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

On 23 June 2016 the British electorate voted for the United Kingdom (UK) to leave the European Union (EU). Despite the recent ruling by the High Court, the beginning of what is now universally known as 'Brexit' is set to happen in March 2017 when the prime minister intends to trigger the infamous Article 50. Given public appetite for, to use a journalistic term, a 'hard Brexit', and the fact that membership of the European Economic Area (EEA) involves free movement of workers and the adoption of most EU laws, the UK looks set to leave both the EU and the EEA.

The implications of Brexit, and therefore what changes should be made to the UK's competition law landscape, depend on the UK's future arrangements with the EU. The below analysis assumes that the UK exits from both the EU and EEA entirely, without negotiating any special arrangement with the European Commission (Commission) on competition law enforcement. As such the UK would have the greatest freedom to reform its competition law system.

Below I consider certain changes to UK competition legislation and enforcement, some of which ought to be implemented while others should be treated with more caution to protect the UK's economic landscape. It is, however, important to note that any changes cannot be discussed in a vacuum of economic (or legal) analysis. The political climate and the will of the British electorate, though appearing to be and dismissed as nationalist and isolationist sentiment, must be considered.

Competition Act 1998

The first, and most obvious, change to UK competition legislation concerns section 60 of the Competition Act (CA98). Section 60 provides that any questions relating to UK competition law are to be interpreted in a way which is consistent with the treatment of corresponding EU law, requiring the UK courts to follow the jurisprudence of the Court of Justice of the European Union (ECJ).[1] As such, section 60 in its current form cannot, and should not, survive a Brexit where the UK leaves both the EU and the EEA. Its operation is ultimately predicated on the availability of recourse of the ECJ and is consequently unnecessary.

More importantly, repealing this provision avoids a court without legitimacy in the UK de facto determining the meaning of UK legislation. This is imperative as these determinations go beyond competition law questions and also import principles such as equality, legal certainty, legitimate expectations and proportionality.[2] In addition, certain EU precedents would be inappropriate, as they are not founded on pure competition law considerations but instead seek to achieve the internal market, of which the UK would no longer be a part.[3]

It is, however, recognised that whenever Brexit should occur, it will be a time where certainty will be much needed. A blanket repeal of section 60 would not afford this (although even in

[1] See section 60(1) and (2) Competition Act 1998.

[2] *Napp Pharmaceutical Holdings Ltd v DGFT* [2001] CAT 3.

[3] For example, jurisprudence relating to vertical restraints over parallel imports or e-commerce has more to do with creating a single market than economic efficiencies. See Practical Law, 'Brexit: implications for UK competition law', available at http://uk.practicallaw.com/8-629-5266?source=relatedcontent

the event of this provision being repealed, the UK courts and the CMA would look to the body of UK case law which has developed consistently with EU law by virtue of section 60 and therefore effects would not be felt immediately).

It is argued therefore that the principle of section 60 should remain. This can be achieved by placing an obligation on the UK courts and the CMA to have regard to relevant EU case law (as is currently the case with regards to decisions or statements of the European Commission[4], and much like many competition authorities outside the EU). In this way EU case law will be of persuasive authority only, as there would be no absolute obligation to ensure consistency, giving the UK courts freedom to depart from ECJ jurisprudence but also retaining a degree of certainty for businesses, particularly for UK businesses trading in the EU who will still remain subject to EU competition law.

What changes should be made to UK competition legislation also rest on the distinction between EU directives and EU regulations. Whereas the former have been transposed into UK law through domestic legislation (and may or may not be repealed), the latter rely on the principle of direct applicability and will fall away upon the UK separating from the EU. In the competition law space, as well as others, this would create 'gaps' as there is no implementing national legislation to rely on.

