In most aspects the competition law of the UK is directly modelled on the competition law of the EU. Therefore the effect of Brexit on UK competition law could be significant. Nonetheless, it is arguably desirable for the status quo to be maintained to minimise disruption for businesses and facilitate access to the EU single market, assuming that this is a political objective. In this article we discuss the possible changes that could be made to different aspects of UK competition law, and changes that will inevitably follow as a result of the UK’s departure from the EU.

The two areas of competition law most commonly relevant to businesses operating across European borders are anti-trust – which covers the prohibitions on anti-competitive agreements and abuse of a dominant position – and merger control.

**Anti-trust**

In the area of anti-trust the UK aligned its competition law with that of the EU following the enactment of the Competition Act 1998 (the CA). Chapters I and II of the CA mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union and are applied by English courts in a manner that is consistent with EU law.

The central difference between EU anti-trust law and the anti-trust law of its Member States is on the purpose of the legislation. The EU prioritises the ‘single market imperative’, while Member States are concerned with economic effects felt at a more local level. EU anti-trust law may only apply where there is an ‘appreciable effect’ on trade between Member States.

Accordingly the European Commission’s relationship with the competition authorities of Member States is one of delegation or subsidiarity: the European Commission concentrates on the largest cases, such as international cartels and other hardcore international infringements, and Member States tend to focus on domestic cases, efficient markets and consumer protection.

From an anti-trust perspective the consequences of Brexit are therefore likely to be minor, at least in the short term. There has been no indication that the UK Government intends to change the prohibitions on anti-competitive agreements and abuse of a dominant position set out at Chapter I and Chapter II of the CA. Indeed, it would be surprising if the UK Government wished to amend these provisions, which are viewed as a ‘gold standard’ and appear in the domestic competition law of nearly all jurisdictions which have competition laws.

One effect on businesses is that they will potentially be subject to parallel investigations brought by the European Commission and the UK’s Competition and Markets Authority (CMA) if any alleged anti-competitive behaviour would have effects in both the UK and EU. Whilst the European Commission and the CMA would be likely to coordinate significantly on any parallel investigation, there would be an inevitable increase in costs, and the potential for fines to be imposed by both authorities.

It is also possible that the CMA and UK Courts (including the specialist Competition Appeal Tribunal) may no
longer be required to interpret the Chapter I and Chapter II prohibitions in accordance with the post-Brexit judgements of the European Court of Justice or be guided by the European Commission’s post-Brexit decisional practice. Therefore, there is the potential for the ways in which the prohibitions on anti-competitive agreements and abuse of a dominant position are interpreted by the EU and the UK to diverge over time.

**Merger control**

The UK’s voluntary merger control regime set out in the Enterprise Act 2002 (as amended by the Enterprise and Regulatory Reform Act 2013) may remain unchanged initially, and any subsequent changes that are made to it are unlikely directly to result from Brexit, but rather will have the objective of improving the efficiency of the merger control process in the UK.

However, unless the UK joins the EEA – which is not currently likely at least in the long term – or a special bilateral agreement is put in place, the EU Merger Regulation will no longer apply to the UK. International transactions between large companies which would have only been notified to the European Commission might need to be notified to both the CMA and the European Commission post-Brexit.

In addition, Article 4(5) of the EU Merger Regulation provides that the European Commission has the jurisdiction to review mergers that meet the thresholds for review under the merger control laws of three or more Member States but do not otherwise meet the jurisdictional threshold set out at Article 1 of the EU Merger Regulation. Post-Brexit there may be mergers which are notifiable in the UK and two Member States of the EU for which three separate filings must be made, whereas currently only one filing to the European Commission might be necessary.

Whilst multi-jurisdictional filings are increasingly common, the requirement to make a filing in both the UK and the EU will increase costs for businesses, and could lead to potentially inconsistent decisions. It could also lead to delays, especially if the CMA is required to adapt to a larger case load post-Brexit.

**Antitrust damages claims**

The UK is currently one of the most favourable jurisdictions in which to bring private damages actions for a breach of competition law, due to the existence of a specialist Competition Appeal Tribunal, the possibility of bringing group actions, and established rules of disclosure. The UK may become a less attractive jurisdiction, as Brexit could cause additional hurdles on jurisdiction, choice of law and enforcement in such cases.

**State aid**

Following Brexit the EU State aid regime may cease to apply. However, it is likely that under any continuing free trade agreement between the UK and the EU, control of State aid by the UK Government would continue to apply in some form. In addition certain forms of subsidy of businesses by the UK Government would be prohibited by WTO rules.

**Conclusion**

The exit process, including any implementation or transition period, may take a significant amount of time and is unlikely to be completed before March 2019. Businesses should familiarise themselves with the potential legal consequences of Brexit in advance to ensure that they are able to make the smoothest possible transition.

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