

BREXIT: State of Play on Competition Issues. Impact on Business in the EU and in Asia

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Unpacking Complexity
Unfolding Opportunity



Outline

- Timeline
- Antitrust
- Mergers
- State aid
- Asia
- Trade



Timeline (1)

- 29.3.2017 - Article 50 TEU notice served
 - 23.4.2017 - French presidential elections (1)
 - 29.4.2017 - EU Summit – EU guidelines
 - 7.5.2017 - French presidential elections (2)
 - 5.2017 - Great Repeal Bill* laid before UK Parliament
 - 22.5.2017 - EU negotiating 'directives'
 - 'TF50' – Commission, Barnier
 - 5-6.2017 – Start of negotiations
 - 8.6.2017 – UK elections
 - 18.6.2017 – French elections
 - 24.9.2017 – German elections
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Timeline (2)

- 10.2018 – Negotiations conclude (EU objective)
 - in fact 6 m before to allow EP's debate and vote
- End 2018 – **Vote on withdrawal agreement (EP/CM)**
- Early 2019 – Great Repeal Act* comes into force
 - no change significantly overnight
- 29.3.2019 – Brexit Deadline
 - date can be postponed – Article 50 TEU cannot have the effect of ejecting a MS from the EU contrary to its own constitutional requirements
 - 5-6.2019 – **EU Parliament elections**
- **Negotiations on the future relationship UK/EU (?)**
 - following withdrawal agreement, contrary to UK demand
 - Mixed agreement (unanimity – see *EU/Singapore*)

* See next slide

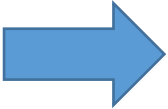


Great Repeal Act

- It repeals the European Communities Act 1972
 - EU law will cease to apply in the UK from the day of exit
 - EU law will no longer be supreme over UK law in the event of a difference
 - CJEU's judgments will no longer bind the UK (*pre-Brexit to clarify*)
 - Parliament will be able to amend, repeal or improve any law after appropriate scrutiny and debate.
- It converts the '*acquis communautaire*' into domestic law
 - Wherever practical and appropriate, the same rules and laws will apply on the day after Brexit as they did before
 - Only gradual changes to avoid any cliff-edge and business uncertainty
 - However, there are many rights enjoyed under EU law that are not capable of replication in domestic law



Contextual points to note*

- Policy/enforcement convergence over time of competition law
 - Cartel investigations - Articles 101 & 102 TFEU mirrored in UK law
 - Role of economics in mergers and unilateral conduct assessment
 - General compliance incentive
 - Close coordination and cooperation (UK/EU)
 - Parallel development and UK influential in it
 - Whether and how these benefits can be retained or replicated post-Brexit?
 - All UK-based companies trading in or with Europe will continue to be subject to EU competition law
 - The interaction between UK and EU law will have considerable business and policy importance
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- Continuity
 - Transition
 - No reduced regulatory burden

* See *Brexit Competition Law Working Group*, Issues Paper, October 2016



Antitrust (1)

- End of direct effect of Art. 101-102 TFEU in the UK
 - End of block exemption regulations in the UK
- UK Competition Act 1998 and Enterprise Act
 - UK courts no longer bound by EU law, by EU courts
 - Loss of consistency, progressive divergence of interpretation
 - Will the principle of consistency with EU law be retained, at least for pre-Brexit (s. 60 CA98)? ['bound by' v 'having regard to']
- European Commission no more powers in the UK
 - No more EU dawn raids – loss of EU-wide leniency
 - ECN no longer covers the UK – loss of cooperation
 - Urgent need for transitory arrangements for ongoing cases
 - Will commitments, block exempted rules, etc still apply post-Brexit in the UK?
 - EEA legal privilege no longer applies to UK-only qualified lawyers
 - However, EU competition law still applies to UK companies in the EU (EU-EEA effects) – RFIs



Antitrust (2)

- Private enforcement - No longer pan-European damages actions?
 - Applicable law, jurisdiction, forum, and enforcement of judgments
 - How the UK will try to keep its leading forum for private competition litigation in the EU?
 - Will Commission infringement decisions still be regarded as “infringement decisions” for damages claims?
 - Will infringement decisions still be binding before the High Court / CAT?
 - Will the Commission still be an *amicus curiae* for UK national courts?
 - What to retain from the Damages Directive?
 - Protection from disclosure of leniency statements and settlement submissions
 - Risk of disclosure in civil litigation a key factor for leniency.



Mergers

- EUMR no longer applies in the UK
 - “one-stop-shop” no longer applies to mergers with effects in both the UK and the EU
 - Increased UK's jurisdiction over mergers that would otherwise have been exclusively 'EUMR'
 - Cross-border effects – needs for further cooperation UK/EU/other MS
 - the Commission will not take account of the effects of a merger in the UK for EUMR assessment
 - the CMA will no longer have a formal mechanism to influence directly the Commission's decisions
 - impact on turnover thresholds: less EU notifications?
 - public interest test for UK mergers? (public security, plurality of the media and financial stability, nationality)
- UK merger regulation
 - Slightly different substantive test (SLC v SIEC)
 - Longer timetable in UK merger control regime
- Parallel application of progressive divergent laws
- Duplication of merger control
 - Additional costs for businesses and authorities



State aid (1)

- State aid rules no longer apply to the UK
- UK's choice:
 - domestic State aid legislation
 - no rules
- WTO anti-subsidy regime applies in any event
- EU State aid rules will continue to apply to UK companies outside the UK
 - Complainants against EU-EEA beneficiaries
 - Potential beneficiaries in the EU-EEA (UK subs)

