Kluwer Competition Law Blog

Brexit and competition law

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A “leave” vote in the UK referendum on 23 June 2016 would have a number of repercussions. Competition law is not one of these areas where these repercussions are going to be dramatic, but still a few things both at the UK and at the whole of the (remaining) EU would be different.

No major effects on substance

UK competition law has long been modelled (since 1998) to the EU system and in terms of substance not much will change. Besides, even if Articles 101 and 102 TFEU will no longer be applicable to the UK, EU competition law enforcement and existing EU case law will continue playing a very influential role in the way UK competition law is applied by the CMA and UK courts. Of course, the CMA and the UK courts will no longer be bound by the European Courts’ case law and will not be subject to Article 3 of Regulation 1/2003, which currently provides that what is permitted under EU competition law cannot be prohibited under national competition law.

If the UK decided to join the EFTA/EEA, it would be bound by the EEA Agreement provisions on competition, which are modelled on the EU equivalent provisions. They are to be found in Articles 53 to 60, Annex XIV and Protocols 21 to 24 of the Agreement. Generally, there is transposition on an on-going basis of all EU Regulations and Directives in this area through Decisions of the EEA Joint Committee. Soft law EU acts, such as Notices, Communications, Guidelines, etc., are usually re-adopted for the EFTA / EEA States by the EFTA Surveillance Authority.

Some legislative accommodations would be necessary

Even if there is no serious impact on substance, the Competition Act may have to be amended to deal with some more detailed / technical questions. Thus, currently, s. 10 of the Competition Act 1998 refers to “parallel exemptions” from the Chapter I prohibition (anti-competitive agreements) and provides that an agreement that is covered by an EU Block Exemption Regulation will be exempted under UK competition law, too. This provision will not make sense following Brexit. However, again, the UK is unlikely to depart from the standards adopted by the European Commission in its Block Exemption Regulations and Guidelines. Indeed, the CMA could decide to recommend to the Secretary of State to copy the provisions of the EU Block Exemption Regulations into “block exemption orders”.

Another provision that would have to be revisited is s. 60, which is a “convergence clause” ensuring that the application of UK competition law should be compatible with the application of EU competition law by the Commission and by the European Courts.

Depending on whether the UK joins the EFTA and the EEA, further legislative accommodations may be necessary.

Enforcement – Procedure (antitrust)

While there will not be any major change in substance, changes in procedure / enforcement would be major. Thus, the CMA will no longer have competence to apply EU competition law and will cease to be a national competition authority (NCA) within the EU. Currently, Regulation 1/2003 provides for a number of duties for NCAs, including for the automatic loss of competence for a NCA if the Commission initiates proceedings in that case. In addition, the CMA is currently part of the ECN (European Competition Network) and there is an informal and flexible allocation of cases among NCAs. There is also close co-operation among NCAs. The effect of all this is that concurrent proceedings in the EU are currently impossible (between a NCA and the Commission) or highly unlikely (between two NCAs). This would no longer be the case after Brexit and the CMA would be likely to open its own investigation irrespective of whether there is already an investigation by the Commission or another NCA. Thus, companies will have to deal with a degree of duplication. This will necessarily increase costs.

Another procedural point worth mentioning is legal professional privilege. Following the UK's withdrawal from the EU, lawyers qualified solely in England & Wales, Scotland or Northern Ireland would no longer be enrolled in an EU Member State's Bar or Law Society and, consequently, their advice would not be privileged. These lawyers would no longer be protected by specific free movement provisions and most likely would be considered as foreign lawyers and would not be entitled to plead before the European Courts.

Brexit may also represent a blow to London as an international litigation centre for damages actions for violation of EU competition law. Currently, Schedule 8 to the Consumer Rights Act 2015 provides for an advanced system of private antitrust enforcement in the UK. These rules apply not only to UK but also to EU competition law. Obviously, in case of Brexit, it will no longer make sense for UK law to keep in place a system for the enforcement of foreign competition rules.

With regard to damages actions, of relevance is also the Rome II Regulation. Currently, according to Article 6(3) of that Regulation, the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is affected. When the market is affected in more than one country, the claimant may also choose to base his claim on the law of the EU Member State where he is bringing his claim, as long as the market of that Member State is directly and substantially affected by the restriction of competition that gives rise to the damages claim. This claimant-friendly rule, read together with the rules on jurisdiction contained in the Brussels I Regulation, provide claimants with the option to have their case for antitrust damages heard by one court applying one single law, even in situations where more than one defendant is involved and where the damages occurred in several EU Member States. Following Brexit the Rome I and Brussels I Regulations would cease to have effect unless saving legislation was enacted by the UK government.

