Untangling the web: UK competition law after Brexit

With competition one of the areas where EU and domestic law are most closely intertwined, **Becket McGrath** considers the legal disruption involved in separating the two regimes and forming a replacement trading model

On 23 June, the British electorate voted by roughly 52 per cent to 48 per cent to leave the EU, an outcome now universally referred to as Brexit. While the referendum was purely advisory, and so had no formal legal effect, the constitutional, political, and economic impacts of the result have been profound.

Although it is not beyond the realms of possibility that the UK will ultimately reverse course and choose to remain in the EU, the prime minister recently indicated that the UK will start the process of leaving the union by the end of March 2017. As a result, formal departure now seems likely by the middle of 2019. Until that date, the UK remains a member state of the EU and EU law continues to apply in full within its borders. Attention is nevertheless now focusing on the terms of the eventual departure.

A member state is able to leave the EU only by formally invoking the withdrawal procedure provided by article 50 of the Lisbon Treaty. Notification of a member state's intention to withdraw starts a period of up to two years for negotiation on the terms of withdrawal, with the country in question being automatically ejected from the EU if no agreement is reached within that two-year period. While an extension is possible, this must be agreed unanimously by all remaining

member states. The consequences of this procedure for the UK's bargaining position in such negotiations are clear, particularly as the two-year deadline approaches.

New arrangements

The UK has been a member of the EU and its predecessor organisations for the past 43 years and their respective legal systems have become tightly integrated in many areas. Competition law is one of the areas where EU and domestic law are most closely intertwined. The size of the task of untangling the two regimes, and the extent of the related legal disruption, depends on what arrangement replaces EU membership.

On the one hand is membership of the European Economic Area (EEA), alongside non-EU EEA members Norway, Iceland, and Liechtenstein, which, along with Switzerland, are also members of the European Free Trade Association (EFTA). On the other is some form of looser bilateral arrangement, whether modelled on the current close arrangement between the EU and Switzerland or a bespoke, and potentially more distant, relationship modelled on free trade agreements with non-European countries such as Canada.

The EEA provides a parallel institutional structure to that of the EU, with the EEA Agreement replicating many of the core provisions of the Treaty on European Union (TEU) and the more detailed Treaty on the Functioning of the European Union (TFEU). The EEA Agreement provides that all contracting parties (i.e. the 28 EU member states plus the three EEA EFTA states) must guarantee the 'four freedoms' (free movement of goods, workers, services, and capital) within the EEA and establish a system to ensure that competition within the EEA is not distorted.

Within an EEA-specific context, the role of the European Commission (EC) is taken by the EFTA Surveillance Authority, whose actions are overseen by the EFTA Court in Luxembourg (performing a similar role to the Court of Justice of the European Union).

At the time of writing, EEA membership seems unlikely, given that it involves free movement of workers and adoption of most EU laws, without having a formal say on their content. While there are a range of alternatives to EEA membership, the relatively close free trade arrangement between the EU and Switzerland, which is based on a complex web of bilateral agreements rather than a single overarching treaty, provides one possible template.

Competition law framework

Before considering the likely future direction of competition law in the UK under these possible scenarios, it may be helpful to summarise the current position, against which those scenarios may be measured.

The core provisions of EU competition law, as set out in articles 101 and 102 TFEU, prohibit anticompetitive agreements and the abuse of dominant market position respectively. These prohibitions are enforced by the EC and the national competition authorities of the member states, including the UK Competition and Markets Authority (CMA).

UK competition law includes two parallel prohibitions, which are set out in the Competition Act 1998 (CA 1998) and are closely modelled on articles 101 and 102. The CMA and UK courts are currently under a legal obligation to apply UK competition law in a way that is consistent with EU law. In addition, a finding by the EC that a company has infringed EU competition law is binding in UK court proceedings.

The EC has exclusive jurisdiction to review the impact on competition within the EU of cross-border mergers involving parties with substantial worldwide and EU revenues, and all such transactions must be notified to the EC for clearance before implementation. Transactions that fall below the thresholds for EU merger control are reviewable by national competition authorities, applying national merger control law.

Anyone who suffers loss as a result of an infringement of EU competition law currently has the right to bring an action for damages or other relief before the courts of any EU member state. UK competition law is also enforceable before the UK courts. An infringement decision by the EC or CMA is binding on the UK courts as proof of the breach of duty. Where a claim for damages is based on a prior infringement decision (known as a 'follow-on' claim), the claimant need only prove causation and quantum of its loss to bring proceedings.

