

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 EU and the EEA.

Whether legal practitioners like it or not, Brexit will bring about significant change. Much of that change will be reactive, as the government struggles to extract our nation from an international legal framework. Laws that no longer make sense in a post-Brexit world must be re-drafted. However, some consider Brexit an opportunity for active legal reform. If the UK exits the EU and the EEA, it would no longer have to enact and interpret its law in accordance with the EU: compliance with EU law would depend entirely on the trade agreements negotiated. Moreover, the freedom to amend our existing laws would make it possible to improve the UK competition regime and tailor it to our own national needs. This begs the question: is this necessarily a good idea? This essay suggests that divergence between the UK and EU competition regimes will cause numerous problems, including legal uncertainty, stretched resources and inconsistent enforcement. Although EU competition law is not perfect, adopting an inward-facing competition regime would be damaging to British businesses, to Britain's reputation as a centre of free market neoliberalism, and ultimately, to the British economy. Therefore, the changes advocated are those which will ensure our continued alignment with the EU.

EU law aims to protect the Single Market from distortions of competition. Post-Brexit, the UK could detach itself from that aim and pursue more nationalistic objectives. Theresa May has spearheaded this approach, promising a "proper industrial strategy" and vowing to protect vulnerable British industries from foreign takeover.¹ Similarly, according to Chancellor of the Exchequer Philip Hammond, the UK must break free of the "constraints" of the EU regime on public subsidies and introduce a "bespoke competition policy".² Certainly, there are aspects of our current competition law regime that, theoretically, merit change. For example, many practitioners resent the muddy distinction between "object" and "effect" in antitrust law. Others consider the competition authorities' requests for information to be impractical and ridiculous in their scope. However, such practical frustrations must be distinguished from the sweeping policy change the government has hinted at. Moreover, even minor changes may not be worth the risk of divergence. Not only is competition law "inherently international"³, but within that framework the EU is "very influential", and "numerous jurisdictions around the world are heavily shaped by the EU and its policies and decisions."⁴ Excessive change will therefore distance the UK from not only the EU but from the world. The argument for harmonisation can be divided into three major themes, dealt with in turn below: first, the problem of decreasing legal certainty and an increasing burden on businesses; second, the issue of resources; and third, the long-term economic effects of blurring legal and political considerations when devising competition policy.

¹ 'We can make Britain a country that works for everyone', a transcript of Theresa May's speech in Birmingham (11 July 2016).

² Hammond made these comments while being questioned by the Treasury Committee on his priorities at Chancellor. See here for the full footage:
<http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2015/chancellor-of-the-exchequer-evidence-16-17/>.

³ M. Herron, S. Long and Matthew O'Regan, 'Brexit? Divergence and convergence in UK and EU competition law', *Competition Law Journal: Brexit Special Online Edition* (14 July 2006), p. 2.

⁴ P. Johnson, 'Brexit: the implications for EU and UK merger control', *Competition Law Journal: Brexit Special Online Edition* (14 July 2006), p. 13.

Under the EU's extra-territoriality doctrine, any UK-based undertaking trading within the Single Market will continue to be subject to EU competition law after Brexit.⁵ Moreover, the majority of mergers, cartels, and other investigations that affect the UK will be simultaneously considered by the EU. The continued relevance of EU law means that any changes to our regime carry two major risks: the risk of imposing duplicate burdens on UK businesses, and the risk of conflicting decisions. Numerous government papers have highlighted how burdensome regulatory regimes hurt business and investment.⁶ Take, for example, merger control. The time and cost of preparing multiple filings weighs heavily on companies. Although yet another filing may be inconsequential for global conglomerates, it would be a significant burden⁷ for companies that would have otherwise only had one EU filing under the "one-stop-shop" principle. Therefore, an alignment of procedural regimes will benefit businesses. For example, the UK currently operates to a much longer merger control timetable than the EU. Coordinating these timetables may reduce the impact of a dual review on transaction completion dates.⁸

