

Consequences of Brexit for competition law and policy

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I. Introduction

Competition law and policy is perhaps the central achievement of the European single market. It is a field in which the European Commission applies law and policy directly, and competition cases have therefore had a large share of the business of the European Courts in Luxembourg. At the same time, European as well as domestic competition rules are applied in member states across the EU, and the UK has been at the forefront of this process. The consequences of Brexit for EU as well as UK competition law and policy are therefore potentially far-reaching, especially if the UK leaves the European Economic Area. Indeed, depending on trade deals, Brexit might itself significantly lessen competition in some UK markets, heightening the importance of sound UK competition policy.

The immediate question if the UK leaves the EEA would be how to keep UK competition policy going after repeal of the European Communities Act of 1972. In the absence of some kind of holding or repair operation, would holes, or at least strains, appear in UK competition policy? If so, what repairs could hold the fort? Longer term issues concern whether, and to what extent, the UK would have new competition policy freedoms following Brexit. If so, would they be good to pursue?

This paper discusses this pair of questions – the short-term and the longer-term – under broad headings that cover the two main elements of competition policy. Section III is about mergers and markets. The current EU Merger Regulation provides for 'one-stop' scrutiny of international mergers in Europe, usually by the Commission in Brussels. After Brexit, however, effects on competition in the UK will no longer be within the Commission's remit. This could have large implications for UK policy, for the priorities and resources of the Competition and Markets Authority (CMA), and indeed for merger transactions. Section IV concerns antitrust, meaning the law on agreements¹ among

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¹ 'Agreements' should be taken also to include decisions by associations of undertakings and concerted practices.

firms – which range from cartel agreements to R&D joint ventures to retail distribution agreements – and on unilateral conduct by firms that hold dominant positions. Should UK law maintain consistency with EU practice and jurisprudence on these matters, or should we diverge, perhaps towards a less formalistic, more economic effects-based approach?

There are many important issues relating to competition law and policy that this paper does not have space for. First, Brexit could have major implications for competition law enforcement (e.g. investigations, information sharing, and inter-agency cooperation more generally) and for private litigation (e.g. the basis for damages actions, and the role of London as a centre for competition litigation). Second, depending on the terms of Brexit, state aid policy may no longer apply to the UK, opening up new freedoms to subsidise. But for the public interest, as distinct from vested interests, do subsidy policies make sense? Third, competition policy has been central to the regulation of industries such as communications and energy. Indeed the regulatory frameworks for those (and other) sectors reflect EU-wide policy, which again has been strongly influenced by UK policy and experience.

Indeed a general feature of competition policy over the past two decades has been international convergence, both within Europe and globally. There is a broad consensus on the need for the three central planks of competition law – prevention of anti-competitive mergers, of anti-competitive agreements and of abuse of market dominance. Views may differ as to what should count as ‘anti-competitive’ or ‘abusive’, and in some areas there is an appreciable US/EU divide, but the broad picture is one of convergence. That also makes business sense. For firms trading in various European markets, it is easier to have one set of competition rules to comply with than two or more. But whether that should constrain post-Brexit policy on competition law is a matter for debate.

Before proceeding further, however, it may be useful to have an overview of the evolution and current state of UK competition law and policy, and its relation to the EU.²

II. Where we are and how we got here

The two main pillars of UK competition law are the Competition Act 1998 on antitrust and the Enterprise Act 2002 on mergers and markets. The central enforcement body is the CMA, which was created by the Enterprise and Regulatory Reform Act 2013 and on 1 April 2014 took over the competition functions of the Office of Fair Trading and Competition Commission. Appeals against

² Fuller accounts are in the Annex to Brexit Competition Law Working Group (2016) and chapter 2 of Whish and Bailey (2015).

authority decisions, and private actions, are heard by the Competition Appeals Tribunal (CAT) and sometimes other courts.

The Competition Act 1998

The Competition Act brought UK law on antitrust into line with EU law. Its prohibitions of anti-competitive agreements (Chapter I of the Act) and of abuse of dominance (Chapter II) precisely mirror the prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the European Union. The Chapter I and II prohibitions apply generally within the UK, whereas the Treaty prohibitions apply where there is an effect on trade between member states, but that threshold is a low one, so many agreements and practices fall under both the UK and EU provisions. Section 60 of the Act contains the governing principle of consistency of treatment between UK and EU law. In particular, UK courts considering questions under the Act must do so consistently with “the principles laid down by the Treaty and the European Court, and any relevant decision of that Court”, and must also “have regard to any relevant decision or statement of the Commission”. So too must the CMA.

