July 2016

Competition law post-Brexit

With competition law being a cornerstone of EU law you would be forgiven for thinking that it would be particularly susceptible to change in a post-Brexit world. In fact, we foresee little change substantively, but it is likely to become more burdensome procedurally for companies operating across Europe.

As with many areas of UK law, the future of competition law will depend on the exact nature of the UK's ongoing relationship with the EU. This may involve joining the EEA, or exiting entirely from the single market, becoming what is known as a 'third country'.[1] Third country status includes, among others, bilateral arrangements of the kind Switzerland has with the EU at present and the less extensive arrangements Canada has recently negotiated.

In either scenario, however, the immediate effects on competition law and merger control would in our view be more procedural than substantive. Nonetheless, they may well lead to more burdensome, and potentially duplicative, administrative procedures and compliance costs for companies operating across Europe.

In a 'third country' scenario, the changes brought about by Brexit, and the corresponding impact on administrative procedures and compliance costs, are likely to be more pronounced. In particular:

- Post-Brexit, the Competition and Markets Authority ("CMA") and UK sectoral regulators would cease to apply EU competition law and would only apply domestic competition law. Companies with cross border activities in Europe will therefore need to be mindful of two sets of rules which, while they may currently align, could start to diverge in the future;

- The European Commission would no longer have jurisdiction to enforce EU competition law in respect of matters that do not affect trade between the EU Member States ("EU MS"), potentially leading to more investigations by UK authorities in parallel to those by the Commission (known as 'me too' investigations); and

- The 'one stop shop' principle under the EU Merger Regulation ("EUMR") would no longer cover the UK, such that, for larger cross border transactions, UK and EU merger control would each have to be considered.

We provide further detail on these points below.

Note that, in the interests of brevity, this briefing covers only the public enforcement of competition law post Brexit. Clearly a range of further issues arise as regards private enforcement and follow on damages actions before the English and other UK

[1] The process for withdrawal enshrined under Article 50 of the Treaty on European Union is explained in our "Leaving the EU: the legal implications" briefing.

courts, the implications of which may also differ depending on the form Brexit takes.

What would joining the EEA mean?

The EEA was established by agreement between the EU MS and three of the four EFTA (European Free Trade Association) States – Norway, Liechtenstein and Iceland (the "EEA-EFTA States"). The other EFTA State, Switzerland, does not participate in the EEA.

The EEA Agreement effectively extends participation in the EU internal market to the EEA-EFTA States. This participation in principle entails adoption by the EEA-EFTA States of all related EU legislation, not only in relation to the 'four freedoms' that underlie the internal market (free movement of goods, services, capital and persons), but including a wide range of related areas such as competition law, employment law, the environment and consumer protection. As with EU MS, legislation (once adopted) either applies directly in the EEA-EFTA States (in the case of Regulations) or requires transposition into their national legal orders (in the case of Directives).

SUBSTANTIVE COMPETITION LAW

The UK joining the EEA

If the UK were to become an EEA-EFTA State, EU competition law would essentially continue to apply in the UK in much the same way as it does now:

- Articles 101 and 102 TFEU have been replicated in Articles 53 and 54 of the EEA Agreement.
- The other principal pieces of EU legislation relating to competition law – in particular including the block exemption Regulations – have also been adopted within the EEA.
- Although, strictly speaking, CJEU case law is not always binding on the EEA-EFTA States, in practice it is almost always followed by the EFTA Court and the courts of the EEA-EFTA States.[2]

In parallel, as under the current EU framework, the UK's own competition regime (under the Competition Act 1998 or "CA98") would continue to apply within the UK.

Enforcement of competition law in the EEA would, in most cases, be an extension of enforcement within the EU – that is, arrangements with an effect on trade between (i) EU MS; or (ii) EU MS and EEA-EFTA States would fall within the Commission's jurisdiction. An adjustment is that where the effect on trade is solely between EEA-EFTA States, the EFTA Surveillance Authority ("ESA") would have jurisdiction. In each case, as is the position in other EEA-EFTA States, the national competition authority, i.e. the CMA and the sectoral regulators in the UK, would be granted powers to enforce EEA competition law alongside their roles enforcing UK competition law.

The UK as a 'third country'

At least as regards future conduct, EU competition law would cease to apply on expiry or completion of the Article 50 withdrawal process. In particular, unless the UK Government provides otherwise as part of the Brexit process, the EU Treaties and all EU Regulations would cease to be part of UK law. However UK legislation enacted to give effect to EU Directives would still remain in place and continue to have effect. In addition, in some cases EU Regulations have themselves been incorporated in UK legislation. In particular the UK Competition Act 1998 explicitly incorporates the benefit of the various EU block exemptions (e.g. the Verticals Block Exemption). It would likely take years for such UK legislation giving effect to aspects of EU competition law to be amended or repealed should the Government wish to do so. The UK may therefore elect to continue the application of at least aspects of EU competition law for a transitional period.