The dual burden on businesses could also extend to remedies. A provision is needed to coordinate the remedy strategies of parallel investigations, in order to avoid duplicate punishment. In the realm of antitrust, another key practical problem for businesses will be the loss of privilege for UK lawyers after Brexit under the restrictive EU definition of legal advice privilege.⁹ Therefore, the UK should push for an equivalence measure to prevent the imbalance of the Commission being able to review evidence that UK authorities cannot.¹⁰ In addition to the increased burden on UK businesses, the second problem to be addressed is the risk of conflicting decisions, or conflicting reasoning. One solution might be to replicate s. 60 of the Competition Act 1998 ('CA98'), which imposes a duty on the Competition and Markets Authority ('CMA'), courts and tribunals to interpret questions arising under CA98 consistently with corresponding questions under EU law. Despite the constitutional oddity of an entirely non-UK court determining the interpretation of UK statutes, this could prevent the major legal uncertainty that conflicting investigation outcomes would generate.¹¹

Duplicate investigations also relate to the second major issue when considering change to our competition regime: resources. The CMA's workload will increase dramatically post-Brexit. The "one-stop-shop" principle and Regulation 1/2003 will cease to apply, meaning that it will review significantly more mergers and alleged cartels.¹² Either the CMA must be allocated more resources (unlikely, given

⁵ This is clear from numerous EU cases that concern jurisdictions outside of the EU. For example, see Case AT.39850 *Container Shipping*, where the Commission investigated allegations of price signalling by container liners based in China, South Korea, Taiwan, Japan and the UAE.

⁶ See, for example: BIS, 'Options to Refine the UK Competition Regime: a consultation' (May 2016); HM Treasury, 'A better deal: boosting competition to bring down bills for families and firms' (30 November 2015); and National Audit Office, 'The UK Competition Regime' (5 February 2016).

⁷ A pre-Brexit report already found that merger control requirements already impose "substantial burdens on businesses" (National Audit Office, 'The UK Competition Regime', p. 39).

⁸ Brexit Competition Law Working Group Issues Paper (October 2016) ("BCLWG Issues Paper"), paragraph 2.5.2.

⁹ Under EU law, legal advice privilege only extends to advice given to a company by external EEA-qualified legal counsel, which would no longer include UK lawyers.

¹⁰ BCLWG Issues Paper, paragraph 2.9.6.

¹¹ *Ibid*, paragraphs 3.6-3.8

¹² N. Querée, 'Rip it up and start again: Cartel regulation post-Brexit', *Competition Law Journal: Brexit Special Online Edition* (14 July 2016), p. 22.

stiff competition from the NHS and a gaping deficit), or an appropriate policy must be adopted to reduce its caseload. The government might ignore the issue and adopt a ‘me too’ approach, conducting a full review of all cases with a UK dimension. This could include changing the obligation to notify a concentration from voluntary to mandatory. Despite having the advantage of being thorough, and of helping the UK build a reputation as a major competition authority, this approach lacks feasibility. Conversely, the government could allocate its resources more selectively, prioritising larger, significant cases. This would prevent the CMA from pointlessly echoing the Commission, especially given that the Commission’s remedy package might often address the UK’s theory of harm. Individual cases could otherwise suffer: “tackling multi-jurisdictional, complex cartel cases is demanding work”¹³, and not suited for an under-resourced authority. This is particularly true given that we can no longer take advantage of the information and evidence sharing powers between the CMA and the Commission.¹⁴

