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POLITICO

As we go to press, the UK cabinet is finally beginning the serious business of drawing up its "blueprint for Brexit": the objectives and principles that should govern the future relationship with the EU and which will therefore drive the negotiated terms of exit. There are already reported to be tensions within Whitehall. Treasury officials, understandably, view continued access to the single market as critical for the financial sector. Others view the "European Economic Area" ("**EEA**") model as unrealistic, especially if Brexiteers' requirements for controls on immigration are to be delivered. It appears, for the moment, that priority will likely be given to immigration controls rather than market access, although the Prime Minister has made clear that the UK will seek a unique trading relationship with the EU rather than any "off the shelf" model. The real challenge for the UK negotiating team, if and when it resolves its internal differences, is whether EU governments will have the time or inclination to negotiate such a bespoke deal for the UK.

In the fifth edition of Lex et Brexit, we consider the impact of Brexit for the anti-trust regime in the UK. We conclude that while the core preoccupations of UK anti-trust regulators are unlikely to undergo major change, the key fascination of Brexit's impact on the UK anti-trust enforcement landscape may lie principally in what it tells us about governmental industrial policy and the UK regulator's nimbleness in adapting to change.

We then examine the impact of Brexit on the prospectus regime in the EU. We conclude that the UK's role in driving capital markets union and further harmonization of prospectus regulation may be greatly diminished. As a result of Brexit, the envisaged ever-increasing path to harmonization of capital markets activity remains, at least from a UK perspective, a vision clouded with uncertainty.

Brexit and Anti-trust

In terms of the substance and enforcement of anti-trust law, the form of the UK's future relationship with the EU will have significant effects. We think it is fair to say that an EEA, continued single market adherence outcome – the "Norway" model – would largely lead to business as usual for UK anti-trust regulation. This article, however, assesses the prospect of a relationship with the EU that is different from the EEA route: a relationship where, in the Prime Minister's words, "Brexit means Brexit" and which is closer to the European Free Trade Association ("Switzerland") or individual trade agreement ("Canada") model.

Of course, the core preoccupations of UK anti-trust regulators are unlikely to undergo major change. They will seek (as do their counterparts in Brussels and other Member States) to preserve the benefits for consumers generated by competition. Better prices, quality and innovation will continue to be achieved through the effective control of mergers, abuse of market dominance and cartel conduct.

Currently, these objectives are pursued in a relatively coordinated manner that (by and large) prevents European national and supra-national regulators from tripping over one another and imposing inconsistent decisions. Irrespective of the arrangements put in place, there will be a continued need for close collaboration between the UK Competition and Markets Authority ("**CMA**") and the European Commission, whether within the framework of the EEA or some alternative arrangement.

However, in a world where the Brexit model is non-EEA, we explain below why businesses whose activities are in or with or affect UK markets may well face:

1. parallel UK and EU merger reviews for large deals previously handled by Brussels alone;
2. divergent substantive tests for merger clearance as the EU and the UK (or both) look at broader "industrial policy" concerns, as well as straightforward competitive market analysis;
3. a related blurring of the principles governing the proper use of state aid and its impact on international competition; and
4. parallel investigations of cartel conduct, increased aggregate penalties and further obstacles to the implementation of an effective cross-border leniency policy.

Merger control

Under the current regime for merger control, the EU Merger Regulation ("**EUMR**") establishes a "one-stop shop" for deals that trigger the relevant revenue thresholds: major transactions affecting a number of Member States need only be filed in Brussels and not with any of the 28 national authorities that might otherwise claim jurisdiction.

While the EU filing imposes significant demands on the merging parties, they at least have the consolation of a single review by one regulator, under a single set of substantive and procedural principles, a known timetable and no need for multiple remedies negotiations in problem cases. This one-stop shop principle decreases the burden on notifying parties which are able to deal with one sophisticated and well-resourced regulator with considerable experience reviewing a range of sectors rather than notifying in parallel to multiple regulators who may well have contrasting levels of experience of a particular sector and consequently divergent views on the competitive impact of a transaction.

An EEA model for the future economic relationship would lead to little change. The Norwegian Competition Authority, for example, has no jurisdiction over mergers which meet the EUMR thresholds. The one-stop shop principle applies. We would assume that the CMA would be in the same position. However, a departure from the single market would leave the CMA freed from the need to respect the one-stop shop and empowered (or, indeed, obliged) to investigate all cases that meet the UK's own thresholds, irrespective of whether they were also caught by the EUMR.

