

Practical Competition/Antitrust Law Issues and Brexit

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Following the “Brexit” referendum vote in June 2016, the exact timing of the United Kingdom’s exit from the European Union (EU), not to mention the form it will take, remains unknown. However, the outline of the final position is reasonably certain. Brexit will be a so-called “hard Brexit” and the UK is likely to have left the EU by March 2019.

“Hard Brexit” means that the UK will not be a member of the EU’s Single Market and will not be a European Economic Area (EEA¹) Member State. It will be outside the jurisdiction of the European Court of Justice (ECJ), the EU’s highest court. The level playing field for business within the EU/EEA, including EU competition/antitrust law², will no longer apply to/in the UK. It will also be outside the EU Customs Union³.

Companies operating in or trading into the UK should be, and many are, actively carrying out a risk identification and assessment exercise. This is essentially an audit, which needs to consider both broad structural issues (the scope and location of a business) and its operations and activities (contracts, trading and the like). It allows a company to identify the steps which it should be taking now (pre-Brexit⁴) and might take in the future both to protect its business and to take advantage of the undoubted business opportunities which arise in the UK and the rest of the EU.

Depending on the business in question, this audit may be very detailed and take weeks or months to complete, even before contingency plans are implemented. The focus is likely to be on matters such as free movement of persons, movement of data, regulatory changes, tariff barriers, customs barriers, IPR, taxation and supply chain issues.

Competition law will continue to apply in one form or another in the UK pre- and post-Brexit, so it may not be at the top of the list of audit considerations. However,

¹ The EEA is the EU plus Norway, Iceland Liechtenstein. Those three countries have extensive access to the EU Single Market. However, this is not full and does not include membership of the EU’s Customs Union for all goods nor access to the Single Market for agriculture and fisheries.

² Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) will no longer apply in the territory of the UK and EU law will no longer be part of UK law.

³ HM Government, The United Kingdom’s exit from and new partnership with the European Union, February 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

⁴ The UK is very likely to leave the EU Single Market at the date of its exit from the EU/EEA. Alternatively, it may leave at the end of any transitional agreement following exit. In this paper, it is assumed that the UK will leave the Single Market at the date of EU/EEA exit, so “Brexit” covers both issues.

this does not mean that competition law-related issues arising out of the Brexit vote can be ignored at the commercial and compliance levels. There are various immediate and longer-term practical matters which in-house and external advisers need to bear in mind and proactively consider.

Reinforce the message that competition law continues to apply in the UK

If asked about competition law compliance, the reaction of many in the UK to the vote would be along the lines of: *“All those EU laws dreamt up in Brussels no longer apply. Surely pesky competition rules are just such rules! We can now do what we want. Correct?”*.

At the same time, even before the vote, a research report for the UK Competition and Markets Authority (CMA) (the UK competition regulator) showed an amazing lack of awareness of basic competition law principles at many companies. For example, the report⁵ found that in the West Midlands region of the UK only 12% of businesses acknowledged that they were familiar with competition law and only 1% had undergone training on competition law. Further, only 43% of businesses in the West Midlands understood that agreeing prices, in order to avoid losing money (i.e. cartelizing), is illegal and only 39% knew that price-fixing could lead to imprisonment.

Against this background, and noting that these figures for the West Midlands are generally replicated throughout the UK, it's important to remind staff (particularly high risk staff) that EU law, including of course EU competition law, continues to apply in the UK at least up to the date of Brexit⁶. In any event, substantive UK competition law is, in effect, the same as EU competition law and also remains in force (and will almost certainly remain in force post-Brexit). Therefore, competition law continues to apply in the UK in exactly the same way today as it did before the referendum vote.

Further, the CMA recently expressly re-confirmed (although there was never any doubt) that in the period up to Brexit, and beyond, it will continue its active enforcement of competition law in the UK. Andrea Coscelli, CMA Acting Chief Executive, said in a speech in February 2017:

⁵ IFF Research, UK businesses' understanding of Competition Law, 26 March 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf.

