

Agenda

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Brexit: implications for competition enforcement in the UK

Competition law may be one of the legal areas most strongly affected if the UK leaves the EU. This would be due to changes in the relationship between the UK and EU competition authorities, potential inconsistencies in the findings or approach of those authorities, and the potential migration of some types of work away from London and into one of the remaining EU member states

As 23 June approaches, the polls are still too close to call: will the UK vote to stay or leave? If the UK were to vote to 'leave', there are many scenarios possible for what would follow. Nothing would be decided immediately, and negotiations would be expected to take some time (Greenland's 1985 exit took place three years after its vote to leave).¹

The effects, both positive and negative, would be felt throughout the UK economy, and the UK's legal services sector, with a GVA of £25.7bn,² is no exception. Macroeconomic considerations, such as access to European and other markets, and free movement of people and investment, will be influenced by the outcome of the vote, and will have important implications for the growth of UK legal services over the coming decades.³

However, this tells only part of the story. The unique role of legal services firms in the economy means that the potential impact of Brexit goes beyond macroeconomic concerns. Many of the laws on which UK law firms advise clients come from the UK's membership of the EU, and are overseen by EU courts.⁴ If these laws cease to apply to the UK, there will be important consequences for the services offered by UK law firms. Historically, one of the areas of law most closely linked to the EU has been competition law, a small but significant part of UK legal services, forming around 5% of the top UK law firms' offering.⁵

The impact of Brexit on competition law would be legally complex, and sensitive to the specific terms of the UK's new relationship with the EU. For this reason, we do not seek to advance a specific assessment of how the practice would change following Brexit; instead, we explore two possible developments outlined by law firms, and put these in the economic context of the wider Brexit debate.

1. The diversion of private competition enforcement (damages claims) away from London to other jurisdictions.
2. The increased role for UK competition authorities as they begin to operate separately from the European Commission. Oxera's independent review of the potential effects of Brexit on transport looked at its effects on the aviation, ports and rail sectors.

Diversion of damages cases away from London?

London is often the jurisdiction of choice for private enforcement competition law, with practitioners reporting several advantages that the city has in this regard.⁶ For example, there is a large and well-developed network of legal, economic, financial and technical advisers to support a claim. Rules on legal matters such as disclosure and limitation are well established and favoured by potential claimants. The courts have a reputation for consistency, with many judges experienced in competition matters. Moreover, the network of claim funders and insurers provides the financial support needed to get a case 'off the ground'.

In economics parlance, London's legal services in general, and competition practitioners in particular, benefit from considerable agglomeration effects, whereby firms benefit from being located near complementary businesses (a classic example is the cluster of technology firms in Silicon Valley).⁷ Such advantages would not disappear post-Brexit and are not easily duplicated by other cities. For these reasons, assuming that the UK remains part of the EEA, the economics of private competition law enforcement in the UK are not likely to change substantially. Due to the

EEA mirroring EU competition law, EU court rulings would continue to bind UK courts, and European Commission decisions would continue to provide a basis for 'follow-on' claims.

However, for a number of matters, it appears that there could be serious legal uncertainty if the UK were to leave the EEA.⁸

The first of these is jurisdiction. Currently, the Brussels Regulation provides guidance on which courts have jurisdiction for which cases, usually the court where the case is first brought.⁹ For competition cases that span multiple member states, claimants may have a choice of court, which is often the UK (assuming the presence of a suitable UK defendant).¹⁰ It is not clear whether the Brussels Regulation would continue to apply to the UK if it left the EEA, and, if not, what jurisdiction rules would apply instead. Nevertheless, the risk of jurisdictional uncertainty following Brexit is widely reported, with some commentators suggesting that a claim brought in a UK court may be subject to anti-suit injunctions from non-UK courts, alongside delays serving proceedings and enforcing judgments.¹¹