Quite apart from the resourcing challenges for an already stretched CMA, there would be process implications:

- for the parties, facing divergent filing requirements in terms of pre-notification, content, timetable and remedies formulation; and
- for the CMA, forced to consider the practicable scope of its investigation of Europe-wide or global cases, given the limitations on its non-UK evidence gathering or order making powers.

Parties, of course, are increasingly used to having to deal with the varying requirements of multiple regulators. The major process challenge may be that faced by the CMA, which would presumably have to try to negotiate some kind of cooperation framework with a European Commission that may not be in a particularly cooperative mood. Indeed, across the competition enforcement spectrum, the CMA's detachment from the European Competition Network - comprising the EU and Member States' national competition authorities – would increase its isolation from operational and policy making cooperative involvement.

Some indication of the CMA's mandate for future merger reviews may be gleaned from the Better Markets Bill, proposed legislation announced in the Queen's Speech prior to the EU membership referendum with the stated objective of, inter alia, "speeding up decisions […] to benefit both businesses and consumers". A consultation process on this proposed legislation is ongoing even though it remains unclear whether the legislation will remain a priority for the new government. This desire to streamline UK merger control review may be substantially re-appraised in light of Brexit.

Impact on the substantive test for merger clearance?

Perhaps exhibiting the condescension of which the British are often accused and occasionally guilty, some UK commentators speculated in the early post-referendum days that the purity of EU competition policy would lose a valuable supporter. The UK, it was said, had (almost single-handedly on occasions) forced EU institutions to hold to a rigorous, economics-led approach. This had been achieved, it was implied, in the face of pressure from less reliable quarters to apply the rules in the context of broader industrial agendas and national champions. Brexit thus opened the way to divergence between natural UK openness to free market competition and an increasing Continental drift towards protectionism.

It was interesting then, that in launching her leadership campaign, Theresa May was concerned that some mergers of key UK companies with foreign partners were potentially inconsistent with a "proper industrial strategy," which she said "wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important to pharmaceuticals is to Britain".

Prior to 2002, the UK merger control regime had indeed permitted deals to be blocked on "public interest" grounds. Unfortunately this presented politicians with a series of no-win challenges, when their natural instincts to permit inward investment came up against public campaigns to "save" Manchester United FC or other alleged national treasures. There was something of a sigh of relief when the decision-making was handed to competition regulators to handle solely on a competition agenda, save for obvious national security or media plurality issues. It may be, then, that the Government will, on reflection, reserve greater powers of intervention in special cases, while backing away from any more formal recalibration of the test for clearance. It is certainly true to say that the CMA is not currently adequately resourced to deal with the volume of cases that may be notified post-Brexit and at the same time deal with politicised cases, subject to intense scrutiny on "public interest" grounds.

State aid

Uncertainty over the resurrection of "industrial policy" also throws up interesting possibilities, in theory at least, in the state aid area. The EU competition rules are reinforced by a requirement that Member States should not grant unauthorised aid that distorts competition in favour of the (often local) recipient. These rules apply only to Member State governments (even if non-EU governmental aid distorts competition within the EU), though an EEA relationship would maintain the position as before.

There is obviously no domestic UK equivalent of the rules, since no government would wish to tie its own hands. So, post-Brexit, and in a Swiss or individual trade agreement model the EU anti-trust derived legal limitations on UK government aid would fall away. The Government might be expected

to be more interventionist as a result, subject to the World Trade Organisation Agreement on Subsidies and Countervailing Measures (which permits one member to impose countervailing duties on subsidised imports from another).

One enduring legacy of the Thatcher era is a distaste in the ruling Conservative Party for bailing-out of so-called lame duck industries by the national government. The UK has a lower than average history of granting such aid, or of falling foul of the state aid rules. For the UK between 2000 and August 2016 there have 439 cases investigated or block exempted by the EU, in comparison with 2,187 for Germany and 872 for Italy during the same period. However, it may be that the post-Olympic political enthusiasm for "investing in what we're good at" as a cornerstone of the new industrial policy will exploit liberation from the state aid regime in order to provide selective government support, for example in new technologies.

This week's European Commission action against Ireland and Apple throws into sharp relief the potential paths a post-Brexit industrial policy may take, free from EU constraints on governmental aid and taxation policy. In the previous edition of Lex et Brexit, we examined how Brexit might impact the UK's existing tax regime and the proposed changes to the UK's tax regime arising out of various international and EU initiatives. This edition is available here.