The relationship between UK and EU law on antitrust deepened further with EU Regulation 1/2003. Under this ‘Modernisation Regulation’ the European Commission shared with the national authorities its previously sole power to apply Articles 101 and 102. National authorities and courts are indeed obliged to apply those Articles, where applicable, alongside the application of domestic law to agreements and practices. National competition law on agreements that may affect trade between member states may not be stricter than Article 101, but divergence with respect to Article 102 is permitted. The European Competition Network of authorities addresses case allocation and policy issues that call for co-ordination, such as leniency for cartel informants.³

The Enterprise Act 2002

The Enterprise Act transferred decision-making power on mergers and market investigations from government ministers to the independent competition authorities (now the CMA, again with appeals to the CAT) and clarified that such decisions are, with narrow exceptions, to be taken on competition grounds. Thus the Act provides for the remedy, mitigation or prevention of mergers that may be expected to result in a substantial lessening of competition. And in respect of market investigation references the CMA has a duty to remedy as comprehensively as is reasonable and practicable any

³ The Enterprise Act 2002 introduced a criminal cartel offence in the UK.

adverse effects on competition that it identifies. The UK is unusual in having remedy powers following market investigations.⁴

The Act was the culmination of a process whereby ministers had over the years in practice largely deferred to the competition authorities and had given competition criteria primacy. But prior law was in terms of the much broader (and vaguer) notion of the 'public interest'. Public interest considerations other than competition are not altogether excluded by the Act, but they are currently limited to national security, media plurality and financial stability.

The current EU Merger Regulation 139/2004 provides that mergers with a 'Union dimension', as defined by turnover thresholds, are scrutinised by the Commission and not by national authorities. If the competition effects of such a merger are concentrated in one member state, the case can be transferred to the national authority, and conversely national authorities can sometimes refer cases to the Commission. The basic principle, however, is one-stop-shopping.

There is no UK equivalent to the EU Treaty prohibition of state aids – subsidies and other forms of preferential treatment – that distort competition in the single market. That important subject is beyond the scope of this paper.

III. Mergers and market investigations

If the UK remains a member of the EEA following Brexit, the implications for competition policy would not be great. What follows therefore proceeds on the hypothesis that the UK would no longer be a member of the EEA.

Immediate consequences of leaving the EEA

Because the main pillars of UK competition law – the Competition Act and Enterprise Act – are independent UK statutes, not dependent on EU regulation, they will not fall over when Brexit happens. But there will be immediate consequences, and strains, of various kinds.

For mergers, the one-stop shop of the EUMR will no longer operate. International mergers that the European Commission alone would have examined will also receive UK scrutiny post-Brexit if, to echo the legislation, it is or may be the case that the merger may be expected to result in a substantial lessening of competition in any UK markets. If, on further examination, the CMA concludes that a substantial lessening of competition is indeed to be expected, its job is to take or

⁴ In keeping with EU Regulation 1/2003 they may not be applied more strictly to agreements (that affect trade between member states) more strictly than Article 101.

recommend action to remedy the competition concerns that it has identified. Meanwhile, the same merger may well have been undergoing examination in Brussels.

This duplication of merger control will have substantial costs both for businesses and the authorities. Given the size and complexity of international mergers, the resource implications for the CMA could be major. But it will not be pure duplication, because the questions addressed by the CMA and by the European Commission will not be identical. Leaving aside the issue of whether or not the EU (significant impediment to effective competition) and UK (substantial lessening of competition) tests are identical for practical purposes, the two authorities will be looking at different geographic markets. Currently, EU scrutiny of a European merger will include consideration of effects in the UK because the UK is part of the EU. But that ceases to be true upon Brexit. Competition effects in the UK might differ from those in the EU. And even if they are the same, EU remedies might not reach far enough to solve UK competition problems. So, even if it were made possible legally, it would not be sound UK policy to abstain from mergers being examined by the European Commission.

So although UK merger law will stand the day after Brexit, a host of practical issues in relation to dual scrutiny of international mergers, and possibly dual remedies, will need to be addressed. Maybe forms of co-operation between authorities will limit unnecessary duplication while safeguarding competition effectively in the UK as well as in the EU. But it looks a hard task, and one to embark on well before Brexit takes effect.

Some of these issues also arise in relation to market investigations but not so acutely. Unlike mergers, market investigations are limited in number, discretionary, quite different in form, of long duration, and their initiation is decided by the authorities. Again, it will no longer be the case that EU market investigations take account of competition issues in UK markets. Again, the consequence might be greater demands on the CMA, though if the demands of merger analysis take priority, UK market investigations might become few and far between.

