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Brexit: Implications for UK Competition Law

This note addresses the impact of Brexit on UK competition law – its interpretation, application, and enforcement. It is one of a series of *GTM Alerts* designed to assist businesses in identifying the legal issues to consider and address in response to the UK's referendum vote of 23 June 2016 to withdraw from the European Union.

Timing of Brexit

The UK has not left the EU. It will remain a member of the EU, and EU law will continue to apply in its territory, for some time.

Before exiting, the UK needs to go through the exit procedure set out in Article 50 of the Treaty on European Union, starting with notification to the European Council of its decision to leave the EU. The new UK Prime Minister, Theresa May, appointed on 13 July 2016, has clearly stated that while "Brexit means Brexit", there should be no rush to serve the Article 50 notification. She and David Davis, the Secretary of State for the new government department in charge of managing Brexit, have supported the view that notification should not take place before the end of the year. Following their recent discussions with Mrs May, German Chancellor Angela Merkel and French President François Hollande have both accepted that the UK needs time to prepare for exit negotiations, although they have also stressed that the UK's Article 50 notification should not be unduly delayed as this would not be in the interests of the EU or UK economies.

While the situation remains fluid, it is expected that the next few months will see the UK establishing its preferred negotiating position on the terms of its exit from the EU and its preferred model for its future relationship with the EU, with notification occurring in early 2017. When the notification is made, it will trigger a two-year, extendible period of negotiation with the EU on the UK's terms of exit only. For more information on the timeline for Brexit please see our previous *GTM Alerts*, "Brexit: The Timeline" and "Brexit: Progress Report One Month in". At this time, it is not clear if

negotiation of new arrangements with the EU will be conducted in parallel, or at a later stage. It is, however, clear that the UK intends to start negotiating trade terms with non-EU countries as soon as possible.

Potential Impact on Competition Law

As noted above, this note looks at the impact of Brexit on competition law and considers the degree to which UK and EU competition law are currently inter-related, and how this might change post-Brexit. It looks at the principal aspects of the two competition regimes - the behavioural rules applicable to market conduct, merger control, and the governance of state aid.

The scope of any changes will be dependent on the chosen model for the UK's future relationship with the EU and, in particular, the degree to which that model enables the UK to retain access to the EU Single Market. For the time being, this remains a primary area of uncertainty. If the UK becomes a member of the European Economic Area (EEA), EU competition law will continue to influence and shape UK competition law policy and enforcement. Other models, such as a bespoke free trade agreement, or relying on the UK's WTO membership, are likely to result in significant divergence over time.

This note focuses on the potential issues that may arise if the UK leaves the EU but does not remain part of the EEA.

As set out in more detail in the sections below, leaving the EU will mean that the UK no longer falls within the scope of the EU's rules on state aid. On the merger control side, clearance of a transaction by the European Commission will no longer remove the need for UK-specific clearance under the one-stop shop principle. For behavioural competition law, the fundamental concepts, namely tackling anti-competitive agreements and abuse of dominance, are mirrored in UK and EU competition law and it is unlikely that the UK's substantive competition legislation will change significantly in any scenario. What is more likely to be impacted by Brexit is how this legislation is enforced, the manner in which it is interpreted, and the development of underlying policy.

- ***Influence of the EU on UK Behavioural Competition Law and Policy***

  - *Single Market Objective* – One of the objectives behind EU competition law is the protection of the Single Market through the removal of artificial barriers to trade. As part of the EU, the UK has shared this objective, which has influenced the development of its domestic competition policy. Post-Brexit, the UK's policy objectives are likely to change, and the UK will no longer have influence over EU competition policy – and vice versa. This creates the possibility of divergence between UK and EU policy, which may impact on the development of legislation and regulatory guidance, case law, and enforcement activity.

