Adam Bruell

'What changes, if any, do you think should be made to UK competition legislation, and to the way it is enforced, in the event of a UK exit from both the European Union and the EEA?'

Introduction

'Brexit' has been selected by Collins as its word of the year after an "unprecedented surge" in its usage of 3,400% in 2016.[1] The increase in its use among UK competition lawyers has no doubt been even greater. The United Kingdom's withdrawal from the European Union will undoubtedly be complicated and messy, and its impact upon the UK's competition regime will be keenly felt. Resolving the implications of Brexit in this area of the law will take time, careful attention and delicate transition.

Whilst there are places where it will pay to tread lightly and ensure continuity, Brexit will prompt or necessitate changes to UK competition legislation and enforcement. Some reforms will be minor, including removing the many references in legislation to Articles 101 and 102 TFEU, but others will be more profound. Brexit also provides an opportunity to reshape the regulatory and enforcement landscape. It is some of those more significant changes and opportunities that are the focus of this essay, including the UK's antitrust provisions and merger control regime, and the roles of the judiciary and the CMA. I will also highlight the potential for the CMA's workload to increase substantially in the wake of Brexit, and recommend that this be accompanied by reform of antitrust enforcement in the UK.

The Brexit vote and the Government's plans

Any review of what changes to the UK competition regime may be necessary or desirable should consider the wider context. The referendum result plunged the UK into an unprecedented fog of legal, political and constitutional uncertainty. This has barely dissipated in the months since, but the Government have offered hints as to how British exit from the EU will occur. Theresa May has stated that a 'Great Repeal Bill' will soon be put before Parliament to "remove from the statute book – once and for all – the European Communities Act".[2] The effect of the Bill would be to convert the body of EU law into British law, and repeal the legislation which gives direct effect to EU law in the UK. Thereafter, Parliament will be free to "amend, repeal and improve any law it chooses" and "the judges interpreting those laws will sit not in Luxembourg but in courts in this country".[3] This, of course, includes EU competition law.

The process of negotiating the UK's exit from the EU with the European Council will begin when Article 50 of the Lisbon Treaty is triggered, which Mrs May has assured us will take place "no later than the end of March next year",[4] and will likely continue for up to two years.[5] The EU Treaties will no longer apply to the UK from the date of entry into force of the treaty the UK negotiates with the EU, or two years after triggering Article 50, whichever is sooner.[6] Mrs May has also explained that the Government wants "free trade, in goods and services" but that "we are not leaving the European Union only to give up control of immigration again".[7] As a result, although the precise terms of the UK's exit remain mired in uncertainty,

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1 Alison Flood, 'Brexit named word of the year, ahead of Trumpism and hygge' *The Guardian* (London, 3 November 2016) https://www.theguardian.com/books/2016/nov/03/brexit-named-word-of-the-year-ahead-of-trumpism-and-hygge accessed 10 November 2016.

2 Theresa May, 'Prime Minister: Britain after Brexit: A Vision of a Global Britain' transcript of speech delivered at the Conservative Party Conference (Birmingham, 2 October 2016) http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of accessed 10 November 2016.

3 Ibid.

4 Ibid.

5 There is now the chance of course that Parliament could derail this process by voting against triggering Article 50 should *R (Gina Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 not be overturned on appeal to the Supreme Court, but that possibility is beyond the scope of this essay.

6 Negotiations may continue even longer if they are particularly fraught and the European Council, in agreement with the UK, decides unanimously to extend the period for negotiation in accordance with Article 50(3) TEU.

7 Theresa May, 'Prime Minister: Britain after Brexit: A Vision of a Global Britain' transcript of speech delivered at the Conservative Party Conference (Birmingham, 2 October 2016) http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of accessed 10 November 2016.

the current position strongly suggests that the UK will not seek an EEA-type arrangement with the EU. The analysis that follows therefore assumes a 'hard' Brexit.

Impact and recalibration

Substantive amendments – antitrust

Following Brexit, the UK will no longer be represented in the institutions of the European Parliament and Council of the European Union, and the UK's duty of sincere cooperation will come to an end. The UK Parliament will be free to legislate however it wishes, and the Great Repeal Bill could even empower ministers to amend legislation and regulations while the UK transitions away from membership of the EU. This provides an opportunity to rewrite and recalibrate the UK's antitrust regime.

But there is no compelling case for wholesale reform of the UK's substantive antitrust provisions. Instead, there are strong arguments that the Chapter I and II prohibitions should remain aligned with Articles 101 and 102 TFEU.

When introducing the bill that became the Competition Act 1998, the then Government made its reasons for adopting these provisions clear: "I cannot over-emphasise that the purpose of the Bill is to ensure as far as possible a consistency with the [EU] approach and thereby to ease burdens for business".[8] Brexit does nothing to undermine the sense of this reasoning. The Chapter I and II prohibitions are simple and well-understood; amending them would add unnecessary increased complexity for companies and likely reduce the attractiveness of the UK as a place to do business. It would be enormously beneficial to maintain business confidence that if a particular action is permitted within the EU it will not fall foul of the UK's antitrust regime. Further, the provisions of the TFEU upon which Chapters I and II are based are widely regarded as the gold standard of antitrust regulation, and have provided a model for the domestic provisions of jurisdictions the world over.