The English courts are a popular venue for hearing such competition law claims, given the relative ease with which a claim may be initiated, the access to innovative litigation-funding models, a generous approach to jurisdiction, the ability for claimants to seek substantial disclosure from defendants, and growing judicial expertise in the field. While some claims have been based on CMA decisions, the flow of international cartel decisions from the EC has provided a more attractive hunting ground for claimants.

Replacement trading model

The choice of replacement trading model will have a significant impact on the post-Brexit UK competition law framework. That choice is now a political matter and the ultimate outcome remains highly uncertain at the time of writing. It is nevertheless possible to offer some predictions.

First, whatever the scenario, it is likely that the >>

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>> substance of UK competition law will remain largely as it is now, with a CA 1998 regime based on prohibitions that closely mirror articles 101 and 102, combined with the continued existence of a parallel market investigations regime that pre-dates the UK's EU membership. It is also likely that CMA officials will continue to apply a broadly consistent approach to that of the EC when analysing cases, and that the CMA and the courts will continue to refer to relevant EU case law as precedent or at least helpful guidance when enforcing UK law.

While some may be tempted to take a different course in the UK on some aspects of competition law, for example by taking a more relaxed approach on vertical restrictions or on abuse of dominance, any such divergence would reduce legal certainty and increase costs for business. It also seems unlikely that the CMA would substantially alter its balance of cases, for example by choosing to take enforcement action against large, global cartels, which currently tend to be investigated centrally by the EC. The CMA would no longer have a presence in the European Competition Network and would lose any influence over EC policy or decisions, even where they concern agreements or mergers involving British companies.

As far as merger control is concerned, moving to the outer tier of EEA membership would leave things largely as they are today, although the rules for allocating jurisdiction between the UK, EC, and EFTA Surveillance Authority would be more complicated. Any alternative existence outside the EEA would see the EU and UK merger control regimes operating independently of each other.

In such a scenario, it is quite possible that parties to large, cross-border transactions would face parallel merger investigations by the EC and CMA. The fact that UK merger control does not oblige parties to reviewable transactions to notify them would soften the impact of this, as would the high degree of alignment in how both authorities assess the impact of mergers on competition. Possible future changes to the UK merger control regime, including the introduction of mandatory filings, would inevitably lead to duplication and higher costs for businesses, as well as increasing the risk of divergence in outcomes.

Turning to competition litigation, EEA membership would again mean relatively minor changes. Under a looser bilateral relationship with the EU, EC infringement decisions would almost certainly no longer be binding on UK domestic courts. As a result, pure follow-on claims would remain possible only on the basis of UK law infringement decisions by the CMA.

Claimants' ability to base claims before the UK courts on the breach of articles 101 and 102 will also come into question. While it may be possible to rely on foreign law tort principles, claimants pleading EU law infringements would clearly face more difficulties before the UK courts than they do at present. This would be a significant change from the current position and would make the UK courts a less attractive forum for most competition law claims.

Shift in philosophy

To assess the potential impact of Brexit more fully, however, it is necessary to widen the perspective. On the one hand, the loss of the UK's influence on EU competition policy could lead to a less economics-focused and more interventionist approach by the EC. Indeed, it is notable that the French president has already expressed a desire to 'adapt' the way in which EU competition law is enforced post Brexit.

Such a shift in guiding philosophy would have a substantial impact across the EU. It is notable that UK businesses that wish to continue selling into the EU will remain subject to EU competition law and a less predictable legal environment would be a problem for them, as well as for the rest of Europe.

Closer to home, it is quite possible that the nationalist and isolationist sentiments that appear to have motivated many Leave voters will lead to the UK government adopting a more protectionist and interventionist economic policy. Although comments by Theresa May that she will reform competition law to facilitate action against companies 'abusing their roles in highly consolidated markets' could suggest an enhanced role for the CMA, her remarks also betrayed a frustration with the current evidence-based and independent approach to enforcement that cuts the other way.

The prime minister's stated desire for a new industrial strategy, and for new laws protecting 'strategic' British businesses from foreign takeovers, points unambiguously towards more intervention. The loss of the state aid controls currently provided by EU competition law may further encourage government interference in the economy.

While it is too early to know for sure, a shift in government policy towards greater market intervention clearly creates a risk of more political interference in the CMA's work, potentially harming its ability to operate at a time when it may find it harder to recruit talent from outside the UK.

Such a shift may also reduce the CMA's influence on the government as an advocate of competitive markets, at a time when this is more necessary than ever. In particular, isolating the UK economy from the competitive forces emanating from the rest of Europe threatens to undo much of the progress towards competitive markets that the UK has made as an EU member. In this febrile and unpredictable atmosphere, the only certainty is that uncertainty will continue for some time to come. **SJ**