⁶ Depending on the terms of any transitional agreement and the position the UK Government takes when transposing EU law into UK law at exit, EU competition law may also continue to apply (or effectively apply) in the UK post-exit, at least for a period. However, it is assumed that there will be no long-term agreement relevant to competition law under which EU competition law would in effect continue to apply in the UK.

“... the CMA has in the past 18 months stepped up significantly our own enforcement work: we are opening more cases and bringing cases to resolution quicker than our predecessors ... Those enforcement efforts will not waver in the period to [Brexit] ... The CMA is acutely aware that our key priority must be to retain our credibility as an agency by doing our day job as well as we possibly can.”⁷.

There is therefore a simple but worthwhile compliance message to be distributed: the corporate competition law compliance programme, including all the training, is still relevant (and this will be the case going forward (including after Brexit)).

Staff should also be reminded that discussions with competitors in relation to the implications of Brexit should not take place without guidance. Businesses’ preparations for and view of the impact of Brexit will often be confidential and therefore will not be the type of information that competitors should learn. This issue is considered below.

Be careful having discussions with competitors on the impact of Brexit

Brexit raises significant commercial, legal and other issues for businesses. Therefore, there may be a desire to discuss it with competitors (either directly or in a trade association or elsewhere). However, under EU and UK competition law, the exchange or discussion (or even one way provision, and even at one meeting) of sensitive commercial information between competitors is very dangerous. This includes in particular information relating to current or future competitive conduct. The same is true where information is shared via a third party.

It should be assumed that sensitive commercial information covers any non-public strategic information about a business’s commercial policy. This will include, but is certainly not limited to, future pricing and output plans. There are numerous cases at EU and UK level in which information exchange has been treated as cartel activity and fined heavily.

A recent UK example is the steel tanks case. On 19 December 2016, the CMA issued two decisions imposing fines on suppliers of galvanised steel tanks for breaching competition law by engaging in various types of cartel arrangements⁸.

⁷ Competition and Markets Authority, Andrea Coscelli on the CMA’s role as the UK exits the European Union, 4 February 2017, available at <https://www.gov.uk/government/speeches/andrea-coscelli-on-the-cmas-role-as-the-uk-exits-the-european-union>.

⁸ Competition and Markets Authority, Supply of galvanised steel tanks for water storage: civil investigation, 19 December 2016, case page available at <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.

One of these decisions was aimed at a supplier which was only involved in anti-competitive information exchange with the cartelists the subject of the other decision and was not in the cartel itself. This supplier was fined for taking part in the information exchange even though it took place at a single meeting.

At EU level, it was recently confirmed by the ECJ that the European Commission had been correct to find that an information exchange on prices aimed at slowing down the price decrease on the smart card chip market was a cartel. There was no need to analyse the effects of the practices in question on the market (if any)⁹.

While perhaps not directly relevant to the types of information that might be discussed during Brexit discussions, these cases do show the breadth of the concerns that can be raised by the rules on information exchange under EU and UK competition law. They are good general compliance examples.

The message should be that no discussions with competitors should take place in relation to Brexit issues without competition law guidance being provided in advance (or at least consideration being given to the issue). Discussions should only take place in formal meetings or calls set up for that purpose (ideally with a competition lawyer in attendance). Individuals should be trained and told that they need to prepare an agenda in advance (and ideally have this reviewed by a competition lawyer in advance), stick to the agenda, ensure minutes are taken, object if inappropriate issues are discussed, make sure these objections are minuted and be prepared to leave any discussion and report concerns to in-house lawyers (orally in the first instance). The training should also make it clear that, if, at a side meeting such as coffee break, a competitor approaches an individual and starts an inappropriate discussion, that individual should stop the discussion, make it clear that he cannot and does not want to discuss such matters and does not want the information. He should also be told immediately to report such an incident to his in-house counsel (orally in the first instance).

