House of Lords Report on Brexit and Competition: What Does it Mean for Businesses?

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Overview

What Does the Report Mean for Businesses?


The House of Lords report provides a detailed account of the most pressing issues that the UK’s competition law regime is facing ahead of Brexit. It also shows the high levels of uncertainty that businesses operating between the EU and the UK face. This uncertainty suggests that businesses should – at least for now – adopt a cautious approach, for example, when formulating their distribution and acquisition strategies in the UK.

Whatever the statutory changes to the UK’s competition law regime after Brexit are, EU law will still remain an important factor to consider when taking business decisions, especially because of the geographical proximity and close trading relationships between the UK and the EU. This means that going forward businesses need to have guidance.

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What Does the Report Say?

The arguments put forward in the report are quite interesting especially because they form a compilation of ‘live’ issues that need to be resolved rather quickly to clarify the UK’s future competition policy. In our view, the report shows three main conclusions:

- There seems to be a consensus among stakeholders and the House of Lords’ EU Committee that the right approach is a ‘balanced’ one which seeks to maintain a link with EU competition law;
- The UK Government does not seem to be in a position to answer all the questions relating to the future of the UK’s competition policy, mainly because of a lack of clarity regarding the future relationship between the EU and the UK.
- This uncertainty will have far reaching consequences for businesses operating in the EU and the UK.

Much has been written on the possible consequences of Brexit for businesses. However, after having the benefit of reading the EU Committee’s report it is now much clearer what exactly is at stake for the UK’s future and for businesses operating cross-border between the UK and the EU. Below we will try and answer a number of questions which are highly relevant for businesses at this stage of the Brexit negotiations.

1. Will EU Law Still Be Relevant after Brexit?
Over the years, London has gained a reputation for being an excellent location for individuals and companies to pursue because of a lack of clarity on the enforcement of State aid. In addition, investments by public authorities in the UK may decrease consequences: businesses planning on implementing mergers in 2018 and 2019 would be faced with levels of uncertainty Government to come to an early agreement with the EU on these matters. Not doing so would have negative In any case, the report recognizes the importance of reaching transitional agreements quite quickly and urges the UK

3. Will the Commission and the CJEU Still Have Jurisdiction in the UK?

The UK on the other hand might go even further and adopt a more liberal approach. The ultimate question is, how much will the UK’s competition law regime differ from EU law?

The general consensus in the report is that the UK should maintain its current principles of competition law especially to provide much needed legal certainty for businesses. The report however also identifies a number of areas where UK competition law could be improved, for example by adopting the use of modern technology and by focusing on procedural efficiencies.

Improving procedural efficiencies is certainly a welcome development however a too ambitious push towards an innovative competition law can also bring dangers for businesses. For example, if the UK decides to adopt a less restrictive approach after Brexit towards vertical restraints (e.g. ditching certain restrictions by object such as RPM or restraints that inhibit EU single market integration), there may be spill-over effects for a business operating in the UK and wishing to establish an EU-wide distribution system because the business may wrongly assume that this less restrictive approach also applies in the EU.

After Brexit, the EU is likely to maintain this economic approach because it is now deeply embedded in the EU case law. The UK on the other hand might go even further and adopt a more liberal approach. The ultimate question is, how much will the UK’s competition law regime differ from EU law?

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The UK has undoubtedly been a source of inspiration for the modernisation of EU competition law. The influence of the UK – among other factors – has contributed to a departure from a ‘form-based’ approach to an ‘effects-based’ or economic approach. In practice this means that the economic effects of commercial transactions play a greater role as well as the assessment of efficiency gains, instead of simply fitting certain business practices into a regulatory mould, such as a restriction by ‘object’, for instance resale price maintenance (RPM) or the prohibition of cross-border passive sales within the EU.

