

The Implications of Brexit for Competition Law – An Irish Perspective

Dr Vincent Power*

This paper examines, from an Irish perspective, the implications of Brexit on competition law. The paper highlights that given the importance of the UK for Irish trade, in the absence of special arrangements, there would be fewer Irish cases which would trigger the requisite "effect on trade between Member States" test and thereby not be subject to EU competition law (e.g., the Magill litigation). Equally, fewer Irish-originating cases would have sufficient EU turnover (because UK turnover would ordinarily no longer qualify under the Merger Control Regulation as EU turnover) and therefore fewer Irish deals would benefit from the EU's regulation and one-stop shop. The paper also covers issues such as legal professional privilege, private enforcement, immunity as well as the growing divergence between UK and Irish competition law (which are already different but which will diverge even further).

Introduction

If Brexit occurs then one of the many areas of law to be affected would be competition law¹ at both the European Union ('EU') and Member State² levels. There is an increasing level of discussion of the impact of Brexit on competition law as far as the UK is concerned³ but there has been very little discussion of Brexit's impact on competition law from an Irish perspective.⁴ It is the purpose of this short paper to consider, through an Irish lens, the impact of Brexit on competition law.

As both Brexit and EU competition law are topics well-known to the readership of this journal, it is not proposed to dwell on explaining or exploring those two topics but rather to concentrate immediately on the implications of Brexit for competition law from an Irish perspective.

More than many other areas of law, the substantive competition laws of the UK and Ireland have been intimately intertwined with the substantive competition law of the EU.⁵ It is therefore inevitable that the

* Partner, A&L Goodbody. BCL (UCC) (College Scholar), LLM (Cambridge) (Evan Lewis Thomas Student), PhD (Cambridge). Adjunct Professor of Law, UCC. Visiting Professor of European Union Law, Schulich School of Law, Dalhousie University, Canada.

¹ This paper concentrates on the impact of Brexit on competition law. The impact on competitiveness (a distinct but related topic) could well be significant in Ireland, the UK, other Member States and the EU generally but that is more relevant to a paper on economics than a paper on law.

² In this paper, the term 'Member State' means a State which is a member of the EU.

³ See, eg, Roth, 'Competition Law and Brexit: The Challenges Ahead' (2017) 16(1) *Competition Law Journal* 5 and Whish, 'Brexit and Competition Policy' (2016) 7 *Journal of European Competition Law and Practice* 297. See also the Conclusions and Recommendations of the Brexit Competition Law Working Group ('BCLWG') published in July 2017: <<http://www.bclwg.org/wp-content/uploads/2017/07/BCLWG-Conclusions-and-Recommendations-Final.pdf>> and the related papers on <<http://www.bclwg.org>>. The British Institute for International and Comparative Law has also published a useful set of 'frequently asked questions' on 'Brexit and Competition Law': <https://www.biicl.org/documents/1581_faq_-_competition_law_and_brexit.pdf?showdocument=1>. See also a range of papers presented at the 10th Junior Competition Conference and published at (2016) 15(3) *Competition Law Journal* 125.

⁴ Eg, see Power, 'Competition Law Post-Brexit' (2016) 23(7) *Commercial Law Practitioner* 193.

⁵ Eg, see the adoption by Ireland and the UK of substantive competition rules relating to anti-competitive arrangements and abuse of dominance which are modelled on the EU substantive competition rules on the same arrangements and practices (see, in particular, sections 4 and 5 (respectively) of both the Competition Act 1991 (the '1991 Act' (now repealed)) and the Competition Act 2002 (the '2002 Act') as well as the adoption by the UK of substantive competition rules for anti-competitive arrangements and abuse of dominance in chapters I and II (respectively) of the UK's Competition Act 1998 (the '1998 Act')). Indeed, the UK enacted section 60 of the 1998 Act to minimise inconsistency between UK and EU competition laws; and while there is no such explicit provision in Irish law, the same principle applies in Ireland by virtue of the Doctrine of the Supremacy of EU law (where it applies) but also factors such as the Long Title to the 1991 and 2002 Acts as well as the practice of the Competition Authority (now replaced by the Competition and Consumer Protection Commission ('CCPC')) and the CCPC as well as the Irish courts.

decoupling of EU and UK competition law (by virtue of Brexit) will have an impact not only on UK competition law but also on Irish competition law.

Post-Brexit, there would still be UK domestic competition laws covering areas such as anti-competitive arrangements, abuse of dominance and merger control.⁶ However, post-Brexit, UK competition law will not be as closely aligned or intertwined with EU competition law as it is now. Indeed, whatever overlap or comparability which exists between UK and Irish competition law now will inevitably be reduced post-Brexit because the UK is taking a different direction in the 'fork in the road' which Brexit represents.⁷

The specific consequences of Brexit for competition law and Ireland will depend very much on the outcome of the Brexit negotiations. For example, if the UK were to remain a member of the European Economic Area ('EEA') (which is currently unlikely⁸ but these things can change) then the competition rules in the UK and the EU/EEA would remain similar in substance but not in terms of institutional enforcement. Assuming that the UK does not remain a member of the EEA (currently, a more likely outcome) then everything would depend on the exact relationship which is agreed (if any) between the EU and the UK for the post-Brexit relationship. If nothing is agreed to legislate for the post-Brexit situation then post-Brexit UK competition law would be as foreign to EU and Irish competition law as the competition law of a third country is today. Indeed, if there are no arrangements between the UK and the EU in regard to competition law then UK competition law would be *more* foreign to, and

In the area of merger control, the test used by Ireland and the UK (namely, the 'substantial lessening of competition' test) is comparable to the test used by the EU (namely, the significant impediment to effective competition test).

While the procedural rules differ between the EU, on the one hand, and the UK and Ireland, on the other hand, there has been some alignment between the regimes including, for example, the abolition of individual notifications in respect of non-merger/non-concentration arrangements at the EU, Irish and UK levels. Equally, the Irish and UK competition agencies have been involved in the European Competition Network ('ECN') but each of the Irish and UK agencies (particularly the Irish one) differs quite substantially from the European Commission.