If competitively sensitive information is used by a third party (for example, to model the impact on a sector of new proposals), then companies must make sure that the information will be treated appropriately by that third party. Similarly, if a company (with a legitimate reason to do so) shares sensitive information with other third parties such as customers and suppliers, it needs to ensure that the third party

⁹ General Court of the European Union, Cases T-758/14 Infineon Technologies AG v Commission and T-762/14 Koninklijke Philips NV and Philips France v Commission, 15 December 2016, available respectively at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=186273&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=339343> and <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d674ae51fa3cbb49b6ad5784f32e51427e.e34KaxiLc3eQc40LaxqMbN4PahaOe0?text=&docid=186277&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=696249>.

is not being used as a conduit to share that information with competitors (and the same is true in reverse if a company accepts or obtains information).

In other words, in broad terms the normal guidance that applies, for example, to trade association meetings (at which competitors will be present) should be followed. Guidance as to what might be appropriate and inappropriate to discuss at such meetings is also broadly relevant. Thus, for example, discussions on general legal (such as tax and environmental law), legislative and regulatory issues raised by Brexit will normally be unproblematic (since these will affect any company's business to the same extent). Generic issues such as matters in the public domain and of general interest to the industry will also usually be unproblematic, as will discussions on how to represent the industry's view to government or other regulatory bodies or the collection and dissemination of aggregated, anonymised and historic statistical information.

However, discussions on a company's particular contingency plans (e.g. moving staff or the business to a particular country (and the details around this), the costs of implementing certain proposals or changes to suppliers) will usually be sensitive commercial information which should not be discussed with competitors. The same is true for discussions on the likely commercial impact of Brexit-related changes on an individual business, such as sales forecasts (high level or suitable aggregated information may potentially be shared, but advice should be taken).

Consider the post-Brexit options but take care with joint lobbying

The UK Government has effectively said that there are two options for the post-Brexit arrangements between the EU and the UK. These are: "an ambitious and comprehensive Free Trade Agreement and a new customs agreement"; or no agreement at all¹⁰. In both cases, the UK would be outside the EU Single Market and outside the EU Customs Union¹¹.

If there is to be a Free Trade Agreement (FTA), the EU's agreement with Canada is often seen as the model, or at least the starting point¹². In the latter scenario of

¹⁰ See the document referred to at footnote 3, chapters 8 and 12.

¹¹ The Single Market treats the EU's Member States as a single economic area. In particular, it promotes the free movement of goods and services within the EU in three key ways: removing import duties on goods (tariffs) and removing quotas; creating a single customs area for the movement of goods without customs checks; and developing a level playing field for all businesses within the EU by removing other barriers to free trade such as differing regulations or technical specifications ("non-tariff barriers"). This latter aspect opens up both goods and services markets and ensures that all EU companies are treated in a fair and non-discriminatory way. The EU therefore forms a Customs Union, with, as noted, no tariff barriers between Member States, and which also includes a common external tariff on imports from countries outside.

¹² The EU and Canada have negotiated the Comprehensive Economic and Trade Agreement (CETA). CETA was signed on 30 October 2016 and on 15 February 2017 the European Parliament gave its consent. That vote paved the way for CETA to enter into force provisionally, once it has also been ratified on the Canadian side. CETA will be fully implemented once the

no agreement at all, the EU and UK would be in a pure “third party” relationship based on the WTO rules¹³.

The UK Government has expressly recognised that all is still to play for. It has suggested that any agreement may take in elements of current Single Market arrangements in certain areas. On customs specifically, it has said that there are a number of options, including a completely new agreement, or for the UK to remain a signatory to some of the elements of the existing arrangements.

Notably, however, these are comments from the UK side only. The other EU members have consistently said that the UK cannot “pick and choose” aspects of current EU membership. For obvious (and entirely sensible) reasons, they do not want the UK to have a better deal outside the EU than it currently does inside.