General impact of Brexit on State aid environment (2)

EU	UK
<ul style="list-style-type: none"> Loss of the "pragmatic contributor" <ul style="list-style-type: none"> "Good student" Refined economic approach "Good aid" pro-competition (restructuration, financial crisis, etc.) <i>risk finance</i>, other guidelines 	<ul style="list-style-type: none"> <i>UK devolution</i> will require a domestic control (EU discipline is the current control tool for the UK) But UK €8bn v EU €101bn / <i>per capita</i> €90 (GER-FR-BEL: €170-€240) <ul style="list-style-type: none"> <i>easy trade off internal market vs UK discipline</i> Aversion for "bad aid" : community of interest with EU discipline
<p>Uncertainty, investment postponed (localisation) Transitory period highly complex</p> <ul style="list-style-type: none"> Pending cases before Commission, GC and CJEU? UK's rights over aid implemented pre-Brexit? Powers of the Commission to implement, post-Brexit, pre-Brexit decisions and rulings? UK's obligations, post-Brexit, vis-à-vis its obligations from pre-Brexit decisions? 	
<ul style="list-style-type: none"> Brexit influence on future State aid policy (2019 review)? 	
<ul style="list-style-type: none"> English language? 	
<ul style="list-style-type: none"> Uniform framework, tool for "multilateral disarmament" 	
<ul style="list-style-type: none"> Risk of decentralisation (consequences of GBER) – 10% remaining aid to notify are the most sensitives... 	

Synopsis – State aid (3)

Pre-Brexit	Hard Brexit	Soft Brexit
<ul style="list-style-type: none"> No change, legally Nissan deal ? 	<ul style="list-style-type: none"> No more EU obligations in the UK WTO But UK companies can invoke EU law in the EU 	<ul style="list-style-type: none"> Should require some form of aid control (<i>in UK's interest</i>) Very unlikely supranational control
<ul style="list-style-type: none"> Commission <i>ex ante</i> control 	<ul style="list-style-type: none"> No <i>ex ante</i> control 	<ul style="list-style-type: none"> EEA? EFTA Court/ESA? Very unlikely! No direct effect – no binding preliminary ruling
<ul style="list-style-type: none"> GCEU – CJEU – national courts Direct effect Retroactive effect Binding effect of preliminary ruling - uniformisation Full choice of remedies 	<ul style="list-style-type: none"> Control more limited (export-import, goods) Weak enforcement No direct effect (via States only) <i>Dispute Settlement Body</i> without retroactive effect 	<ul style="list-style-type: none"> EFTA? EU-CH model? European Agreements (national legislation with independent authority) Ex. EU-Ukraine – control in the UK less than in UKR or TUR?
	<ul style="list-style-type: none"> Limited remedies <ul style="list-style-type: none"> Cessation order Countervailing duties 	<ul style="list-style-type: none"> <i>sui generis</i> regime? Access to internal market? CETA type arbitration (+ aid)?



Asia

- UK a standalone market
- Markets the most affected? (*shift of the balance of power away from the 'liberalisers' - blocking minority more difficult*)
 - financial services (more harmonisation, less liberalisation?)
 - digital single market (less liberalisation?)
 - tax policy (more harmonisation?)
- Demand for corporate HQ/high end residential in the UK could fall (Asian investors affected)
- Potential relaxation in State aid rules in the UK
 - Demand for investment in infrastructure/energy?
- Higher operating costs for outbound operations
 - Restrictions in free movements between EU/UK
 - IPR – duplication of filings
 - Mergers – duplication of filings
- Japanese demand (UK as a gateway)
 - Transparency in negotiations
 - Maintenance of unfettered investment environment, freedom to provide financial services, cross-border investment provisions, unified protection of IPRs
- FTA negotiated directly by the UK with Asian countries



Trade model?

- EEA?
 - ESA (antitrust, mergers [EUMR], State aid)
- Bilateral agreement
- Customs union
- Free Trade Agreement – which model?
 - NOR (EEA-EFTA)
 - FTA (such as UKR new model)
 - CH (bilateral EU/UK)
 - TUR (EU/TUR customs union)
 - WTO
 - *sui generis* model?
- WTO rules



Various options for various models

	Norway Model	Turkish Model	Switzerland Model	FTA Model	WTO approach
Access to EU market for goods	Yes (full)	Yes (limited)	Yes (full)	Yes (full)	No
Access to EU market for services	Yes (full)	Yes (unless negotiated)	Yes (limited)	Yes (limited)	No
Common external customs tariff	Yes	Yes	No	No	No
Contribution to EU budget	Yes (reduced)	No	Yes (reduced)	No	No
Free movement of persons/ employees	Yes	No	Yes (limited)	No	No
Influence over EU legislation and trade policy	No	No	No	No	No
Subject to CJEU's jurisdiction	No, but EFTA follows the CJEU	No	No	No	No



Trade – huge challenges

- EU
 - exit negotiation
 - new terms for future UK-EU trade
 - while maintaining access to the EU for UK trade exports
- EEA
 - UK a member only as an EU Member State...
- WTO
 - UK to negotiate new individual tariff and service schedules
 - New terms on WTO procurement rules
- FTAs
 - New terms to replace EU's FTAs (SAF, KOR, MEX, CAN)

Thank you for your attention!
Please contact us with any questions.

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