BREXIT: WHICH BREXIT?

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On June 2016 we woke up with the news that a majority of British citizens voted for the United Kingdom to leave the European Union. For many people this news was a very bad one. For others it was only unexpected.

Later on, more precisely on March 29th 2017, the United Kingdom formally notified the European Council of its intention to leave the European Union according to Article 50 of the Treaty of the European Union and starting from that date, a two-year negotiation period has started in order to reach a withdrawal agreement, unless the European Council unanimously decides to extend such period.

However, in this respect, it is also important to underline that there is still an on-going debate over whether it is legally possible for the United Kingdom to revoke its Article 50 notification letter. Obviously the possibility of this revocation opens totally new scenarios. This said Competition law is one of the several fields which will be affected by this withdrawal, also generally known as Brexit. On the British side, only last July 23rd 2017, the UK House of Lord, EU Internal Market Sub-Committee started a coordinated inquiry on the implications of Brexit for the application and enforcement of competition law in the UK, launching a consultation. During this initial consultation phase written evidences were submitted to the Sub-Committee including those of members of the UK Competition and Markets Authority (“CMA”). The Report of this Sub-Committee has been finally published on 2 February 2018.

On the EU side, the Council’s guidelines of April 29th 2017 only affirm that “any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.”.

The European Parliament resolution of April 5th 2017 and the subsequent resolutions regarding the state of play of the negotiations with the United Kingdom dated 3 October and 13 December 2017, do not provide any further information on this specific issue. Nor they do the general principles and the procedural arrangements for the conduct of the negotiations established in the Council negotiating directives of 22 May 2017, as well as the European Council guidelines for the second phase of the Brexit negotiations adopted on 15 December 2017.

In this respect, the “Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU”, dated 8 December 2017, only confirms that “[...] on ongoing Union administrative proceedings both Parties have deepened their

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understanding of the respective positions, and explored some areas, such as competition, state aid […]”.

Before analysing the effects of Brexit on competition law according to the different current scenarios, two preliminary considerations have to be taken into account: first of all, on one hand, in the UK as in any other Member State, competition law is substantially shaped on EU competition law.

Moreover, on September 12th, the Great Repeal Act passed a second reading in the House of Commons and this Act, after the end of the Committee stage, will need to pass through a third reading before a further approval by the House of Lords. Thanks to this act, the UK could be able to convert all the acquis communautaire into British laws as far as possible.

So far, section 60 of the Competition Act of 1998 already states that there should be consistency in UK with the treatment of corresponding questions arising in EU law in relation to competition within the European Union (“consistency principle”) and section 10 of the same Act provides for the automatic transposition of the European provisions related to the so-called block exemptions (system of “parallel exemption”).

As for section 60 of the Competition Act, the EU Internal Market Sub-Committee of the House of Lords, in its report of 2 February 2018, recommended that the duty for the UK authorities and courts to act consistently with European case-law becomes simply a duty to ‘have regard to’ that case-law. This also considering that such an approach might not be appropriate in the long term. This is also the position stated by the CMA on September 22nd 2017.

On the other hand, however, as for section 10, it is clear that the simple transposition of European statutory rules, without the acknowledgement of the primacy of European law, would not be sufficient to prevent in the future and in the long term a misalignment between the UK and the European competition law systems, since the interpretation of the Court of Justice is necessary to ensure such uniformity.

For these purposes, the recognition of the primacy of European law, as envisaged for the citizens’ rights Part of the Withdrawal Agreement, might represent a relevant precedent which could be followed also in the field of competition law.

In any case, in theory, the end of the obligation of consistency with the EU principles might not have significant effects in the short/medium term, as many precedents - strengthened throughout the years and based on EU law - will still be available to the British judge, which operates in a common law system based on the stare decisis.

Secondly, since an effects-based approach inspires European competition law, the rules upon which this system is based will always be applied whenever the effects of the anticompetitive practices will be widespread among the EU territory, regardless of the country where the conducts at stake have been implemented.

In other terms, since this principle is also applicable when such behaviors are carried out outside the EU, the withdrawal of the United Kingdom from the European Union will not
imply that British undertakings won’t be hindered by European antitrust prohibitions.

