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UK Competition Law

The implications of a vote by the UK to leave the EU

Following the UK vote to leave the EU competition laws applicable to businesses operating in the UK are likely to remain relatively unchanged in the short term. Over the longer term, UK competition law could take a different direction to EU competition law. One impact likely to be felt straight away by businesses operating across the UK and EU is the greater administrative burden of being subject to parallel competition regimes.

This briefing explores the likely changes to the key competition law prohibitions, discusses five key areas where the vote to leave will impact on UK businesses, and then puts forward some ideas about how UK competition law might develop outside the EU in future.

As with many aspects of the debate around the UK's departure from the EU, the true impact is impossible to predict because it will depend on the UK's future relationship with the EU. Our "five consequences" analysis assumes that the UK drops out of the EU and European Economic Area (EEA) entirely, without negotiating any special arrangement with the European Commission (Commission) on competition law enforcement (as Switzerland has done).

In fact, it seems likely to us that the UK Competition and Markets Authority (CMA) and future UK governments will be keen to maintain competition enforcement links with the Commission like many other national competition authorities outside the EU.

What will happen to the two key competition law prohibitions?

Currently both EU and UK competition law are based on two key prohibitions: a prohibition on anti-competitive agreements; and a prohibition on abuse of dominance. The prohibitions under EU law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) and UK law (Sections 2 and 18 of the Competition Act 1998 (CA98)) are almost identical. The key difference is the geographical scope of the provisions. The CA98 prohibitions apply to agreements and conduct having an effect on trade within the UK, and the TFEU prohibitions apply where the effect on trade is between the Member States of the EU.

Agreements which infringe either EU competition law or UK competition law may benefit from an exemption, either individually or by virtue of a block exemption. EU individual and block exemptions currently apply "in parallel" under UK competition law. This means that agreements are exempt from the Section 2 CA98 prohibition, where they are covered by an EU block exemption, or would be covered if the agreement had an effect on trade between EU Member States. Examples of such block exemptions include the Vertical Agreements Block Exemption Regulation, which is relied on by so many businesses.[1]

Since UK competition law is modelled on the EU competition law regime, in practice, there will be little immediate change for businesses operating within the UK.

Section 60 CA98 requires UK courts and the CMA to ensure that questions relating to UK competition law are interpreted in a way which is consistent with judgments of the Court of Justice of the EU. They also have a duty to have regard to any relevant decision or statement of the Commission. Although the UK government could repeal section 60, it seems likely that the CMA and UK courts will continue to have regard to any relevant EU law just like many competition authorities outside the EU.

As a result of the 'Modernisation Regulation'[2] EU competition law is currently enforced within the UK by both the Commission and the CMA. Despite the UK vote to leave the EU, EU competition law will

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1 Section 10 of CA98.

2 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002.

still apply to UK businesses if their activities have an effect on trade in the EU and the Commission will still be able to investigate their activities in the EU and fine them. However, the key difference is that the CMA will have **no** power to enforce EU competition law in the UK.

In terms of EU block exemptions, existing block exemptions are likely to continue to apply within the UK in the immediate short term. However, the CMA will be free to vary or cancel "parallel" exemptions in the UK.[3] It could replace them with UK block exemptions which are more applicable to the UK market. With regard to any new EU block exemptions, given that the UK will no longer be involved in the EU legislative process, we expect the UK to decide on a case by case basis whether it wishes to adopt parallel provisions within the UK.

Five consequences of the UK departure to consider

1. Businesses may face the double jeopardy of EU and UK merger review

The impact on UK merger control will be limited. The UK has operated a voluntary merger control system since 1965, pre-dating the EU Merger Regulation (EUMR) by 25 years. Unlike many other Member States, UK merger control is not modelled on the EUMR and operates distinct legal concepts and systems.

However, the vote to leave will have important effects on mergers involving larger, international companies. First, the EUMR 'one stop shop' will no longer apply, meaning that UK merger control could apply alongside the EUMR. Second, turnover in the UK willno longer count towards the EUMR jurisdictional tests.

This means that some deals involving businesses with significant UK turnover which are currently notifiable under the EUMR may no longer meet the turnover thresholds, thus relieving the parties of the obligation to make a filing under the EUMR. That said, these transactions may need to be notified under national merger control regimes not only in the UK but also in other EU Member States and, therefore, the net effect for some deals could be to increase the number of filings required.

For other deals which will still qualify under the EUMR, it is possible that clearance may be required under the UK regime as well. This raises the prospect of parallel proceedings, duplication of legal cost and inconsistent decisions by the Commission and the CMA respectively.

