Competition Law Post-Brexit?

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Everyone is still analysing the consequences of the vote by the electorate in the UK and Gibraltar on 23 June 2016 to leave the European Union ("EU"). It is premature to be definitive on all the consequences of Brexit or even to predict whether the UK will ultimately leave the EU. Nonetheless, it is important to try to anticipate some of the implications, even in narrow and specific areas. The purpose of this short paper is to consider some of the implications for competition law.[1]

Short-Term Implications

In the short term, until the UK leaves the EU, the EU competition law rules continue to apply in respect of: (a) the UK itself (e.g. the EU's State aid rules[2]); and (b) "undertakings"[3] (of whatever nationality) whose activities have an impact on trade in the EU and the UK. Put simply, it is "business as usual" in that the competition rules remain in place and compliance should be maintained. In the long run, UK undertakings whose activities affect trade in the EU will remain subject to EU competition law so the Brexit dream of ridding UK business from the effects of EU law (and, in this context, EU competition law) is illusory in this context at least.

In reality, there will be a change in the mindset of many of those involved in competition law and policy even before the UK leaves. One could see some executives (particularly those of a Brexit mindset) being less inclined to comply with EU competition law even if the rules remain, as a matter of law, binding on their undertakings. Moreover, as we get closer to the "exit date", there is a possibility that the UK Government and the devolved UK Governments will become more ambitious about devising schemes[4] which would not be compatible with EU State aid law *if* the UK post-Brexit were still bound by EU State aid rules. Equally, plaintiffs could be less inclined to institute long-running competition litigation (e.g. damages actions) before the UK courts if there is doubt about whether EU competition law (and, in particular, European Commission decisions) will continue to have direct effect in UK law.

In the short term and over the medium term, the UK will be considering its "shopping list" for the negotiations with the EU and the remaining EU Member States. If the UK maintains its desire to have access to the EU's internal market then it will almost inevitably have to accept some form of competition law regime because it would be paradoxical to allow the UK to have access to the internal market but be able to frustrate the operation of such a market by having private arrangements or practices (e.g. cartels and abuse of dominance) or public practices (e.g. State aid) which would undermine the aims and operation of the internal market but have no mechanism to control such anti-competitive behaviour.[5] So, one should assume that the UK would remain subject to some form of EU competition law regime post-Brexit but it is useful to consider how matters might evolve if it was not subject to EU competition law in one form or another.

Longer Term

The longer-term implications will only become clearer once the exact terms of any post-Brexit arrangement between the UK and the EU have been finalised.[6] However, it is useful to consider some implications.

If the EU State aid rules were to no longer apply to the UK then the UK authorities would be free, as a matter of EU law, to provide State aid without breaching EU law. This would be problematical for all remaining EU Member States (including the likes of Ireland) because EU State aid law currently limits the provision of anti-competitive State aid by Member States.[7] Conversely, if State aid law continues to apply to the UK as part of the post-exit settlement (e.g. as part of the UK joining a European Economic Area ("EEA") arrangement) then this will be a disappointment for those who voted for Brexit if they anticipated that the UK could be more supportive of UK domestic businesses and have greater freedom dealing with all businesses.

The biggest changes would probably be in the area of merger control. At present, the UK benefits from the "one stop shop" regime embodied in the EU's Merger Control Regulation ("MCR")[8]—a "concentration" with a "Union dimension" is typically notified only to the European

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1 See Whish, "Brexit and EU Competition Policy" (2016) 7 *Journal of European Competition Law & Practice* 297.

2 See arts 107–109 of the Treaty on the Functioning of the European Union ("TFEU"). See also art.106 of the TFEU in respect of State authorities and any privilege granted by a Member State.

3 The term "undertaking" is the term used in EU competition law to describe those entities subject to competition law. See arts 101–102 of the TFEU.

4 E.g. corporation tax and grant regimes.

5 The Court of Justice of the European Union ("CJEU") has long recognised that the EU rules on competition are essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of an internal market. (See *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) [1999] E.C.R. I-3055, para.36; *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297, para.20; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) [2006] E.C.R. I-6619, para.31; *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] E.C.R. I-4529, para.49.)

6 See art.50 of the Treaty on European Union.

7 Such practices might be challenged, in certain circumstances, under the rules of the World Trade Organisation but that is not as easy as it would be under the EU's State aid rules.

8 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT* [last accessed 6 July 2016].

Commission and does not have to be notified to, and cleared by, all of the individual national competition agencies in the EU. This "one stop shop" approach is seen as very desirable by the business sector and reduces compliance costs and complication. If the UK left the EU entirely then the turnover in the UK would not count towards the Union dimension and the UK would probably retain its own national merger control regime, which would mean that businesses would have to notify many deals twice (i.e. once to the EU and once to the UK), with the inevitability of higher costs and the possibility of having divergent results.[9] Indeed, the fact that the UK would be outside the MCR regime would mean that the European Commission could block a transaction affecting the UK without the UK having any ability to have the transaction referred back to the UK under art.9 of the MCR (because transactions can only be referred back to a Member State).[10] One could anticipate a scenario arising whereby a deal involving UK companies would be prohibited by the European Commission as being very controversial.[11] If the UK wants to retain the MCR regime, at least in some measure, then the UK would have to be part of an EEA-type model or some comparable arrangement. It is very likely that many in the UK business community would overwhelmingly support such an outcome.