This said, many different scenarios can be envisaged. As in every other context, also for competition law, the consequences of a British exit from the European Union will depend upon the agreements that will be negotiated under art. 50 of the TEU.

The first possible scenario is that the UK will join the European Economic Area (EEA), whose parties are 28 EU Member States as well as Iceland, Liechtenstein and Norway: in this case the competition law regime would remain almost unchanged.

Firstly, this is because the EEA Agreement provides for the application of common rules, including those concerning competition and state aid, based on EU primary laws UE (articles 53 and 54 EEA / articles 101 and 102 TFEU).

Secondly, the EFTA (i.e. European Free Trade Association) Court, in a single instance, adopts the EEA competition rules in light of the decisions of the EU Courts.

Finally, even though the competition authorities of the EEA States are not members of the European Competition Network, the EFTA Surveillance Authority plays the same role as the European Commission in guaranteeing respect of EEA competition law; moreover, the European Commission would maintain exclusive competence on concentrations having European dimension within the EEA.

However in such a scenario, as it has been correctly argued, the UK would not be able any more to take part in the elaboration and adoption of the EU competition laws, even though it will still be subject to EU legislation in several important fields. This makes such first option quite problematic, as also remarked by the UK Prime Minister in her speech of 22 September 2017.

The second scenario envisages less binding agreements between EU and UK, which, as in the Swiss model, would join the EFTA and sign single bilateral agreements with the EU, creating a customs union with the EU, along the lines of what happened with Turkey, and/or negotiating single free trade agreements.

These agreements, however, would not guarantee the UK a full access to the single market, on the contrary, they sometimes might force it to keep on following some EU trade politics without being able to have any say in the matter or any veto power. Therefore this second scenario does not appear likely either.

Finally, with the third scenario, in the absence of specific agreements, European competition laws would not be valid any longer and the Competition Act of 1998 would remain the only source in the subject of competition.

This third hypothesis, also known as “full Brexit”, is easier to be compared with the current enforcement system of the European rules and it therefore allows a better evaluation of the impact of the withdrawal.

Which would be the consequences in this case?

With regard to merger control, the first and main consequence is the end of the “one-stop shop” system on which Council Regulation (EC) No 139/2004 is based.
According to this system a concentration of Community dimension shall be notified to the Commission which retain exclusive competence, with no need of further notifications to the relevant national authorities where the notification thresholds are also met.

These rules are partially restrained by the fact that this Regulation provides for some mechanisms through which single national authorities may ask the Commission to examine concentrations affecting a single Member State in particular, thus resulting in a postponement.

Thus, with the withdrawal of the United Kingdom from the European Union, concentrations exceeding Community and British thresholds, even though notification is not compulsory under UK merger control rules, could be examined both by the European Commission and the CMA, which would do so from a very different perspective: whilst the former would evaluate the impact of the concentration on the European market, the latter would mainly focus on the effects over the UK markets.

In this respect, in the UK, the Secretary of State, according to Section 58 of the Enterprise Act, can have a primary role in the examination of a concentration in case of public interest. This regulation has seldom been applied. When it has, it was for reasons of national security, for instance in cases Alvis Plc/General Dynamics Corporation (2004), Finmeccanica/AgustaWestland (2004), Finmeccanica/BAE Systems (2005), Lockheed Martin UK Holdings Limited/Insys Group Limited (2005), General Electric/Smiths Aerospace Division (2007) and Atlas Elektronik/QinetiQ (2009).

Then there are some companies over which the UK Government hold a golden share (e.g. Rolls-Royce) which therefore could allow to intervene in case of change of control. Moreover it is possible under the Industry Act of 1975 to prohibit the acquisition by persons not resident in the UK of the control of undertakings engaged in the manufacturing industry. In these respects, it is important to underline that the EU Internal Market Subcommittee of the House of Lords, on balance, affirmed that Brexit should not be seen as an opportunity to make significant changes to such existing public interest criteria in merger control.

Therefore a possible duplication of control by the two competition authorities could follow with the potential risk of conflicting decisions. This even though the Brexit Competition Law Working Group, in its report of July 27th, expressly recommended to keep unchanged the substantial lessening of the competition test for the examination of concentrations.