⁶ Just as (a) there was competition law (albeit in a less sophisticated form) in the UK before the UK's accession to the then European Communities on 1 January 1973 and (b) there are competition law regimes which are comparable to (but not identical with) the EU competition regime in around 100 States worldwide even though those states are not EU Member States.

⁷ Even if the post-Brexit UK were to adopt every single decision and policy which the EU were to adopt after the UK leaves the EU (which is very unlikely), there would still be delays and digressions as well as differences in adjudication and advice (eg, the Court of Justice of the European Union ('CJEU') would not be involved in, for example, preliminary references from UK courts or tribunals under Article 267 of the TFEU).

⁸ Speaking in Florence on 22 September 2017, UK Prime Minister Theresa May MP said:

[s]o the question for us now in building a new economic partnership is not how we bring our rules and regulations closer together, but what we do when one of us wants to make changes. One way of approaching this question is to put forward a stark and unimaginative choice between two models: either something based on European Economic Area membership; or a traditional Free Trade Agreement, such as that the EU has recently negotiated with Canada. I don't believe either of these options would be best for the UK or best for the European Union. European Economic Area membership would mean the UK having to adopt at home - automatically and in their entirety - new EU rules. Rules over which, in future, we will have little influence and no vote. Such a loss of democratic control could not work for the British people. I fear it would inevitably lead to friction and then a damaging re-opening of the nature of our relationship in the near future: the very last thing that anyone on either side of the Channel wants.

<<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>>.

separated (or even isolated) from, EU competition law than US,⁹ Canadian¹⁰ or Swiss¹¹ competition law is today because each of those three jurisdictions has co-operation agreements with the EU.¹² Presumably, there will be (although it should take some time¹³) co-operation agreements and international agreements between the EU and the UK but, in the absence of such arrangements, UK competition law would be fundamentally foreign and unconnected with the EU and Irish competition law regimes.¹⁴

Post-Brexit, there will be variations, in terms of different areas of competition law, between (a) EU law (and hence Irish law) and (b) UK law. It is likely that there would still be, post-Brexit, national competition laws in the UK relating to anti-competitive arrangements, abuse of dominance and merger control with those laws being comparable to (but not identical to) the laws of the EU. However, it is also unlikely, unless something is agreed specifically,¹⁵ that there will be UK rules on State aid¹⁶ or that the UK would benefit from the EU's Merger Control Regulation ('MCR').¹⁷

Similarly, it is quite likely that there will be a greater and growing divergence over time between EU and UK competition law irrespective of how much overlap there is at the moment when the UK leaves the EU.¹⁸ This diversity already takes two forms - institutional differences and substantive differences – and it is likely that these differences will grow rather than diminish. Indeed, a third difference, relating to competition policy (and not just competition law), could also emerge between the EU and the UK; for example, the UK could introduce somewhat protectionist policy-based rules rather than rely on a pure

⁹ See, eg, (a) the 1991 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America and (b) the 1998 Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (both are available at <<http://ec.europa.eu/competition/international/bilateral/index.html>>). For further information, see <<http://ec.europa.eu/competition/international/bilateral/usa.html>>.

¹⁰ See, eg, (a) the 1976 Framework Agreement for commercial and economic cooperation between the EU and Canada and (b) the 1999 Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (both are available at <<http://ec.europa.eu/competition/international/bilateral/index.html>>). For further information, see <<http://ec.europa.eu/competition/international/bilateral/canada.html>>.

¹¹ See, eg, (a) the 1972 Agreement between the European Economic Community and the Swiss Confederation and (b) the 2014 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (both are available at <<http://ec.europa.eu/competition/international/bilateral/index.html>>). For further information, see <<http://ec.europa.eu/competition/international/bilateral/switzerland.html>>.

¹² For details of the EU cooperation agreements with various jurisdictions around the world, see <<http://ec.europa.eu/competition/international/bilateral/index.html>>.

¹³ Presumably, competition law is not a top priority in the current Brexit negotiations but it would be relatively straightforward to draft such arrangements given the availability, as precedents, of (a) 'dedicated agreements' on competition co-operation and (b) the competition provisions in more general agreements (see, eg, <<http://ec.europa.eu/competition/international/bilateral/index.html>>).

¹⁴ Eg, there would be a reduction post-Brexit in the regular contact between Irish and UK national competition agency officials by virtue of the ECN.

¹⁵ As in, for example, the 2134-page EU-Ukraine Association Agreement (OJ L 161/3, 29.5.2014 and available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.161.01.0003.01.ENG&toc=OJ:L:2014:161:TOC>). The relevant competition provisions are available at <http://ec.europa.eu/competition/international/bilateral/ukraine_eu_2014.pdf>.

¹⁶ It is useful to consider the State aid provisions of the EU-Ukraine Association Agreement (ie, Arts.262-267) as they might provide a possible (but imperfect and incomplete) model for an EU-UK agreement relating to State aid.

¹⁷ Ie, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24/1, 29.01.2004 and available at <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0139>>).

¹⁸ There is a certain parallel which could be drawn between, on the one hand, the laws of the UK and the EU post-Brexit and the laws of the UK and the Irish Free State in 1922 when the latter became independent of the UK: the laws could start out being the same or very similar but, over time, the divergences will emerge.

competition-based merger control regime. There could even be rules preventing take-overs of UK businesses by foreigners or State enterprises.¹⁹

It is thus impossible to be precise at this stage about what will be all the implications of Brexit for competition law in Ireland because the exact terms of the UK's exit from the EU and, more importantly, the precise terms of the post-Brexit relationship have not yet been identified, let alone agreed. Despite this element of uncertainty, it is prudent to consider the implications of Brexit for competition law from an Irish perspective at this stage because it helps to understand what the future could look like and how it could be shaped by Ireland in the Brexit negotiations.