Changes to the competition law regime are arguably second order when compared with these major issues and, as noted, it can be assumed that competition law of some nature will remain in force post-Brexit in the UK. The UK Government has in the context of its Brexit discussions recognised the benefits of competition law as a type of “cross-cutting regulation”. However, at a high level, and of specific interest to some businesses, it seems clear that a side effect of hard Brexit is that the direction of EU and UK competition policy is likely to diverge over time. There have already been calls for changes to EU competition law, particularly so as to allow “national champions” to be created in the EU (through more lenient application of the merger control rules) and to allow greater state intervention (through a relaxation of the EU State aid rules). From the UK point of view, similarly, one of the supposed benefits of Brexit has been touted as freedom to intervene in industry (i.e. free from the EU State aid rules). There have also been calls for wider “public interest” tests to be introduced into UK merger control post-Brexit and there could be changes to rules on vertical agreements such as distribution agreements (see further below).

All issues are up for negotiation and it is therefore incumbent on every business to consider what is best for it and how to lobby for this (including in relation to any transitional arrangements which may take effect at the date of exit). The approach should be very similar to that taken when lobbying in relation to existing EU trade deals (such as the Canada agreement and the proposed (and now probably defunct)

parliaments in all EU Member States ratify the deal according to their respective domestic constitutional requirements. CETA provides for the phasing out of all tariffs on industrial and most agricultural goods entering the EU. It also addresses a number of other directly discriminatory measures such as quotas and subsidies for industrial goods. It does not include “passporting” for financial services firms and provides for only limited liberalisation of other services markets.

¹³ WTO rules represent a minimum threshold for trading with third party countries. Under WTO rules, neither the UK nor the EU could offer each other better market access than that offered to all other WTO members.

EU/US deal¹⁴). Lobbying should be done in the UK, in Brussels and in the other Member States of the EU. Joint lobbying which reflects the collective views of an industry sector will often be more effective than individual lobbying by separate companies, however important they are.

This could mean taking the following actions:

- providing joint papers covering the EU and UK positions of the industry (e.g. by a UK and an EU trade association);
- providing practical solutions to the negotiation issues raised by any proposed agreement;
- providing ideas as to how to market the particular issue to the public (why should “Joe Six Pack” or “The Man on the Clapham Omnibus” or his equivalent, care?).

Businesses may also want to consider lobbying for special treatment within the UK now and post-Brexit (i.e. as a separate issue from the EU/UK relationship). A high profile example of this is Nissan’s apparent success in gaining concessions from the UK Government to persuade it to invest in a car plant in the UK (see further the EU State aid section below).

Turning to the competition law aspects of lobbying itself, joint lobbying by competitors for the purpose of urging or influencing official action is, in principle, permissible under EU and UK competition law. However, there is no “*Noerr-Pennington*” presumption as there is in the U.S. Therefore, when analysing a company’s Brexit lobbying, its legality needs to be analysed from first principles.

In the context of Brexit lobbying, the likely principal concern (apart from exchange of confidential commercial information which may arise as a result; see the discussion above), is whether the lobbying has an inappropriate aim in terms of its impact on others and its proportionality. For example, if the joint action could lead to an increase in the relative costs of other undertakings active on the market or the petitioners’ market power, resulting in potential price increases or negatively impacting the variety of goods available to consumers, then concerns could arise. The impact on third parties and the proportionality of this needs to be considered. This may apply both to lobbying on post-Brexit arrangements with the EU and special treatment within the UK post-Brexit (or indeed in the lead up to it).

¹⁴ The EU has been negotiating a trade and investment deal with the United States (The Transatlantic Trade and Investment Partnership or TTIP), but its status is currently uncertain at best. See European Commission, The future of EU trade policy, 24 January 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155261.pdf.

Before engaging in joint Brexit lobbying, companies should therefore consider the main purpose of the lobbying, its proportionality and the procedure that they use (so as to deal with information exchange concerns)¹⁵. Competition law guidance needs to be taken in advance¹⁶.

Review trading agreements

The form of many agreements affecting the EU (or at least certain clauses within them) is driven by competition law considerations. For many businesses, the most obvious example is distribution agreements and, in particular, limitations on the ability to impose restrictions on distributors concerning pricing and cross-border sales in the EU (whether this concerns online or offline sales). However, a range of other agreements are also affected (such as agency agreements, licensing arrangements and cooperation agreements with competitors, including joint ventures).