Until such uncertainties are resolved, it is questionable whether it would be economically viable to pursue a claim in the UK against a group of defendants domiciled outside the UK. Some notable cases fall into this category—for example, the follow-on damages claim for the cartel in carbon brushes (which are used to conduct electricity) featured only a single UK defendant out of six.¹² Jurisdictional uncertainty could therefore have a real impact on the number of cases brought in the UK. Of the 35 monetary claims cases registered at the Competition Appeal Tribunal (CAT) since its formation, five¹³ have involved defendants that are predominantly based outside the UK.¹⁴

The second ambiguity concerning the legal industry is the status of Commission decisions as factual evidence in UK private damages claims.¹⁵ Many damages claims in the UK 'follow on' from Commission decisions and any associated hearings at EU courts. In the event of the UK leaving the EEA, there would be some ambiguity about the applicability of such decisions to UK courts.¹⁶ Moreover, new decisions from the Commission would not apply to the UK and a follow-on claim would require a separate investigation and decision issued by the UK competition authorities (see below). The economic impact of this change would be twofold.

- If a single case is brought in Europe, it may be more appealing to claimants to bring the case in a jurisdiction where the applicability of Commission decisions is unambiguous. Using the same 35 monetary claims brought in the CAT as a benchmark, 12 of these have been based on European Commission decisions.¹⁷
- It may become necessary to bring two separate cases (one for the UK, and one for the rest of Europe) to claim damages for the European market. This duplication of casework would increase the costs of bringing the case compared with the current environment, without increasing the claimable damages, meaning that

some cases might become economically unviable for claimants and claim funders.

Both factors might result in a decrease in the number of claims brought in the UK. These changes could be particularly detrimental to the sector in the context of wider economic and regulatory developments. Other regimes in Germany and the Netherlands have been the forum for significant volumes of damages claims in recent years.¹⁸ Looking forward, the EU Damages Directive seeks to harmonise the process for damages claims across the EU and includes provisions to add many of the features of the UK regime (such as disclosure rules) to the legal framework of other member states.¹⁹ While London's historical advantage will remain, a UK exit from the EEA might result in increasing volumes of cases diverting to these other regimes.

Multiple authorities for mergers and enforcement

If the UK remains part of the EEA, many commentators consider that the role of UK competition authorities would change only to a limited extent, with responsibility for competition law enforcement and merger control continuing to be shared between the UK and European authorities. However, the European authority concerned would switch to being the EFTA Surveillance Authority rather than the Commission.²⁰

The EFTA Surveillance Authority currently has jurisdiction for Iceland, Liechtenstein and Norway, and it has been widely noted that adding the UK would be a step change in its responsibilities. Indeed, as measured by GDP, the economic area of responsibility would increase nearly sevenfold.²¹ While the Commission would continue to be responsible for cases involving EU countries, this would potentially require some significant organisational change in an authority with a total staff of 70 and where, to date, no mergers with an 'EFTA dimension' have ever been notified.²² Leaving these administrative challenges aside, the long-term impact is likely to be minor, with the fundamental role of UK authorities remaining one of partnership with the EU authorities.

However, in a scenario in which the UK leaves the EEA, law firms have highlighted that there are likely to be more significant changes to the role of the UK competition authorities. In particular, the UK's authorities would have a greater ability to operate alongside, but independently of, the European Commission.²³

Currently, a national competition authority will not investigate an alleged infringement or complaint that is also under investigation by the Commission. In practice, as many cartels cross international borders, this has meant that the Commission has taken the lead in public cartel enforcement actions in the EU. Similarly, the current merger regime allows mergers to be assessed by the UK Competition and Markets Authority (CMA) or the Commission, but not both. A merger for which the UK and the Commission both have jurisdiction does not need to be notified to both authorities.

Outside the EEA, law firms note that UK regulators would become responsible for all UK mergers and enforcement, and therefore are likely to be busier. Some of the work currently conducted in Brussels would move to the UK, and some would be duplicated.²⁴ Consider a case for which the CMA and the Commission both have jurisdiction: a merger might end up being investigated by both authorities;²⁵ an alleged infringement could attract two investigations and two decisions.