This could also imply higher costs for the undertakings operating both in the European and in the British market, which would have not only to undergo longer proceedings, but also the risks of double sanctions in case of infringements of these two regulatory systems. All of these consequences have been so far prevented by a preliminary control system based on the “one-stop shop” principle.

Moreover, the laws which are currently regulating the cooperation between the Commission and the CMA in the field of merger control will be no longer applicable: therefore new coordination mechanisms should be implemented in order to prevent the risks mentioned above. In this respect, a starting point could be the analysis of
the cooperation agreements negotiated by the EU with USA, Japan, Switzerland, Canada and South Corea.

The CMA itself, in its answer to the UK House of Lord, EU Internal Market Sub-Committee, deemed the regime of the U.S.A. as a possible model to follow.

Further transitory issues will also have to be settled. For example: a) who will have the jurisdiction over cases when the Brexit takes place; b) who will control UK issues referring to the commitments adopted for concentrations examined by the European Commission?

Similar consequences can be envisaged for the application of EU laws to agreements and abuses of dominant positions. Indeed EU laws will still be applied after Brexit whenever an agreement involves British undertakings or an abuse by a British corporation affects the EU.

Historically, the Court of Justice has grounded its jurisdiction according to the area of implementation of the anticompetitive conduct, taking into consideration whether the undertaking involved was established in the EU territory also by the way of a subsidiary company etc..

However, more recently with the Intel decision, the Court of Justice expressly stated that in order to establish its own jurisdiction it would be sufficient to ascertain the existence of effects over the EU territory, providing however that these effects (even if only potential) are qualified meaning that they are foreseeable, immediate and substantial. Thus, for the purposes of this ascertainment, the conduct of the undertaking at issue will have to be examined as a whole. However besides that, the European Commission will not be able any more to use certain investigation tools in its proceedings towards British undertakings, e.g. it won’t be able to make or to ask the CMA to make dawn-raids in the premises of the British undertakings investigated.

Generally speaking, in this field the same coordination problems might occur as in concentrations. Indeed, for agreements and abuses of dominant position, these problems have been always dealt by the cooperative enforcement system established by Regulation 1/2003 (Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty).

The British withdrawal will also have many further important effects that cannot be dealt with herein. It is enough to consider that inapplicability of article 101 TFEU will imply that the exceptions introduced by the European Commission for several kinds of agreements, through the so-called block-exemption regulations (e.g. for vertical agreements, research and development, etc.) will have to be subject to a re-examination and reformulation at the national level even in case UK will decide to still apply them.

Such divergence could lead to UK and EU parties of the same contract being subject to different competition rules. This explains why the EU Internal Market Sub-Committee of the House of Lords, in its report of 2 February 2018 recommended that arrangements similar to Section 10 of the UK Competition Act should continue to apply under UK law after Brexit.
Anyway, in redefining such exceptions, the UK will not be bound any more by the need to preserve competition in the internal market, therefore it cannot be excluded that territorial restrictions forbidden by European regulations might be admitted in certain cases.

Brexit will unfortunately affect also a very important field for the public enforcement, that is the cooperation at European level.

As said, Regulation No. 1/2003 provided important means of cooperation among the various EU enforcers. Notably Regulation No. 1/2003 introduced the European Competition Network (ECN) among all the Member States of the EU. Inside ECN, European Commission and national competition authorities cooperate and share information in order to guarantee the uniform application of EU laws and assist each other during their investigations. Moreover, there are certain procedural guarantees aimed at preventing double proceedings resulting in double sanctions to the undertakings.

In addition, the European Union has concluded cooperation agreements negotiated with USA, Japan, Switzerland, Canada and South Corea, aimed at allowing cooperation, exchange of information and at coordinating investigations of competition authorities in order to successfully sanction those restricting practices which involve several jurisdictions.

This happens at different levels. As a matter of fact, there are first and second generation agreements. Among the latter, there is the agreement between EU and Switzerland in competition issues had only so far involved air transport, whilst in all the other fields the cooperation only consisted in informal contacts. Most of all, it overcomes the limit of the so-called “first generation” agreements, that is the prohibition of exchanging protected or confidential information without the approval of the undertaking that provided them.