Given the uncertainty as to the shape of post-Brexit arrangements and, in particular, the likely changes to the competition law landscape, it is not possible to make changes at this stage in order to ensure compliance with competition law going forward (or indeed to make sure that a business is not unnecessarily limited in its activities). Nevertheless, businesses should review their existing agreements, precedents and new agreements affecting the EU (not just the UK) to identify terms driven by competition law considerations and to determine the potential impact of Brexit on relevant terms. It is advisable, at least, to consider language which might be inserted into or changes to new agreements or precedents to take account of possible Brexit-related changes.

Some clauses may not operate as originally intended post-Brexit, some might be changed post-Brexit to the advantage of a business and some may no longer be legal post-Brexit¹⁷. When the position post-Brexit is clearer, renegotiations or termination can be considered. This applies to UK agreements and non-UK agreements which might affect the UK.

One simple example of a current competition law rule is that, under current EU and UK competition law, it is generally not permissible to restrict a distributor from

¹⁵ Competition authority guidance in this area is limited, but the Romanian National Competition Authority has published an analysis. This is available at http://www.consiliulconcurentei.ro/uploads/docs/items/id8255/indrumari-bune_practici_in_activitatea_de_petitionare.pdf (in Romanian only).

¹⁶ There are other compliance issues relevant to lobbying, including in particular bribery/corruption rules and specific requirements for lobbyists.

¹⁷ For example, it is not yet known whether the parallel exemptions under UK competition law (which provide for UK equivalents of the EU provisions providing for automatic exemption from EU competition law of certain agreements; the well-known EU “block exemptions” such as that for vertical agreements) will continue to be available.

making cross-border sales within the EU (and regulatory fines are likely for such provisions). However, under certain circumstances, “active” sales into other countries may be restricted (“passive” sales can, as a general rule, never be restricted). These rules are to a large extent designed to implement the EU’s Single Market (level playing field) principles.

Since the Single Market will no longer be relevant in the UK after Brexit (assuming a hard Brexit), it is possible that at or after Brexit the UK Government will take the opportunity to put in place UK rules which will allow greater restrictions on cross-border trade from or into the EU (and intra-UK trade) than are currently allowed under EU and UK law. This would also impact the shape of permissible agreements concerning distribution in the EU, since a complete ban on exports to the UK (once outside the EU) would not raise EU competition law concerns either if there was no realistic possibility of the products being re-imported into the EU (which will be entirely possible for many goods given transport costs and the likely need for customs clearance in both directions). Companies may wish to be ready to take advantage of these changes.

The CMA has already recognised that there may be changes in this area. Andrea Coscelli, CMA Acting Chief Executive also said in his February 2017 speech:

“... scope for possible change would ... exist on the antitrust side [post-Brexit]: the EU antitrust block exemption regime would no longer apply directly, for example, and so – following [Brexit] with a clear break there could be an opportunity over time to reassess the policy rationale underpinning those block exemptions. The European exemption regime is, unsurprisingly, significantly influenced by the single market regime – with increasing trade globalisation there would in theory be scope to review what approach we should take with, for example, vertical restraints, once those single market imperatives don’t apply directly.”¹⁸

A range of other non-competition law-related terms in existing agreements may be impacted by Brexit or become relevant even now as a result of the Brexit vote (such as references to EU regulatory provisions, *force majeure* provisions, compliance with law clauses, hardship clauses, termination rights and material adverse change provisions). These could provide protection for a party which becomes negatively affected. English common law principles might also be used (such as frustration).

