Gleiss Lutz

CLIENT UPDATE

Brexit : EU Antitrust Law without the United Kingdom

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The United Kingdom has voted to leave the European Union - its departure will also have a significant impact on antitrust law in daily practice.

1. Competition policy as part of the internal market

Competition rules are a necessary element of the European internal market, which is why they have remained unchanged from 1 January 1958, when the EEC Treaty entered into force, through to today. The founding fathers of the EEC Treaty saw competition law as a necessary counterweight to the fundamental freedoms, the aim being to prevent not only state-imposed restrictions on the free movement of goods and persons, but also distortions of competition by companies (e.g. in the form of cartels) or as a result of state aid.

This fundamental concept still applies unreservedly today as it did back then. If the Brexit takes effect one day, the United Kingdom will cease to be part of the “Common Market” or the “Internal Market” and EU competition rules will cease to apply in the United Kingdom.

2. What do we need to consider at this stage?

For the time being, the current legal situation will not change. Under Article 50 of the EU Treaty, Brexit will not take effect until the day on which the withdrawal agreement enters into force, or at the latest two years from the day on which the British government officially declares the United Kingdom’s intention to leave the European Union, which has not happened yet. Until that time strictly speaking primary competition legislation and all secondary legislation, and also the European Merger Control Regulation, will continue to apply in the United Kingdom without restriction.

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3. What can we expect?

More important is the question of what will apply after the UK leaves the European Union. It will then no longer be a part of the EU. Restrictions on imports and exports to and from the EU and to and from the UK are not, as such, restraints on "trade between Member States", i.e. they are not capable of triggering the application of Article 101 or 102 TFEU. However, according to the "effects doctrine", EU competition rules apply to actions that are initiated in third countries but implemented in the EU. Case law has a broad interpretation of this principle. For this reason, numerous cases with a UK dimension will continue to be subject to EU competition law.

In addition it might be the case that UK competition law will be applicable. This law was developed on the basis of the European model and, with the exception of procedural law, is currently largely identical to EU competition law. At this stage there is also nothing to suggest that UK competition law will distance itself fundamentally from EU competition law as far as substantive provisions are concerned, such as the antitrust prohibition or the market dominance test. Even if no major substantive departures are to be expected, the future structure of procedural law does raise a raft of fundamental questions:

4. Merger control

With the Brussels one-stop-shop no longer applying, companies in the UK, the EU and elsewhere will probably have to make additional UK merger control notifications, entailing additional cost and effort.

And then there is of course the problem of divergent decisions. Delivering commitments in multiple filing cases is also going to present a special challenge. If, for instance, the notifying party makes divestment commitments in various jurisdictions in order to avoid a prohibition, then the proceedings in Brussels and London respectively will have to be closely coordinated. As previous experience with third countries shows, this can create problems if the assessments of the different authorities do not coincide.

5. Antitrust law

Antitrust investigations will also be more complicated because the UK Competition & Markets Authority (CMA) will then no longer be a member of the European Competition Network (ECN).

This means that the rules governing the division of work in the ECN will no longer apply; most notably, there is a possibility of parallel proceedings before the CMA and the Commission and/or ECN authorities. The worst-case scenario here would be multiple fines because the double jeopardy rule does not apply in relation to third countries.

Lawyers who are admitted to practise law in the UK will then also be treated like other lawyers from third countries. They will no longer enjoy a "legal privilege" in antitrust proceedings, i.e. the correspondence between lawyer and client is in this case not to be treated as attorney-client privileged and can be used against the companies.

6. New enforcement structure is completely uncertain

Some Brexit proponents envisage a model that would involve retaining the main "fundamental freedoms" (free movement of goods, persons, services, capital and payments, and freedom of establishment) and other core elements of the internal market, based on the EEA rules.

This model, which is practised in the EEA with Norway, Iceland and Liechtenstein, does not really fit the bill, however: It would achieve a certain congruence with the current situation if the UK were to join the EEA - then the same competition rules as in the EU would apply via Article 53 et seq. EEA Treaty - but in this case the UK would have to agree to accept the acquis communautaire in full, which would make it bound by the case law of the courts of the European Union. This solution is clearly at odds with the whole Brexit idea.

The alternative would be to agree a network of bilateral agreements, as in the case of Switzerland. However, this network comprises of more than 120 agreements, all of which have to be constantly updated. The EU would hardly be likely to accept a solution of this kind either (this complicated relationship would appear to have been an accident borne of historical considerations that was not meant to set a precedent).

All that remains, therefore, is an agreement of the kind entered into with other third countries, which often only set outs an agenda that is not directly binding on individual companies. The model hitherto used with other third countries such as the USA and South Korea, based on cooperation agreements, would not do justice to the strong links between the EU and the UK economies. The Canadian

model favoured by Brexit advocates would not really fit the bill, either, when it comes to reorganising relations because it has the major disadvantage, from the UK perspective, of not providing full market access for financial services. Setting up an institutional framework for the enforcement of antitrust law therefore raises a host of problems.

7. European state aid law

The described difficulties apply to a greater extent when it comes to state aid control, which - along with Articles 101/102 TEU and merger control - form the third pillar of competition law.

If the United Kingdom wants to retain access to the internal market, a situation in which British or EU companies have state aid at their disposal that could distort competition must be prevented. In order to achieve a level playing field, a system of jurisdiction and cooperation must be introduced – as in the EEA – in which aid is jointly approved by the European Commission and the United Kingdom in a codecision procedure. However, from the point of view of the proponents of the exit, it hardly makes sense to submit to a verdict from Brussels when the aim is to support national champions.

8. Private enforcement

Most observers are in agreement that, just as in the case of the banking and finance sector, London will not be able to maintain its strong position in Europe in the field of antitrust law either. This presumably also applies to the law firms who do business there.

It will be possible to find solutions to some of the individual problems. For instance, a number of British lawyers have already applied for admission in Ireland so that they can, to a large extent, maintain their legal status in the EU (e.g. with regard to "legal privilege" and admission to the Courts of the European Union). However, the expected changes run deeper. For example, there will no longer be a standardised system of jurisdiction pursuant to the Brussels I Regulation for follow-on claimants in the United Kingdom. What seems even more important is that the binding effect of previous decisions by authorities and courts pursuant to Article 16 of Regulation 1/2003 will cease to apply, i.e. a plaintiff would have to furnish comprehensive proof of a cartel before the British courts without being able to rely on the findings of the European Commission. In future, fine decisions by the Commission will likely not deal with matters from the United Kingdom anyway. In addition the enforcement of British judgments in the EU will no longer be as straightforward as it currently is.

As a result, potential plaintiffs will have considerably less incentive to opt for a forum there. This can certainly be an advantage for the defendant companies, since proceedings in London tend to be plaintiff-friendly, time-consuming and very expensive.

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