Articles

Competition law and Brexit: the challenges ahead

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Introduction

It seems tolerably clear from the Government's recent White Paper,[2] following the Prime Minister's Lancaster House speech on 17 January 2017,[3] that Brexit will involve the UK leaving the European Economic Area (EEA). This article is not concerned with whether Brexit, and in particular a so-called 'hard' Brexit, is or is not, in the famous phrase of the authors of *1066 and All That*, 'a Good Thing'. Its aim is to consider what may be some of the implications for competition law in the UK.

UK competition law has been intimately bound up with EU competition law for decades. The relationship became much closer through the Competition Act 1998 (CA98), which aligned provisions of domestic antitrust law with those of the EU treaties, and incorporated in section 60 CA98 the consistency principle as regards the interpretation of those provisions. That was followed by the Enterprise Act 2002 (EA02) in relation to merger control, which enshrined the de-politicisation of UK review of mergers. And, more recently, there have been the far-reaching implications of Regulation 1/2003,[4] and the operation of the European Competition Network (ECN).

The effects of the UK's withdrawal from the EU and the single market on competition law are therefore far-reaching and it is impossible to mention them all, let alone discuss them, in this article. I will therefore refer to some of what seem to me to be the most important aspects. Like anyone considering these matters, I have benefited from the Issues Paper put out by Brexit Competition Law Working Group[5] and the responses it has generated.[6]

One thing is clear. Whatever the future as regards the control of State aids, competition law will not disappear in the UK. It has a life wholly independent of the EU, as shown by the increasing number of jurisdictions around the world, in every continent, with an active competition law regime. In both substantive law and enforcement, it is remarkable how many countries have chosen to follow the EU model – of course with various national modifications. Competition law has been one of EU's most successful exports.

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2 'The United Kingdom's exit from and new partnership with the European Union' (Cm 9417) (2 February 2017).

3 Rt Hon Theresa May MP, *The Government's negotiating objectives for exiting the EU* (17 January 2017), available at https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

4 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.

5 BCLWG, *Issues Paper* (25 October 2016), available at http://www.bclwg.org/wp-content/uploads/2016/10/BCLWG-Issues-Paper-FINAL.pdf.

6 Available at http://www.bclwg.org.

This article considers the future under three heads:

(1) public enforcement;

(2) private enforcement; and

(3) substantive law.

To put substantive law last may seem theoretically illogical, but in practical terms, this reflects what I believe is the order of the impact which I think Brexit is likely to have.

Public enforcement

Mergers

The most immediate impact is likely to come in merger control. Decisions on mergers account for the greater part of the decisional output of the European Commission (the Commission). Clearly, the 'one-stop shop' for larger UK mergers having a European impact will end, to be replaced in many cases by two shops. The Commission will cease to consider the effect of a concentration in the UK, and the UK can hardly cede sole control of large mergers to the Commission in which it is no longer involved. Occasionally, there may still be a one-stop shop, only it will be a different shop: post-Brexit, I imagine that a merger like *Hutchison/O2*[7] would not be reviewed by the Commission at all. But that is something of an exception. Given the significance of the UK market, many large mergers will be subject to scrutiny by the Competition and Markets Authority (CMA) as well as the Commission. The proposed merger between LSE and Deutsche Börse, now undergoing a Phase 2 assessment in Brussels, is a classic example.[8] That will mean that such mergers will be subject to separate decisions and potentially separate appeals.

The UK and EU authorities will no doubt seek to cooperate in these cases, as does the Commission with other competition agencies – notably the US Federal Trade Commission – so that they will notify each other and take each other's views into account. There is potential for coordinated action to go beyond that, as envisaged under the EU–Swiss cooperation agreement.[9] That should assist in achieving consistent outcomes – although that is to some extent dependent on the UK retaining the existing substantive test for merger control.

Even so, the increased burden and uncertainty for business is unavoidable. I would hope that there is potential for aligning the informational requirements involved in merger notifications, so that domestic notification could largely duplicate a notification to Brussels. There are also currently different periods prescribed for assessment of mergers under the UK and EU regimes. The CMA has 40 working days for Phase 1 assessment, compared to 25 working days for the Commission; and, for Phase 2, the CMA has 24 weeks, whereas the Commission has 90 working days and thus 18 weeks. However, the difference in practice is not always so stark because of the Commission's use of the facility to 'stop the clock'.