New agreements, which will continue in force after Brexit or which might be affected by Brexit-related developments prior to that point, should include a “Brexit

¹⁸ See the previous footnote; EU block exemptions provide for automatic exemptions for certain types of agreements from EU competition law, subject to conditions.

clause” or clauses of some nature (or at least active consideration should be given to this). For example, parties should consider including specific provisions relating to the potential impact of prolonged negotiations to implement the exit, the impact of any new trade agreements once negotiated or related issues. They should also consider whether to include renegotiation and/or termination rights in case any new trade agreements will result in an increased burden or negative effects on the intended business transaction. Specific potential effects from Brexit will depend on the industry and the contract in question, but could include for example the imposition of tariffs, restrictions on the ability to provide services cross-border, the need for new licences and consents, restrictions on the ability to move workers cross-border, changes to relevant regulatory law and exchange rate fluctuations.

Parties should also consider whether expressly to include or exclude Brexit from standard terms in new agreements such as *force majeure* and material adverse change provisions. If a specific Brexit clause is used, it would seem preferable to exclude Brexit impacts from these types of clauses. However, if Brexit is to be covered by them, these types of provisions should include suitable notice terms and detailed explanation of the consequences of the right to terminate, and more importantly, ensure that the Brexit definition and when it can be triggered is sufficiently wide to cover particular concerns.

There are other contractual drafting issues to consider. For example, many agreements have the “European Union” as their territorial scope. Once the UK leaves the EU, it will of course no longer be covered by any such territorial description. Consideration will need to be given to whether an amendment to the contract is required or if instead one can invoke a *force majeure* or material adverse change clause to terminate the contract (if desired). New agreements should in any event cover the issue (but also note that the UK itself may change its composition, for example if Scotland ceases to be part of the UK as a result of or even at Brexit, which is entirely possible). New agreements should also deal with specific references to EU legislation and succeeding UK legislation. Enforcement issues in the event of litigation are also relevant.

Consider private competition litigation strategy

Private competition law litigation (damages and other claims, particularly for injunctions) is expanding rapidly in the UK and the rest of the EU. This is now a genuine commercial weapon for businesses of all sizes. This will only be increased

by the implementation of the EU Antitrust Damages Directive in all EU Member States¹⁹.

Brexit raises issues for general commercial litigation, which are also relevant in the context of private competition law litigation. Thus, for example, recognition and enforcement of judgments may be affected by Brexit, and general issues concerning justiciable causes of action and jurisdiction will arise.

As with other types of litigation, the impact of Brexit on private competition litigation needs to be considered when planning strategy (as a claimant or defendant). A particular issue is that many current actions for damages in the UK courts for breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) rely, in whole or in part, on European Commission infringement (and fining) decisions. These decisions establish that an infringement of EU competition law took place and are currently binding on the UK courts. Despite academic views being expressed to the contrary, it seems inevitable that post-Brexit this will no longer be the case (as a matter of UK law). This is because it would no longer be appropriate upon the UK's exit from the EU competition law regime for the UK courts to be bound by any measures of the European Commission (which after all will be just another third country competition law regulator post-Brexit), even in matters relating to the application of EU law to conduct implemented in the EU (and not the UK).

At this stage, it is impossible to say whether the UK's attractiveness as a forum for private competition litigation impacting the EU (outside the UK) will be changed post-Brexit (as opposed to litigation relating to purely domestic UK issues, for example, based on decisions of the CMA relating only to the UK, which will be unchanged). There may be technical legal arguments as to why this does not need to change (and UK-based lawyers are inevitably keen to make these), but it seems likely that there will be at least a mood or perception shift in favour of jurisdictions which remain within the EU (particularly Germany and the Netherlands, which with the UK are currently the leading jurisdictions for private competition law litigation in the EU). The implementation of the EU Antitrust Damages Directive

¹⁹ The European Commission's summary of the implementation position is available at http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html. It seems likely that, upon Brexit, the UK's implementation of the Damages Directive will remain in place, but the position after that is unclear. The UK Government's consultation on the implementation of the Damages Directive (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577228/damages-directive-consultation-response.pdf) states: "...Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU."

will only increase this shift, since in many countries this Directive makes it dramatically easier to bring private competition law claims (at least for damages).

