



Brexit – The implications for anti-trust law

In this article we consider the possible impact on anti-trust law following the UK's vote to leave the European Union ("EU") on 23 June 2016. The potential implications for Competition law depend on whether the UK is a member of the European Economic Area ("EEA") or the European Free Trade Area ("EFTA") following any exit from the EU or whether the UK seeks a looser arrangement with the EU, for example by entering into a free trade agreement or relying on membership of the World Trade Organisation ("WTO") as a basis for trade with the EU.

EEA/EFTA approach

It is possible, (although it looks increasingly unlikely) that the UK will seek to join the EEA/EFTA as a non-EU Member State:

- EFTA was founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. These countries were later joined by Finland, Iceland and Lichtenstein. Over time, the UK, Denmark, Portugal, Austria, Finland and Sweden left EFTA to join the EU. The remaining EFTA states are Iceland, Lichtenstein, Norway and Switzerland.
 - The EEA Agreement, which came into force in 1994, was entered into by Iceland, Lichtenstein and Norway and allows them to participate in the EU's internal market (EU Member States are also part of the EEA). It applies the four freedoms throughout the 31 EEA States and provides for cooperation in other areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture. The EEA Agreement does not cover common agriculture and fisheries policies, customs union, common trade policy, common foreign and security policy, justice and home affairs or monetary union. EU legislation which is relevant to the EEA is incorporated into the EEA Agreement.
 - Switzerland did not enter into the EEA Agreement but has a series of bilateral agreements with the EU, including a free trade agreement and an agreement in relation to freedom of movement which allows EU citizens to live, enter and work in Switzerland and vice versa.
- These agreements were subject to separate negotiation. In 2014, the Swiss voted in a referendum to impose limits on free movement, and it is currently unclear how this will impact on Switzerland's agreements with the EU, however the EU has indicated that the Swiss deal is contingent on freedom of movement.
- The potential implications for anti-trust law of the UK leaving the EU but being a member of the EEA and/or EFTA are as follows:
- Articles 53 to 64 of the EEA Agreement mirror the competition provisions in the Treaty on the Functioning of the European Union ("TFEU"). The EEA Agreement is applicable whenever trade between one or more EEA EFTA States and one or more EU Member States is affected, as well as when trade between the EEA EFTA states themselves is affected. EU law is applicable whenever trade between EU Member States is affected.
 - The European Commission (the "Commission") and the EFTA Surveillance Authority share jurisdiction to apply the EEA agreement and the EFTA Court can review decisions taken by the EFTA Surveillance Authority in the same way as the General Court and the Court of Justice of the European Union ("CJEU") review Commission decisions.
 - This means that if the UK joins the EEA, it is unlikely that there would be any significant change to anti-trust law. The EFTA Surveillance Authority would enforce the provisions of the EEA Agreement and UK Courts would still be required to interpret EEA provisions in accordance with EU anti-trust law and the case law of the General Court, the CJEU and the EFTA Court.
 - In merger cases the Commission has exclusive jurisdiction in the EEA to deal with all concentrations which meet the criteria for a merger notification at EU level. Therefore there would not be any change to merger control and the 'one-stop shop' would not be affected (i.e. transactions would not be reviewed in parallel by the Commission and the Competition and Markets Authority ("CMA")).

- If the UK joins EFTA but not the EEA, it will be in a similar position to Switzerland and will need to negotiate access to the single market through bilateral agreements with the EU. Anti-trust law is likely to form part of that negotiation. Swiss anti-trust law is similar to EU/EEA anti-trust law, however the EU/EEA anti-trust law regime is not relevant, for example the 'one-stop shop' does not apply and companies may be subject to parallel merger reviews in the EU and Switzerland.
- The UK is an attractive jurisdiction in which to bring anti-trust damages claims and there are an increasing number of claims being brought in the UK. However, if the UK is outside the EU/EEA, EU infringement decisions will cease to have a binding effect on the UK courts and this will prevent claimants from bringing follow-on damages claims based on EU decisions. This should not affect follow-on claims in respect of a UK infringement decision or standalone damages claims.

Free trade agreement/WTO approach

It is possible that rather than joining the EEA/EFTA, the UK would seek a looser arrangement with the EU, for example by entering into a free trade agreement or relying on membership of the WTO as a basis for trade with the EU.

It is important to note that after the UK's exit from the EU, EU anti-trust law would in any event continue to apply to any agreements or conduct by UK businesses with an effect in the EU. A UK business which takes part in a global cartel will still be subject to enforcement action by a number of competition regulators around the world, including the Commission, and a transaction contemplated by UK businesses which meets the thresholds for notification to the Commission would still need to be notified in accordance with the EU Merger Regulation. Therefore, post-exit, any UK businesses offering goods and services in the EU will still be required to comply with EU anti-trust law.

The potential impact on the anti-trust law regime in the UK if the UK leaves the EU, and does not join the EEA/EFTA, is as follows:

- The principles of EU anti-trust law set out in Article 101 and Article 102 TFEU have largely been implemented into UK legislation through Chapters 1 and II of the Competition Act 1998, as well as the Enterprise Act 2016. It is possible that the government could seek to materially amend anti-trust legislation in the UK, however this appears unlikely, at least in the short to medium term. Therefore it appears as though the UK anti-trust regime would remain in its current form, even though the EU regime would cease to apply in the UK.
- The single market imperative of some of the EU rules in relation to vertical restraints and parallel trade will no longer be relevant to the UK following its exit from the EU and therefore the UK position regarding vertical restrictions and parallel trade may change in due course.
- State aid law is an area where there may be significant change. Currently, EU State aid rules prevent Member States from distorting competition by granting aid. The State aid rules have not been implemented into UK legislation. Therefore, if the UK is outside the EU and EEA/EFTA, the UK may be able to provide aid to businesses in the UK.

- The UK regulations relating to public procurement implement several EU directives, however, if the UK leaves the EU/EEA, it is possible that the UK may repeal these regulations and seek to change the UK public procurement regime. However, this appears to be unlikely for public policy reasons and if the government sought to favour UK businesses over EU businesses this may result in retaliation from the EU against UK businesses.
- Although the principles of anti-trust law in the UK may not change significantly following any exit (other than the exceptions mentioned above), if the UK Courts are not required to follow the case law of the General Court and the CJEU, a gradual divergence of interpretation of UK anti-trust law and EU anti-trust law may occur over time.
- The CMA may see an increase in its workload and businesses may face a greater regulatory burden for the following reasons:
 - the 'one-stop shop' principle under the EU Merger Regulation would no longer apply to the UK and transactions may be reviewable in parallel by the Commission and the CMA (and this may lead to different outcomes); and
 - currently, if the Commission commences an investigation into an alleged competition infringement, national competition authorities in the EU cannot investigate the same conduct, however this would cease to be the case and the CMA (or a sector regulator) may concurrently investigate conduct under investigation by the Commission.

In summary, there may not be significant change to UK anti-trust law in the short to medium term following any form of 'Brexit', but we may see diverging approaches being taken in the UK and in the EU if the UK adopts a free trade agreement/WTO approach and the direction of UK anti-trust law may change over the longer term.

If you have any questions on these or any other issues relating to competition law and Brexit, do please contact Gustaf Duhs, Partner and Head of Competition & Regulatory or Maliha Mahmood, Senior Associate, who will be happy to discuss.



Gustaf Duhs
Partner & Head of Competition & Regulatory
T: +44 (0)1483 734217
E: gustaf.duhs@stevens-bolton.com



Maliha Carey
Senior Associate
T: +44 (0)1483 734289
E: maliha.carey@stevens-bolton.com