On the other hand, when it comes to judicial challenge, the time frame of a judicial review (JR) in a merger case before the Competition Appeal Tribunal (CAT) is considerably quicker than the determination of a challenge to a Commission decision before the General Court (GC). So for those seeking to prevent a merger, even if the CMA and Commission decisions are the same, we may see more JR applications to the CAT. The EU rules on standing when it comes to review of merger decisions, as interpreted by the GC, have not been over-restrictive,

7 Case M.7612 *Hutchison 3G UK/Telefónica UK* (11 May 2016).

8 Case M.7995 *Deutsche Börse/London Stock Exchange Group* (on-going).

9 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014) OJ L 347/3.

but there is no doubt that the standing requirement for JR under section 120 EA02 is more generous: 'any person aggrieved'. This is illustrated by the challenge brought by the Merger Action Group to the *Lloyds/HBOS* merger heard by CAT in 2008[10] – which was decided within two weeks of the action being commenced – where the applicants comprised shareholders and account holders in affected banks. Such a case would not have been entertained in the European courts. Even here, the standing of the applicants was held to be 'borderline'.[11]

There is no doubt that this will bring a significantly increased workload for the CMA. That is mitigated by the fact that there is no compulsory notification of mergers in the UK, but it is the mergers which require competition scrutiny that create the real work. This will require an increase in the resources of the CMA; and if that is not provided, then the question arises as to what other areas of their current work would be cut back.

Antitrust

Obviously, merger control is prospective. Antitrust – ie the investigation and sanction of anticompetitive agreements or abusive conduct – is essentially retrospective. Many decisions go back many years. For example, the Commission's *Trucks* decision (July 2016)[12] involved a cartel lasting 14 years, from 1997 to 2011. Other cartels are not so long, but there is typically a significant time-lag of several years between the end of the cartel and the adoption of the Commission's infringement decision. The recent Commission decision fining Japanese and South Korean suppliers of rechargeable lithium batteries for price coordination concerned a cartel that came to an end in 2007.[13] Therefore, for several years following the UK's exit from the EU, one can expect decisions on cartels that ended prior to Brexit. It seems to me that such decisions will cover the EEA as it was at the time of the infringement, and thus include an effect in the UK. And the relevant turnover for the purpose of the fining guidelines would still include turnover in the UK. This situation has some analogy with decisions taken by the Commission after 2002 in relation to the coal and steel sector which continued to apply the rules of the European Coal and Steel Community Treaty although that Treaty had come to an end.[14]

Some observers have questioned whether the same approach will be adopted when a cartel covering a period pre-Brexit is discovered only post-Brexit, but it is by no means clear why such cases should merit different treatment. Therefore, for those cases, I would not expect the CMA to launch a parallel investigation. The same approach may apply, for example, for large abuse cases covering much of the EU: for example, the practices of which Google is accused cover the UK as much as other Member States.[15]

However, there will come a point when the cartel being investigated concerns a period after the UK has left the EU. And, of course, there will be problematic transitional cases where the cartel period spans the date of Brexit. From the point when the UK is no longer in the EU, Commission decisions will not address or take account of the effect in the UK. In that respect, the position of the UK will be no different from that of the US or any other country which was never a member of the EU.

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10 *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36.
11 Ibid, para 46.
12 Case AT.39824 *Trucks* (19 July 2016), decision not yet published. See Commission press release, 'Antitrust: Commission fines truck producers €2.93 billion for participating in a cartel' (IP/16/2582, 19 July 2016).
13 Case AT.39904 *Rechargeable batteries* (12 December 2016); a summary decision has been published. See Commission press release, 'Antitrust: Commission fines rechargeable battery producers €166 million in cartel settlement' (IP/16/4356, 12 December 2016).
14 See, eg, Cases C-201 & 216/09P *AccelorMittal Luxembourg SA v Commission*, EU:C:2011:190, at paras 62–70.
15 Case 39740 *Google Search* (on-going). See Commission press release, 'Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules' (IP/16/2532, 14 July 2016).

The key question is: what will the CMA do in such cases? It would be surprising if the CMA were to ignore a major international cartel affecting the UK. If fines are imposed in the Commission decision excluding the effect on the UK market, then for the CMA to impose fines should not involve double jeopardy. I would expect section 38(9) CA98 to be amended accordingly.

It also follows that a full leniency application for a pan-European cartel would need to be made to the CMA, as it is now to other third country authorities. There is no leniency one-stop-shop today, but following the ECN model leniency programme[16] the CMA, like most Member States, accepts only a summary application where an application is made to the Commission. It seems doubtful that this arrangement could continue once the CMA retains full jurisdiction to investigate a cartel in parallel with a Commission investigation.

