

Legal Implications of Brexit

Danish Association of European Law

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Aspects of post-Brexit regulation in the Competition field

Commission's Jurisdiction Post-Brexit



- EU competition rules imposed to the extent *“necessary for the functioning of the internal market”* (Art 3 TFEU)
- Once UK outside Single Market, no obligation for EU competition rules to apply in the UK
- Commission's enforcement powers in the UK will change
 - no Commission-led dawn raids in UK
 - UK Competition and Markets Authority (“CMA”) will no longer conduct dawn raids on behalf of the Commission/NCAs
 - Commission/NCAs may only send information requests to businesses situated in the UK

Competition Law Enforcement in the UK

- Modernisation Regulation no longer applicable in UK post-Brexit
- No direct application of Arts 101 & 102 TFEU in UK by CMA or national courts
- But s60 Competition Act requires UK competition law questions to be interpreted in a manner consistent with corresponding questions under EU law – will this change?
- Legal advice given by lawyers qualified in England & Wales/Scotland will not be protected under EU's privilege rules

Block Exemptions

- EU block exemptions currently apply “in parallel” in UK – will this continue?
- Ban on restricting parallel imports is for the benefit of the Single Market – will the CMA take a different approach to bans on active and passive sales outside the UK?



Cartels

- Currently, possible to obtain EU-wide leniency for civil sanctions – “one-stop-shop”
- EU-wide leniency will terminate post-Brexit – separate UK leniency application could be needed
- But cartel participants already apply for leniency in individual Member States to ensure protection – Brexit impact may not be so severe?
- Companies could face fines of up to 10% world turnover in both the UK and the EU
- UK Criminal cartel offence:
 - Imprisonment of up to 5 years
 - Unlimited fines
- UK Director Disqualification Order – up to 15 years



Damages Actions



- UK is a popular forum to bring EU follow-on competition law damages actions – will this continue post-Brexit?
- Unlikely if UK courts are no longer bound by Commission decisions
- Other MS jurisdiction likely to be more attractive as will provide greater legal certainty
- Funding may become more difficult to obtain in the UK
- UK competition law damages regime for follow-on CMA decisions will not change

Merger Control (1)



- UK outside EU's "one-stop-shop"
 - Outside Commission's jurisdiction
 - No longer possible to refer mergers from the CMA to the Commission or vice-versa
 - Likely to lead to more UK merger filings
- UK turnover no longer included in EUMR thresholds – revision of EUMR thresholds?
- Possibility of filings in both EU and UK leading to increase in costs and regulatory burden for merging parties

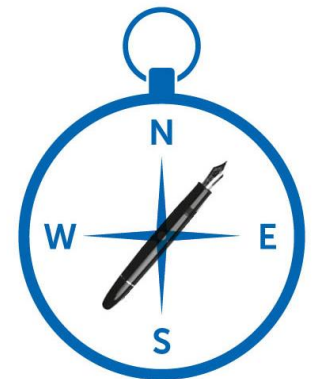


Merger Control (2)

- Timeframe
 - EU – Phase I: 25 working days; Phase II: 90 working days (18 weeks)
 - UK – Phase I: 40 working days; Phase II: 24 weeks
- Filing Fees
 - EU filing fee = zero
 - UK filing fee ranges from £40,000 to £160,000 varying based on target's UK turnover (2016)
- Uncertainty - possibility of divergent decisions and remedies?
- Ability for Commission and UK to consult/share information?

Information Exchange

- Cooperation and exchange of information provisions under Reg 1/2003 will cease on Brexit
- Post-Brexit, CMA will no longer be part of ECN or the ECA
- But CMA will continue to be an ICN member
- Will UK enter into a bilateral agreement or Memorandum of Understanding with the Commission to enable exchange of information and mutual assistance?



Role of EU judgments post-Brexit

- UK courts currently able to apply Arts 101 and 102 (Art 6 Reg 1/2003)
- S60 UK Competition Act – English courts must:
 - ensure there is no inconsistency with EU competition law and EU judgments
 - have regard to decisions or statements of the Commission
- UK Government has stated that CJEU will not have jurisdiction in the UK post-Brexit
- EU judgments/Commission decisions post-Brexit likely to be persuasive but not binding
- English courts no longer able to refer competition law questions to EU courts

The proposed UK Great Repeal Bill – its purpose and coverage

Purpose of Great Repeal Bill

- To repeal the UK European Communities Act 1972 (“ECA”)
- Convert EU law as it exists when the UK leaves the EU into UK law
- Give UK Government the power to make secondary legislation
 - To ensure the UK’s legal system functions properly outside the EU
 - To reflect any withdrawal agreement under Article 50