Longer term questions

A longer-term possibility arising from Brexit is wider scope to apply non-competition 'public interest' criteria to merger appraisal. In particular, Article 21 of the EUMR allows member states to take measures in relation to mergers that fall within the Commission's exclusive competition jurisdiction, but (without special approval) only on grounds of public security, media plurality or financial stability. In future, the UK could also apply other considerations to mergers which, but for Brexit, would have been examined only in Brussels.

This possibility is part of the broader question of the extent to which non-competition considerations should apply in UK merger policy. Fifteen years ago, the ‘public interest’ was still the statutory standard for merger policy, and ultimately ministers took the policy decisions. In practice, however, competition considerations were paramount and ministers generally accepted the advice of the competition authorities. The Enterprise Act crystallised this policy stance by making ‘substantial lessening of competition’ the statutory standard, de-politicising decision-making by removing ministers from the process, and by empowering independent competition authorities to take decisions subject to judicial review by the Competition Appeal Tribunal. As noted above, reserve powers for ministers to intervene on other grounds were however retained. They are narrowly defined and correspond to issues of public security, media plurality and financial stability just mentioned in relation to the EUMR.

Indeed financial stability was added as a public interest consideration in the financial crisis of 2008 so that Lloyds could acquire the failing HBOS without competition scrutiny. This suspension of competition policy was unwise financial stability policy, never mind merge policy. Experience of banking crises shows the importance of separating ‘bad’ banks from ‘good’ banks. Here, by contrast, merger control was lifted to allow the country’s largest retail bank to absorb a bad bank.⁵

Whatever possibilities Brexit might open up, UK merger policy should retain the competition foundations it now has. The lure of the ‘public interest’, which means different things to different people, should be resisted when it comes to competition policy. That is not because competition is the be-all and end-all. Of course it is not. But making decisions about competition on non-competition grounds is generally a poor way of advancing other objectives. They are best pursued by policies targeted at them – innovation policies to advance innovation, labour market policies to enhance job creation, &c – and not by distorting competition policy.

Furthermore, if non-competition considerations became increasingly influential, merger policy would be re-politicised, for ministers, rather than authorities-accountable-to-the-courts, would take more and more decisions. Among other things this would be a field day for the lobbying and public relations industry. I saw the tail-end of this when I joined the OFT in 2000. The mergers panel – a gathering of civil servants – would convene to discuss mergers. Familiar though I was with the theory of regulatory capture, it was shocking to see in practice. On one occasion civil servants arrived enthusiastically bearing faxes (those were the days) from the merging parties. I abolished the panel. Of course there is an industry of lawyers and others today that seeks to influence merger decisions, but with a clear competition test there are strong disciplines on what counts as a relevant

⁵ See further Competition Appeal Tribunal (2008) and Vickers (2008).

argument and evidence, and there is judicial oversight. There is nothing undemocratic about the political executive generally not being involved in merger decisions. The authorities, subject to the courts, are performing duties given to them by the elected legislature.

Turning to market investigation references, an EU constraint on remedies could in principle be removed by Brexit. In particular, with Regulation 1/2003 no longer applying, remedies relating to agreements between firms could go further than Article 101. Whether this new policy option would, or should, come into play is however unclear. On the one hand, UK policy towards anti-competitive agreements has generally been no stricter than Article 101, which has perhaps been applied in a more formalistic and interventionist manner than many in the UK competition community would favour. On the other hand, it could at times be tempting for the CMA to use market investigation references rather than antitrust law to address competition issues involving agreements, just as UK sector regulators have preferred regulation to antitrust enforcement. Antitrust law can be a harder way to get results, but if that reflects checks and balances on the authorities, it might be no bad thing.

IV. Antitrust

Themes from the discussion of the consequences of Brexit for mergers apply also to antitrust enforcement. One difference however is that the authorities have choices to make about antitrust enforcement whereas they must respond to the flow of merger activity. This has the risk that unless the CMA's resources are enhanced to deal with potentially much greater merger work, UK antitrust enforcement could get squeezed.

Immediate consequences of leaving the EEA

Another difference is that, whereas merger cases take months, antitrust cases can take years. This could raise major transitional issues around Brexit concerning cases in midstream, and indeed about pre-Brexit conduct (say a cartel) discovered post-Brexit. The issues paper by the Brexit Competition Law Working Group (2016) identifies various other immediate issues that would arise for antitrust enforcement if the UK were to leave the EEA. For example, for the UK what would replace the extensive cooperation between member state competition authorities and with the European Commission that is facilitated by the European Competition Network? Would commitments given to the Commission to resolve cases still stand in the UK post-Brexit? Would the benefits of block exemption regulations be carried forward? With an end to a 'one-stop shop' for cartel investigations, what would be the implications for leniency programmes and leniency applicants? As

with mergers, would parallel antitrust cases (not only in relation to cartels) arise as between the UK and the EU? What if any coordination would (or could) there be among the authorities? Would legal professional privilege still apply to UK lawyers and their clients in relation to EU legal proceedings? Beyond public enforcement, what would Brexit mean for private competition cases in the UK (e.g. for damages following a finding of competition law breach by the authorities), and indeed for London's place as a forum for competition litigation?