Whilst this could increase the regulatory burden and lead to uncertainty, the impact should not be overplayed. The position will be no different to a transaction which is currently notifiable under the EUMR and any other third country's regime (e.g. the US). Furthermore, the CMA will be likely to negotiate information sharing agreements with the Commission in due course to facilitate liaison with the Commission to coordinate interventions in major mergers where appropriate.

2. Businesses under investigation for committing competition law infringements in the UK and one or more EU Member States may find themselves under investigation by the CMA as well as the Commission and or other EU national competition authorities

Businesses suspected of a breach of competition laws both in the UK and one or more EU Member States could find themselves under investigation by the CMA as well as the Commission and/or one or more EU national competition authorities. This might apply to participants in alleged cartels which have a nexus with both the UK and one or more EU Member States, or businesses alleged to have abused a dominant position in the UK and one or more EU Member States.

Competition investigations are very costly for businesses under investigation. Even if they are ultimately found not to have infringed competition law, an investigation can last many years and businesses can incur significant costs. Thus there is the potential in some cases for the duplication of legal costs, double exposure to fines and increased uncertainty created by inconsistent decisions between the CMA and the Commission.

The cost of any investigation will depend on the facts of the case. Both the EU and the UK cap the level of fines at 10% of worldwide turnover. Theoretically therefore, a combined EU and UK competition law fine could, in some cases, be twice as big as a fine would have been, if the UK remained in the EU. In practice, fining criteria under both regimes have regard to the conduct of the

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3 Sections 10(5) and 51 of CA98.

parties in the respective jurisdictions. So where the infringement is very serious and long running in both the UK and the EU, fines could double. In other cases, some increase in total fines may be more likely.

Furthermore, the risk of businesses receiving multiple fines from different competition authorities already exists. In a number of cases, infringements have been found and fined in multiple jurisdictions around the world (e.g. Marine Hoses, Car Parts, EURIBOR/LIBOR). There have also been cases in which parties have been investigated and fined by the Commission and EU national competition authorities (Lifts and Escalators (the Commission and the Austrian Competition Authority) and Detergents (the Commission and the French Competition Authority)).

Thus far the CMA has been a less aggressive regulator when it comes to competition law enforcement than some of its European counterparts.[4] Often, where the Commission has opened an investigation into the same industry as the CMA, the CMA has dropped its probe on the basis of 'administrative priorities'.[5] The UK vote to leave may provide the CMA with more potential cases (which might otherwise have been dealt with solely by the Commission). But whether the CMA takes on such cases – and whether therefore the risk of increased fines is real – will depend on how the CMA approaches competition enforcement without Commission support and the resource provided by the UK government to allow the CMA to handle an increased workload.

The risk of inconsistency of judgments between the Commission and the CMA is low in the short term. UK competition law is very closely modelled on EU competition law. Despite the vote to leave, UK competition law is unlikely to change in the short term and, even if section 60 CA98 is repealed, EU case law is likely to be at least persuasive, particularly in the period immediately following its departure.

3. The Commission and the CMA (in the short term at least) will find some of their investigatory abilities hindered

Commission no longer able to conduct dawn raids in the UK

One of the consequences of the vote to leave is that the Commission will no longer be able to raid UK business premises in the UK when investigating EU competition law infringements. Similarly the Commission and other EU national competition authorities will not be able to ask the CMA to conduct a raid for them. They may only write to request information from UK businesses situated in the UK.

This may hamper the Commission's ability to investigate UK businesses involved in EU cartels. But it is not an insurmountable issue. The UK could come to an agreement with the EU to facilitate this, although it will not be as comprehensive as the current arrangement.

CMA – no longer part of the European Competition Network or the European Competition Authorities Network

The CMA is currently a member of the European Competition Network (ECN), the European Competition Authorities Network (ECA) and the International Competition Network (ICN). The ECN is composed of the Commission and the national competition authorities (NCAs) of the EU Member States. In addition to the members of the ECN, the ECA includes the NCAs of Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority. The ICN is composed of over 300 competition authorities worldwide. Each of these bodies facilitates the exchange of best practices relating to competition law. The ECN also facilitates information exchange on current and future competition enforcement, and both the ECN and the ECA facilitate information exchange on merger proceedings.

Depending on the agreement reached between the UK and the EU, the UK leaving the EU will presumably result in the CMA dropping out of the ECN as well as the ECA. This will deprive the CMA of competition intelligence obtained through these sources. In the short term this may hinder its ability to do its job slightly. In the medium to long term, we would expect the CMA to negotiate its own information sharing agreements with the ECN and the ECA, which may fill this void. In any event the CMA will continue to be a member of the ICN.