Though major change is unnecessary, that is not to say that there are no amendments around the periphery that could improve the current regime by adding clarity for businesses. A good example is that, in the context of the Chapter I prohibition, it makes sense for the UK's current safe harbour regime (by which the EU block exemptions are co-opted into UK law through section 10 of the Competition Act 1998) to be replaced; it would be untenable to have safe harbours under UK law governed by what will be foreign law by then. The Government should therefore legislate to introduce new safe harbours: block exemptions which provide greater certainty. (It could, for instance, revert to the previous approach to vertical agreements which excluded from competition law all but those concerned with resale price maintenance.) It could even wind the clocks back to the time prior to Modernisation on 1 May 2004, when businesses were able to apply for an individual exemption of their agreements, which would remove unnecessary risk for businesses and provide the CMA the opportunity to intervene in potentially anti-competitive agreements before they are made.

Substantive amendments – merger control[9]

The UK's departure from the EU and the EEA would signal the end of the one-stop-shop principle (whereby mergers satisfying EU filing thresholds must be notified to the Commission but then do not require clearance by national authorities) insofar as it currently applies to transactions with a UK nexus. This is discussed in greater depth below but it is worth acknowledging here that some parties, who would

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8 Lord Haskel, Hansard (HL) 17 November 1997, col. 417

9 The likelihood that Brexit will result in an increased number of merger filings to the CMA, as well as the appropriate response to this development, are discussed in depth below. The focus here is on the question of whether substantive legal changes are required.

previously have had to consider only an EU merger control review, will also have to consider a review under UK law in the future.

The UK's merger control regime under the Enterprise Act 2002 is not harmonized with EU law in the same manner as its antitrust regime. Accordingly, there is little reason to amend the substantive provisions of UK merger control in the wake of Brexit. However, some amendments to the procedural aspects of UK merger control may be desirable to acknowledge the fact that the UK regime is not designed to run in parallel with the EU regime. Doing so could reduce the burden on merging parties. But this is not critical; merging parties are accustomed to considering the regimes of numerous jurisdictions on large transactions and adding the UK to this list would be of minimal inconvenience (provided the process is optimized as set out below).

Judicial impact

Brexit will upend the existing relationship between UK and EU courts and marks the end of the supremacy[10] and direct effect[11] of EU law. Even assuming no substantive changes to UK competition law, divergence in the interpretation of EU and UK competition law will come about as a result of cases brought in the UK courts, either in the course of private enforcement or challenges to authority enforcement.

The UK's highest court, now the Supreme Court, will be the final arbiter on questions of law affecting the UK, and appeals to the Court of Justice of the European Union on points of European law will cease to be a possibility. Further, section 60 of the Competition Act 1998, which has operated to ensure that the Chapter I and II prohibitions develop consistently with Articles 101 and 102, will almost certainly fall away. So too will the provisions of Regulation 1/2003 managing the relationship between UK courts and the Commission on the application of Articles 101 and 102, including i) the courts' duty to avoid giving decisions which would conflict with a decision contemplated by the Commission where it has already initiated proceedings,[12] and ii) the rules which currently mandate the application of Articles 101 and 102 when UK courts apply national competition law, and which prevent the prohibition of anticompetitive agreements not barred under Article 101.[13]

These developments will unavoidably result in some differences between UK and EU competition law over time. However, given the benefits of maintaining the UK's substantive antitrust provisions, this will hopefully be minimised by the judiciary's continued attention to EU jurisprudence as a source of persuasive (albeit not binding) authority. This seems likely given our common legal heritage and is the position adopted by other jurisdictions whose competition provisions are inspired by EU law (such as South Africa).

The CMA's workload

In terms of practical enforcement, the CMA should expect to be busier after Brexit. The CMA (and concurrent regulators) may therefore need to devote greater resources to antitrust enforcement, or readjust their priorities accordingly.

In due course the Commission will no longer make decisions in respect of competition infringements within the UK.[14] (However, UK businesses will continue to be subject to the Commission's jurisdiction to the extent that they operate within the EU, or their conduct has an impact on trade between Member

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10 Case 6/64 *Flaminio Costa v ENEL* [1964]

11 Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963)

12 Regulation 1/2003, Article 16(1)

13 Regulation 1/2003, Article 3(1) & (2)

14 And, given that we will not be in the EEA, antitrust in the UK will not be enforced by the EFTA Surveillance Authority either.

States.) As a result, concurrent Commission and CMA investigations (currently impossible) will become inevitable. The scale of the potential for concurrent proceedings is illustrated by the fact that 24 of the 28 cartel decisions adopted by the Commission since 2012 have involved at least some conduct within the UK.[15] Following Brexit, the CMA could take on such cases.

