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Bernardine Adkins, partner and head of EU, trade and competition, discusses the impact of Brexit on current competition legislation and enforcement. This includes competition laws regulating firms' behaviour (prohibitions on restrictive agreements - unless exempt - and abuse of market dominance), merger control, the market investigations regime, controls over state aid to industry and the public procurement rules.

Current Legislative Framework

Competition laws

This section covers the impact of Brexit on current competition legislation and enforcement. We include competition laws regulating firms' behaviour (prohibitions on restrictive agreements - unless exempt - and abuse of market dominance), merger control, the market investigations regime, controls over state aid to industry and the public procurement rules.

Behavioural competition law

EU competition law is based on two main Articles in the Treaty on the Functioning of the EU (TFEU): Article 101 prohibiting agreements and concerted practices which have as their object or effect the distortion of competition, unless they are exempt from prohibition because their economic benefits outweigh their anti-competitive effects (Article 101(3)); and Article 102 on prohibition of abuse of market dominance. These Treaty Articles are
themselves directly effective and so have legal force in the UK as a result of EU law principles and Section 2(1) European Communities Act 1972.

Articles 101 and 102 are administered by the European Commission and national competition authorities, acting together under EU legislation made in the form either of EU Regulations of the Parliament and Council or of Commission Regulations. The division of casework is set out in the Regulations and European Commission guidance.

The main procedural Regulation (1/2003) requires Member States of the EU to apply Article 101 or 102 in their territories if they are applying national competition law to practices which would be caught by those Articles (provided the practices may affect trade between Member States). This provision will fall on withdrawal and will not be replaced.

Breach of EU competition rules exposes firms to fines - calculated by reference to their turnover in the markets affected, but in any case not exceeding 10% of their total turnover. They may also be sued in EU domestic courts for damages by those harmed by the unlawful behaviour (see below).

In addition to EU competition law, all EU Member States have domestic competition laws which may be applied in parallel to EU competition law. The UK's behavioural competition rules are contained in the Competition Act 1998 (as amended). This statute contains exact copies of both Articles 101 and 102 TFEU, except that the two prohibitions apply to purely domestic anti-competitive behaviour (there is no need to show an effect on trade between EU Member States for the Competition Act prohibitions to apply) and to all other practices which may affect trade in the UK.

As in EU competition law, breach of UK competition law allows the Competition and Markets Authority (CMA) to impose fines and may also expose infringers to claims for damages.

Section 60 Competition Act 1998 requires UK authorities and courts to apply UK competition law on competition questions (but not procedural ones) in a manner consistent with the interpretation and application of the same question in EU law. This provision was inserted into the Act in order to ensure that UK businesses did not have to face the compliance costs of being subject to two similar but differing competition regimes. Much of the interpretation of EU competition law is carried out by the General Court of the CJEU and (on appeal from the General Court) the CJEU itself.

In addition, the Competition Act provides that EU 'block exemptions' (safe harbour
regulations automatically exempting some kinds of restrictive agreements) also apply for the purposes of domestic competition enforcement - even where there is no effect on inter-state trade. Both this provision and Section 60 will need to be repealed on withdrawal - it is likely that the block exemption regime will need to be replaced with similar provisions. Depending on the post-Brexit relationship the UK has with the EU, those aspects of the block exemptions that are concerned with ensuring free trade across EU Member States may be removed. This will be relevant in particular with the vertical restraints block exemption (Regulation 330/2010).

EU competition law is administered in the UK by either the European Commission or the CMA. When administering EU competition law in the UK, the CMA nevertheless applies the procedures set out in national law (Competition Act 1998 and statutory instruments made under it). The CMA is not required to follow EU procedural law as set out in the EU Regulations.

UK sector regulators also apply the Competition Act prohibitions in the industries they regulate - energy, electronic communications, rail and water - a system known as 'concurrency'.