It is proposed to consider the issue from the perspective of the following possible consequences:

- (a) potential reduction in the number of EU competition law cases relating to Ireland because of a reduced number of Irish cases triggering the 'Effect on Trade between Member States' test because the UK would no longer be an EU Member State;
- (b) the potential reduction in the number of MCR cases relating to Ireland because UK turnover would no longer constitute EU turnover;
- (c) the change in the arena of competition being reviewed;
- (d) the increased number of agencies involved in competition cases relating to Ireland and the UK;
- (e) the different timelines involved in merger control review in cases relating to Ireland and the UK;
- (f) the possibility of a gap in State aid law control if the UK is not subject to a post-Brexit State aid regime;
- (g) the UK would no longer be involved in the European Competition Network;
- (h) full leniency applications may have to be made to the UK's CMA despite a full leniency application having been made to the European Commission;
- (i) reduced possibility of having cross-border assisted inspections/dawn raids;
- (j) potential increase in the number of follow-on damages actions being heard by the Irish courts;
- (k) there is unlikely to be much, if any, citation by the Irish courts of the jurisprudence on competition law adopted by the UK courts;
- (l) there will be increased divergence of competition laws;
- (m) increased workload on the Irish competition institutional machinery;
- (n) possible reduced redress for Irish victims of breaches of competition law because the UK courts may not be as readily available;
- (o) increased complication in regard to criminal sanctions;
- (p) potential increased compliance costs for undertakings; and
- (q) increased migration of competition lawyers, for registration purposes, to Ireland.

¹⁹ Such a regime is not far-fetched because various jurisdictions (eg, the EU, the US, Canada and Australia) have rules involving protectionism to a greater or lesser extent. Moreover, the so-called Lilley Doctrine in the UK was concerned with preventing 'back-door' nationalisation of UK privatised enterprise being bought by foreign State-owned entities.

Obviously, there will be other effects too including, not least, transactions and arrangements which will be attempted to address or circumvent the implications of Brexit and which will therefore keep competition agencies busy.²⁰ Ironically, these agencies could also have some spare capacity because some mergers, acquisitions and investment deals will not proceed at all because of the uncertainty surrounding Brexit. It is clear that Brexit has such a disruptive effect on so many aspects of business life that it will also impact on the nature²¹ and number of cases which competition agencies in Ireland, the UK, the EU and elsewhere will have to handle in the run-up to, and post, Brexit.

Potential Reduction in the Number of EU Competition Law Cases relating to Ireland because of a Reduced Number of Irish Cases triggering the ‘Effect on Trade between Member States’ test because the UK would no longer be an EU Member State

It is trite but true that a prerequisite for the application of EU competition law is that there is an effect on trade between EU Member States.²² If there is no such effect on trade then EU competition law is simply inapplicable. For example, post-Brexit, an effect on trade entirely in, say, Wales without any effect on trade between Member States would not be subject to the EU competition law regime because there would be no effect on trade between Member States.²³

In a great many EU competition law cases relating to Ireland to date, the requisite effect on trade between Member States was satisfied by the effect on trade between Ireland and, specifically, the UK (as opposed to between Ireland and any other Member State). One need only think of *Magill*²⁴ and the trade in television listings magazines in Ireland and the UK. Equally, cases such as *B&I Line (Holyhead I) / Sealink*,²⁵ *Sea Containers (Holyhead II)/Sealink*²⁶ and *British Midland/Aer Lingus*²⁷ are all cases where the requisite effect on trade between Member States appeared²⁸ to be satisfied exclusively by the trade between Ireland and the UK. There have also been some (but fewer in number) Irish-related EU competition law cases which have not depended on the effect on trade in the UK; one need only consider, for example, *Irish Continental Group plc/Chambre de Commerce et Industries de Morlaix (Roscoff)*²⁹ but they are relatively rare. It is clear that a significant number – very probably the majority – of EU competition law cases relating to Ireland have satisfied the requirement of having an effect on trade between Member States by virtue of the level of trade between Ireland and the UK; indeed, many of those cases would not have otherwise satisfied the requirement of having an effect on trade between Member States but for the trade with the UK. This is consistent with the pattern of trade between Ireland

²⁰ Eg, there could be (a) acquisitions by EU undertakings of businesses in the UK or (b) acquisitions of businesses in the UK by EU undertakings. Both of these type of acquisitions could be aimed to minimise the disruption of Brexit (eg, by having depots inside the ‘other’ territory and thereby not to be as badly affected by border delays).

²¹ Eg, it is unlikely that the UK competition agency and courts will be able to benefit from the EU handling certain cases and, instead, there will have to be parallel application of UK competition law by the UK authorities which means that there will be an increase in the workload of the UK competition regime.

²² The effect on non-Member States is not sufficient on its own to trigger the application of EU competition law.

²³ An exception however would be an effect on trade through a Welsh port where there was traffic (eg, commercial traffic or haulage) passing between Ireland and the rest of the EU through that Welsh port.

²⁴ See, eg, in the CJEU: C-241/91 P and C-242/91 P *Radio Telefis Éireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743, ECLI:EU:C:1995:98.

²⁵ Comm.Dec. of 11 June 1992 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/34.174 – *Sealink / B&I (Holyhead) – Interim measures*) (available at <http://ec.europa.eu/competition/antitrust/cases/dec_docs/34174/34174_2_2.pdf> and [1992] 5 CMLR 255).

²⁶ Comm.Dec.94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - *Sea Containers v Stena Sealink - Interim measures*) (available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31994D0019>>).

²⁷ Comm.Dec.92/213 of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, *British Midland v Aer Lingus*) (available at <<http://eur-lex.europa.eu/legal-content/HR/ALL/?uri=CELEX:31992D0213>>).

²⁸ The European Commission might still have found an effect where there was sufficient trade passing through the UK to another Member State.

²⁹ [1995] 5 CMLR 177.

and the UK generally: it is well-known that the UK is, in reality, Ireland's biggest export market while Ireland is also a very significant trading partner for the UK.