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4 Please see our briefing on the National Audit Office's report on the UK Competition regime.

5 For example, see Commercial Vehicle Manufacturers, Interchange Fees - MasterCard and Visa, and Hotel Online Booking.

4. The law on State aid will no longer be applicable in the UK

State aid is an area of pure EU law and so, in the absence of a specially negotiated agreement between the UK and the EU, EU State aid rules will no longer apply in a UK outside the EU. This will increase the ability of the UK government, if it chose, to support UK businesses financially and otherwise. It is of course debatable whether a UK government would choose to do this, given its recent historical avoidance of interfering in UK industry where possible. Additionally, if the UK government grants subsidies, it could find itself subject to anti-dumping investigations and the products in question could be subject to anti-dumping duties. Some kind of negotiated access to the Single Market would almost certainly entail compliance with EU State aid rules. For access to the EU single energy market for example, it would be essential for the UK to comply with EU State aid rules.

Practically, there are three potential issues for UK businesses. First, if the UK did choose to support a particular business or industry, then competitors would not have recourse to a State aid challenge against the award. Second, a beneficiary of any UK State aid would be more likely to have anti-dumping duties imposed on its goods or services if it tried to export them. Third, the UK government would have limited ability to challenge State aid granted by EU Member States to EU businesses where this affects the UK market. Competitor UK companies could raise a complaint before the Commission, although the Commission would be unlikely to act on the complaint unless there was also an anti-competitive effect in the EU. The UK could also impose an anti-dumping duty on EU businesses which are being artificially boosted by EU State support, although it will have to weigh the risk of the incident resulting in retaliatory tariffs.

5. The UK may be a less attractive forum for follow-on damages from EU competition infringement decisions

The UK is currently a popular forum to bring follow-on damages actions based on competition authorities' decisions. The EU Damages Directive[6] which is intended to provide an effective regime for private enforcement actions across all EU Member States draws heavily on the UK system. The vote to leave is unlikely to change the UK competition law damages regime for actions in respect of CMA decisions. However, it will have an impact on how popular the UK is as a seat for follow-on actions in respect of decisions by the Commission and EU NCAs. This will depend on various factors including:

- what the UK's relationship with the EU is after leaving (e.g. whether the UK becomes an EEA member or not);
- what (if any) agreements the UK negotiates about the jurisdiction and applicable law for disputes between parties in the UK and the EU;
- whether the UK will continue to implement the provisions of the Damages Directive; and
- how the UK courts treat decisions by the Commission and the EU NCAs.

On the face of it, it seems likely that the UK will be a less attractive forum for follow-on actions from EU competition infringement decisions.

Conclusion

Aside from the area of State aid, the UK competition regime will not look very different on the day after the UK leaves the EU. The UK competition law prohibitions have their roots in EU law, but are governed by UK legislation and the UK merger control regime has always evolved independently of the EU merger control regime. UK businesses will still be subject to the EU competition law regime insofar as any of their actions affect competition in the EU.

There may be an increase in the regulatory burden on businesses operating in both the UK and the EU, if they are required to deal with both the UK and EU competition authorities on some mergers and competition law investigations. If businesses do face parallel UK and EU competition investigations, this would be more burdensome, but whether this will materialise in practice will depend on how the CMA responds to a potentially increased case load.

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6 Directive 2014/104/EU 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, 26 November 2014.

State aid is the one area that could change significantly. The regime in the UK could disappear in the absence of a special negotiated agreement between the UK and the EU. Even in the absence of such an agreement, EU State aid rules might still have an impact on UK businesses. A future UK government might enact its own State aid laws. However, the UK and UK businesses would will have only a weak recourse in respect of EU businesses who may have benefited from State aid.

What can we expect going forward?

With all the legislative changes involved in an EU exit, it seems unlikely that a UK government will want to spend legislative time making changes to the UK competition law regime in the short term. In the medium to long term, there may be a divergence in the UK and EU competition law regimes if the UK government amends the UK regime.

Similarly, the EU block exemptions will theoretically continue to apply in parallel to the UK market. However, subject to the agreement negotiated between the UK and the EU, the UK government could vary or cancel them. Over time, the CMA and the UK government might, in any event, want to revise the block exemptions so that they are more relevant to UK markets.

It is possible that there could be more radical changes such as a move to a more Anglo-Saxon adversarial competition law system like those in Australia and the USA. However, it is more likely that any changes would will be less radical and led by changes in economic thinking and case law. There might in the short term be a void in applicable case law, until the UK courts fill those gaps in the law. Such changes may be welcomed by some businesses, however greater divergence will also mean higher regulatory costs for international businesses.

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