Appeals against European Commission competition decisions addressed to UK firms is to the General Court in Luxembourg. In practice the General Court applies an enhanced 'judicial review' standard to examining the European Commission's factual findings, although it is allowed to substitute its own fines for those of the Commission where necessary. Decisions of the CMA applying both EU and UK competition law can be appealed to the UK Competition Appeals Tribunal (CAT) which can substitute its own findings of fact for those of the CMA (merits review) as well as having full jurisdiction to alter any fines imposed.

On withdrawal, EU procedural rules will fall in the UK but the UK enforcement architecture will remain intact and is not likely to change materially.

Since Articles 101 and 102 are currently directly effective in the UK, companies and individuals can rely on them in full in the UK courts. In particular, victims of breaches of those Articles can rely on them as the basis for a claim for compensation. These claims are usually framed as claims for breach of statutory duty (Section 2(1) ECA 1972, in the case of EU competition law).

European Commission decisions are binding on those to whom they are addressed (Article 288(4) TFEU) and national courts in the EU (and EEA courts where the EEA rules are also used by the Commission, as is often the case in cartels, for instance) are
required to enforce them. In the absence of appropriate transitional provisions, this will no longer be the case if there is a total withdrawal of the UK from the EU and the UK does not remain part of the EEA.

Breaches of the Competition Act prohibitions will remain actionable in UK courts both before and after withdrawal. CMA findings of fact in any decision are binding (after expiry of any appeal period) on the parties and an infringement decision is binding on the UK courts (including the CAT) under the Competition Act 1998. Consequently, victims of infringements found by CMA decision can rely on the findings in the decision to form the basis of their claim, although they are still required to demonstrate a causal link between the infringement and the harm they have suffered as well as the amount of loss.

**Merger control**

Merger control may be required either under EU law or under UK law.

The EU Merger Regulation (139/2004) gives the European Commission exclusive competence to examine mergers which have a 'Community dimension'. Mergers will have a Community dimension, based on a turnover test, where (broadly) the combined worldwide turnover of the parties is at least EUR5 billion and two or more of them earn at least EUR250 million each in the EU. Where more than two thirds of the EU turnover is earned in a single Member State, there will be no Community dimension. However, smaller mergers (where the total worldwide turnover is EUR2.5 billion) may also have a Community dimension where the merging parties have significant combined turnovers in at least three EU countries.

Whether a merger has a Community dimension and is subject to EU merger control does not therefore depend on the place of registration or principal place of business of the merging parties.

The European Commission has exclusive competence in the EU to decide whether to clear or block a merger that has a Community dimension (the 'one-stop shop'). Mergers can only be blocked by the Commission if they would 'substantially impede effective competition' in the EU or a significant part of it. Notification to the European Commission of a merger with a Community dimension is mandatory - it is unlawful to complete such a merger with effect in the EU without a decision by the European Commission clearing it.

The EU merger control regime will remain unchanged after withdrawal but the UK turnover of the merging parties will no longer count towards the calculation of 'Community
For mergers where there is no Community dimension, national merger control may apply. UK merger control is carried out by the CMA (not the sector regulators, although they have the right to input) under powers in the Enterprise Act 2002. The CMA may investigate any merger where the value of the assets being acquired is £70 million or the merger would create or strengthen a market share of 25% in any UK market. The CMA may block a UK merger where it may be expected to result in a substantial lessening of competition in a UK market. The 'SLC' test is deliberately framed to be applied in substantially the same way as the test under the EU merger regulation.

Appeals against CMA merger decisions may be made to the CAT, but they are rare.

**Market investigations**

The European Commission was given the power in 2004 to investigate markets where 'the trend of trade [...] the rigidity of prices or other circumstances' suggest that competition may be being restricted or distorted in the EU. The investigation leads to a report - there is no formal power to remedy any restriction of competition found following a market investigation - but the Commission has used its findings to begin investigations of restrictive agreements and market abuses under Articles 101 and 102.