  - *Supremacy of EU Law* – Under the European Communities Act 1972, EU law has supremacy over UK law. Section 60 of the Competition Act 1998 (CA '98) also makes it clear that the application of UK behavioural competition law must be consistent with the application of parallel EU competition law. As a result, decisions of the European Courts are binding on UK authorities when applying the CA '98. Absent the concept of EU law supremacy, those decisions will no longer be binding precedent in the UK and, as a result, there is potential for significant divergence.

  - *Reliance on EU Guidance and Regulations to Supplement UK Competition Law* – The UK relies on various EU regulations to supplement its national rules (such as block exemption regulations on various matters including, for example, vertical agreements). Assuming these regulations will cease to apply on Brexit, they will need to be replaced with similar or alternative UK-specific rules.

  - *EU Extraterritorial Application* – EU law captures any conduct which affects competition within the EU, regardless of where the companies engaged in that conduct are located or where the conduct takes place. As

a result, UK companies active within the EU will still need to comply with EU competition law, as well as applicable domestic law. The current requirement to interpret EU and UK competition law according to the same principles simplifies the task of compliance for businesses. Post-Brexit, this may be more complex in the event of future divergence.

- ***Public Enforcement of Behavioural Competition Rules***

  - *Parallel Proceedings* – Under the current procedural rules set out in Regulation 1/2003, the UK's Competition and Markets Authority (CMA) must apply and enforce EU competition law in parallel with UK competition law when there is an effect on trade between EU Member States. However, if the European Commission is best placed to investigate particular conduct, the CMA and other national regulators will 'stand down' and support the European Commission in its efforts. Assuming Regulation 1/2003 ceases to have effect in the UK, there is a realistic possibility that businesses could be subject to parallel European Commission and CMA investigations, albeit with a different geographic focus. This would impose extra cost and additional strategic considerations, such as the potential need for parallel leniency applications and the possibility of differences in findings between the two enforcement agencies.

  - *Co-operation Between Enforcement Agencies* – As a member of the European Competition Network (ECN), the CMA exchanges information with enforcement bodies in each of the EU's Member States, and with the European Commission itself. It also benefits from the co-operation arrangements in place between the EU and third countries, such as the United States, ensuring mutual assistance in carrying out enforcement activity. In a non-EU future, the UK will need to negotiate its own bilateral arrangements to ensure ongoing co-operation. It is likely that many parties will want to reach replacement arrangements relatively swiftly, but there are no guarantees. At the same time, the UK's involvement with entities such as the Organisation for Economic Co-operation and Development and the International Consumer Protection and Enforcement Network will be unaffected by Brexit.

  - *CMA Workload* – If separation of the UK from the EU results in an increase in investigations, it will place the CMA's existing resources under strain. This may be exacerbated by a similar uptick in the number of merger references (see below). Investment in additional capacity may be required to ensure that competition issues affecting UK markets are addressed effectively.

- ***Litigation of Behavioural Competition Issues***

  - *UK Regime for Private Damages* – The UK has been at the forefront of developing a framework for private damages actions and its regime is arguably more advanced and extensive than the framework set out by the EU for implementation in each of the EU Member States. These fundamentals are unlikely to change – particularly when it comes to litigating UK competition law cases.

  - *Impact on Forum Shopping* – The benefits of the UK's regime, including its approach to disclosure, have made it one of the top choices for bringing private actions based on breaches of EU competition law. There are some doubts, however, as to whether post-Brexit the UK Courts will continue to treat European Commission decisions and decisions of the national competition authorities of the remaining 27 Member States as a sufficiently binding basis for follow-on-damages actions. Similarly, concerns about the enforceability of UK judgments in other EU Member States and the removal of the principle of the supremacy of EU law may impact the selection of the UK as a venue for private competition law enforcement through litigation. For some, however, the freedom of UK Courts to depart from findings and economic analysis set out in EU decisions may well prove attractive.

- *References to the EU Courts* – In a post-Brexit world, the UK Courts will no longer have the option of referring questions of interpretation of EU law to the EU Court of Justice (CJEU). This would mean that when UK Courts are asked to adjudicate on the basis of EU law, final responsibility for determining novel or complex issues will rest with the UK judiciary. This may deter references to the CJEU from now on given the typical time-lag between the making of the reference and the judgment of the CJEU. There may, therefore, be a greater inclination toward addressing the issues domestically.