If the final Brexit arrangements result in the UK not being subject to the EU's competition law regime then, all things being equal, there ought to be relatively fewer EU competition law cases relating to Ireland because trade with the UK (on its own) would not count as having an effect on trade between Member States because the UK would no longer be a Member State. There would also be a fall in the number of UK-related EU competition cases where those cases relate solely to trade between the UK and Ireland.

Over time, if trade between Ireland and the UK becomes more difficult and there is a diversion of Irish trade to elsewhere in the EU then the number of EU competition law cases relating to Ireland should increase again³⁰ but, in the short term, there could be a reduction in the number of EU-related cases. This means that there ought to be a step up in activity by the Irish competition agency and, indeed, by the UK competition agency because otherwise cases which might have been addressed currently by the EU agency would otherwise be left unaddressed if the national agencies did not address the deficit.

Potential Reduction in the Number of EU Merger Control Regulation Cases relating to Ireland because UK Turnover would no longer constitute EU Turnover for the purposes of the Regulation

Roth has commented that the 'most immediate impact [of Brexit on competition law] is likely to come in [the area of] merger control'³¹ Usually, a prerequisite for the application of EU's MCR is that the undertakings involved in the transaction have a certain minimum level of turnover in the EU as a whole and in a number of individual Member States. If the turnover thresholds set out in Article 1 of the MCR are not met then usually that the MCR is simply not applicable.

Of the Irish-related MCR cases dealt with by the European Commission under the MCR, it is very likely that the vast majority of those cases met the thresholds for the application of the MCR because of turnover in the UK of the undertakings involved in the transactions. Examples would include cases such as *McKesson / UDG Healthcare (Pharmaceutical Wholesale and Associated Businesses)*³² and *Centrica/Bord Gáis Energy*.³³ Obviously, there are some cases connected with Ireland which were not dependent on turnover in the UK. Nonetheless, it is clear that if the UK leaves the EU and there is no special arrangement then the number of Irish-related concentrations which would qualify for consideration under the MCR would reduce because the UK turnover would no longer constitute EU turnover. So again, it is likely, all things being equal, that there would be a reduction in the number of MCR cases relating to Ireland. While the reduction would be small in absolute terms, as the number of MCR cases directly related to Ireland has always been small, the fall-off could be significant in relative terms.

Does this matter? It does in a number of ways. First, instead of the 'one-stop shop' across 28 Member States which the MCR currently offers,³⁴ one could anticipate that businesses would have to make, in certain circumstances, merger control notifications in the UK as well as the EU when only one notification would be needed pre-Brexit. Secondly, the procedural and timetable regimes would be different between the UK and the EU thereby leading to uncertainty, doubt and cost. Thirdly, the UK could well introduce additional criteria which could be somewhat protectionist or policy-driven with the result that, potentially at least, a transaction could be approved at the EU level but blocked at the UK

³⁰ This is because there would be an increase in trade between Ireland and, say, France, Germany, Poland, Spain and so on with the result that these cases would then satisfy the requirement of an effect on trade between Member States.

³¹ Roth, 'Competition Law and Brexit: The Challenges Ahead' (2017) 16 *Competition Law Journal* 5, 6.

³² M.7818, 3 March 2016, <http://ec.europa.eu/competition/mergers/cases/decisions/m7818_331_3.pdf>.

³³ M.7228, 5 May 2014,

<http://ec.europa.eu/competition/mergers/cases/decisions/m7228_20140613_20310_3784546_EN.pdf>.

³⁴ See, eg, Reg.139/2004, Article 21(3).

level (ie, in the same manner as the *GE-Honeywell*³⁵ scenario where a transaction between two US corporations was approved at the US level but prohibited at the EU level with the result that the transaction did not proceed anywhere).

It has been observed by the BCLWG that:

particularly in the context of 'mergers, Brexit need have no direct effect on substantive UK law. The existing UK merger provisions are substantially the same as those in the EU, and are fit for purpose for assessing mergers that would have been considered by the European Commission...absent Brexit. We recommend that the SLC test³⁶ should be retained as the substantive standard to be applied by the [Competition and Markets Authority]; we also recommend that no change be made to the approach to public interest considerations set out in [the Enterprise Act 2002 (the 'EA 2002 ')]. Further, we see no reason to recommend any change to the substantive test for market investigation references in [the EA 2002].³⁷

This is however a finely crafted passage expressing noble aspirations which deserves closer scrutiny because it is quite possible that the UK could introduce public interest criteria which would weaken or even undermine the competition focus of the current regime. It would be unwise to forget that the move toward Brexitism is essentially a move towards protectionism and therefore the admirable logic expressed by the BCLWG could be trumped by politics, pragmatism and protectionism.

Change in the Arena of Competition being Reviewed

If the UK leaves the EU then the European Commission will no longer be considering the potential impact of a transaction on competition in the UK as such. Thus, the typical cross-border case involving Ireland will usually no longer involve an analysis of the UK dimension as such.

Increased Number of Agencies Involved

Brexit could mean that transactions in the UK could be subject to scrutiny not only by the European Commission (as would be the case where there is an effect on trade in the EU) but, additionally, the UK's Competition and Markets Authority. At present, many such cases would be dealt with solely by the European Commission and would not involve the UK competition agency as well. The involvement of the UK, alongside the EU, will increase compliance costs for businesses because they will have to deal with more agencies than the 'one-stop shop' of the European Commission with the possibility that there could be divergent analyses and results. Indeed, even if the European Commission is not involved, it is possible that national competition agencies ('NCAs') within the European Competition Network ('ECN') might allocate a case (or refrain from acting) because of the 'centre of gravity' of the case favouring one EU NCA over another but the UK would, post-Brexit, not be bound by (or, perhaps, even influenced by) the ECN system of allocation so the UK might well decide to act as well as a Member State NCA.