However, for the CMA to carry out an independent investigation of a major, international cartel is a very significant undertaking in itself. So that too has resource implications for the UK authority. It may be that a procedure could be devised whereby a CMA decision would in some way follow on from a Commission decision, although I anticipate considerable procedural difficulties in any such arrangement. And if the CMA took separate infringement decisions and imposed fines, no doubt there would be appeals to the CAT. Experience of such cartel appeals to the GC shows the heavy demands such cases make of the appellate court.

Moreover, there is the question of criminal sanctions. The CMA generally does not pursue individuals under the UK cartel offence[17] when the cartel in question is subject to a Commission investigation. But can that policy position be sustained? It would be rather strange, to say the least, if the serious criminal sanction introduced by Parliament for the most offensive anti-competitive conduct was applied only to smaller, domestic cartels and not applied to participants in pan-European or global cartels. On other hand, if the UK did start to launch criminal investigations in such cases, that would greatly complicate the operation of very successful European leniency policies, raise questions of extradition, and might interfere with the cooperation and sharing of evidence which the CMA would wish to achieve with the Commission and other European national competition authorities.

I think such cooperation arrangements would be essential, and mutually beneficial. Currently, it takes place under the framework established by Regulation 1/2003[18] and the formal powers of the Commission to seek information and carry out inspections.[19] It is difficult to see how Parts 2 and 2A CA98 implementing those provisions can survive in their present form.

Moreover, there are good precedents for cooperation arrangements, not least the 2013 Agreement between the EU and Switzerland, which came into force in 2014.[20] That so-called 'second generation' cooperation agreement goes much further than the EU's previous cooperation agreements with third countries, providing as it does for coordination of enforcement activities, including the timing of dawn raids and the exchange of evidence when authorities are investigating the same or related conduct or transaction. However, it is important to note that under that agreement, evidence transmitted cannot be used for the purpose of imposing sanctions on individuals. The EU is likely soon to enter into a very similar agreement with Canada. I would expect that it would be in the interests of both the UK and EU for an agreement to be reached which goes at least as far as the Swiss and new Canadian agreements.

16 ECN Model Leniency Programme (November 2012), available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.
17 EA02, s 188.
18 Regulation 1/2003, Articles 11, 12 and 22.
19 Regulation 1/2003, Articles 18 to 21.
20 EU/Swiss Confederation Cooperation Agreement, n 9, above.

Furthermore, the UK would need, in due course, its own cooperation agreements in competition law with third countries with which the Commission already has such arrangements: thus, it will need to negotiate its own agreements with the US, Canada, Japan, South Africa, South Korea, etc. In late October 2016, the Minister of State at the Department for Business, Energy and Industrial Strategy (BEIS) suggested that bespoke agreements negotiated by the UK with a country such as Canada could go further than the EU's proposed new cooperation agreement and could provide for extradition where both States have a criminal cartel offence.[21]

Although antitrust is, in general, retrospective, there is an issue regarding commitments made under Article 9 of Regulation 1/2003, which is particularly relevant in the context of abusive practices. Where commitments extend to conduct regarding the UK, there is a question how that would continue to apply post-Brexit, or how such commitments might be modified. But perhaps that is more of a detail.

Market investigations

If the CMA has to deploy extra resources on mergers and antitrust, there must be a risk that it would have to curtail its activities in relation to market investigations which take the longest time to complete and are very resource-intensive. I think this would be unfortunate, as the UK market investigation is a valuable feature of the UK competition law regime. It would be paradoxical if a consequence of the UK leaving the EU was to reduce the operation of something that is distinctly British and clearly beneficial. Indeed, in principle, the scope for remedies imposed following a market investigation would be enhanced, since the CMA would no longer be precluded from condemning agreements which did not violate Article 101 TFEU: Article 3(2) of Regulation 1/2003 would obviously no longer apply to the CMA.

Private enforcement

Two assumptions seem to me to be inescapable:

(a) Articles 101 and 102 TFEU will no longer be directly enforceable in the UK: they will no longer be part of UK law, and thus a breach of them will not constitute a breach of statutory duty.

(b) Infringement decisions by the Commission will no longer be binding in UK.

Some commentators have questioned whether there might be some way around this, but I regard that as unlikely in the context of a coherent and independent system. Of course, there will be exceptions, or rather savings, in the transitional provisions. Agreements or arrangements or conduct carried out pre-Brexit would have to satisfy the law as it applied at the time in question, and that law would therefore include Articles 101 and 102 TFEU.