Consider how to take external legal advice

Post-Brexit, EU competition law will of course continue to apply to any company active in the EU (including UK or U.S. businesses which have no physical or legal presence there but only trade). The European Commission will continue to be the lead competition law regulator for the EU.

Against this background, it needs to be recalled that only legal advice from external EU/EEA-qualified lawyers is privileged vis-à-vis the EU institutions (meaning it is protected from disclosure in an EU antitrust, cartel, merger control or State aid investigation). This means that, post-Brexit, advice from UK-qualified (in England and Wales, Scotland or Northern Ireland) external lawyers will no longer be privileged for these purposes and would therefore have to be disclosed to the European Commission in any investigation (as is already the case in relation to advice from, for example, U.S.-qualified, as well as all in-house, lawyers).

This is clearly a very significant issue and it can be expected (and is happening even now²⁰) that companies will not seek advice on EU competition law matters from lawyers who are qualified only in the UK²¹. Companies need to consider how they obtain external legal advice on EU competition law matters and, in particular, whether to continue to use lawyers who are only qualified in the UK.

Consider EU State aid and UK aid

One branch of competition law in the EU is State aid. EU State aid law bans aid in all forms from EU Member State governments and public bodies to companies, unless a market investor would have done the same thing or the aid is exempted. If illegal aid is identified, there is a risk that the company will be required to repay it with interest. There are no equivalent rules at national level in the EU.

²⁰ Even assuming pre-Brexit advice from such lawyers will remain privileged post-Brexit, companies should carefully consider whether, for pre-Brexit European Commission investigations, a legal team consisting of lawyers qualified only in the UK is appropriate. It will be necessary and desirable to ensure that case knowledge and relationships with Commission officials can continue post-Brexit and this may not be the case if lawyers who are only UK-qualified are used.

²¹ In the interests of transparency and full disclosure, the author notes that he is qualified in the UK (England & Wales) and the Republic of Ireland (the latter will of course continue as an EU Member State) and holds a practising certificate in both jurisdictions (i.e. he is not simply “on the roll” and non-practising in either or both of these jurisdictions, which is a course many England & Wales lawyers have taken in relation to Republic of Ireland qualification). He is also a member of the Brussels Bar (E List).

There have been several high-profile examples of EU State aid cases in the past year or so, not least involving taxation in Ireland, the Netherlands, Luxembourg and Belgium²². The UK Government's arrangements concerning the new Hinkley Point C nuclear power plant were reviewed under the EU State aid rules²³.

The UK will remain subject to these rules until Brexit but it seems likely that the EU State aid rules will fall away after that. In principle, the UK will then be able to assist companies and industries in ways that it cannot do at the moment.

However, the UK may wish to have its own laws in place at Brexit. In any event, even if it does not, it is likely still to be subject to some type of control of subsidies (and a non-interventionist UK Government might be willing to agree to this as a negotiating point anyway).

As noted, the most likely long-term arrangement with the EU is a type of FTA. CETA (the EU/Canada agreement) includes a whole chapter on government subsidies (Chapter 7)²⁴. Both the EU and Canada have to notify each other if they subsidize the production of goods. In addition, they have to provide further information on any subsidies they give to companies providing services, if the other side asks for such information.

In addition, the chapter sets up a mechanism to enable the EU and Canada to consult each other on subsidies that may negatively affect trade between them, and to find solutions if a subsidy is found to do so. The EU and Canada also agree not to subsidize exports of agricultural products to each other's markets.

Even the WTO option for the UK post-Brexit is not entirely free of a type of State aid control²⁵. The WTO Agreement on Subsidies and Countervailing Measures controls the use of subsidies and regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Alternatively, a country can launch its own investigation and ultimately charge extra duty ("countervailing duty") on subsidized imports that are found to be hurting domestic producers. There may not be a requirement to pay back, but a business could of course still be impacted by this.

²² The European Commission's summary of tax rulings cases concerning these jurisdictions is available at http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.

²³ European Commission, SA.34947 Support to Hinkley Point C Nuclear Power Station, 8 October 2014, case page available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34947.