Different Timelines Involved in Merger Control Review

There are already different timelines for national merger review in the UK and Ireland. This does not matter too much because many of the larger transactions are notified to the European Commission rather being notified to the Irish and UK national competition agencies so there is a one-stop shop regime in operation. However, with the removal of the UK turnover from the MCR turnover calculation,

³⁵ M.2220, 3 July 2001, <http://ec.europa.eu/competition/mergers/cases/decisions/m2220_20010703_610_en.pdf>.

³⁶ Eg, ie, the 'substantial lessening competition' test.

³⁷ *GE-Honeywell* decision (n 35), para 1.9.

there will be more national notifications. In Ireland, the timelines for Phases 1 and 2 are (very broadly) up to 30 and 120 working days from the date of notification (subject to the CCPC stopping the clock) but in the UK, the timelines for Phases 1 and 2 are (very broadly) 40 working days and 24 weeks from the date of notification. This gap is currently alleviated where the transaction is notified to the European Commission under the MCR but post-Brexit, there will be proportionately fewer notifications under the MCR and therefore the likelihood of differences in approach is increased. This means that planning and executing mergers, acquisitions and certain joint ventures will be more difficult.

The Possibility of a Gap in State Aid Law Control if the UK is not subject to a Post-Brexit State Aid Regime

While State aid law is a creation and creature of EU law rather than Member State law, it is an important part of the competition law landscape generally. The UK (like Ireland) does not have domestic/national competition law rules relating to State aid. Instead, the State aid rules operate at the EU level.³⁸ This means that if the UK leaves the EU then there would be (in the absence of an agreement to the contrary) no State aid law controlling the provision of State aid by the UK – this is different from the EU rules on anti-competitive arrangements, abuse of dominance and mergers which would no longer apply but have, at least, some national comparators in domestic UK law.

The disappearance of State aid controls in the UK³⁹ could have profound implications for the Irish economy. If a business in Ireland were to be faced with competition from a French, German, Spanish or other EU Member State competitor then there would at least be some State aid controls on the non-Irish competitor but post-Brexit (in the absence of an agreement on the point), the UK could 'turbo-charge' their favourite businesses by way of State aid which would have been illegal pre-Brexit.⁴⁰ It is submitted that Ireland should argue strongly – because it is in the interests of all remaining Member States as well as their businesses and consumers - that there should be State aid rules put in place to deal with the State aid situation post-Brexit.

The UK would no Longer be involved in the European Competition Network

Obviously, unless there is a special arrangement to the contrary (and it would appear unlikely at present), the UK (including the CMA) would no longer be involved in the ECN. There is no doubt that Ireland (including the CCPC) would be well able to argue its corner in the ECN but the fact that there would no longer be the Common Law and significant UK in attendance could have a significant impact.

Full Leniency Applications may have to be made to the UK's CMA despite a Full Leniency Application having been made to the European Commission

At present, EU Member State NCAs usually accept a summary leniency application where a full application is made to the European Commission.⁴¹ This means that an Irish leniency applicant would have to file a full leniency application to the UK's CMA notwithstanding that a full one has been filed with the European Commission and a summary one would suffice for the CCPC.

³⁸ See, eg, Treaty on the Functioning of the European Union ('TFEU'), Arts.107-109 in particular.

³⁹ See, eg, Schonberg, 'Continuity or Change? State aid control in a post-Brexit United Kingdom' (2017) 16(1) *Competition Law Journal* 47.

⁴⁰ There may be alternative controls on such State aid (eg, the World Trade Organisation) but such other controls would not be as effective as those contained in Arts.107-109 of the TFEU and the EU State aid regime generally.

⁴¹ This has been the case since the adoption of the ECN model leniency programme: see ECN Model Leniency Programme (2012), paras.2 and 24 in particular (available at <http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf>).

Reduced Possibility of having Cross-Border Assisted Inspections/Dawn Raids

Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁴² sets out the general rules on the enforcement of EU competition law. Article 22 of that regulation provides for cross-border inspections (ie, 'dawn raids' in popular parlance) to be conducted out by different EU agencies on behalf of other agencies.⁴³ So, for example, at present the CCPC could assist the CMA by conducting an inspection in Ireland for the benefit of the CMA or, conversely, the CMA could conduct an inspection in the UK on behalf of the CCPC. If the UK leaves the EU then the possibility of such cross-border/cross-agency inspections involving the UK would disappear unless there are alternative arrangements agreed between the UK and the EU.

Potential Increase in the Number of Follow-on Damages Actions being heard by the Irish Courts

It is worth canvassing whether there could be an increase in the number of follow-on damages actions in EU competition cases brought before the Irish courts, instead of the English courts, post-Brexit. Put another way, it is worth discussing whether some of the many follow-on actions which would be ordinarily litigated in London (if Brexit did not happen) would divert to Dublin. Some lawyers have expressed informally a hope that there could be such an increase. In reality, it is somewhat doubtful that there would be such an increase for several reasons.

Even if there is a downturn in the number of follow-on actions being heard by the English courts post-Brexit, there are already well-established forums in the likes of Germany and The Netherlands which have attractive rules and a critical mass of lawyers, economists, experienced plaintiffs and litigation funders. Moreover, there are certain procedural and related advantages with using the Dutch, German and, even post-Brexit, English courts.

The growth in the number of claims being brought before the London courts did not happen by accident. First, it has been recalled, quite rightly, that '[s]uccessive UK governments have sought to make it easier for private undertakings to bring actions in UK courts based on competition law infringements.'⁴⁴ It is improbable that an Irish government would do the same – if only to avoid the suggestion that it would be encouraging litigation and enriching lawyers and economists – but one might be surprised because there can be benefits from encouraging such actions.⁴⁵ Secondly, there have been several changes to

⁴² OJ L 1/1, 4.1.2003, available at <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>>.

⁴³ Article 22 ('Investigations by competition authorities of Member States') provides:

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article [101] or Article [102] of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

⁴⁴ BCLWG, para 2.17.