Cartel investigations

Finally, life post-Brexit is unlikely to get easier for those accused of engaging in cartel behavior. At present (and not unlike the one-stop shop principle governing control of the largest cross-border mergers), national competition authorities in the Member States stand back from multi-jurisdictional cartel matters investigated by the Commission in Brussels. The Commission has well-publicised powers of investigation, whether through dawn raids in Member States or requirements to provide information, in each case backed by heavy fining powers for failure to comply. These investigations typically run for a number of years and take up much of the time of a large section of European Commission staff. Many, if not all, national-level regulators are ill-equipped to undertake similarly complex and long-running investigations which are usually cross-border and require supra-national investigation.

UK domestic cartels are investigated by the CMA, with similar powers and applying similar principles, save that certain categories of serious cartel offence (such as price fixing or market sharing) can carry criminal sanctions. If the UK follows the EEA model, little is likely to change. EEA participants effectively agree to the same allocation of responsibilities. But a "Swiss" or "Canadian" outcome could leave the CMA somewhat stranded in pursuing a parallel investigation to that of the Commission. From the wrongdoer's perspective, yet another authority would come into play, with the potential for additional penalties. Yet the CMA would also be lacking some key tools for the job, being deprived of the investigatory powers that it currently shares with Brussels and with no certainty that it would have access to information affecting UK players. As in the case of merger control, there would presumably need to be an agreed framework for cooperation between the two authorities, struck at a time when the Commission may be disinclined to be seen as easing the path for exiters.

It should also be taken into account that the CMA has not covered itself in glory in its proceedings against purely domestic cartels, notably during the collapse of the 2010 criminal prosecution against British Airways executives for alleged involvement in a fuel surcharge price-fixing cartel with Virgin Atlantic. Its prospects of doing better on a wider stage, with limited investigatory resources, are slim. The regulatory task would be made even harder if the UK were excluded from any one-stop leniency scheme operated by the Commission and remaining Member States. It is well-established that effective leniency schemes are a key weapon in the enforcer's armory. Any detachment which deterred UK applicants from disclosing cartel details due to the cost or risk of qualifying elsewhere would deal a blow to the CMA's efforts to secure high profile wins to accompanying deterrent effect.

Overall, the fascination of Brexit's impact on the UK anti-trust enforcement landscape may lie principally in what it tells us about governmental industrial policy and the CMA's nimbleness in adapting to change. But neither of these is likely to trouble the anti-trust community unless and until a non-EEA exit emerges as the preferred option.

Prospects for the Prospectus Directive

The Prospectus Directive (Directive 2003/71/EC, as amended), along with its corresponding implementing measures (including the current Prospectus Regulation (809/2004)), was intended to simplify the existing system of "home" and "host" country requirements across the EU. By imposing uniform form and content requirements, as well as "passporting" provisions, a Prospectus Directive-compliant prospectus approved in one member state can be passported to another member state in order to publicly offer securities in that market as well, increasing capital markets harmonization in the process.

In this issue of Lex et Brexit, we evaluate two scenarios in the event the UK does not remain an EEA member. First, we examine the Prospectus Directive's existing equivalence regime and potential implications for UK companies undertaking public offers of securities or seeking admission to trading on EEA regulated markets after Brexit. Then, we examine the implications Brexit may have on the European Commission's proposed Capital Markets Union action plan and associated proposal for a revised prospectus regime (an initiative we discussed in our December 4, 2015 memo, European Commission Proposal for a New EU Prospectus Regulation).

Prospectus Directive equivalence

Article 20 of the Prospectus Directive provides that issuers having their registered office in a non-EEA jurisdiction, or "third country", may submit a prospectus drawn-up in accordance with the third-country's legislation for approval in a "home" member state in the EEA for an offer of securities to the public or admission to trading on an EEA regulated market. To utilize this approach, a decision from the European Securities and Markets Authority ("**ESMA**") regarding "equivalence" of the third-country prospectus regime is required. Notably, in the past two years, ESMA has made equivalence assessments regarding the prospectus regimes of Turkey and Israel, thus enabling an approach for prospectuses drawn up in accordance with the rules of those countries to be approved by a competent authority in an EEA member state and ultimately passported across the EEA.

Following Brexit, a similar path could be utilized for companies wanting to access markets in London and the Continent. First, ESMA would need to determine that the UK prospectus regime is "equivalent." Technically, this would seem to be a straightforward exercise given that the existing UK prospectus regime is formally compliant with the Prospectus Directive. But post-Brexit, the main market of the London Stock Exchange would no longer be an EEA regulated market and so divergence from the Prospectus Directive regime could be possible. Such flexibility could encourage the UK government and regulators to tailor the UK prospectus requirements following Brexit to encourage listings, but any material modifications could lead ESMA to delay or even reject equivalence.