Sources of EU Law



European Communities Act 1972 (“ECA”)

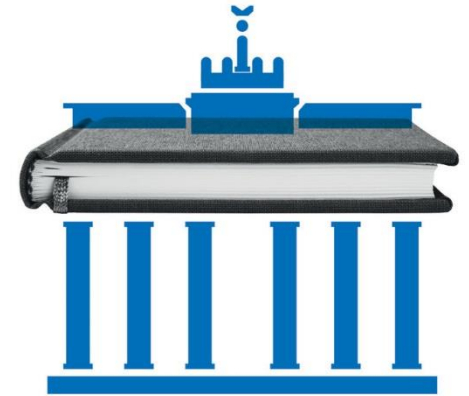
The ECA:

- gives the EU treaties direct effect in UK law
- incorporates EU law into UK legal order
- provides for the supremacy of EU law
- requires UK courts to follow CJEU judgments

GRB will repeal the ECA



Treaties



- Likely to become irrelevant post-Brexit
- BUT may assist UK courts' interpretation of EU laws preserved in UK law
- GRB will enable individuals to continue to rely on directly effective rights in EU treaties in court
- E.g. Article 157 TFEU – equal pay

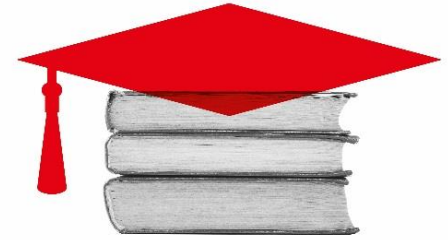
Regulations

- s2(1) ECA enables Regulations and other directly applicable EU laws to become part of UK law
- GRB will convert this law into UK law as applied in UK before Brexit
- BUT they will **not** be copied out
- Continue to apply until UK legislators amend
- E.g. Vertical Agreements Block Exemption Regulation

Directives

- S2(2) ECA enables directives to be implemented into UK law
- Once ECA is repealed, all directives implemented by secondary legislation under ECA will fall away
- GRB will preserve this secondary legislation
- Directives implemented by primary legislation (i.e. Act of Parliament) will be unaffected
- Directives due to be implemented post-Brexit will not become UK law

CJEU Case Law



- GRB will give CJEU case law existing up to Brexit date the same status as UK Supreme Court judgments
- UK courts will rely on CJEU case law to interpret EU derived laws that have been converted into UK law
- Can only be amended by the Supreme Court or by UK Parliament when it is “right to do so”
- Post-Brexit CJEU case law will **not** be binding in the UK – will it be persuasive?

Supremacy of EU law



- Post-Brexit, CJEU will have no jurisdiction in the UK
- UK Parliament will be free to pass its own laws
- Conflict between an EU-derived law and other pre-Brexit law = EU-derived law takes precedence
- Conflict between EU-derived law and new UK legislation = new UK legislation takes precedence

Guidelines/Opinions

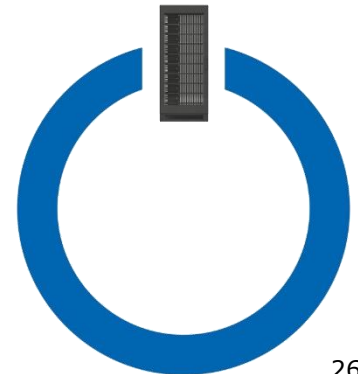
- Non-binding under EU law
- But can be used as an aid to interpretation by domestic courts when interpreting EU law
- Not covered in the GRB White Paper
- Expect guidelines/opinions to continue to aid interpretation of EU laws existing at Brexit which are incorporated into UK law

EU Charter of Fundamental Rights

- Only applies to Member States acting within the scope of EU law
- Will become irrelevant on Brexit and will **not** be converted into UK law
- UK Government thinks this will not affect individuals' substantive rights in the UK
 - Many of the rights exist in body of EU law which will be converted into UK law
 - Some already exist in UK law (HRA) or through international agreements (ECHR)

Delegated Powers to correct converted EU law

- Some of the EU converted law will not function effectively post-Brexit because:
 - UK no longer a Member State
 - EU law will stop operating as intended or will be redundant
 - reciprocal arrangements with the EU/other Member States may cease post-Brexit
- GRB will give Government the power to correct converted EU law – cannot be used to make policy changes



Timescales



- GRB will be announced in Queen's Speech in May 2017
- Introduced in UK Parliament in early summer 2017
- Both the House of Commons and the House of Lords will need to approve the GRB
- Expect GRB to enter into force on Brexit day

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