Brexit and competition law

CCRP Round Table on Brexit

Dr Helen Jenkins
Managing Partner

Dr Luis Correia da Silva
Partner

19 January 2017

Strictly confidential
Competition Law and Brexit
A shock to a well established competition regime

Current competition law framework:

- Well established competition law regime that has had a high degree of policy input from UK
  - consumer focussed
  - economic evidence plays a central role

- High degree of convergence between UK and EU competition law
  - certainty for EU businesses
  - incentivises high levels of compliance
  - no regulatory arbitrage

- High degree of cooperation between national competition authorities within the EU
  - effective enforcement against competition law violation
  - lower duplication and resource costs

- Can these features be preserved?

## Competition Law and Brexit

### Hard or soft Brexit?

Policy questions depend on UK’s relationship with the rest of the EU after Brexit

<table>
<thead>
<tr>
<th>‘Hard Brexit’: leave EEA</th>
<th>‘Soft Brexit’: remain in EEA</th>
</tr>
</thead>
</table>

**Key similarities:***

- currently, Competition Act 1998 and Enterprise Act 2002 closely mirror EU law
- UK businesses will still need to consider EU competition law if they have operations in Europe (and vice versa)

**Key Differences:**

- ‘Great Repeal Bill’ stops EU law having direct effect in UK and ECJ no longer binds UK
- possibility of longer term competition policy divergence
- state aid laws no longer automatically apply
- more work for UK competition authorities?

**Key similarities:**

- substance of competition law the same (Articles 53 and 54 of EEA Agreement)
- state Aid laws continue to apply
- ECJ continues to bind UK on EEA law

**Key Differences:**

- responsibility for enforcement/merger review shift from European Commission to EFTA surveillance authority
- UK has no formal say on how EU competition law develops
1. Should UK/EU competition authorities maintain a consistent approach after Brexit? How will this be maintained?

2. Will Brexit facilitate a future emphasis on analysis of economic effects, as opposed to object (or vice versa)?

3. Will UK and rest of EU continue to work together on determining direction of competition policy?

4. End of the one stop shop and ‘extra barriers’ to trade: what if CMA and European Commission reach a different conclusion on similar conduct?
Competition Law and Brexit
Economic questions for merger control

Short term questions: pressure on CMA → less merger reviews?

• all else equal, CMA likely face an increase in its workload
• if the CMA were to keep doing everything it currently does, how many additional staff might be needed?
• if extra resources are not available, the CMA will need to prioritise activities. Using the CMA’s own impact assessment to calculate benefit cost ratios of CMA activity, merger reviews are possible area of efficiency
  (i) reducing reviews of small mergers?
  (ii) filter/fast-track where merger is already being reviewed by another major competition authority?

Long term questions: ‘industrial strategy’ → broader approach to merger control?

• the UK government would have the discretion to apply a broader set of concerns aside from competition to the assessment of mergers (a public interest test?).
  • potentially costly for economic efficiency → additional uncertainty for businesses
  • ways to minimise possible economic downsides around such a policy
    • conducted by an independent body
    • non-subjective criteria within an established assessment framework.

## Competition Law and Brexit
### Economic questions for state aid

<table>
<thead>
<tr>
<th>Legal context</th>
<th>• if the UK does not agree any special trade arrangements with the EU post Brexit, the UK will be bound by WTO rules; these rules are narrower in scope</th>
</tr>
</thead>
</table>
| Upside for the UK (downside for EU)? | • UK Government would have more discretion to provide state funding.  
• realistic? UK Government currently has lower levels of state funding than many other member states |
| Downside for the UK (upside for EU)? | • UK based businesses will have more limited rights to complain to the European Commission regarding state aid, even if they are being disadvantaged  
• UK based businesses may no longer receive ‘compatible aid’ from EU (e.g. for R&D activities) |
| The impact on competition | • the introduction of disparate state aid regimes between different parts of Europe introduces the issue of a competitive distortion between member states  
• risk of regulatory arbitrage? |

See Oxera (2016), 'Brexit: implications for state aid rules', Agenda, 4 May
Competition Law and Brexit
Economic questions for the business of competition law

Short term uncertainty?
will the lack of clarity on matters of competition law and economics to increase need for professional advice in short and medium term?

A shift in private enforcement?
will the ability of lawyers based in the UK to advise on competition matters in Europe be adversely affected if the UK leaves Europe?
will other non-UK courts become relatively more attractive for private damages actions?

Impact on incentives?
could post-Brexit legal ambiguity have a ‘chilling’ effect on businesses contemplating private damages actions?
will it be possible to make single claims for competition damages across the EU including the UK, and if not, what will be the consequences for the volume of private enforcement?

Overall direction of impact uncertain
Scale of impact in UK: Oxera estimates that competition makes up around 5% of the UK’s top law firms’ service offering and every 10% shift in demand would have a GVA impact of around £167m by 2030

See Oxera (2016), ‘Brexit: implications for competition enforcement in the UK? An economic review’, Agenda, 3 June
Competition Law and Brexit

References


• Lyons, B; Reader, D and Stephan, A, ‘UK Competition Policy Post-Brexit: In the Public Interest?’ Centre for Competition Policy Working Paper, November

See also from Oxera:

• Oxera (2016), ‘Brexit: what do prediction markets tell us about its likelihood?’, 1 June

• Oxera (2016), ‘Brexit: implications for state aid rules’, Agenda, 4 May

• Oxera (2016), ‘Brexit: implications for competition enforcement in the UK? An economic review’, Agenda, 3 June

• Oxera (2017), ‘The future of merger control: hard Brexit, difficult questions?’, Agenda, forthcoming