Second, and more cumbersome, UK companies undertaking a public offering of securities in an EEA member state or seeking a listing on an EEA regulated market would then be required to submit a prospectus drawn up in accordance either with the Prospectus Directive requirements or EEA-equivalent UK rules to a competent authority in an EEA member state for approval. In the situation where the UK company also desires to publicly offer securities (or maintain a listing) within the UK, this requirement would be incremental to the UK Listing Authority's ("**UKLA**") own approval processes. While presumably EEA regulators would continue to recognize the UK's prospectus approval process as robust, and perhaps, as a result, apply less scrutiny to a concurrently approved prospectus or otherwise be willing to accept the UKLA's determinations, the outcome is uncertain.

For non-UK companies as well, the appeal of a London listing is in part driven by its function as a gateway to the EU through sophisticated regulators and a well-developed body of regulations and clear listing requirements. In this way, Brexit negotiations, instead of seeking to minimize listing requirements and regulatory scrutiny, may instead seek to enhance UK regulatory powers to demonstrate commitment to equivalence with European securities offering and listing regimes, even if technical requirements differ.

In any event, London listed companies, contemplating securities offerings in the EEA (without a concurrent listing on an EEA regulated market), could continue to avail themselves of the Prospectus Directive's "qualified investors" exemption from the requirement to have an EEA-approved

prospectus. Indeed, in many European offerings today, rather than undertake the incremental steps associated with passporting an approved prospectus, securities marketing efforts instead focus on targeting “qualified investors” only across the EEA. Following Brexit, London listed companies and their advisors in offerings may, in the absence of sufficient equivalence determinations, be further deterred from attempting to access retail investors across Europe. While the degree of movement is uncertain, it will depend in large part on the extent to which the UK is able to maintain equivalence to the EU in its regulatory approach.

Implications for the Capital Markets Union

Over the past few years, the European Commission has been pursuing a “Capital Markets Union action plan,” seeking to lower barriers to capital markets access across the EU. As part of these efforts, in November 2015, significant amendments were proposed to the European prospectus regime in an attempt to make the prospectus preparation and approval process less cumbersome and costly, particularly for small and medium-sized companies. The Commission has proposed replacing the current Prospectus Directive with a new Prospectus Regulation, which would be directly applicable across EEA member states without the requirement for individual member state implementing legislation. The new Prospectus Regulation is still going through the European legislative process and will be accompanied by a number of implementing and regulatory technical standards that remain to be published. It is unlikely that the final text of the new Prospectus Regulation will be published in the Official Journal before early 2017 and will only take effect 12 or 24 months after publication. Moreover, following agreement in the legislative process on the text of the new Regulation, it is unlikely that the UK will be able to materially influence the technical standards (e.g. relating to the level of disclosure required) while the Brexit negotiations are ongoing.

Prior to Brexit, the Capital Markets Union action plan was perceived to be largely friendly to UK interests. With a plan to further reduce existing barriers across member states, London would be poised to benefit from further centralization of financial activity, as harmonized prospectus, listing and offering requirements made it more flexible for continental companies to list in London and offer across Europe. Moreover, UK regulators were viewed as an important voice in encouraging flexible standards and reducing cross-border barriers across Europe.

Post-Brexit, the UK’s role in driving capital markets union and further harmonization of prospectus regulation may be greatly diminished. What this means for the fate of the Capital Markets Union initiatives in the remainder of the EU is unclear. EU Member States could pivot towards enhanced prospectus harmonization initiatives for remaining Member States in an attempt to encourage development of a non-London financial center. That is, by seeking to further link listing and offering requirements, the EU could seek to enhance the role of remaining member states as a gateway to and center of capital markets activity in the EU. On the other hand, the drive towards centralization may be diminished by Brexit, as EU leaders step back from an approach favored by the financial services sector towards a scheme that would be more accommodating to national interests.

Thus, as the UK aims to balance flexibility and equivalence in its post-Brexit approach to prospectus regulation, the aimed-for equivalent regime will remain, to some extent, a moving target. Over a decade after the coming into force of the Prospectus Directive, the envisaged ever-increasing path to harmonization of capital markets activity remains, at least from a UK perspective, a vision clouded with uncertainty.

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