CPI's ICN Column Presents:

Now what? Competition law post-Brexit

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Against all expectations, on 23 June 2016 the UK voted to "leave" the European Union. The terms on which she would do so were not however determined by the referendum. As such there is great uncertainty regarding the exact relationship that will exist between the EU and the UK if and when the decision to exit is implemented. This is in turn makes it very difficult to predict with any degree of certainty the implications of Brexit for EU and UK competition law.

Broadly, however, there are 3 routes open to the UK and the EU.

First, the UK could join the European Economic Area ("EEA Model"). Should it go down this route much will remain the same in the field of competition law (including state aid), at least in the short to medium term. However, the UK will lose its ability to influence the development of policy and legislation. This may have significant implications over the long term. In particular, the UK has over the last 20 years, been the strongest proponent of competition interventions focusing exclusively on consumer welfare (backed by sophisticated economic analysis). The inability of the UK to continue to exert its influence in this area will strengthen the hands of those who would like EU competition law to take other public policy interests, such as employment or the creation of national champions, into account to a much greater extent than it does now. Indeed, a few days after the referendum the President of France, François Hollande, told reporters that competition law could be "adapted" following Brexit to ensure that it provides greater support for growth, investment and employment.

Second, the UK could seek to negotiate a bilateral deal that provides some access to the Single Market (often referred to as the "Swiss Model"). Amongst other things, the extent of that access would depend on the UK's willingness to apply certain elements of existing EU law. Given that competition law is far less politically important than areas such as free movement of people, it is difficult to predict the deal that would be done in this area. On balance, however, given the very significant benefits to business of the one-stop-shop in merger control, significant pressure would be put on the UK government to agree to EU competition law continuing to apply to the UK, much as it does now. In that scenario, the implications of Brexit would be similar to that outlined above under the EEA option.

Third, the UK could seek to rely on its membership of the World Trade Organization as basis for regulating trade between itself and the EU (the "WTO Model"). In this case the links between UK and EU competition law would clearly be broken. However, UK competition law is modelled on the EU system. As such, whilst Articles 101 and 102 TFEU would no longer be applicable to the UK, EU competition law enforcement and existing EU case law would likely continue to heavily influence the way competition law is applied by the CMA and UK courts. Of course, the CMA and the UK courts would no longer be bound by the European Courts' case law and would not be subject to Article 3 of Regulation 1/2003 (this provision prevents national law from prohibiting what is permitted under EU competition law).

The Competition Act will however have to be amended. For example, s. 10 of the Competition Act 1998 refers to "parallel exemptions" from the Chapter I prohibition (anti-competitive agreements) and provides that an agreement that is covered by an EU Block Exemption Regulation is automatically exempted under UK competition law. This provision would fall away after Brexit. Given the general consensus amongst competition practitioners and

businesses of the benefits of the EU block exemptions, it seems unlikely that the UK would move too far away from the rules that currently exist. Most likely the UK would copy the provisions of the EU Block Exemption Regulations into domestic law. One provision however that would definitely not survive is s. 60 which essentially requires the CMA and UK courts to follow EU law.

An area that is often forgotten in the debate is the EU State aid rules. These would no longer apply. The UK government would have to decide whether to replace them with a domestic system of State aid control. However it is worth noting that the application of WTO rules in this area would, in any event, apply.

Turning from substance to procedure, the UK competition authorities would no longer apply EU competition law and would cease to be national competition authorities (NCAs) with all the rights and obligations that flow from this. In particular they would no longer be prevented from undertaking those merger and antitrust investigations which affect the UK but currently fall within the exclusive jurisdiction of the EU. This of course makes sense since, under this option, the EU would no longer be responsible for ensuring that competition operates effectively in the UK. But it would also increase regulatory costs of business.

One obvious downside for the UK of this model is that advice from external lawyers qualified solely in England & Wales, Scotland or Northern Ireland would no longer be legally privileged in competition cases before the European Commission and the European Court of Justice. Two points are however worth noting in this regards. First this will only take effect once the UK has formally left the EU (which is *at least* two years away). In the meantime advice given by UK practitioners will remain privileged – as it would do if the UK were to join the EEA. Second, it is worth noting that many UK practitioners have already taken, or are in the process of taking, the step of securing admission to practice law in other EU Member States. As such this should not, in practice, create major issues.

Another, potential downside of this model for the UK is that it may allow other jurisdictions to challenge the strong position London has an international litigation centre for damages actions in competition cases. Following Brexit the Rome II and Brussels I Regulations would no longer apply. This would significantly reduce the benefits of bringing damages actions in London. However, it seems highly likely that alternative arrangements would be negotiated which would, in effect, recreate the effects of Rome II and Brussels Regulation for the UK. As such, given the other very powerful advantages offered by the English courts, London's position as a centre of damages actions is unlikely to be affected.

Final Thoughts

Although there is much uncertainty, on balance it would seem unlikely that European (or indeed UK) competition law will fundamentally change as a result of Brexit, at least in the short to medium term. As such, the best reaction for competition practitioners to the current situation is to follow the advice of a poster that was designed in 1939 by the UK government (but never, in fact, displayed). It simply read '**Keep Calm and Carry On'**.