The EU market investigation power is inspired by the (long-standing) power under UK legislation to carry out competition investigations into markets. In contrast to the EU regimes, where the CMA investigation panel reports that there are market features which have an adverse effect on competition in the UK, the CMA is under a duty to remedy the adverse effect found. It may accept undertakings from firms to do this, but it (and the government) have powers to make orders requiring firms to comply and they may also require structural changes to the market (including divestments).

Appeals against findings in UK market investigations may be made to the CAT. In contrast, since European Commission market investigation reports do not in themselves have any legal effect, there is no appeal against them.

**Control of state aid to industry**

The European Commission carries out control of state aid to industry using powers under Articles 107 to 109 TFEU. The definition of 'aid' is wide - and covers any pecuniary
advantage derived by the recipient from state resources. Member States are required to notify any state aid above certain (fairly low) thresholds to the European Commission before it is granted. The Commission will prohibit the aid where its grant would lead to a distortion of competition affecting trade between EU Member States.

Legislation and guidance made under Articles 107-109 set out how the Commission is to be notified and contains exemptions for certain categories of state aid provided they meet certain conditions (for example, aid to less economically advanced regions of the EU).

Aid which is paid in breach of the EU state aid rules must be recovered (with interest) by the paying state from the recipients.

There are no equivalent UK rules on state aid.

**Public tenders - procurement rules**

For similar reasons to the EU control of state aid, EU rules require the open advertisement and transparent evaluation of tenders for public procurement contracts. They apply to procurement above certain (again relatively modest) thresholds by public bodies (central and local government) and by utilities, for most goods and a wide range of services.

The EU public procurement rules require tender notices to be published in a supplement to the EU Official Journal and to be open to all firms in the EU who meet the (non-discriminatory) tender criteria. Failure to follow the correct tendering procedure will mean that any contract to procure goods or services made following it will need to be set aside. In addition, unsuccessful tenderers will be entitled to compensation.

EU public procurement rules are made by Directives which are implemented in the UK by regulations in statutory instruments made under Section 2(1) ECA 1972.

**Transitional Framework**

**Behavioural competition law**

The prohibitions in Articles 101 and 102 TFEU will continue to apply substantively in full until the UK withdraws from the EU. There will be no impact on ongoing litigation in the UK courts, including notably follow-on and stand-alone damages claims with respect to cartel cases where the European Commission has issued an infringement decision. With respect to fresh cases, again, given that any claims will relate to such time as when the UK was
part of the EU and EEA, there will be no effect.

However, there may be some impact before then due to the European Commission's loss of decisional powers (in the absence of any different transitional provisions) on that date:

- for ongoing investigations, the Commission will not be able to impose fines on firms in respect of their UK activities after the date of withdrawal. In such cases, it is likely that the Commission would request the CMA to make a decision and impose a fine pursuant to its domestic powers under the Competition Act 1998 (which we assume will remain unchanged);
- where a European Commission decision is made after withdrawal relating to breaches of Article 101 or 102 occurring before withdrawal, that decision will no longer have binding force in the UK. In particular, the UK courts will no longer be required to follow European Commission decisions when presented with a claim for damages for breach of the competition rules. However, depending on the transitional provisions for recognition of Commission decisions, its decision may still be admissible as evidence of a breach.

**Merger control**

Both the current EU and UK merger control rules will continue to apply as now to merger and acquisition agreements made before the withdrawal date.

**Market investigations**

Where the Commission carries out a market investigation before withdrawal which concludes afterwards, the report may still make findings in relation to UK markets. As noted, European Commission market reports do not in themselves have any binding effect, so the Commission would be unable to take any action against pre-withdrawal anti-competitive conduct, but the CMA could use the findings to ground a reasonable suspicion to launch its own investigation.

**Control of state aid**

For firms based in the UK and receiving aid here, the operation of the state aid regime will depend on the 'post-Brexit' UK agreement with the EU. In particular, if the UK is part of
the EEA, the current regime will remain largely unchanged (see below). Subject to this, aid
generated by the UK government, even in the transitional period, could escape from EU state
aid enforcement after withdrawal - so the requirement to repay state aid already
unlawfully received could fall away on the withdrawal date in the absence of transitional
provisions.

