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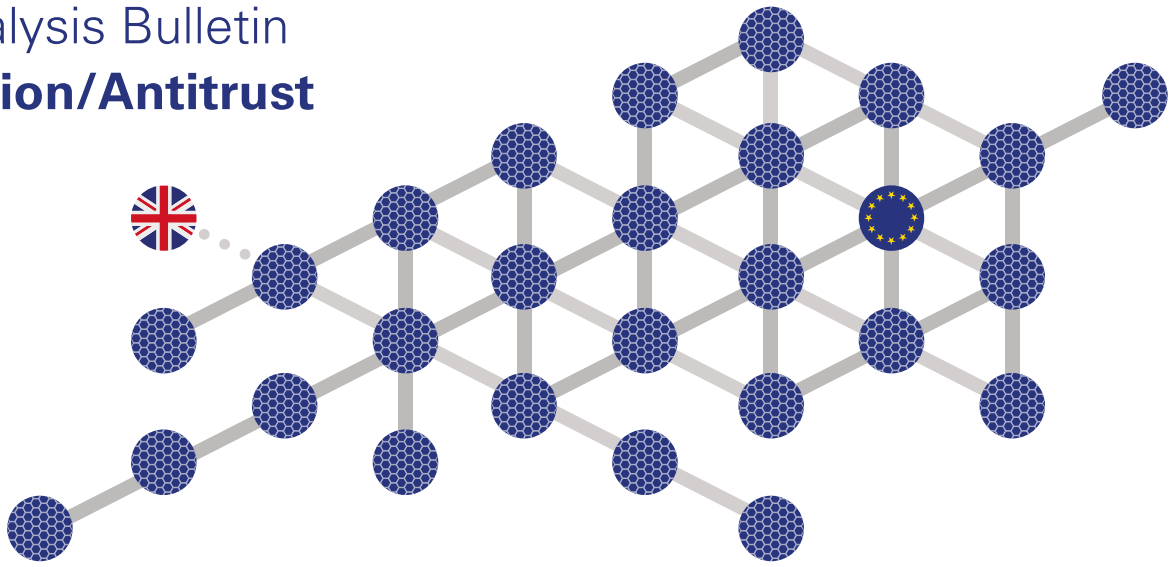
Brexit Analysis Bulletin
Competition/Antitrust



The UK has voted to leave the European Union. This on its own does not automatically affect or change the UK's legal position in or vis-à-vis the EU. In order to exit from the EU, the UK government will need to trigger a formal process under Article 50 which sets in train a two-year formal negotiation. Until the end of that process, the UK remains part of the EU and will be subject to all the rights and obligations of an EU member state. There is much uncertainty around who will negotiate for what in the coming months and how much of that will be realistically achievable. Moreover, some significant UK-internal constitutional issues are currently unfolding which add additional complexity to the potential outcomes.

In the immediate short term therefore the UK competition law landscape will not change. Even after Brexit we will expect that UK businesses will continue to be subject to EU competition law for a number or reasons. Firstly, UK competition law is modelled on EU rules and is expected to remain largely intact. We believe it is unlikely that this will change given the similarity of the substantive law not just in Europe but throughout the world. Secondly, EU competition law will continue to apply to businesses whose activities have an effect on trade between EU member states. Jurisdiction to enforce EU competition law does not depend upon a business being based in a country which is part of the EU. In a globalised world, most businesses who sell their products, services or source their inputs from other member states will meet the EU 'effect on trade' test. Therefore, EU competition rules will continue to apply to many operations of UK businesses after a Brexit, as they do now.

Nonetheless, there may be significant legal and procedural changes, the details of which will depend on the post-Brexit model that the UK agrees with the EU. Set out below are some potential scenarios we envisage going forward.

Legal framework and post-Brexit options

If the UK secures membership in the European Economic Area (EEA) Agreement, then EU competition law (including state aid rules) will continue to apply without any changes. The UK would have to continue to apply EU rules (competition and others), without having any means to influence the decision-making process and without the ability to contribute to the development of new laws (through the intergovernmental negotiation or through UK officials within the European Commission and UK MEPs). If the UK chooses to leave the EEA altogether, only then will it be free (at least in theory) to abandon some of the EU rules, but mostly only in limited circumstances.

