

# Brexit's Antitrust Implications for U.S. Companies

—By Paula Riedel, Kirkland & Ellis International LLP

In the run-up to the June 23 referendum on whether the U.K. should leave the European Union, opinion polls indicated it would be a close-run vote. However, the actual result, with a majority voting to leave, has caused shockwaves.

For some time to come, the impact of the referendum will be unclear: there is even talk that the U.K. may not ever trigger the mechanism to withdraw from the EU, although that in itself would risk another political earthquake.

In any event, we expect it to be business as usual in the near to medium term for antitrust enforcement and merger control.

Longer term, there could be an “uncoupling” of U.K. antitrust law and process from EU antitrust. This would add to administrative and cost burdens — e.g. additional merger filings and more diffuse antitrust scrutiny. Substantively, we would expect the analysis to remain broadly similar as between the U.K. and EU, perhaps with the U.K. coming explicitly closer to the U.S. position in certain areas of enforcement, such as

monopoly power and vertical restraints (where the EU has typically been more interventionist than the United States).

## What Happens Next?

The U.K. must invoke Article 50 of the Lisbon Treaty to set in motion the two-year procedure for withdrawal (all member states in the EU would have to agree to an extension of that two-year period). At present, there is no clarity on when Article 50 will be invoked. Until actual withdrawal, we can expect the current legislative framework to remain in place and thus no major legislative change for a number of years.

If the U.K. remains a part of the European Economic Area (comprising EU member states, Norway, Liechtenstein and Iceland) (the so-called “Norway” model), there will be few practical implications for global businesses since U.K. law will remain aligned to EU antitrust law. If that model is not followed, there is the possibility of complete detachment of U.K. antitrust from the EU system. As discussed below, however, we would still expect considerable alignment.

## How Might This Affect U.S. Companies Doing Deals in the U.K. and EU?

Leaving the EEA would signal a departure from the “one-stop shop” principle, which grants the European Commission exclusive jurisdiction to review deals that meet specified turnover thresholds. This would have two consequences:

- Some deals would no longer hit the EU turnover thresholds, as U.K. turnover will not be taken into account. As one of the largest markets in the EU, U.K. turnover is often significant, so there is a real chance that fewer deals will fall to the EC. These deals would have to be filed for review in member states whose local thresholds were triggered, or else undergo the “referral up” process, which exists for deals that affect a number of member states but which don’t hit the EU thresholds. The referral-up process allows the EU to take jurisdiction and is popular, but it does add delay.
- Where deals hit the relevant EU thresholds or are referred up, businesses will have to decide whether to make an additional filing to the U.K. The U.K. merger system is voluntary, but in practice, the U.K. Competition and Markets Authority expects deals with a material impact on U.K. markets to be notified (and regularly investigates cases that are not filed voluntarily). To minimize disruption/risk of divergence, the CMA and EC will need at the very least to set up some soft cooperation mechanisms. The CMA may also wish to set up its own cooperation arrangement with U.S. agencies so that it can be involved in across-the-pond contacts between the EC and the Federal Trade Commission or the U.S. Department of Justice on major mergers.

If the U.K. remains in the EEA, the current merger regime, including the “one-stop shop” principle, will continue to apply, so there will be no significant change.

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## Antitrust

EU competition rules would continue to apply to agreements and conduct by U.S. businesses operating in the EU (albeit the U.K. would no longer be part of the EU).

However, if the U.K. were to leave the EU and were not even part of the EEA, and assuming there were no bespoke arrangements for antitrust/merger control, enforcement of competition law in the U.K. would be the sole responsibility of the U.K. regulatory and judicial bodies.

We could expect the CMA to become more active in global cartel investigations. The EC would not be entitled to carry out dawn raids in the U.K. and all immunity applications would need to be dual-filed. Indeed, the recommendation from now is to dual-file for immunity/leniency with the CMA and the EC, given that it is unclear how the regimes will operate in future. That said, as the U.K. already has a separate criminal regime for cartels, it is already fairly common practice to dual-file.

Having decoupled from the EU treaties, the U.K. would no longer be bound to apply its competition law consistently with EC decisions. EU case law is still likely to continue to exert an influence, but there is also the possibility of more visible influence from other antitrust systems, notably the U.S. In particular, the U.S. agencies have tended to be less interventionist than the EC in relation to monopoly power (abuse of dominance) than the EC, as well as with vertical restraints. The CMA (and its predecessor body, the Office of Fair Trading) philosophically appears to sit closer to the U.S. agencies in these areas. Withdrawal from the EU might enable it to be more explicit on this.

But the major U.S. companies whose business is pan-European will remain subject to EC scrutiny. The only comfort they may take is that the U.K. may not rush to open investigations in these areas in parallel to the EC.

## Private Lawsuits

The U.K. is a preferred forum for private damages, with well-established rules on disclosure and a reputation for antitrust expertise and consistent decisions. Only last year, the U.K. further enhanced its preferred status by introducing a mechanism for class actions in antitrust litigation, with the possibility of opt-out collective proceedings, under the Consumer Rights Act 2015. Indeed U.S. plaintiffs law firms expanded their presence in the U.K. to take advantage of the opportunities arising as a result of the act.

This preferred status may be threatened by Brexit, in particular if EC infringement decisions cease to be binding in the U.K.; the U.K. would less naturally fall as a jurisdiction of choice for damages actions following on from EC infringement decisions. Germany and the Netherlands already compete with the U.K. as a forum of choice in these cases and might well benefit if the U.K. falls out of favor with claimants.

## State Aid

Aid granted by EU member states that benefits certain companies and that may distort competition and affects trade between member states is prohibited unless approved by the EC.

If the U.K. exited the EU without a special trade agreement with the EU in place, the U.K. may no longer be required to comply

with the EU state aid rules. As a result, the British government might have greater discretion in giving aid to U.K. businesses, and even preferential tax treatment to attract international companies.

## In Summary

In conclusion, the shape of change will be slow to emerge but as set out above, seismic shifts with regard to antitrust are not expected. Companies should also be reassured that existing clearance decisions will no doubt be honored and, in the absence of new facts, closed cases will not be reopened.

The most acute question for the CMA will be whether it will have the resources to manage a potentially significantly increased workload going forward and to maintain its status as a well-respected antitrust agency.



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