Besides that, this cooperation agreement provides that, with respect to enforcement activities that the notifying competition authority considers may affect important interests of the other party, the cooperation between the States is carried out through the following means: notification (Article 3), coordination (Article 4), negative and positive comity (Articles 5 and 6), exchange of information (Article 7) and consultations (Article 11), which is the typical mechanism provided for in the cooperation agreements between EU and USA (2011, 1998 and 1995), Canada, Japan and South Corea.

The ECA (European Competition Authorities) network is another example of informal network of cooperation among the various national competition Authorities of the European Economic Area (ie the EU Member States, the European Commission, the Member States of the EFTA and the EFTA Surveillance Authority) aiming to the exchange of views and the constructive discussion on competition issues.

With the withdrawal of the British CMA, the European Competition Network and the ECA could thus experience an influential and qualified loss, as UK has always significantly contributed to cooperation in both enforcement and policy issues.
The CMA itself, in its answer to the UK House of Lord, EU Internal Market Sub-Committee, deemed the EU/USA agreement as a possible model to follow, but it is clear to the international antitrust community that in this way the cooperation level might be undermined. This is why the UK House of Lord, EU Internal Market Sub-Committee, advocated for the need to negotiate the most comprehensive competition cooperation arrangement the EU has ever agreed with a third country.

In addition to these agreements, there are further examples of international cooperation which would still involve the CMA, such as the International Competition Network, that was established in October 2001 as open to all competition authorities which have adopted a national antitrust law. So far, ninety competition agencies (from 76 jurisdictions) have joined the organization.

Other examples are the OECD Competition Committee which work on subjects such as competition and regulated sectors and international aspects of competition, as well as the UNCTAD Competition and Consumer Policies Programme, whose aim is to ensure that partner Countries enjoy the benefits of increased competition, open and contestable markets.

As for private enforcement, it remains to be seen whether the UK, even though after some necessary amendments, will keep the rules of the 2014/104/UE Directive for claims in respect of loss or damage arising from competition infringements which have been transposed in March 2017 through the “Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017” (e.g. prohibition to access black-list information, rules on the positive legitimation of indirect consumers, rules on the decisions of competition Authorities of other Member States ascertaining an antitrust infringement that can be a prima facie proof able to reverse the burden of proof in a possible follow-on action in the UK).

In such context, it is well known that throughout history the UK has always played a leading role in the promotion of compensation for antitrust damages actions thanks to some internal rules which allowed a better protection of the complainant (punitive damages, wide disclosure mechanism, opt-out class actions, quicker proceedings, mechanisms of action funding).

Following Brexit, although UK has already transposed the 2014/14/UE Directive, the British courts will not have to follow the interpretations provided by the Court of Justice. Therefore follow-on actions might be discouraged, but, at the same time, this might start the ball rolling for the UK to modify European laws and make the British court even more attractive, thus fostering that forum shopping phenomenon that already in the past characterized the relationship with the judicial systems of the other Member States.

In this respect it is interesting to underline that the Brexit Competition Law Working Group, made up of antitrust experts, in its report recommended that sections 47a and 58a of the Competition Act, whose joint provision provides for the binding effect of the decisions of the European Commission, remained unchanged.
In this respect the EU Internal Market Sub-Committee of the House of Lords only concluded that the Government should take the UK leading status on such specialist legal services into account when it decides whether to repeal or amend the legislative basis for ‘follow on’ claims in the UK Competition Act.

However it has also to be considered that, in the absence of specific agreements with the EU, Bruxelles II regulation (Regulation No. 1215/2012) would cease to apply to the UK. Therefore the UK would have to negotiate specific agreements in order to allow national decisions to be acknowledged in the EU and prevent problems related to the lis pendens of the same litigation in different EU States (See Article 29 of Regulation 1215/2012).

In summary, as it has been said, the only certainty at the moment is uncertainty. No one can foresee the future accurately but it is clear that also in the field of Competition Law it will be in Europe’s interest as well as the UK’s to reach very soon a balanced and comprehensive deal.

Furthermore, beyond Brexit and despite Brexit, those of us who believe in Europe have to underline that European Competition Law is now a uniform set of rules and that its enforcement system represents a virtuous model of cooperation throughout Europe. As a consequence, the antitrust community should be kept together, maintaining the strongest institutional, scientific and professional relationships.