Currently, section 60 of the UK Competition Act 1998 provides that UK competition law should be ‘dealt with in a manner which is consistent’ with EU law. Once the UK leaves the EU and depending on the outcome of the Brexit negotiations this provision might not be appropriate anymore because EU law will no longer have supremacy in the UK. Nonetheless, commentators in the report argue in favour of a softer duty where the UK authorities would ‘have regard to’ EU law.

Such a softer duty would make sense for a number of reasons: (i) UK businesses might have to rely on EU law anyway because the geographical proximity with the EU makes it difficult to significantly disregard EU law and (ii) the UK has been relying on EU law for a long time, therefore maintaining such a softer duty would prove beneficial for businesses. For example, the EU block exemptions – such as the Vertical Block Exemption Regulation (Regulation 330/2010) – are widely used by businesses to determine their distribution systems in a reliable and relatively easy way. What would happen if after Brexit the UK would no longer have regard to the EU provisions or if the UK in the future ceases to update block exemptions in parallel to the EU?

There are, however, also some downsides to this softer approach. Some commentators have raised concerns that such a duty would put a significant burden on UK judges if they have to justify any departure from the EU case law.

In any event, the consequence of diverging from EU law – at least in the short-term – is that businesses operating both in the EU and the UK would face a significant regulatory burden because they would need to comply with two different competition regimes. For this reason the EU Committee calls on the UK Government to clarify its approach towards the consistency principle and towards the future reliance on the EU’s block exemptions.

2. How Different Will UK Competition Law Be from EU Law?

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3. Will the Commission and the CJEU Still Have Jurisdiction in the UK?

Strictly speaking no, however, there are quite a lot of nuances. For example, what happens to cases which are ‘live’ at the point of Brexit? The EU and the UK seem to fundamentally disagree on this question. The EU considers that the Commission and the Court of Justice of the EU (CJEU) should have jurisdiction over cases which started before Brexit but which extend after the UK’s departure as well as over cases which only start after Brexit but which relate to pre-Brexit behaviour. The UK seems to disagree. As explained in the report, the UK, in its position paper on ongoing Union judicial and administrative proceedings, considers that the EU should not have jurisdiction over cases which were initiated after Brexit relating to pre-Brexit behavior.

In any case, the report recognizes the importance of reaching transitional agreements quite quickly and urges the UK Government to come to an early agreement with the EU on these matters. Not doing so would have negative consequences: businesses planning on implementing mergers in 2018 and 2019 would be faced with levels of uncertainty that would have a chilling effect on merger activity. In addition, investments by public authorities in the UK may decrease because of a lack of clarity on the enforcement of State aid.

4. Will the UK Still Be a Relevant Jurisdiction for ‘Follow-on’ Damage Claims?

Over the years, London has gained a reputation for being an excellent location for individuals and companies to pursue ‘follow-on’ damage claims for breaches of Article 101 and 102 TFEU, mainly due to the UK judges’ technical expertise
and certain procedural benefits (such as the rules on discovery). Brexit could put this reputation at risk.

Under the current regime decisions by the European Commission and national courts of the EU Member States are automatically recognized by UK courts. If after Brexit this automatic recognition is no longer available, potential claimants would have the significant burden of proving before a UK court the underlying infringement of competition law.

Given these uncertainties, the EU Committee encourages the Government to (i) take these issues into account when deciding whether to repeal or amend the legislative basis for follow-on claims and (ii) consider whether EU infringement decisions would continue to be automatically recognized by UK courts.

5. Where Should You Notify a Merger Post-Brexit?

The UK’s departure from the EU means that the one-stop-shop established by the EU Merger Regulation (EUMR, R. 139/2004) will be lost. In practice this means that it will no longer be sufficient to notify a multi-jurisdictional merger in the EU but also a separate notification in the UK would be required.

While notifying a merger in the UK is voluntary, failing to do so if the thresholds established in the Enterprise Act 2002 are met can have serious consequences for businesses, namely: the possibility that the CMA might start an initiative on its own and if that is the case the merging parties would be subject to a shorter business response time in which to persuade the authority not to initiate an in-depth Phase 2 review.