Public procurement rules

The EU public procurement rules will continue to apply to all procurement exercises
completed before the withdrawal date.

Post-EU Exit

The UK leaves the EU but remains part of the EEA

Behavioural competition rules

Articles 53 and 54 EEA Agreement contain exact copies of Articles 101 and 102 TFEU.
There are, however, differences in the way in which they are enforced. In particular, the
EEA Agreement prohibitions are enforced in the EEA countries by the EFTA Surveillance
Authority, which, in a manner similar to that of the European Commission, has the power
to take infringement decisions against companies and to fine infringers.

Appeals from the decision of the Surveillance Authority are to the EFTA Court (based in
Geneva), which has equivalent powers to those of the General Court in Luxembourg.

Cases are allocated between the Commission and the Surveillance Authority according to
where the behaviour affects trade. If there is an appreciable effect on trade in both the EU
and the EEA, the European Commission applies the prohibitions in the EEA Agreement
alongside those in Articles 101 and 102; the Surveillance Authority will not take jurisdiction
in those cases.

In contrast to the position in EU law, the provisions of the EEA Agreement are not directly
effective in the laws of EEA states. This means that those harmed by competition
infringements must rely on their national legislation to provide a remedy for damage
caused to them. In the UK, the relevant provisions of the Competition Act 1998 would
therefore need to apply to the behaviour and some amendment to the Act will be needed
to give effect to the decisions made by the Surveillance Authority under Articles 53 and 54
EEA Agreement.
Merger control

Article 57 EEA Agreement requires the Surveillance Authority to undertake merger control, using the tests and procedure in the EU Merger Regulation, where a 'Community dimension' arises in the combined EU+EEA area if the merger has its 'centre of gravity' in the (non-EU) EEA states. The competence of the Surveillance Authority is determined using turnover tests as set out in the relevant Annexes and protocols of the EEA Agreement. In other cases, the European Commission applies merger control to such mergers and its decisions will also be effective in the EEA countries.

When the European Commission applies the EU/EEA merger provisions, under the 'one-stop shop' principle, it has sole competence to do so, both within the EU and in the EEA states. Where the Surveillance Authority makes the decision, EU Member States remain free to apply their own domestic merger control rules to the concentration (that is, there is no 'one-stop shop' for EEA merger control with an EEA centre of gravity).

Market investigations

The EEA agreement will not affect the current market investigation regimes, although the EFTA Surveillance Authority might wish to use the results of a European Commission report to initiate its own Article 53 or 54 investigations. It is possible that the Surveillance Authority may wish to carry out its own market investigations, however.

Control of state aid

The EEA Agreement (Articles 61-64) provides for the Surveillance Authority to control the grant of state aid by EEA members in the same way that the European Commission applies the state aid rules within the EU. If the EU considers that the Surveillance Authority has not applied the state aid rules appropriately (or vice versa) the matter is referred to the EEA/EU standing Joint Committee, which is a panel set up to resolve disputes over the operation of the EEA Agreement with the EU.

Where no resolution of the difference can be reached and the EU continues to believe that the aid permitted by the Surveillance Authority distorts competition in the EU (or vice versa), the 'harmed' side may apply countervailing measures on imports into the EU from the EEA state(s) concerned to remedy the effects of the competition distortion.
Public procurement

Article 65 EEA Agreement applies the EU procurement legislation within the EEA countries - to be administered by the Surveillance Authority where the procuring entity is located in an EEA country.

UK legislation would therefore be needed on withdrawal to provide a basis for maintaining the UK statutory instruments which currently implement the EU public procurement Directives under Section 2(1) ECA 1972.

The UK leaves the EU but joins EFTA

The exact effect of using a 'Swiss' model will depend on the scope and terms of the bilateral agreements entered into between the UK and the EU in addition to the EFTA Convention. The commentary in this section assumes no additional agreements and deals simply with the position under the EFTA Convention (1960).