While it has not been possible to estimate the cost impact to the private sector, it should be noted that multinational firms and their advisers already deal with multiple authorities (for example, with the Commission and the Swiss competition authority). In terms of the public sector costs, Oxera estimates that UK regulators could require 80–90 extra staff, with estimated incremental costs of up to £4.8m per year to the UK public sector.²⁶ Such costs, while substantial, are much smaller than the broader (positive and negative) fiscal impacts of Brexit.

The more significant impact of having multiple authorities would be felt in the long term. It is possible that the two authorities could reach an inconsistent decision on an infringement or merger, resulting in uncertainty for the parties affected. In the longer term, the overall economic and procedural approaches of the two authorities could begin to diverge. This would allow the UK regulator more discretion to adopt its preferred approach, but would further increase compliance costs for businesses.

Conclusions

The Brexit debate in the competition law sphere mirrors that found in many other service sectors. Brexit would involve disruption, administrative costs and the risk of diversion of business away from London to rival cities elsewhere in the EU. The extent of these costs would depend on the exact terms of a Brexit deal, and in particular on whether the UK remains part of the EEA. However, it is clear that Brexit implies risks for competition law practices in the UK; as an illustration, a case where Brexit results in a 10% reduction in UK-based competition advisory services would have an estimated impact of £167m on GVA per year by 2030.²⁷

Ultimately, the economic significance of such disruption should not be overstated. The costs and risks within competition law firms and authorities are small compared with the wider (and more uncertain) impacts that even small changes to the UK competition law regime could have for businesses and consumers across the UK economy as a whole. Here, the benefit of greater discretion for the UK in setting its own rules must be offset with the loss of the UK's ability to shape rules in the EU (with which many large UK businesses would still need to comply). Such impacts therefore represent both a risk and a potential opportunity to the competition regime in the UK.

- The impact of Brexit on legal services as a whole is uncertain, but consensus is emerging that competition law could be one of the areas most strongly affected. Oxera estimates that competition makes up around 5% of the UK's top law firms' service offering.¹
- The ability of UK-based lawyers to advise on competition matters in Europe is likely to be affected if the UK leaves the EU, due to issues over the applicability of legal privilege and the transfer of legal practice licences.
- Oxera estimates that a 10% reduction in UK-based competition advisory work would have an impact of £167m on UK gross value added (GVA²) per year by 2030.³
- Some European Commission functions might need to be transferred to, or duplicated by, UK regulators

in the event of an exit from the EEA. We estimate that the incremental costs could be up to £4.8m per year to the UK public sector.⁴

- In the event of Brexit, uncertainty over jurisdiction, or the legal status of European Commission decisions, could lead to competition litigation cases diverting to other countries. For example, a large cartel damages case such as that involving carbon brushes might not happen in the UK if it voted to leave the EU.

Note: ¹ Based on a proportion of legal experts in Who's Who Legal, <http://whoswholegal.com/search/>, accessed 5 May 2016.

² An economic measure of the contribution of a sector to total UK output. ³ GVA estimate based on Oxera analysis of revenues of Top 50 UK law firms. ⁴ Estimated cost of additional staff based on Oxera analysis of staff requirement for equivalent activities at European Commission DG Competition, derived from European Commission (2014), 'DG Competition Annual Activity Report 2014. Annexes', http://ec.europa.eu/atwork/synthesis/aar/index_en.htm, accessed 5 May 2016.

