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Brexit and EU Competition Law - Antitrust

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Introduction

- Substantive antitrust provisions are likely to remain **very similar** in the UK and the EU, at least for some time, but their enforcement might **change**
- **Practical issues** are likely to arise, for example, in relation to:

1. coordination of investigations
2. exchange of information and evidence
3. coordination of leniency applications and procedures
4. enforcement of EU commitment decisions
5. extraterritorial jurisdiction for the enforcement of EU competition law

Substantive law - Continuity

- UK Competition law – unlikely to change in short term
  - Chapter I and Chapter II prohibitions will continue to mirror Articles 101 and 102 TFEU
  - Underpinning rationale remains unaltered
- EU Competition law
  - Articles 101 and 102 TFEU will be part of UK law for **conduct pre-Brexit**
  - Will continue to apply to UK companies operating in the EU for **conduct post-Brexit**
- Block exemptions (BE)
  - Will continue to apply to the Chapter I prohibition
  - Will need to be renewed as national block exemptions subsequently

Substantive law - Divergence

- Post-Brexit and over time - divergence in the **application** of these prohibitions
  - **No legal obligation** for CMA and Courts to interpret UK competition law in line with EU law and/or decisional practice (S. 60 Competition Act), **nor** access to preliminary rulings of the CJEU under Art 267 TFEU
  - EU competition law and case law will be downgraded from binding to "**softly persuasive**"
  - No role for the UK in the development of EU competition law (but participation in international fora, such as ICN and OECD)
- Decisions of the European Commission probably will **not be binding** in follow-on damages actions for post-Brexit conduct

Cooperation Post-Brexit

- EU and UK to negotiate the model of cooperation post-Brexit, including the following issues:
  - Whether the CMA or the European Commission will have jurisdiction over cases that are **ongoing** at the time of Brexit;
  - Whether the UK courts or the European Courts will have jurisdiction over cases that are ongoing at the time of Brexit;
  - Whether the CMA or the European Commission will have jurisdiction over cases relating to **pre-Brexit activities**;
  - Whether the UK courts or the European Courts will have jurisdiction over cases relating to pre-Brexit activities; and
  - Whether commitments and decisions imposed by the European Commission will bind the CMA if it launches **parallel** proceedings

Coordination of antitrust investigations

- Currently, Commission or NCA can **launch** an investigation under Articles 101 or 102 TFEU. NCA **must notify** the European Commission when they start an investigation
  - Post-Brexit, CMA and European Commission will be able to start investigations
  - Swiss Agreement allows for notification
- The Commission can demand NCAs to conduct **dawn raids** on its behalf
  - Post-Brexit, European Commission will have no power to carry out dawn raids, nor will it be able to ask the CMA to do so on its behalf
  - Swiss Agreement gives the Commission and the Swiss Competition Commission the ability to coordinate the timing of dawn raids
- NCAs are bound by EC decisions and cannot bring **parallel** investigations
  - The status of the EC's existing decisions and commitments on the UK is still under negotiation
  - For post-Brexit cases, parallel investigations will now be possible
- Commission will continue to be able to send written **requests for information** (RFIs) to companies in the UK

Exchange of information and evidence

- Currently, Regulation 1/2003 allows for information exchange between NCAs and the European Commission, with restrictions on the exchange of leniency information
  - Post-Brexit? Swiss Agreement establishes a mechanism for information exchange with slightly stricter restrictions on the exchange of leniency information
- There are already safeguards in place to prevent the CMA from using an EC leniency application as evidence or information in a **criminal** prosecution.
- The Swiss Agreement and Regulation 1/2003 put similar restrictions in place on using shared information for criminal prosecutions.

Coordination of leniency applications

- Leniency is **not** harmonised at EU level, so applicants for leniency to the European Commission need to also apply to NCAs for leniency
  - Post-Brexit, UK companies will not be able to submit a national application (short form) in conjunction with a full EU application, in order to safeguard their position in national queues
  - The increase in parallel prosecutions (criminal and civil) will make applying to the **CMA** for leniency more important
- The Swiss Agreement has no provisions on leniency beyond the limitations on sharing leniency information

Extraterritorial application of EU competition law

- As with any third country, companies based in the UK can still be liable for infringements of Article 101 and 102 TFEU post-Brexit
  - UK companies operating in the EU
  - For anti-competitive agreements or practices or abuses of dominance
- In *Intel*, the CJEU confirmed that the European Commission will have jurisdiction if there are "*foreseeable, immediate, and substantial effects in the EU*"

Legal professional privilege

- Regulation 1/2003 does not refer to legal professional privilege, but it was established by the CJEU in *AM&S* and confirmed in *Akzo*. But legal professional privilege only applies to **EU qualified lawyers**
  - Post-Brexit, UK lawyers will not benefit from legal professional privilege. This is particularly problematic for transitional cases.
- There is a long-shot argument that legal professional privilege could (or should) still apply to UK qualified lawyers post-Brexit.
  - In *AKZO*, AG Kokott noted that the lack of legal privilege for non-EU lawyers was because it would be too difficult for the CJEU and Commission to verify the **independence of lawyers** in every third country
- The Swiss Agreement includes a requirement that legal professional privilege should be respected when authorities exchange information.
  - Article 7(7) of the Swiss Agreement provides that the EC and Swiss authority shall not discuss, request or transmit information if using such information would be prohibited under the procedural rights established under their respective laws, including the right against self-incrimination and legal professional privilege.

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