For example, section 10 of the CA98 refers to "parallel exemptions" from the Chapter I prohibition and provides that an agreement is deemed to comply with UK competition laws if covered by an EU block exemption regulation, such as the Vertical Restraints Block Exemption Regulation. However following Brexit, the EU block exemptions will cease to have direct effect. The benefits of the UK departing from current EU block exemptions would be few, as businesses throughout the UK rely on them. Despite this, to replicate EU block exemptions by either copying these out (or incorporating them by reference) through a UK enactment would be missing an opportunity to move from the single market focus of the EU and allow for an approach better suited to UK policy choices.[5]

To provide a degree of legal certainty to businesses, there should form of replication, but with adaptations allowing the UK to introduce new and different block exemptions - for example by permitting a greater degree of territorial restriction in agreements that benefit from the exemptions and an exemption to replace the current Insurance Block Exemption Regulation set to expire on 31 March 2017.

Competition and Markets Authority

One of the most pertinent questions for the CMA post-Brexit will be whether it has adequate resources to manage a potentially significant increased workload. The "one-stop shop" review procedure under the EU Merger Regulation (EUMR)[6] would cease to apply, and as a result mergers may be subject to both EU and UK merger control regimes. This is problematic for a number of reasons: the increased regulatory burden on the parties to the transaction, reviews may lead to different outcomes, timetables are radically different, but significantly it will also place the CMA's existing resources under strain.

This will be exacerbated by the fact the duplication of competition law regimes could apply equally to multijurisdictional cartel investigations. Currently, if the Commission commences

[4] Section 60(3) Competition Act 1998.

[5] For example, some of the provisions of the Vertical Restraints Block Regulation which is currently applied through section 10 of the Act are aimed at promoting the single market, like active, passive and online sales restrictions.

[6] Council Regulation (EC) No 139/2004 of 20 January 2004.

an investigation it has exclusive jurisdiction, and the CMA only investigates if the effect of the anti-competitive activity is restricted to the UK. However, following Brexit, this would cease to be the case and the CMA may concurrently investigate conduct under scrutiny by the Commission.

Rather than revise the UK's jurisdictional thresholds as a way to limit the number of transactions capable of review by the CMA in anticipation of a trend, which may or may not manifest itself, the CMA should, in any event and where relevant, look to concurrent sector-specific regulators, which the UK has in aviation, rail, communications, electricity and gas, water, healthcare (in England) and financial services.[7] While there has been a "clear increase in joint working between the CMA and sector regulators across the competition toolkit…[providing] sector-specific input in the CMA's market investigations,"[8] the reality remains that these regulators currently have no or limited merger control powers.[9] Therefore, it is argued that there should be a "greater pooling of competition enforcement resources across the concurrent regulators"[10] and such sector-specific regulators should have a greater role in merger control. Even if the referendum produced a different result, this change would still make sense as such regulators have expertise in their given sectors. This should enable them to review cases that may give rise to competition issues in a timely manner, which, following Brexit, will be a concern as the CMA's timetables for review of mergers are much longer than that of the Commission. As such, Brexit and the potential increased workload of the CMA make a pivot to sector-specific regulators not just desirable, but necessary.

In addition, in order to minimise the risk of disruption the CMA and Commission should negotiate a competition cooperation agreement that retains the current cooperative provisions under the EUMR and Implementing Regulation or, at the very least, of the type currently in place with the US.

Brexit would also present an opportunity for the CMA to move towards a more prosecutorial model. Arguably with a great number of cartels to investigate and the removal of dishonesty from the cartel offence, the CMA could focus on individual liability as the primary enforcement mechanism, in place of administrative fines or undertakings. "A move towards a prosecutorial system would represent a clean break from the European model, and arguably engender a new cultural approach to competition law enforcement. "[11] However, as the UK government decided against such in 2011[12], any such change would be unlikely, not to mention lower on the list of priorities post-Brexit. That said, I would welcome the prosecutorial model, a model which has achieved notable success in the United States of America.