- ***Merger Control***

  - *UK Outside the EU's 'One-Stop-Shop'*– Post-Brexit, the 'one-stop-shop' merger clearance offered under the EU Merger Regulation (EUMR) would cease to apply to mergers that also meet the UK's jurisdictional thresholds. As a result, those mergers will be subject to both the EU and UK merger control regimes, increasing the regulatory burden on the parties to the transaction. Although notification is not mandatory under the UK regime, the need for certainty may increase the number of transactions notified to the CMA. The CMA will also have a larger pool of deals from which to identify un-notified transactions that it may wish to 'call-in' for review.

  - *Impact on EUMR Thresholds* – If the EUMR turnover thresholds remain unchanged, but turnover generated in the UK is no longer included when calculating relevant turnover, this may reduce the number of transactions that are caught by the EUMR and increase the number that need to be looked at under the national rules of the remaining EU and EEA Member States.

  - *Government Intervention* – In terms of domestic policy, early indications are that the new Prime Minister may be contemplating the introduction of greater powers for governmental intervention in mergers with strategic significance for the UK, although it is presently unclear what this might mean in practice for UK merger control.

- ***State Aid***

  - *UK No Longer Subject to the EU State Aid Regime* – The state aid rules prevent EU Member States from distorting competition by granting subsidies or other advantages to specific businesses on a selective basis, without prior European Commission clearance following an assessment of the impact of the aid on competition. After Brexit these rules will no longer apply to the UK. This may create greater scope for provision of aid to UK businesses, although the UK's freedom to do so would be subject to the UK's continuing obligations under WTO rules on the use of subsidies.

  - *Ability to Challenge Aid by Remaining Member States* – The UK and UK businesses will no longer have the right to challenge aid granted by the remaining EU Member States where this distorts competition to the disadvantage of UK firms. As a result the UK will be dependent on the remaining Member States effectively policing each other.

- ***Identification of Relevant Geographic Markets***

  - *Is the UK Part of the Same Market as the EU?* – A key element of behavioural competition law and merger control decisions is the identification of the relevant market. This assessment is carried out on a case-by-case basis and is intrinsically linked to the nature of the products in question, amongst other things. In many cases, markets will have been considered to be EU-wide due to the homogenous conditions of competition arising within the EU by virtue of the Single Market and harmonised regulation. In future cases, whether or not the UK forms part of the same geographic market as the remaining EU Member States will be a more complex

assessment, undoubtedly influenced by the nature of the UK's future relationship with the EU. For example, will the new arrangements result in barriers to trade or other factors that prevent the conditions of competition in the UK and the remaining Member States being sufficiently similar?

- *Impact on Past Decisions* – In instances where the UK is no longer seen as part of the same relevant market as the EU, this may also threaten continuing reliance on past decisions. For instance, if a competition authority had concluded that an entity was not dominant by reference to its position in an EU-wide market, but post-Brexit there are likely to be two separate markets for the UK and the EU, there is a possibility that the conclusion on dominance might change. The entity concerned would need to re-evaluate its market status, and market conduct, accordingly. Similarly, if a challenge based on alleged anti-competitive conduct had failed on the basis that market shares were sufficiently low for a block exemption or de minimis defence to apply, but the UK now needed to be looked at as a market in its own right, this could increase market share to the point where the original defence no longer applies and the challenges could be re-invigorated.

Conclusion

The full implications of the UK's withdrawal from the EU are still being worked through and they will depend to a great extent on the model chosen by the UK for its future relationship with the EU. Until there is greater clarity and certainty, businesses should continue to monitor developments, identify those areas where their businesses are likely to be affected by new or amended legislation and regulation – and, importantly, those areas that are unlikely to be unaffected – and determine how to mitigate risks in affected areas.

Further information about issues relating to Brexit can be found here.

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