Longer term questions

Perhaps the central longer-term economic issue concerning antitrust is whether the *substance* of UK antitrust law and policy could and/or should diverge from EU law and policy. Divergence could happen in two ways. Most radical would be to repeal the Chapters I and II prohibitions of the Competition Act 1998, which mirror Articles 101 and 102 on anti-competitive agreements and abuse of dominance respectively, and perhaps replace them by other antitrust provisions. It would however be an extraordinary step, notwithstanding the continuation of market investigations by the CMA, for a major market economy to dispense with either of the central pillars of antitrust law and policy. And it is far from clear what alternative wording of those prohibitions would be superior. New wording would also create at least years of uncertainty, and consequent risk of detriment to businesses, consumers and productivity.

So perhaps a more likely form of divergence would be to retain the prohibitions as now but to allow their interpretation to evolve differently from EU jurisprudence. This takes us to the issue of section 60 of the Competition Act, which currently requires consistency with EU jurisprudence, combined with the right of UK Courts to refer questions of law to the European Court of Justice. Section 60 would in any event be a curious (but not incoherent) provision post-Brexit, because it would result in a wholly non-UK court determining the meaning of a UK statute. An intermediate possibility would be to modify section 60 to require UK authorities and courts to "have regard to" EU case law rather than necessarily to act consistently with it.

But would divergence be a good thing? There are respectable arguments for saying not. EU competition law applies anyway to UK firms in respect of their EU activities, and two sets of standards could result in cost, uncertainty and inefficiency. On the other hand, EU law on abuse of dominance and some kinds of vertical agreement has arguably become more formalistic and less economics-based than is good for competition and consumers.⁶ And the EU single-market

⁶ Vickers (2005) was an attempt to outline the advantages of a more economics-based approach to abuse of dominance. The recent Opinion of Advocate General Wahl in the *Intel* case is congenial from that perspective, but it remains to be seen whether the Court of Justice will take a similar position.

imperative, which has influenced some developments in EU competition law, need not apply to the UK post-Brexit.

In short, the arguments for and against substantive divergence, or at least its possibility, are balanced. If it does happen, complex issues might arise with respect to the force post-Brexit of pre-Brexit case law precedents. Of course competition law will not be alone in that respect.

V. Conclusion

Competition law to prevent anti-competitive mergers, anti-competitive agreements and abuse of dominance is fundamental to the operation of a free market economy. Brexit does not change that. If the UK remained in the EEA post-Brexit, competition law and policy would continue essentially as now. That would largely steer clear of the cost and potential inconsistency of removing the UK from the integrated network of European competition law enforcement that has been built in the past two decades.

This paper has therefore focussed on the scenario with the UK no longer a member of the EEA. Existing competition law, being based on UK statute, will stand but its operation will become more difficult, for example in respect of a dual UK/EU merger regime. It will be important to anticipate and address those difficulties, to the extent possible, well in advance of Brexit.

It is true that non-EEA Brexit would open up some new policy possibilities. To a degree, some might be worth pursuing. For example, if EU law on agreements and abuse of dominance became increasingly formalistic, the interpretation of the corresponding UK statutes could develop along lines based more on economic effects. But to use Brexit as an occasion for radical reform of UK competition law – for example to go back towards the politics of the ‘public interest’ as distinct from targeted competition appraisal of mergers – would be bad policy and detrimental to the UK economy in the post-Brexit world.

References

Advocate General's Opinion in Case C-413/14 P *Intel Corporation Inc. v Commission*, October 2016.

Brexit Competition Law Working Group (2016), *Implications of Brexit for Competition Law and Policy: Issues Paper*, available at www.bclwg.org.

Competition Appeal Tribunal (2008), *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 10 December.

Vickers, J. (2005), 'Abuse of market power', *Economic Journal*, 115, F244-261.

Vickers, J. (2008), 'The financial crisis and competition policy: some economics', *Global Competition Policy Magazine*, 12(1) December.

Whish, R. and D. Bailey (2015), *Competition Law*, 8th edition, Oxford University Press.