UK competition law, as set out in the Competition Act 1998 and the Enterprise Act 2002, mirrors the wording of Article 101 and 102 of the Treaty on the Functioning of the EU (TFEU). Many non-EU countries have followed that wording. Currently, UK institutions and courts have a duty to follow EU secondary legislation, Commission guidance and case law of the Court of Justice of the European Union. EU Regulation 1/2003 requires the UK to follow harmonised procedures with respect to the

EU competition law enforcement. This means that UK authorities tend to follow broadly the same procedure irrespective of whether they enforce UK or EU laws (or both). Going forward we would expect the UK to reach the same outcomes as in the EU (very much in the same way as Switzerland does). However, there may emerge differences in process, emphasis and enforcement priorities that could affect UK businesses. Such differences could potentially increase competition compliance costs for businesses operating in the UK.

Restrictive Agreements, Mergers and State aid

For UK businesses operating in or sourcing products and services from other EU member states, EU competition rules on restrictive agreements and abuse of dominance will continue to apply. We set out below the key aspects of competition legal framework that will be affected by Brexit.

Agreements that benefit from EU Block Exemptions

EU Block Exemptions which currently apply in the UK and provide safe harbour to certain agreements will no longer apply to conduct or agreements which affect only UK trade. For example, the EU Vertical Block Exemption provides the benefit of legal certainty for vertical agreements that fall within the thresholds and do not contain hard-core competition restrictions. If, as part of the exit settlement, replacement provisions are not introduced or divergent exemptions emerge, this could potentially lead to a significant alteration in the legal position in the UK, requiring businesses to review and potentially redraft contracts that currently benefit from EU Block Exemptions.

Mergers

EU merger control rules will continue to apply where the EU jurisdictional tests are met (providing a single process for larger mergers). Where these thresholds are not met companies will need to submit to separate merger applications in the UK and in those other member states where relevant jurisdictional thresholds are met. Following a Brexit, UK companies acquiring other companies with significant businesses in Europe will still have to submit to EU merger clearance when the thresholds are met. However, EU clearance will not cover the UK, so companies will be faced with the prospect of having to obtain separate merger clearances from the Competition and Market Authority (CMA) in the UK. This will increase transactional costs and regulatory uncertainty.

State aid and procurement

Following exit from the EU, EU State aid and public procurement rules will no longer apply in the UK. The UK government will be able to revise its public spending policies, limited only to the constraints of the World Trade Organisation (WTO) anti-subsidy obligations.

Legal privilege

Legal privilege is a protection which attaches to legal advice, protecting documents from discovery by the European Commission. Under current rules, at the EU level, legal privilege applies to communications with external lawyers qualified to practice in an EEA member state. Therefore advice provided by a UK-qualified lawyer benefits from this protection and, post-referendum, this remains the case until the UK formally withdraws from the EU following the Article 50 process. After withdrawal, the position will depend largely on the trading model which the UK chooses to adopt following exit from the EU. If the UK leaves the EU but remains in the EEA (similar to the Norwegian model), UK lawyers' advice will continue to attract legal privilege. Should the UK leave the EEA entirely (adopting, for example, the Swiss model), the advice of UK lawyers will not be legally privileged unless the lawyer in question is also qualified in a member state of the EU. The legal community is actively investigating how to address this issue.

EU sector inquiries

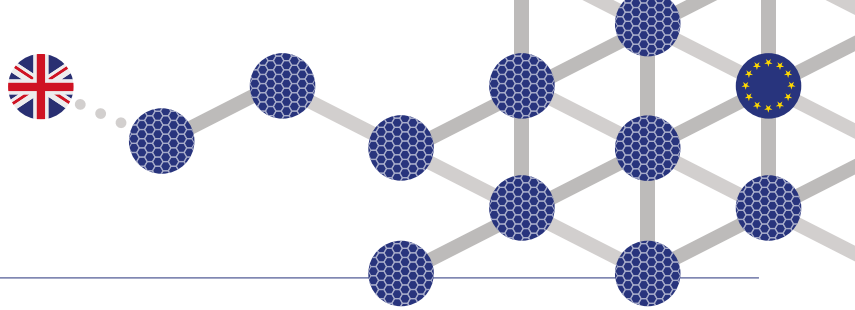
When the European Commission opens a sector inquiry, it usually covers businesses operating in all member states, but this regularly affects businesses outside of Europe as well. The European Commission is, for example, currently investigating e-commerce, with a final report scheduled for the first quarter of 2017. Sector inquiries are often followed by enforcement or legislative actions. UK businesses will likely continue to be affected by such inquiries and follow-up actions in the same way that Swiss, US and Far Eastern businesses already are.