In the merger control context, the end of the one-stop-shop principle means that the CMA will also have to dedicate more resources to the UK aspects of large international deals that would otherwise have been reviewed by the Commission. The CMA will need to adjust to ensure it is able to handle a significant increase in the volume and complexity of the cases it considers. As mentioned above, it is also possible that as a result of dealing with the CMA as an additional merger authority on large European transactions, parties will face some additional cost, complexity and risk. Coordination with the Commission to avoid timing and process conflicts would help to reduce this burden.

Enhanced enforcement

In a speech delivered 9 November this year Michael Grenfell, the CMA Executive Director for Enforcement, recognised the CMA's rather unimpressive record of "3.6 infringement decisions a year, and only £65 million of fines in total in the 3 years 2012 to 2014" and the "need to do more cases, and more quickly".[16] The likelihood that the CMA's workload will increase substantially in the wake of Brexit further necessitates innovation in competition enforcement. A review of Part 1 of the Competition Act 1998 is already scheduled in accordance with section 38 of the Enterprise and Regulatory Reform Act 2013 and will be completed by April 2019. Fortuitously this coincides with the likely March 2019 end date of the UK's negotiations with the EU under Article 50, so provides the perfect opportunity to reassess enforcement in the light of Brexit.

Increased private enforcement would be a welcome development to supplement the CMA's efforts.[17] The opt-out collective action regime introduced by the Consumer Rights Act 2015 is a significant step forward, providing small and medium sized enterprises (SMEs) access to justice. However, although the procedure is still nascent (the first action was issued 25 May 2016[18]), there are points of difference with the American model of class-action lawsuits (the absence of treble damages, for instance) that suggest we are unlikely to see the growth of a serious culture of competition litigation in the UK. By contrast, damages in the UK are compensatory only. The introduction of punitive damages in collective action cases here would stimulate greater litigious appetite among SMEs and their representatives.[19] Further, the threat of such sanctions would act as an obvious disincentive for firms from engaging in anticompetitive behaviour in the first place. It would also be helpful to pursue a relaxed interpretation of whether a particular person is a "just and reasonable"[20] class representative, so that SPVs, law firms and funders can all bring claims on behalf of SMEs. Though there is no absolute prohibition on such actors bringing these claims,

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15 7 of these decisions included conduct expressly affecting the UK while in the remaining 17 the conduct concerned spanned the EEA or was world-wide.

16 Michael Grenfell, 'UK competition enforcement – progress and prospects' transcript of speech delivered at the IFLR Competition Law Forum (London, 9 November 2016) https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law accessed 10 November 2016

17 This is a view shared by the CMA Executive Director for Enforcement, who welcomed the expanded jurisdiction of the CAT under the Consumer Rights Act 2015 to consider stand-alone damages actions in his 9 November speech: "[o]ne dimension that we should not forget is that people and companies who believe they are victims of anti-competitive practices now have an alternative to bringing a complaint to the CMA".

18 Claire Alderman, 'UK's first 'opt-out' collective action begins' *Monckton Chambers News* (London, 20 June 2016) https://www.monckton.com/uks-first-opt-collective-action-begins/ accessed 10 November 2016

19 Of course the general rule that the loser pays the winner's costs also deters some potential claimants in the UK. It is justified however, on the grounds that it deters the sort of frivolous or speculative claims that have become a burden to many businesses in the US. Further, the enticing prospect of large damages awards should ensure that claimants with serious cases are not dissuaded from bringing actions.

20 Competition Act 1998, section 47B(8)(b)

during the reform process they were initially intended to be barred and there is concern in some quarters that certification will prove a sticking point in future cases.

A second proposal is to continue to allow parties to rely on the Commission's antitrust decisions as the source of follow-on damages claims. Though this might provoke the ire of Brexiteers, there would be few practical impediments given my recommendation that the substantive antitrust provisions remain largely in keeping with those under EU law. The Commission's decisions could, at the very least, be cited as a rebuttable presumption of the existence of a cartel, leaving claimants with the task of proving only that it extended to, and caused harm in, the UK. This would ensure that the numbers of follow-on damages actions do not fall off a cliff following Brexit. Given that concurrent decisions by the CMA or more challenging stand-alone damages actions appear to be the only other enforcement solutions, propping up private enforcement in this way would be extremely valuable.

Finally, as already discussed, it seems inevitable that Brexit will result in the CMA and the Commission bringing concurrent enforcement actions. To lessen its workload in this respect, the CMA could piggy-back its investigations on Commission findings as many other 'me-too' jurisdictions already do. This could save significant time and resources, streamlining the CMA's procedure and avoiding expensive wasted effort.

Conclusion

Brexit will be a seismic shift in the legal landscape of the UK and the roles played by various state institutions will have to adjust accordingly. Our courts will enjoy a position as the final arbiter on questions of competition law and the CMA will inherit elements of the Commission's workload. Legislating for the UK's withdrawal from the EU will require meticulous technical amendments to a wide range of competition law provisions. But the process also presents an opportunity to make some more significant adjustments, particularly in respect of antitrust enforcement. Promoting a strong culture of private damages actions should be a top priority. While the responses to various recent consultations on enforcement have displayed limited appetite for change in this area, the necessity of a comprehensive response to Brexit might just provide the impetus needed for meaningful reforms.