⁴⁵ Eg, BCLWG, para 2.17: '[s]uch actions make it easier for UK consumers and businesses to seek redress for wrongs, and also increase the incentives on companies to comply with the law.'

the substantive and procedural laws in the UK⁴⁶ and rules to enable follow-on actions to be processed more easily in the English courts than would otherwise have been the case otherwise. It would be possible that these changes could also be made in Ireland but the English courts will not give up lightly their cherished position in the national litigation of competition law claims.

This is not to say that the fight to have some litigation diverted from London to Dublin is a forlorn one. It is far from the case. It is yet to be seen how the English courts will be able to accept unquestioningly the finality of a European Commission decision (particularly one upheld by the General Court and the Court of Justice)⁴⁷ without, in effect, being accused of accepting the jurisdiction and decisions of the EU institutions – an issue on which the UK Government has been (relatively) resolute. It would seem paradoxical that the UK will have nothing to do with the jurisprudence of the EU⁴⁸ but then the UK courts would uphold EU law (whether in the form of a European Commission decision or a judgment of the CJEU), without question, in the English courts' handling of competition law claims.

In conclusion, could Ireland end up with some of the private enforcement⁴⁹ litigation which is currently being litigated before the London courts? It is possible that Ireland will succeed in attracting this litigation because it will always be easier (all other things being equal) to engage in private litigation over EU competition law before a court in an EU Member State. However, it will not be easy to divert some of this enormously valuable work to the Irish courts. This is for several reasons including, for example: the benign approach of the English judiciary towards this type of litigation; this type of litigation has been well established in the English courts for many years; several of the issues which arise have now been litigated and settled; there is well-established machinery to deal with such cases; there is experienced and expert personnel who have a track record in such litigation; and, importantly, there is a regime which tolerates and permits litigation funding. Private competition litigation in the UK is seen as an 'export market' and there will be strenuous efforts made to minimise the migration of this case law abroad.

There is unlikely to be much, if any, Citation by the Irish Courts of the Jurisprudence on Competition Law adopted by the UK Courts

Despite the long-established tradition and practice in Ireland of citing, as persuasive authority, the jurisprudence of the English courts, there has been relatively little (indeed, if any) English competition law jurisprudence cited by the Irish courts or competition agencies. This is likely to continue in a post-Brexit environment where the UK regime is no longer coupled with, or based upon, the EU regime so the influence of English jurisprudence is more likely to wane than increase.

More generally, it is notable that section 60 of the UK's 1998 Act provides for consistency between the UK competition rules and CJEU jurisprudence. It is inevitable, if Brexit proceeds in its current form, that this section would be repealed. It would be anathema and contrary to the motives of those in the UK who wish to leave the EU. One could anticipate that Remainers would wish for the provision not to be repealed but to be diluted so that the UK courts would 'have regard to' EU jurisprudence (and not be bound by it) but then why not have a provision to say that the UK courts should 'have regard to' US

⁴⁶ Eg, to address issues such as confining contentious issues, proof and so on.

⁴⁷ See, in particular, sections 47A and 58A of the 1998 Act.

⁴⁸ The BCLWG Final Report asked in para 2.18 'whether, post-Brexit, it will remain possible for claimants to bring follow-on claims that rely on a decision by the EC that Article 101 and/or 102 has been infringed. In our view, such actions should continue to be possible' and then made a recommendation at para 2.19 that:

[t]he most obvious way in which this could be achieved would simply be to retain sections 47A and 58A of the CA98 as currently drafted. These provisions state that parties may bring actions for infringements of Article 101 and/or 102, and that in determining such actions the court or tribunal is bound by any EC infringement decisions that have become final. Maintaining these provisions would help to provide certainty to UK businesses and consumers that the UK courts will continue to offer an effective means for redress for any infringement of the EU competition rules that has harmed them.

⁴⁹ On private enforcement in the UK post-Brexit, see Herron, Long and O'Regan, 'Brexit, Competition Law and Private Enforcement' (2016) 15 *Competition Law Journal* 121.

antitrust law or the competition laws of, say, Australia, Canada and New Zealand? If Brexiteers are to remain faithful to their cause then section 60 will probably be repealed.

There will be Increased Divergence of Competition Laws

If the advocates of Brexit are to achieve their ambitions then there will have to be, by definition, divergences between the laws of the UK and the EU; anything else, would have rendered the entire Brexit exercise futile.

The issue from an Irish perspective is the degree of divergence. Minimising the level of divergence would be in the interests of: (a) undertakings (so as to, for example, reduce compliance costs and uncertainty); (b) competition agencies (so as to, for example, reduce workload); (c) the courts, competition agencies and lawyers (so as to, for example, ensure that there is consistency and precedent available while uncertainty is minimised).

There have been hopes expressed that, for example, attempts would be made to ensure 'that there are no policy gaps' between the EU and the post-Brexit regimes.⁵⁰ This is an admirable aim but, unfortunately, one which is somewhat unrealistic and even perhaps undesirable. While one would want to *minimise* policy gaps, it would be better to recognise that there will be gaps and to work around that reality so as to minimise the impact of the gap. It would be undesirable to align UK and EU competition law entirely because that would mean that EU competition law would have to be reduced to the then lowest common multiple of UK competition law (eg, what would happen to the EU's Internal Market imperative?). It is better to recognise that there will be differences and then minimise the divergence as much as possible.

The level of divergence will not be great at the outset but there will be some divergence. Four arguments demonstrate the point. First, the existing UK legal framework⁵¹ is very comparable to the EU legal regime and, while some aspects of it are likely to be changed, there will still be a great deal of overlap. Secondly, the 'internal market' imperative – so important to EU competition law – will be absent from the UK framework unless the UK remains part of the EU's Internal Market post-Brexit. Thirdly, the more sensible/ ambitious/ interventionist/ cavalier (depending on one's position on the Brexit spectrum) of the European Commission is not always mirrored by the UK courts – for example, the ports of Holyhead, Roscoff and Rødby represented a substantial part of the EU's internal market according to the European Commission but the English courts might not see a comparable port in the same way. Fourthly, the relative freedom which the European Commission enjoys (as policymaker, investigator, inspector and decision-maker as well as being relatively free from interventionist oversight by the CJEU) is not matched in the UK where the UK courts and Competition Appeals Tribunal have not shied away from, on occasion, quashing (even crushing) the decisions of the CMA (and its predecessor). So, it is likely that the UK institutions will be less ambitious and less pervasive than the European Commission.