Anti-competitive arrangements or abuse of dominance involving UK undertakings would still be subject to investigation by the EU where there was an effect on trade in the EU despite the UK leaving the EU. In this respect, the UK would be no different than any other "third State" and would be subject to EU competition law (e.g. investigations by the EU of cases involving US technology companies). Presumably, the UK would not voluntarily yield jurisdiction to the EU so the UK authorities would also investigate the allegations. For the undertakings involved, this would lead to duplication of costs and penalties, as well as potentially divergent outcomes. Indeed, even where there was no divergence (e.g. where there was a finding of a breach of EU and UK competition law) then the undertakings could be punished on the double (i.e. at the EU and the UK levels).

UK domestic competition law (principally, the UK's Competition Act 1998 (the "1998 Act")[12]) would presumably continue in force and, indeed, would be all the more necessary. However, there would probably be inevitable amendments to domestic UK competition law. For example, s.60 of the 1998 Act provides, in effect, that to ensure consistency between the EU and the UK regimes, the UK courts must avoid such inconsistency and, essentially, follow the EU precedent—that could hardly survive a true Brexit. Equally, there would have to be some amendments to the 1998 Act to address the fact that the EU's block exemption regulations would no longer apply (if there was a complete so-called "hard exit").

If there is any divergence, however small, between EU and UK competition law then not only could there be unfortunate consequences (e.g. a transaction not proceeding at all because it is prohibited by just one regime) but there would also be inconsistency in philosophy and approach between the EU and the UK regimes. Over time, such divergences and inconsistencies would be likely to grow rather than reduce and cause concern and difficulty for all involved.

Consequences in an Irish Context

What would be the relevance for Irish business and Irish competition law? It is useful to consider some of the implications.

At an institutional level, the possible absence of the UK and its Competition and Markets Authority from the EU's European Competition Network could be quite significant. There will be a greater burden on Ireland, the Department of Jobs, Enterprise and Innovation, as well as the Competition and Consumer Protection Commission, to advocate the common law/Anglo-Saxon corner in the EU. Over time, if the UK is outside the EU or even somewhat semi-detached, there will be a growing divergence between Ireland (as part of the EU) and the UK on various competition law issues. One could see a greater move towards the civil law approach to these issues.

There would be consequences at a business level too. Many Irish businesses are able to benefit from the MCR because of their turnover in the UK and, as matters stand, the "UK turnover" counts towards "EU turnover", thereby triggering the application of the MCR. However, if the EU turnover of Irish businesses no longer includes UK turnover then it is quite possible that the MCR would no longer apply because the EU threshold would not be met. This means higher compliance costs for some Irish businesses because they would no longer be able to notify the European Commission but would have to notify several different competition agencies (all with different tests, procedures and policies). More generally, there would be higher compliance costs because of the divergence in approach.

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[9] It is even possible in the context of some deals that the removal of the UK turnover would remove the deal entirely from the scope of the MCR thereby forcing the parties to notify in several jurisdictions.

[10] This would also mean that the MCR's arts 4 and 22 case reallocation provisions would also disappear vis-à-vis the UK.

[11] An analogous situation arose where the European Commission prohibited the proposed acquisition by General Electric of Honeywell (both US corporations) even though the US approved the transaction. For the EU decision, see Case No COMP/M.2220 – *General Electric/Honeywell*, 3 July 2001, available at: *http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf* [last accessed 6 July 2016]. In a scenario where the UK left the EU in its entirety then the UK companies would be in the same scenario as the US ones in the *General Electric/Honeywell* transaction.

[12] 1998 c. 41. See *http://www.legislation.gov.uk/ukpga/1998/41* [last accessed 6 July 2016].

Lawyers giving advice on EU competition law need to be not only external lawyers[13] but must also be called to a bar or roll of a Member State if their advice is to benefit from legal professional privilege. Lawyers who are called in the UK only would not be able to give such privileged advice as a matter of EU law. The same would arise in the context of advice rendered during competition investigations (i.e. so-called "dawn raids"). And, equally, non-EU lawyers are not able to sign pleadings before the CJEU. Hence, there is already a surge in the number of UK lawyers seeking to requalify, even if only as a formality, elsewhere in the EU, including Ireland.

Conclusions

It is too early yet to decipher all of the consequences of the Brexit vote. With regard to competition law, it is almost inevitable that if the UK does succeed in retaining access to the internal market, the competition rules will remain largely intact but the divergences and differences which are likely to emerge are such that they will lead to higher costs for businesses, greater uncertainty for all and a poorer regime. From an Irish perspective, it would be important to ensure that the UK remains bound by EU competition law (particularly EU State aid law) so as to ensure that competition is not adversely distorted vis-à-vis Ireland (e.g. in the context of tax or grant regimes). Whatever happens, the outlook is uncertain but it will be interesting to observe.

[13] See *AM & S Europe Ltd v Commission* (Case 155/79) [1982] E.C.R. 1575, available at: *http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=155/79&td=ALL#* [last accessed 6 July 2016]. See Power, "In-House Lawyers and the European Court: The *Akzo v Commission* Judgment" (2010) 45 Ir. Jur. (n.s.) 198.