²⁴ The text of CETA is available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

²⁵ The UK is a WTO member in its own right. As part of leaving the EU, the UK will need to establish its own tariff schedules at the WTO covering trade in goods and services. The UK Government is working on this and its aim is to establish schedules which replicate so far as possible the current position.

Businesses should consider whether they have received aid in the past in the UK, whether they might be able to receive it in the future under a looser post-Brexit regime (and indeed, in the run up to Brexit, if the UK government already starts to provide aid), and also whether competitors might similarly benefit. This can impact investment and other decisions²⁶.

The other side of this issue is that, in the future, it is likely that UK-based companies established only in the UK will be unable to challenge or formally complain about aid granted in other EU Member States to their competitors (and the same will be true for the UK Government). If EU competitors are likely to receive aid and this could impact the business, consideration should be given to what steps can be taken. A complaint pre-Brexit might be an option.

Consider Public Procurement

Public procurement law is an EU internal market issue, but is often “lumped in” with competition law, so is considered in this paper.

Any UK company which uses rights set out in the EU public procurement rules to access contracts in other EU Member States needs to be aware of this issue. It is not clear what the position will be post-Brexit, but some comments can be made at this stage.

Even in a hard Brexit, it seems likely that the UK would continue to remain a party to the Government Procurement Agreement (GPA), a WTO “plurilateral” agreement. The GPA rules are very similar to the EU public procurement directives and would give UK companies access to the procurement markets of the EU countries and a number of other major countries (including the U.S.). Post-Brexit, public procurement rules are therefore likely to be very similar to those today. However, companies with an interest need to monitor the situation.

Consider leniency

The European Commission and national competition authorities, such as the CMA, operate leniency (whistleblowing) programmes. These provide for protection against fines for companies which provide evidence of certain illegal anti-competitive behaviour (principally cartels).

²⁶ A high profile example from 2016, mentioned in the main text above, concerns Nissan’s decision taken after the Brexit vote to make further investments in the UK. According to the UK Government, the concessions it made to Nissan in order to facilitate this do not involve State aid (and the European Commission appears to agree with this position). See, for example, the summary available at <http://www.bbc.co.uk/news/business-37893849>.

An application to the Commission covers its investigation in the entirety of the EU. This includes the UK at the moment but of course post-Brexit will not include the UK. Therefore, in the period up to Brexit, any company which applies for leniency to the Commission at EU level should consider very carefully whether to do so in the UK at the same time. This is often done anyway as a fail-safe, but could become a crucial issue post-Brexit, when the UK competition regulator (the CMA) may investigate and rule on pre-Brexit infringements (instead of the Commission).

If a leniency application has not been made in the UK in relation to pre-Brexit conduct, then a company may not gain protection in relation to its activities in the UK (i.e. absent a separate UK leniency application pre-Brexit, the company may fall into a loophole that leaves it unprotected in the UK). Since fines for anti-competitive activity can be high even if only imposed by the CMA, this could be a very costly omission.

Conclusion

Broadly, competition law will at a substantive level likely be very similar in the UK immediately following Brexit as it is now (although it is very likely to change and to diverge from the EU position over time). Companies have many issues to think about in the lead up to Brexit, and competition law is not likely to be top of the list. However, various practical considerations and issues do arise and in-house and external advisers should give thought to these.

These issues range from the practical to the more strategic. In the former category are compliance issues such as ensuring staff continue to comply with competition law in the UK and ensuring that discussions on the impact of Brexit with competitors and any lobbying do not infringe competition law. The issue of how to take legal advice so as to ensure privilege protection is maintained is also such an issue, as is how to approach a leniency application in the EU if this becomes necessary in the run-up to Brexit.

The latter (strategic) category includes a review of trading agreements for competition law issues, a consideration where relevant of the impact of Brexit on private litigation strategy and a consideration of the potential impact of changes to EU State aid and public procurement law.

As with any aspect of Brexit, preparation and clear thinking is necessary to take advantage of the competition law-related opportunities and to prepare and protect a business against competition law issues.