It is possible that the divergence between EU competition law and UK competition law will not grow as large as it could well do in other areas of law because of the increasing (and continuing) convergence (but not uniformity) in the area of the competition law regimes of different States. Given the international movement towards convergence in competition law, it is now the case that diverse legal systems in different parts of the world often have a common core of competition law. Membership of the EU is obviously not a common factor for all of those States. Instead, learning from international experience as well as the on-going dialogue through bodies such as the International Competition Network ('ICN') as well as the Organisation for Economic Cooperation and Development ('OECD') have meant there is a degree of overlap which is likely to survive post-Brexit because the UK participates in such bodies (and presumably will continue to do so post-Brexit). So, in some ways, the divergence may not be as

⁵⁰ BCLWG Final Report, para1.5.

⁵¹ In particular, the 1998 Act and the 2002 Act. Chapters I and II of the CA 1998 largely reflect the essence of Articles 101 and 102 of the TFEU. The EA 2002 uses the concept of 'substantial lessening of competition' for the review of mergers and acquisitions which is largely comparable to the 'significant impediment of effective competition' test in the EU's MCR.

great as might otherwise be the case without such deep international convergence and co-operation⁵² but there will still be uncertainty. Even if all of EU law had full force on Brexit-Day,⁵³ it is incontrovertible that EU law will change and there will be further divergence from UK law

Increased Workload on the Irish Competition Institutional Machinery

Post-Brexit, it is likely, for the reasons outlined already, that there would be an increase in work for the Irish competition institutional machinery. This additional work is more likely to fall on the CCPC rather than the courts for the reasons outlined above.

In the area of merger control, there will be an increase in the number of notifications to the CCPC which would otherwise have been notified to the European Commission under the Merger Control Regulation. These additional cases which would have, in the absence of Brexit, gone to the European Commission are more likely to be the larger scale and, usually,⁵⁴ more complex transactions which have just missed out on notification to the European Commission because of the fact that the UK turnover no longer qualifies as EU turnover.

Possible Reduced Redress for Irish Victims of Breaches of Competition Law because the UK Courts may not be as Readily Available

At present, Irish-based victims of breaches of competition law occurring in the UK may complain to the European Commission and/or seek redress from the UK's courts. If the UK leaves the EU then the possibility of seeking redress through the UK courts might be reduced but it would certainly not be eliminated.

Increased Complication in regard to Criminal Sanctions

If the European Commission is investigating a matter then typically the Irish and UK competition agencies do not seek to impose their own criminal sanctions. If, however, the UK leaves the EU then the European Commission investigation would become largely irrelevant and it is therefore possible that the UK could seek to apply its own criminal regime⁵⁵ to an arrangement or practice affecting trade in the UK. This means that conduct which might not otherwise attract personal liability for executives (because it would have been covered entirely by the European Commission in respect of the UK and Ireland) could start to attract personal liability for executives by virtue of the application of UK competition law.^{56,57}

Potential Increased Compliance Costs for Undertakings

While there are substantial differences in the way in which the national (or domestic) competition laws of Ireland and the UK operate, there is absolute uniformity in the way in which EU competition law is

⁵² Indeed, those in the UK who are keen to ensure convergence should advocate that the UK would remain active in these international organisations and forums.

⁵³ Perhaps Brexit-Day will become known as B-Day!

⁵⁴ This is not always the case as there might be, for example, a lack of overlap or any potential theory of harm in regard to trade in Ireland in such a case (eg, the *McKesson / UDG Healthcare (Pharmaceutical Wholesale and Associated Businesses)* case cited above).

⁵⁵ See, eg, s 188 of the UK's EA 2002.

⁵⁶ The situation could become very complex because typically information sent cross-border is not usually capable of being used to impose sanctions on individuals in those circumstances (eg, the 2013 EU-Swiss Agreement).

⁵⁷ This is largely because the UK's competition law regime will diverge from the EU model upon which the Irish regime is based.

applied to both the UK and Ireland. Hence, undertakings currently operating in both the UK and Ireland do not incur any additional incremental cost in complying with EU competition law in both jurisdictions. That will continue to be the case because EU competition law will continue to apply to conduct in the UK where there is an effect on trade between Member States but it is very likely that there will be an increased difference between the competition laws of the EU, Ireland and the UK hence leading to increased compliance costs for business.

Increased Migration of Competition Lawyers, for Registration Purposes, to Ireland

Lawyers who are enrolled on a register of lawyers in a Member State have special privileges. In particular, they are able to sign pleadings and appear before the CJEU irrespective of whether they are in-house or external lawyers – this is the so-called ‘rights of audience’. However, external (but not most in-house) lawyers who are enrolled on a Member State roll of lawyers may also give legal advice which is protected by legal professional privilege - this privilege is a right belonging to their clients (not the lawyers) hence clients can waive the privilege but will, more often than not, do whatever they can to protect the privilege. While the right to draft and plead is extremely important for some lawyers, the ability to give legally privileged advice is vital for all lawyers practising in the area of EU competition law.

The advent of Brexit would mean that being a lawyer enrolled only in England and Wales, Scotland or Northern Ireland would not give the lawyer the ability to provide advice which would be regarded as privileged according to EU law because the advice would not be provided by a lawyer enrolled in a Member State. The result has been that a very significant number of lawyers from the UK enrolled (and continue to do so) in Ireland whether as solicitors or barristers.⁵⁸ These lawyers are not relinquishing their enrolment in the UK – which they need to retain so as to benefit from privilege under the laws of the UK – but rather they are taking up the additional qualification in Ireland so as to maximise their chances of being able to give privileged legal advice for the purpose of EU competition law.