However, for international claims, there is the question of jurisdiction and enforcement. The regime applicable today is governed by the Brussels Regulation, now recast as Regulation 1215/2012.[22] The divorce of the UK from that pan-European regime raises concerns for civil litigation going well beyond competition law, which have been the subject of strong representations from the legal profession and business. The Lord Chancellor has stated that the Government is actively exploring potential solutions which would preserve the attractiveness of the UK courts for cross-border cases.[23] One option is the conclusion of a

21 Documents considered by the House of Commons European Scrutiny Committee (14 December 2016), para 5.9, available at https://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxii/7108.htm.

22 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

23 Ministry of Justice press release, 'Legal services at forefront of Global Britain' (19 January 2017), available at https://www.gov.uk/government/news/legal-services-at-forefront-of-global-britain.

special agreement on jurisdiction and enforcement, like the EU-Denmark agreement of 2005.[24] Denmark had opted out of the Brussels regime, and only by a separate and express agreement did it become subject to parts of the Brussels Regulation. But under that agreement, Denmark accepted the interpretation of the agreement by the Court of Justice of the European Union (CJEU) in Luxembourg. I do not know if that would now be regarded as acceptable to the UK. But the UK's decision to continue to participate in the Uniform Patents Court, which took many by surprise, is encouraging. Alternatively, there could be a provision that in the interpretation of the provisions 'due account' would be taken of judgments of the CJEU, as in Protocol 2 to the 2007 Lugano Convention.[25] And indeed ratification of the Second Lugano Convention might be appropriate in addition, to maintain the UK in the regime covering the European Free Trade Association (EFTA) States.

Therefore, assuming that the issues of jurisdiction and enforcement are satisfactorily resolved, I anticipate that, for some time, we should continue to see follow-on claims in the English courts and the CAT relying on Commission cartel decisions which concern a period pre-Brexit. I would hope that, to this extent, the binding nature of Commission antitrust decisions would be maintained.

However, there will inevitably come a time post-Brexit, I suspect sooner regarding Article 102 than Article 101 TFEU, when Commission decisions will not relate to a pre-Brexit period and will not cover the UK. A follow-on claim would then have to rely on a CMA decision regarding a violation of the Chapter I or Chapter II prohibition. Such a follow-on claim is confined to the scope of the CMA decision: see the *Enron* judgment of the Court of Appeal.[26] And for a stand-alone claim concerning agreements or conduct after Brexit, the claimant would have to allege a breach of the Chapter I or Chapter II prohibition.

It may perhaps be possible to contend that an infringement of UK competition law caused loss to a claimant in France or Germany, but that may also give rise to issues regarding the territorial scope of UK competition law, analogous to the issues regarding the territorial scope of Article 101 considered in the recent *Iiyama* judgments in the High Court.[27] Accordingly, the inability to rely on a breach of Article 101 or 102 would considerably complicate international competition damages claims. Since claimants and those funding them seek to minimise their risk and uncertainty, this may eventually be a deterrent to bringing such claims in the UK.

On the other hand, the fact that there was a Commission investigation under way would no longer provide an impediment to an English claim proceeding. Even where the Commission has adopted a decision, while no doubt it would be taken into account, there would be no obstacle to an English court taking its own view on the evidence. Any restriction on the proceedings here imposed by Article 16 of Regulation 1/2003 would have fallen away. We may indeed see tactical litigation brought in the UK under UK competition law with a view to influencing the outcome of parallel proceedings in the EU under EU competition law.

Substantive law

There has been a suggestion that the UK would change the test for the assessment of mergers, as part of a new industrial strategy that would intervene to protect important British

24 Agreement between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2005) OJ L 299/62.
25 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007) OJ L 339/3.
26 *EWS Ltd v Enron Coal Services Ltd (in liquidation)* [2011] EWCA Civ 2.
27 *Iiyama (UK) Ltd & Others v Samsung Electronics Co Ltd & Others* [2016] EWHC 1980 (Ch) and *Iiyama Benelux BV and Others v Schott AG and Others* [2016] EWHC 1207 (Ch).

companies from foreign takeovers. The catalyst for that call was bids by a few high-profile US companies for well-known British manufacturers: Kraft's takeover of Cadbury's in 2010 and then, more recently, Pfizer's ultimately unsuccessful effort to acquire AstraZeneca. Both of these instances were referred to by Theresa May just before taking office as Prime Minister, in what many thought might signal a return to a public interest test for mergers. Some experienced voices have since warned against such a move, notably Sir John Vickers.[28] It is notable that the Government Green Paper on industrial strategy published on 23 January 2017 contained no reference to such a proposal,[29] but that may not be the last word on this matter. Any general public interest test, of the kind that existed under the little lamented Fair Trading Act 1973, would certainly complicate UK merger review, take it out of line with the approach of the EU Merger Regulation[30] and introduce a lot of uncertainty. We shall have to wait and see.