In any event, UK competition law, which is in most respects identical to EU competition law, is a freestanding body of law (applicable insofar as trade within the UK is affected) and there have as yet been no formal proposals for substantive

[2] The EFTA Surveillance Authority ("ESA") has also, similar to the Commission, adopted guidelines and notices on key matters (e.g. horizontal cooperation and vertical agreements).

reform of the regime.[3] It is currently applied consistent with – and often in tandem with – EU competition law, and it is likely that, even post-Brexit, Commission decisions and CJEU case law will likely be regarded at least as indicative (non-binding) guidance. It may be that the two regimes only begin to diverge substantively (if at all) on a case by case basis over time.

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It is also worth noting that, regardless of EU competition law ceasing to apply as regards the UK, nonetheless it will remain a very significant compliance issue for many UK companies. Any UK company involved in activity that has an effect on trade between the remaining EU MS – which will commonly include the trade of goods or services into the EU – will remain subject to EU competition law. Further, the European Commission will not refrain from investigating and enforcing breaches of EU competition law against non EU domiciled companies, as it has done in the past against, for example, US, Japanese and Korean companies.

Transitional arrangements may be needed to cover various ongoing matters, for example: (i) investigations with UK elements already pending before the Commission (although in practice such investigations are likely to have an EU dimension beyond the UK in any event); (ii) leniency applications already made to the Commission; and (iii) existing Commission decisions on which parties may seek to rely in UK private damages actions.

As regards fresh investigations, there may be a rise in CMA enforcement activity post-Brexit by way of 'me too' investigations in parallel to those carried out by the Commission and/or other authorities.[4]

It is likely the CMA and Commission will cooperate on any such related investigations,[5] but the risk of conflicting approaches would remain, and for companies operating across Europe the increased time and cost of having to deal with multiple investigations could be significant.

MERGER CONTROL

The UK joining the EEA

Were the UK to join the EEA the merger control regime would also see comparatively little change.

The EU merger control regime is effectively replicated in the EEA Agreement framework, save for some slight structural differences. Any transactions with an 'EU dimension' (calculated on the basis of *EU* turnover only, excluding any turnover in the EEA-EFTA States) continue to be subject to review by the Commission, and under the 'one stop shop' principle its decisions also cover the EEA-EFTA States (in addition to the EU MS), i.e. under this scenario, including the UK.

For transactions with an 'EFTA dimension' (i.e. meeting the same thresholds set out under the EUMR but in respect of turnover in the EEA-EFTA States only, including in this scenario the UK) *but where there is neither:* (i) an 'EU dimension'; or (ii) a situation where each of acquirer and target have two thirds of their turnover in one EEA–EFTA State, then the ESA has merger control jurisdiction. In such cases the 'one stop shop' principle would only cover the EEA-EFTA States, so the transaction may still be subject to parallel merger control by individual EU MS.[6]

In the absence of an 'EU or EFTA dimension', transactions would be subject to the merger control regimes of each EU MS / EEA-EFTA State.

For many transactions, there would therefore be little change in the way merger control clearances are obtained. For some pan-European transactions

[3] We note, however, that the incoming Prime Minister Theresa May indicated in her national campaign launch speech on 11 July 2016 that competition law may be an area to be addressed under her tenure.

[4] The CMA has recently commented, however, that it faces staffing resource issues dealing with even its current CA98 caseload.

[5] While the CMA will no longer be part of the network of competition authorities of EU MS (the European Competition Network), many third countries have bilateral agreements with the EU setting out mechanisms for cooperation in respect of enforcement of competition law – such agreements currently exist between the EU and Switzerland, Korea, Canada, the US and Japan, and we would expect to see similar for the UK.

[6] Given the high turnover thresholds, and the operation of the "two thirds" rule, such cases are likely to be rare. To date no concentrations have been notified to the ESA.

where a large percentage of total turnover is achieved in the UK, the exclusion of UK turnover from assessment of an 'EU dimension' could lead to the transaction falling outside the scope of the EUMR, and thus outside the 'one stop shop' principle for EU MS. In such cases, clearances from several individual EU MS may need to be sought, leading to increased time and cost.

The UK as a 'third country'

In a "third country" scenario, the UK would no longer fall within the scope of the EUMR and the Commission would no longer have jurisdiction for the UK element of any transaction. UK merger control would therefore need to be considered separately from the rest of the EU in every pan-European transaction, regardless of its size.

The loss of the 'one stop shop' principle is likely to be viewed negatively by many larger businesses, particularly as the UK merger control regime is often considered to be more burdensome, and arguably more interventionist, than many other jurisdictions. However, it does have the corresponding advantage of remaining a voluntary notification regime and as such there will be no additional notification requirement to consider when acquirer and target are not competitors. Clearly there will also be no need for parallel EU and UK processes where the acquirer and target business have purely UK domestic operations with no sales into EU MS.

Finally, it is also worth noting the recent comments from the incoming Prime Minister, Theresa May, indicating (among other things) a desire for possible additional grounds for Government intervention in mergers on public interest grounds.

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