The basis of the qualification in Ireland for solicitors from England and Wales is not usually on the basis of the EU mutual recognition of lawyers regime⁵⁹ – which would probably disappear if Brexit were to occur (assuming no special arrangements were concluded between the UK and the EU) – but rather a separate bilateral arrangement between the law societies of, on the one hand, Ireland and, on the other hand, England and Wales.

It will be interesting to see whether the European Commission, the EU's General Court and the CJEU would respect privilege of Irish-enrolled UK lawyers in a post-Brexit environment. The argument in favour of privilege being recognised in a good one: the Law Society of Ireland as well as the Bar Council of Ireland regulate and supervise their members; the persons who have registered in Ireland are independent lawyers; and would have been able to give privileged legal advice but for the fact that the UK would have withdrawn from the EU. However, the argument against privilege being retained is not without merit: the registration in Ireland is for convenience; legal privilege is an extremely important feature of any society and is not upheld in all circumstances (one need only recall the *AM&S*⁶⁰ and *Akzo Nobel*⁶¹ jurisprudence); and anything less than independent advice by a person properly regulated and registered in a Member State would not be treated as privileged; and, so, the argument might run, that there might not be, in a specific case, a ‘genuine link’ between a lawyer in the UK and the Irish regulator. While no view needs to be expressed in this paper at this stage, the question is one which might well

⁵⁸ See, eg, Thompson, ‘Antitrust Lawyers Lead Race to Register in Ireland’, *Financial Times*, 12 July 2017, page 17 which recalls that almost ‘1,000 solicitors in England and Wales have registered in Ireland in the year since the EU referendum, at least 10 times the regular annual number, because they fear losing the rights to represent clients in European courts after Brexit’. Thompson also wrote that most lawyers ‘who had registered [in Ireland] had not set foot in the country.’

⁵⁹ See, eg, <<http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?newlang=en>>.

⁶⁰ Case 155/79 *AM & S Europe Limited v Commission of the European Communities* [1982] ECR 1575, ECLI:EU:C:1982:157.

⁶¹ Case C-550/07 *P Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities* [2010] ECR I-8301, ECLI:EU:C:2010:512.

be tested in appropriate circumstances and it will be interesting to see how the matter is viewed by the EU institutions.

Recommendations for the Irish Government's Negotiations with the UK

Competition law is generally not politically contentious. Instead, it is a practical and relevant issue which should be taken into account in the Brexit negotiations. The UK has stated that 'wherever practical and sensible, the same laws and rules will apply immediately before and after our departure'⁶² which is somewhat comforting but no more than that. If the UK is to achieve the full benefits (as Brexiteers would see it) then there will have to be some divergence between the EU and the UK positions (and hence the Irish and UK positions) otherwise Brexit would have been not only unproductive (in that the rules would remain the same) but counterproductive (in that the UK, being outside the EU, would have less opportunity to influence the rules). The Irish Government should therefore be proactive in addressing competition law in the negotiations. While rules on anti-competitive arrangements and abuse of dominance, it is clear that the position in regard to merger control and State aid need to be addressed more than any other area of competition law.

Conclusions

There is no doubt that if the UK does leave the EU then there will be implications for competition law in Ireland. It would not be the biggest problem which Ireland would face post-Brexit but it is one which ought to be borne in mind and is capable of resolution; in any environment where so little could be capable of resolution, attempts should be made to address this issue at least.

It is not an issue which will be resolved simply or easily. Nor indeed will the issue be resolved quickly. One need only think of the area of cartels which can last for many years and may only be the subject of a decision years later when the facts come to light (eg, through a leniency or immunity application) so there is every possibility that the competition law issue will not be resolved in 2019 (or whenever the UK might leave the EU) but take many years to be finally resolved. For example, although it was anticipated and foreseen – for fifty years – that the Treaty Establishing the European Coal and Steel Community⁶³ ('ECSC') would come to an end (and it did so in a far more harmonious and simpler way than Brexit could ever do so), there were still issues which continued after the ECSC ended.⁶⁴

⁶² Foreword from the Secretary of State for Exiting the European Union to the policy paper entitled *Legislating for the United Kingdom's withdrawal from the European Union* (Updated 15 May 2017), <<https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>>.

⁶³ Available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11951K%2FTXT>> and referred to below as the 'CS' treaty.

⁶⁴ Eg, the CJEU said in Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg SA v European Commission* (C-201/09 P) and *European Commission v ArcelorMittal Luxembourg SA and Others* [2011] ECR I-2239, ECLI:EU:C:2011:190:

62 In paragraphs 63 and 64 of the judgment under appeal, the General Court thus concluded that the continuity of the European Union legal order required the Commission to ensure, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals by virtue of the ECSC Treaty, and that Article 23(2) of Regulation No 1/2003 had therefore to be interpreted as enabling the Commission to penalise after 23 July 2002 agreements between undertakings arrived at in the sectors falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

63 Those findings are not vitiated by any error of law. It follows from the case-law that, in accordance with a principle common to the legal systems of the Member States whose origins may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and that that principle applies to amendments to the primary law of the European Union (...)

There could well be, and is likely to be, an increasing divergence of law, policy and jurisprudence leading to increased uncertainty, divergent outcomes and compliance costs. It is, perhaps in an ironic twist of history, much like the moment when Ireland left the United Kingdom in 1922: the laws of the two jurisdictions were then very largely united and uniform but, over time, they remain somewhat similar but sufficiently different that there are dangers for those who assume they are the same and practise in both jurisdictions as if the rules were the same. To paraphrase and amend the pervasive warning on the London Underground: 'Mind the Gap: It is getting Wider!' The same will probably be said about UK and Irish competition law if the UK does leave the EU.

64 As the Commission rightly observes, there is no indication that the European Union legislature wished it to be possible for concerted practices prohibited under the ECSC Treaty to escape the application of all penalties after that treaty expired (...)

66 In those circumstances, it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the legal order of the European Union if the Commission did not have jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that treaty (...)