As regards antitrust law, it is again important to distinguish the situation where the facts arose before and those where they arise after the date of Brexit.

Although section 60 CA98, setting out the consistency principle, will almost certainly be replaced, if not removed altogether, I anticipate that will be prospective only: the law pre-Brexit as a matter of principle should not change.

However, that simple statement conceals some problems. Given the long factual tailback in both public and private enforcement, what account will be taken of decisions of the Commission, and more particularly of the European courts, given after Brexit when applying the law to circumstances pre-Brexit? It seems to me that it would be perverse to regard European competition law as set in stone on the date that the UK leaves the EU. But that means we will be applying EU law, both directly and by way of interpretation of domestic competition law, bound by judgments of the courts on which the UK no longer has a judge, of an EU of which we are no longer a part. Moreover, the UK courts will no longer be in a position to make a reference to the CJEU for a preliminary ruling. It may be that, at least as regards competition law, this problem is more theoretical than real, since there have been remarkably few such references in this area over more than 40 years of UK membership. But one never knows what may arise, and if a UK court considers that an otherwise binding judgment of the EU court merits further consideration, that could give rise to difficulty.

Where the circumstances of a case arise post-Brexit, a variety of issues may result.

EU block exemptions are currently treated as giving rise to parallel exemption from the Chapter I prohibition by reason of section 10 CA98. The Great Repeal Act of which the Government has spoken[31] is likely to preserve that status for the time being and, fortunately, none of current crop of block exemptions are due to expire within a couple of years of Brexit.

However, a serious issue is the application of the Chapter I prohibition to agricultural products. Under Article 42 TFEU, the competition rules in Article 101 apply to the

28 Sir John Vickers, Paper for the *Oxford Review of Economic Policy*/British Academy conference on 'The Economic Consequences of Brexit' (7 December 2016), available at http://www.bclwg.org/wp-content/uploads/2016/12/Vickers-British-Academy-7-Dec-16.pdf.

29 Department for Business, Energy and Industrial Strategy, 'Building our Industrial Strategy' (23 January 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586626/building-our-industrial-strategy-green-paper.pdf.

30 Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004) OJ L 24/1.

31 'The United Kingdom's exit from and new partnership with the European Union' (n 2, above), at p 10.

agricultural sector only to a limited extent. Essentially, agreements and practices concerning agricultural products that are necessary for the attainment of the Common Agricultural Policy (CAP) and farmers associations are excluded. That exclusion is taken into UK domestic competition law by Schedule 3 of the CA98. With Brexit, the UK shall cease to be subject to the CAP. Therefore, the degree to which agricultural products fall outside the Chapter I prohibition – and the definition given to agricultural products – will require clarification.

These are perhaps narrow, although still significant, issues. The broader question is how will UK competition law develop free from the obligation in section 60 CA98 to mirror EU law? I have little doubt that the UK courts will continue to take close account of decisions of the Commission and EU courts. However, that is different from being bound by the judgments from Luxembourg. It would be open to parties to argue that a line of EU case law should not be followed, referring perhaps to decisions of courts in non-EU jurisdictions. It may be argued that some aspects of EU competition jurisprudence have been more influenced by the imperative of single market integration rather than pure competition concerns. And, no doubt gradually, the UK courts would, over time, be able to develop a distinctive jurisprudence, perhaps in areas where the approach of EU competition law has attracted particular criticism. For example, the treatment of vertical restraints and price rebates has provoked controversy and different approaches between different systems. It is notable that Australia seems to be adopting a different approach, underpinned by legislation, to resale price maintenance compared to the rather stricter application of Article 101(3) TFEU to such arrangements as explained in the Commission's Guidelines on Vertical Restraints.[32]

Moreover, the distinction between cases concerning facts before Brexit and cases concerning facts after Brexit are manifestly not exclusive alternatives. There will be a significant number of competition cases where the facts span the date on which UK actually leaves the EU. In practice, it is those cases which are likely to give rise to the greatest complications.

Conclusion

Depending on your perspective, the challenges which all this brings may be a cause for excitement or despair. For business, it will no doubt create some uncertainty. For the CMA, an independent role in deciding major cross-border cases will raise its international profile. For academics, there will be much to analyse and discuss. And for competition lawyers in practice, most of these developments will bring more work.

32 European Commission, Guidelines on Vertical Restraints (2010) OJ C 130/01.