In light of this, the UK might adopt several solutions. First, the CMA could establish a ‘sifting’ system, investigating only cases where the parties concerned are of particular UK significance, in terms of either turnover or market presence. Second, more work could be outsourced to concurrent regulators. These bodies currently have parallel competition powers, but expanding their role could give them a “greater scope to set and pursue their own enforcement priorities, and play a more active role in the regulation of their markets”.¹⁵ For example, the Financial Conduct Authority, which already deals effectively with market abuse, might be well placed to consider cartels. Third, a shift could be made towards partial self-assessment in the merger control regime.¹⁶ In addition, preventative guidance and clear regulations will become more important than ever to maximise resources: as the government identified in a policy paper of November 2015, “enforcement action is a last resort and regulators should start by helping businesses do the right thing”.¹⁷ Finally, it would be advisable for the UK to codify a new provision for information-sharing with the Commission (and other national competition authorities). There have already been indications that the UK will lose the benefit of international evidence-sharing after Brexit, putting UK investigators at a serious disadvantage.¹⁸ The UK already has effective information-sharing arrangements with the USA that could be replicated.¹⁹ Alternatively, it could go further and codify parts of Regulation 1/2003 in order to guarantee the continued benefits of the special information and evidence-sharing relationship it enjoys with the Commission.

Changes to our competition regime might also affect the longer-term prospects of the British economy and Britain’s international legal reputation. In order to maintain its position as an investment hub despite Brexit, the UK must be proactively internationalist and competitive. However, the current government has indicated a shift towards protectionism: Theresa May has lamented foreign takeovers and advocated a need to protect important British industries, whilst Philip Hammond has criticised

¹³ *Ibid.*

¹⁴ UK law does not contain any provision enabling the *receipt* of information from the Commission, only one that enables us to offer information (Part 9, Enterprise Act 2002).

¹⁵ N. Querée, ‘Rip it up and start again: Cartel regulation post-Brexit’, p. 23.

¹⁶ P. Johnson, ‘Brexit: the implications for EU and UK merger control’, p. 17.

¹⁷ HM Treasury, ‘A better deal: boosting competition to bring down bills for families and firms’, p. 9.

¹⁸ Minister Jesse Norman suggested that after Brexit, the UK will no longer benefit from a 1999 agreement between the EU and Canada that allowed evidence sharing in international cartel cases. [<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xi/7105.htm>]

¹⁹ The Marine Hose investigation is a good example of where the UK and USA have effectively cooperated to share evidence.

public procurement and State aid law. Although it is doubtful whether the government will commit to this policy (the takeover of ARM by Japanese firm SoftBank might suggest its approach is inconsistent²⁰), the dangers of a parochial industrial strategy should be noted. The CMA has issued a critical paper warning of the dangers of a widened public interest test.²¹ It emphasises that our system should be one of “comfort and predictability”, which relies on an objective, competition-based analysis (in line with the EU and our biggest trading partners, including the US, Canada and Australia). The current public interests test already allows for the extension of the grounds for intervention, albeit with appropriate safeguards in place.²² A public interest test incorporating generic social or political considerations may become a catch-all exemption, or in the very least could generate major uncertainty by rendering the test subjective. In addition, it would remove transparency from the regime: the politicisation of merger control could be perceived as allowing political lobbyists to affect decisions.

In terms of State aid and public procurement, it should first be noted that the UK is still limited by the World Trade Organisation’s subsidies and countervailing measures regime. However, change even within the parameters of this regime may be inadvisable. Championing individual firms or industries could distance the UK from international standards and provoke other nations to take similar protectionist measures. It may also deter investors, particularly given that the “independence and professionalism” of the UK competition regime has been cited by the Secretary of State as a reason for investor confidence.²³ Even if the government refrains from politicising competition law, it should proactively take measures to protect the UK’s position as a leading forum for competition disputes. The UK’s role as an international court will perhaps inevitably shrink: for example, much concern has been voiced about how the UK will maintain its position as the choice court for private damages claims after Brexit. However, if the government takes a pragmatic approach, concedes compliance with EU law when negotiating trade agreements, and retains the majority of the provisions of the Damages Directive²⁴, then claimants may still be both able and willing to turn to the UK judiciary. Certainly, our courts will not lose their expertise overnight, and will continue to attract claimants if the issue of jurisdiction is handled carefully. The UK pursuing its own national competition policies could destroy this possibility.