Public interest test

[7] CMA, Annual Report on Concurrency (28 April 2016), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519739/Annual-_-report-on-concurrency-2016.pdf

[8] Ibid, p.3

[9] Brexit: the implications for EU and UK merger control, Paul Johnson, Competition Law Journal, Brexit Special Online Edition, available at http://www.jordanpublishing.co.uk/system/froala_assets/documents/969/CLJ_2016_BrexitSpecial.pdf

[10] National Audit Office, 'The UK Competition Regime', HC 737, Session 2015-16, 5 February 2016, p.11, available at https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf

[11] Rip it up and start again? Cartel regulation post-Brexit, Nicholas Queree, Competition Law Journal, Brexit Special Online Edition, available at http://www.jordanpublishing.co.uk/system/froala_assets/documents/969/CLJ_2016_BrexitSpecial.pdf

[12] Department of Business, Innovation and Skills, 'Growth, Competition, and the Competition Regime: Government Response to Consultation' (2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competitionregime-government-response.pdf

It is also important to address the discussion over the possibility of increased government intervention in merger control. Brexit would allow for non-competition considerations to be applied without the constraints of Article 21(4) of the EUMR. The Prime Minister has already called for "a proper industrial strategy" and the loss of the state aid controls currently provided by EU competition law may further encourage government intervention on public interest grounds.

With the UK outside the EU, member states that advocate a greater role for industrial policy may have increased freedom to put such policies into practice.[13] The French President has already suggested that EU competition law should take increased account of industrial policy considerations,[14] while the president-elect of the United States of America looks set to adopt a more protectionist and interventionist economic policy as well.

Should the UK follow suit?

No. This is an area where I do not advocate change. The above may mean at some stage increasing the number of sectors in which a public-interest test is applied,[15] but until the post-Brexit dust settles, mergers can be assessed on a case-by-case basis with a government ready to intervene on special cases as they have done in the past. I cannot be more articulate than Alex Chisholm, former Chief Executive of the CMA, who commented in 2014 that: "A 're-politicisation' by adding more exceptions to competitive-based merger controls, or introducing criteria in foreign investment control that have previously been abandoned in merger control by successive governments, could undermine business confidence and the credibility of any merger regime."[16] Given the uncertainty created by virtue of the UK's exit, this does not need to be added to with unnecessary legislative change to the public interest test contained in the Enterprise Act 2002 and government intervention in enforcement procedures.

Some may propose that the CMA be responsible for the enforcement of all merger control rules, including the public interest provisions. As discussed above, it is fair to say that the CMA is not currently sufficiently equipped to deal an increase of cases post-Brexit whilst simultaneously taking account of additional 'public interest' issues in its assessment. Even with additional resources, it is still not appropriate for the CMA to be given such powers; competition authorities are deemed experts in competition analysis and are not best placed to advance other objectives, such as industrial policy, or engage in a balancing of competing interests.[17] In addition, a competition regime should not be used as a tool for delivering non-economic policy goals by the back door.

Conclusion

The departure of the UK from both the EU and the EEA would create the opportunity for immediate changes to UK competition legislation and enforcement, and long-term there will be many more changes to make. It also provides opportunity for EU competition law and

[13] Untangling the web: UK competition law after Brexit, Becket McGrath, Solicitors Journal,

[14] Comments of Francoise Hollande recorded at the European Council conference in Brussels on 29 June 2016 http://www.ambafrance-us.org/spip.php?article7630

[15] The Economist, 23 July 2016, 'A change of gear', available at http://www.economist.com/news/britain/21702531-new-prime-minister-signals-more-hands-approach-business-change-gear

[16] Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference, 11 September 2014, transcript available at https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-competition-and-politics

[17] The pursuit of national champions: the intersection of competition law and industrial policy, Jonathan Galloway, European Competition Law Review, (2007) 28 ECLR 17

policy to diverge from the approach currently taken, without the UK's influence being taken into account; it is possible that there will be "a more Franco/German approach to competition policy, resulting in ordo-liberal decision-making."[18] However, as the UK sets off down this path, it should be remembered that the British have oft been a valuable and innovative voice within the EU and are likely to remain at the forefront of competition policy post-Brexit. A custom-tailored UK competition regime may just rise from the post-Brexit ashes.

[18] Competition Policy International's Europe Column, UK Competition Policy and Brexit – Time for a Reset by Oliver Bretz, 26 July 2016, available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2016/07/Europe-Column-July-Full.pdf