Of course, a possible Brexit does not affect the jurisdiction of UK courts to apply EU competition law as an integral part of the law of an EU Member State, if the latter is the law applicable to the dispute pending before the UK courts. However, in that case, the EU court would be applying EU competition law as part of a foreign applicable law.

Merger enforcement

While, again, merger enforcement in the UK will not change much in terms of the substantive analysis in case of Brexit, there would be important procedural and jurisdictional changes. The EU Merger Regulation will cease to apply and, as a result, there will no longer be a one-stop-shop principle for notification of mergers. Transactions would have to be notified to the EU if the EU Merger Regulation criteria are fulfilled (the UK not being considered as an EU Member State) and may have to be notified, at the same time, to the UK authorities. The new state of affairs might even lead to the introduction of a mandatory merger notification system by the UK. The UK competition authorities may argue that maintaining the voluntary system would no longer make sense, bearing in mind that the CMA would no longer be consulted by the European Commission on a number of major mergers with effects on UK territory. Again, this would mean duplication and certainly more costs for companies.

If the UK joins the EFTA/EEA, the specific rules on EU, EFTA and national dimension would apply (Article 57 EEA Agreement).

State aid law

In case of Brexit, the EU State aid rules will no longer apply and the UK government would have to decide whether to replace them with a domestic system of State aid control or simply do nothing. In the latter case the UK would regain a degree of economic sovereignty. UK companies doing business in the EU would continue to be protected against illegal State aids given by EU Member States to companies.

Of course, this is all without prejudice to the application of WTO rules on subsidies, which will continue to apply. Thus, if the UK government hands out aid to ailing companies that trade with the EU, the latter risk being on the end of anti-dumping / subsidy duties.

Long-term effects on the EU

Finally, Brexit might have some long-term effects on the way EU competition enforcement and case law develops. The UK has generally been very influential within the EU in promoting free trade and competition and in fighting, in particular, State restrictions to competition. At the same time, the UK competition authorities have historically been a bastion of modern competition enforcement and an effects-based approach. This positive influence would be lost following Brexit and there is some risk that EU competition law enforcement may shift towards more formalism.

In addition, the UK members of the European Courts have historically been less prone to formalism and less deferential to the Commission, when it comes to shaping the competition law case law in Luxembourg. A basic research of some EU Court judgments that espoused an effects-based approach shows that the reporting judge was British or the case was decided by a chamber with a British member. That positive influence would be lost.

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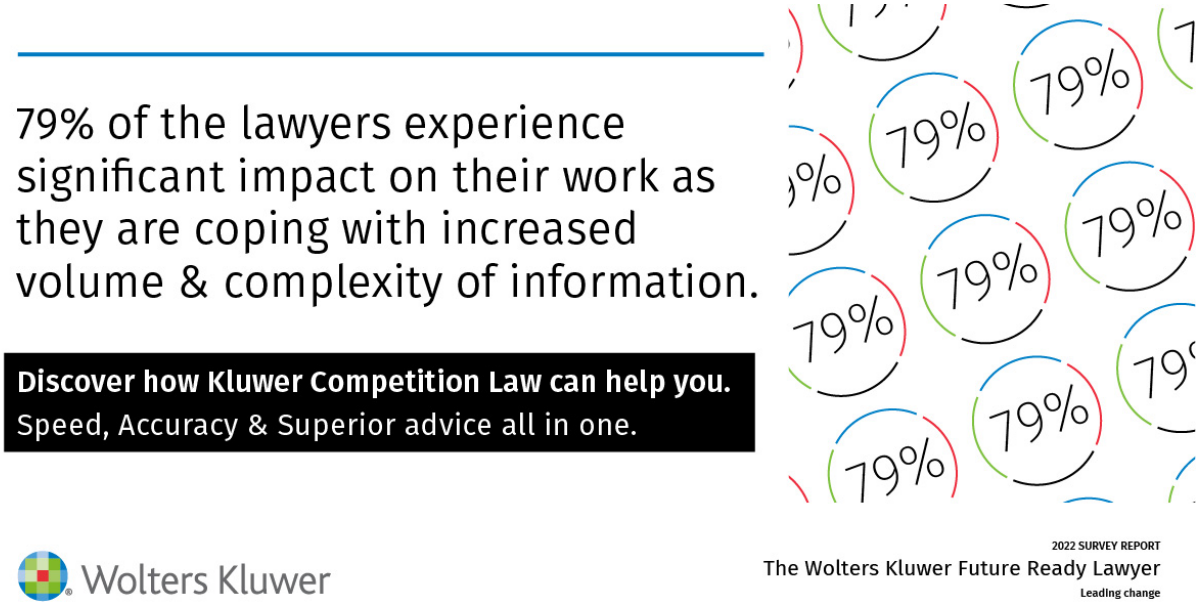

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