Private actions for damages

A significant number of competition law damages in the UK courts and Competition Appeal Tribunal (CAT) follow on from European Commission infringement decisions. UK and EU-based businesses benefit from claiming damages in the UK because of the legal and practical advantages the UK system offers. The right to pursue a follow-on claim is enshrined in UK law, and this expressly includes claims based on a decision of the European Commission. Again, until the UK has formally ceased being part of the EU nothing will change and UK courts continue to be bound to make decisions in line with UK legislation.

Once the UK has left the EU, that system may, however, change. This is covered in a separate briefing note.

The UK government is in the process of consulting on the implementation of the EU Private Damages Directive which strives to facilitate private damages



actions following infringements of competition law, by harmonising rules on access to evidence, clarifying rules on compensation and establishing a rebuttable presumption that cartels cause harm. The timetable is such that the UK is under an obligation to implement the Directive by the end of this year i.e. before Brexit. Moreover, much of the content of the Directive is exporting UK concepts and principles (e.g. disclosure) into the systems of other member states and many of the requirements set out in the Directive already exist in UK law. As such, divergence seems unlikely, at least in the short term. Following a Brexit the UK government could introduce rules that diverge from those in the rest of Europe.

International angle

Once the UK has withdrawn from the EU, it will not be able to participate in the EU legislative process, which also includes any future changes to the EU competition rules (which, as set out above, may still apply to the UK companies). Until such a withdrawal the UK as a full member state will continue to participate but it is highly likely that the gravitas of its voice will have diminished. The CMA currently chairs the ECN's working group on mergers, and has significant influence on policy developments in the area that will continue to have direct impact on UK businesses. The CMA (and its predecessor, the Office of Fair Trading) has been particularly involved in modernising the EU regime to introduce a more rigorous economics based approach to enforcement. Going forward, even during Article 50 process we can expect significantly less influence.

At an international level, the European Commission has engaged in a wide range of cooperation activities with competition authorities in a number of third countries on the basis of bilateral agreements or memoranda of understanding. The nature of the cooperation activity varies between countries and can cover coordination of enforcement actions, sharing of information on cases of mutual interest, dialogue on competition policy issues and, in some cases, also capacity building support. Competition also features in international trade agreements negotiated by the European Commission (e.g. the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation The UK will have to negotiate similar bilateral agreements if it is to benefit from similar cooperation.

Concluding remarks

Overall, the cost of competition compliance following Brexit may be higher for UK companies, who will lose the benefit from the streamlined and harmonised EU competition rules. Going forward, to the extent that the UK's competition regime develops in a direction that diverges from that taken in the EU, businesses operating cross-border will be required to seek multi-jurisdictional guidance on questions that currently benefit from harmonised approach throughout the EU.

What Now?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change. For further information in the first instance, please contact John Schmidt or Joanne McDowall.

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SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS
JOINING THE DOTS OF THE EU REFERENDUM

What next?
Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

A number of lawyers in our team are qualified both in the UK and other countries.

For further information in the first instance, please contact:

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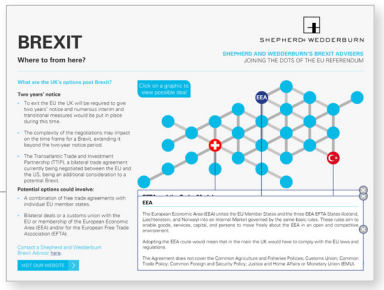
Bookmark our Brexit Advisers page for a comprehensive collection of Brexit updates and guidance

Click here to view our 'Where to from here' Brexit infographic.



Click here to read our 'What now' Brexit bulletin.

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