- ¹ Travers Smith (2016), 'Brexit: the legal implications', March.
- ² Office for National Statistics (2015), cited in The Law Society (2016), 'Economic Value of the Legal Services Sector', March.
- ³ The overall impact of these factors on legal services is uncertain, but the Law Society estimates that they will drive a relative reduction in legal services output of 0.5–4.0% by 2030 if the UK leaves the EU. The Law Society (2015), 'The UK Legal Services Sector and the EU', September.
- ⁴ The European Court of Justice (ECJ) and General Court (GC).
- ⁵ Oxera analysis, based on proportion of legal experts in Who's Who Legal, <http://whoswholegal.com/search/>, accessed 5 May 2016. The calculation does not include Scottish legal experts.
- ⁶ See Flett, J. (2016), 'Implementing the Damages Directive - will the UK maintain its competitive advantage?', Presentation to 10th Annual Junior Competition Conference, 15 April.
- ⁷ For a general discussion, see GLA Economics (2008), 'London's Central Business District: Its global importance', January.
- ⁸ We assume here that the UK would instead seek to build a trading relationship based on its membership of the World Trade Organization, but this is not central to the developments we outline.
- ⁹ Allen and Overy (2016), 'English jurisdiction clauses – should commercial parties change their approach?', Brexit Specialist Paper No.2, February; and Norton Rose Fulbright (2016), 'Impact of a Brexit on Enforcement', March.
- ¹⁰ Allen and Overy (2016), 'Gaining or losing the competitive edge? Implications for competition law enforcement', Brexit: Specialist paper No. 11, March.
- ¹¹ Norton Rose Fulbright (2016), 'Impact of a Brexit on Enforcement', January.
- ¹² Competition Appeal Tribunal (2010), *Deutsche Bahn AG & Others v Morgan Crucible Company PLC & Others*, Case Number: 1173/5/7/10, 15 December, <http://www.catribunal.org.uk/237-6896/1173-5-7-10-Deutsche-Bahn-AG--Others.html>. Oxera advised one of the parties on this matter.
- ¹³ It was not possible to source data for the High Court. Numerical results based on Oxera analysis of CAT register of monetary claims, <http://www.catribunal.org.uk/237/all/1/Cases.html>, accessed 5 May 2016.
- ¹⁴ While providing context, this cannot be read across to a case number impact—any claim for damages sustained in the UK would still need to be brought in the UK, so in some cases jurisdictional uncertainty may simply result in separate cases being brought in the UK and other EU countries.
- ¹⁵ Shepherd and Wedderburn (2016), 'Brexit Analysis Bulletin: Competition/Antitrust', February.
- ¹⁶ Section 60 of the Competition Act requires UK authorities and courts to maintain consistency with Commission decisions and EU court rulings, although this could be repealed post-Brexit. See Whish, R. (2016), 'Brexit and EU Competition Policy', *Journal of European Competition Law & Practice*, 7:5, editorial.
- ¹⁷ Oxera analysis of CAT register of monetary claims, <http://www.catribunal.org.uk/237/all/1/Cases.html>, accessed 5 May 2016.
- ¹⁸ See, for example, Kuijpers, M., Tuinenga, S., Wisking, S., Dietzel, K., Campbell, S. and Fritzsche, A. (2015), 'Actions for Damages in the Netherlands, the United Kingdom, and Germany', *Journal of European Competition Law & Practice*, 6:2.
- ¹⁹ European Commission (2014), 'DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union', 5 December, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.
- ²⁰ See Slaughter and May (2016), 'Brexit essentials: the legal and business implications of the UK leaving the EU', March.
- ²¹ Combined GDP would increase by a factor of 6.7, based on latest GDP figures from the World Bank, <http://data.worldbank.org/>, at market exchange rates, accessed 19 May 2016.
- ²² See EFTA Surveillance Authority website, 'The EFTA Surveillance Authority at a glance', <http://www.eftasurv.int/about-the-authority/the-authority-at-a-glance/>, and 'Merger control', <http://www.eftasurv.int/competition/merger-control/>, accessed May 2016.
- ²³ See, for example, Whish, R. (2016), 'Brexit and EU Competition Policy', *Journal of European Competition Law & Practice*, 7:5, editorial.
- ²⁴ Simmons & Simmons (2016), 'Brexit: the implications for competition law', February.
- ²⁵ Shepherd and Wedderburn (2016), 'Brexit Analysis Bulletin: Competition/Antitrust', February.
- ²⁶ This is an order of magnitude estimate derived by assuming that the proportion of DG Competition's work that relates to the UK is in approximate proportion to GDP. Staff numbers from European Commission (2014), 'DG Competition Annual Activity Report 2014. Annexes', http://ec.europa.eu/atwork/synthesis/aar/index_en.htm, accessed 5 May 2016. Assumes Commission work relating to the UK is in proportion to UK share of EU GDP.
- ²⁷ Oxera analysis of revenues at the UK's largest law firms.