should be employed to ensure that the trade and regulatory environment post-Brexit ensures domestic markets are still open for competition.

8. European regulation to liberalize network industries such as transport, telecoms and energy, has been, and continues to be, of significant benefit to the UK, in particular in terms of opening up continental markets for UK-based firms to compete. But UK consumers can also benefit from increasing integration of UK and continental markets. The obvious example is energy, where because of very low levels of interconnection, consumers of electricity and gas in the UK

are not benefiting from lower prices and better security of supply from markets in the rest of the EU. For these reasons and also those advanced under point 7 above, continued application of EU sectoral regulations, at least during a transitional period, could be of mutual benefit to the UK and EU-27

- 9. There is increasing concern in the USA and in Europe about the impact of foreign takeovers on the domestic economy. Brexit will make it easier for the UK to impose stricter national controls on these transactions to because no EU-wide agreement will be necessary to get them adopted. However, as the CMA has emphasized in its recent submission on broadening the 'public interest' test for mergers, any widening of the criteria has advantages and disadvantages, not just for businesses but also for governments and consumers. It should not be entered into lightly.*

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