Therefore, losing the one-stop-shop and having to notify in the UK adds an additional administrative, legal and regulatory layer for businesses. In addition, filing a merger in the UK is not cheap: unlike in the EU where there is no filing fee, the fees in the UK are quite substantial ranging from GBP 40,000 to GBP 160,000 depending on the UK turnover of the company being acquired.

Businesses are not the only ones going to struggle. In the House of Lords’ report the CMA estimates that after Brexit, UK notifiable merger activity could potentially increase from 57 Phase 1 mergers in 2016 to 80 to 100 Phase 1 mergers and from 5 Phase 2 mergers in 2016 to around 12 Phase 2 mergers. In addition, the number of appeals before the Competition Appeal Tribunal (CAT) is also likely to increase.

With limited resources the CMA will have to decide on which competition enforcement priorities to focus on. Should it prioritise tackling the increasing merger workload? Should it focus on pursuing cartels and perhaps allocating fewer resources to addressing vertical restraints? To sustain the likely increase in caseload the EU Committee calls on the Government to sustain the work of the CMA with adequate resources and to continue to work towards procedural efficiencies to minimise the burden on businesses.

Finally, the report also seeks to discourage the Government to broadening the public interest criteria in merger reviews in order to limit foreign ownership in strategic sectors. The report notes in this regard that the UK already enjoys extensive powers to pursue public policy goals in merger reviews – such as media plurality, defence, etc. – and further expanding these criteria could make the UK less attractive for foreign investments.

6. Will State Aid Still Be Relevant in the UK?

Most likely, yes. The report seems to reach the conclusion that any potential trade deal between the EU and the UK will most likely incorporate provisions on State aid control. It is still unclear which form such a system will take but there may be a link between the level of access to the EU’s internal market and the level of adoption of the EU State aid rules. Alternatively, if no deal is reached, the UK would still be bound by the rules on subsidies under the WTO.

The report points out that while there have been complaints – especially from local authorities – that the current rules are too complex and that the approval process is too burdensome, there is a consensus that the EU’s system of State aid did not hamper the UK’s ability to provide aid. In fact, the UK is among the EU Member States which granted the lowest levels of aid compared to other countries in a similar situation.

Another question mark in this debate is which authority will enforce State aid rules in the UK. Some respondents argue in favour of UK judges, but the most obvious candidate as pointed out in the report is the CMA despite its lack of technical expertise and already stretched resources.

The future State aid regime in the UK is still uncertain but, if such a system is established, the report calls on the Government to work together with local authorities to reduce the administrative burden. There have been voices that the UK should seize the opportunity and increase public spending in order to bolster its industries. The report, however, welcomes statements by the UK Prime Minister that the Government will not attempt to ‘beat’ other countries’ industries by unfairly subsidising their own.

The UK Government has said little about its position on State aid. The Government’s reply in the House of Lords’ report is somehow lukewarm and to some degree worrying because of its lack of foresight. The most ‘reassuring’ statement in the report is the Government’s clear intention to have a policy by the time of Brexit.

Conclusion

At this stage, there are still significant outstanding issues to clarify. Businesses operating under this uncertainty should be concerned that potential changes to the UK’s competition law regime may end up creating additional costs and regulatory burdens which will need to be considered in future business decisions.
The reality is that businesses need to decide now whether to invest in a particular region or whether to update existing distribution networks. This level of uncertainty is not helpful when making these decisions and waiting for Brexit to be resolved is not an option for most businesses.

Therefore, the safest bet for businesses – at least at this stage – is to remain compliant with EU competition law, for a number of reasons: (i) EU competition law has been applied in the UK since it joined the EU in 1973. It is therefore a well-established system in the UK; (ii) the geographic proximity and close trading relationship between the EU and the UK will make it difficult to completely depart from EU law; (iii) in any event, UK businesses will remain subject to EU competition law for their EU operations, and (iv) even non-EU countries which seek a close trading relationship with the EU have to comply with EU law and the UK will most likely not be an exception.