The dearth of Brexiteers amongst competition lawyers suggests the inseparability of the field from the EU. However, Brexit does not have to mark the end of the UK’s prominent role in global competition policy, provided the government is realistic when considering any changes it might make. There is a temptation to use Brexit as an opportunity to fix every aspect of competition law that UK practitioners resent, or to nationalise and politicise our policies. This would be misguided. In the decade between 1995 and 2005, an improved and increasingly globalised competition policy is estimated to have accounted for 20 per cent of industry productivity growth in the UK.²⁵ To prevent regression, the UK should make a concerted effort to keep its regime in line with the EU. This essay has argued that a diverging competition law regime would build resentment amongst burdened businesses, create legal

²⁰ C. Rhodes, ‘Industrial Strategy’, House of Commons Briefing Paper No. 07682 (14 October 2016), p. 8.

²¹ ‘Submission from the Competition and Markets Authority to the Business, Innovation and Skills Committee’s inquiry into the Government’s industrial strategy’ (28 September 2016).

²² The extension of the public interests test must receive parliamentary approval through the affirmative procedure.

²³ BIS, ‘Options to Refine the UK Competition Regime: a consultation’ (May 2016), p. 4.

²⁴ Directive 2014/104/EU.

²⁵ HM Treasury, ‘A better deal: boosting competition to bring down bills for families and firms’, p. 8.

uncertainty, drain government resources, and contribute to the longer-term economic and legal decline of the UK. Therefore, the changes that should be made to UK competition law and its enforcement are those changes required to ensure the continued alignment of our competition policies and the continued cooperation of our authorities. At least in the realm of competition law, Hard Brexit should not mean hard-line change.

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Bibliography

'We can make Britain a country that works for everyone', a transcript of Theresa May's speech in Birmingham (11 July 2016): <http://www.wlrk.com/docs/TheresaMayJuly11Speech.pdf>

'Philip Hammond questioned on priorities at Chancellor':
<http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2015/chancellor-of-the-exchequer-evidence-16-17/>.

Competition Law Journal: Brexit Special Online Edition (14 July 2006):
http://www.jordanpublishing.co.uk/system/froala_assets/documents/969/CLJ_2016_BrexitSpecial.pdf

M. Herron, S. Long and Matthew O'Regan, 'Brexit? Divergence and convergence in UK and EU competition law', pp. 1-3.

A. Howard, 'Brexit: exit stage left for competition damages?', pp. 4-9.

P. Johnson, 'Brexit: the implications for EU and UK merger control', pp. 10-18.

N. Querée, 'Rip it up and start again: Cartel regulation post-Brexit', pp. 19-24.

Department for Business, Innovation & Skills, 'Options to Refine the UK Competition Regime: a consultation' (May 2016):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525462/bis-16-253-options-to-refine-competition-regime.pdf

HM Treasury, 'A better deal: boosting competition to bring down bills for families and firms' (November 2015):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480797/a_better_deal_for_families_and_firms_print.pdf

National Audit Office Report, 'The UK competition regime' (5 February 2016):
<https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf>

Brexit Competition Law Working Group Issues Paper (October 2016): <http://www.bclwg.org/wp-content/uploads/2016/10/BCLWG-Issues-Paper-FINAL.pdf>

Select Committee Publications, 'EU/Canada co-operation in competition law enforcement':
<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xi/7105.htm>

C. Rhodes, 'Industrial Strategy', House of Commons Briefing Paper No. 07682 (14 October 2016):
<http://researchbriefings.files.parliament.uk/documents/CBP-7682/CBP-7682.pdf>

Submission from the Competition and Markets Authority to the Business, Innovation and Skills Committee's inquiry into the Government's industrial strategy (28 September 2016):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561718/cma-submission-to-bis-select-committee-on-industrial-policy.pdf

Study by UNCTAD secretariat, 'The relationship between competition and industrial policies in promoting economic development' (July 2009): http://unctad.org/en/docs/ciclpd3_en.pdf