Behavioural competition rules

Article 18 EFTA Convention recognises that anti-competitive practices (defined in terms similar to those in Articles 101 and 102 TFEU) are contrary to the Convention. The contracting parties agree to take action against them in their respective territories and the Convention gives them the right to raise a concern with other parties if this does not occur.

Where practices continue despite concerns being raised, the Convention gives other state parties the right, after consultation and under some circumstances, to apply countervailing measures against the defaulting state party. The Convention also permits contracting states to take the dispute to binding international arbitration using the arbitration arrangements set out in Article 48 of the Convention.

As the Convention does not have direct effect, and (unlike under the EEA Agreement) there is no supranational enforcement mechanism, national (UK) legislation will regulate the application of behavioural competition rules in the UK.

The UK authorities would no longer be part of the European Competition Network. A sensible solution would be for the UK to conclude a Memorandum of Co-operation with the EU.
Merger control

The Convention contains no provisions on merger control, which is therefore governed by the internal laws of the parties.

EU merger control would therefore continue to apply to mergers having a Community dimension after withdrawal even where the merging parties are based in the UK. The UK will also apply its own merger rules to such a merger, in parallel to those of the EU.

Market investigations

The EFTA Convention does not affect the UK market investigation regime.

Control of state aid

The Convention expressly incorporates the state aid rules contained in the WTO Subsidies and Countervailing Measures Agreement (SCM) under the General Agreement on Trade and Tariffs (GATT) - 1994. In particular, the SCM adopts a narrower definition of 'subsidy' than the corresponding EU law definition of 'aid' - requiring a financial contribution from the state. Other kinds of state 'advantage' are not covered by the WTO regime.

In the event of dispute, the conciliation and arbitration provisions of the Convention (Article 48) noted above will apply where subsidies which distort competition remain in place.

As the UK does not have any purely domestic, overarching legislation on the award of economic public subsidies, this will be an area where change is likely to be needed after 'Brexit'. However, it would be compatible with the EFTA Convention for the UK authorities simply to ensure that a subsidy does not unduly distort competition on a case-by-case basis.

Public procurement

The EFTA Convention (Annex R) contains a set of public procurement rules which are very similar in scope to those provided for under the EU procurement Directives, although the remedies available under the Convention for breach of the rules are considerably less extensive than those under EU or EEA law. In particular, there is no requirement to compensate affected unsuccessful tenderers if a tender process is not complied with, nor are there any provisions automatically requiring unlawful tender processes to be stopped and/or rerun.
Legislation to replace (or re-enact) the current UK procurement regulations would be needed in this scenario.

**The UK leaves the EU and trades with the EU**

It is unlikely that the UK will rely solely on its membership of the WTO to regulate its trading relationships with third countries (including the EU); there will be bilateral agreements which may contain competition-related provisions.

The WTO agreements (GATT, etc) do not include a specific competition protocol. Although negotiation work was begun on a competition agreement under the Doha round (from the mid-1990s) it was dropped in 2004 and currently appears unlikely to recommence. However, even in this WTO scenario, we would expect domestic competition law to continue to apply to all practices which affect trade in the UK (as currently under the Competition Act 1998).

And, as noted above, the WTO agreements do contain rules on both state subsidies and public procurement - which will mean that UK law will need to be amended to include regulations in these areas after EU withdrawal.

The greatest impact that will be felt to the UK competition regime and to companies will arise if the UK engages in ‘full’ as opposed to soft Brexit, and does not remain within the EEA, or its equivalent.

Over time, the UK and EU regimes are likely to diverge. The UK will no longer be able to promote its liberal free market and ‘undistorted competition’ stance within the EU, and so there may be an evolution, unchecked by a UK presence, towards championing more protectionist competition measures, in relation to state aid and merger control, for example, and a more rules-based approach rather than an economic one in relation to the behavioural rules. At the very least, this will lead to increased costs for business with respect to parallel investigations, and increased compliance risks arising from two divergent regimes of close trading partners.