Trustonic Limited (Trustonic), a joint venture between ARM Ltd and Gemalto NV, formed in December 2012. Trustonic is incorporated in the United Kingdom, a significant presence in the UK and France, as well as activities in a number of locations around the world. As a company with a pan-European footprint, Brexit presents both a threat and an opportunity, in the context of competition policy.

**General**

What should competition policy in the UK set out to achieve? What guiding principles should shape the UK’s approach to competition policy after Brexit?

Competition policy in the UK should ensure fair and well-functioning markets that incentivise innovation, reward investment, and benefit consumers. Correspondingly, hostile, anti-competitive business practices that seek to stifle competition and unfairly leverage dominant market position should be robustly discouraged, and penalised.

Post-Brexit, it is our perspective that the UK should consider the following principles when shaping UK competition policy:

- It is essential the UK’s departure from the EU does not lead to unnecessary regulatory fragmentation. The UK competition regime should remain aligned as much as possible with EU rules to avoid businesses facing contrasting (or worse conflicting) competition policy regimes in the EU and the UK after Brexit.
- Equally, we encourage the UK to take advantage of the increased regulatory flexibility provided by the UK’s departure from the EU to pursue an innovative and adaptive approach to enforcement of competition policy, particularly in the fast evolving technology sector.
- It is also vital that UK regulatory enforcement agencies have sufficient capacity and expertise to proactively enforce competition rules immediately following the UK’s departure from the EU. This means government must legislative for the transfer of powers to UK enforcement agencies via the Withdrawal Bill, currently before Parliament. It will also be necessary to review current staffing and budgetary allocation of the Competition and Markets Authority, to ensure that it is fit for purpose.

**Antitrust**

Post-Brexit, to what extent should the UK seeks to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?

An area of EU antitrust law in recent years which is particularly relevant to our business is the way in which subsequent European Competition Commissioners have attempted to leverage competition law in the digital sector to curtail the dominance of several large non-European (American) technology firms. Microsoft, Intel, Qualcomm and Google have all been subject to antitrust enforcement action on the part of the European Commission, resulting in landmark fines and protracted legal appeals.
As competition concerns in the technology sector are often on a regional or global basis, the UK will benefit from maintaining consistency with EU interpretations of antitrust laws in this area. Only by working with colleagues in the EU, and elsewhere, can the UK expect to successfully bring cases against global players to protect smaller UK business. This is true today for the EU DG-Comp for example which often collaborates with the FTC in the US and national authorities with Europe including the FCA in France and the CMA in the UK.

The greater freedom offered by Brexit should be used as an opportunity for the UK to become more nimble in its enforcement of antitrust rules, as it will no longer have to move at the pace of DG Competition. Departure from the EU will provide the CMA with increased flexibility in terms of deploying enforcement procedures, which we would recommend it takes advantage of. This could, for example, mean showing a greater willingness to halt anticompetitive business practices, while collating a sufficient evidence base to move ahead with full enforcement proceedings. In practice this would involve the CMA taking the following steps when a complaint is received:

- Making proactive usage of interim measures, by lowering the threshold to be triggered where there is a perceived need to act for the purposes of preventing significant damage to a particular person or category of person.
- Putting in place a clear policy/process around the deployment of interim measures, with hard timelines and some more innovative structures to protect small companies trying to innovate from large established companies with effectively unlimited resources.

The UK need only look at the threshold for interim relief which exists in other EU member states to get a sense of what might be possible in this regard. Whereas the threshold for granting interim relief under EU law is more onerous than the current threshold under the Competition Act, in some EU Member States, the threshold tends to be lower, based on the existence of “serious, irreparable damage”. The French competition authority, for example can adopt interim measures during an investigation on the grounds that the potentially infringing conduct constitutes “a serious and immediate prejudice to the economy in general, to the sector at stake, to the interests of consumers or to those of the complainant”.

We urge the UK government to use Brexit as an opportunity to depart from the high threshold set out in EU law for deploying interim measures, and to make use of such instruments more readily, taking a sectoral, and consumer centric view of a given case.

**Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?**

Brexit presents an opportunity to improve the UK’s status as a destination of choice for antitrust action, by becoming more responsive to complainants and demonstrating a greater willingness to step in and deploy enforcement proceedings where British business interests are at stake.

However, the UK’s determination to end the direct jurisdiction of the CJEU could have an adverse effect on the UK’s status as a preferred destination for antitrust
activity. A complaint lodged in a country under the jurisdiction of the CJEU can prompt a referral to the European court, which results in a ruling with legal precedent across the EU; the initial antitrust action can be amplified across a market of 500 million consumers.

Moreover, to establish its reputation as the venue of choice for antitrust proceedings, the UK regulator would do well to find innovative ways to ensure innovative companies facing existential threats from large, well-financed firms can have not only interim measures protection, but potentially also interim financial compensation. These funds could be used to prevent the fallout out of financial harm across an entire sector while the fuller case is referred.

Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?

It is probable that parallel investigations between UK authorities and the European Commission and national competition authorities will increase as a result of Brexit. It is not at all clear however that this would be a positive development for business. Parallel investigations constitute an extra administrative burden for businesses, involving duplicating or otherwise reproducing evidence supplied to competition authorities as part of a given investigation. It is our recommendation that the UK coordinated closely with the Commission and national competition authorities after Brexit to minimise any increased strain on businesses from parallel investigations.

Even better, the UK should harbour an ambition to lead in terms of competition enforcement after Brexit. In this scenario, we envisage that a proactive and robust enforcement action to halt market dominance abuse in the UK would be honoured and supported by the EU, who could amplify the enforcement action and associated penalties across a much wider market.

Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

The two most important outcomes of policy making in Europe from a business perspective are regulatory certainty and maximum harmonisation. In the digital sector, where services can be deployed seamlessly across borders to end users in multiple jurisdictions, these aspects are even more important.

We think it is absolutely in the mutual interest of the EU and UK to cooperate in the field of competition policy after Brexit, via some form of cooperation agreement. The main provisions which would be necessary for such an arrangement to be effective include: a mechanism for regular dialogue; mutual recognition of relevant decisions; aligned high level policy objectives; and regular, joint interaction with stakeholders.

How will Brexit affect the CMA’s ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK’s influence in developing global competition policy?
Brexit will not in itself have any tangible impact on the CMAs ability to cooperate with non-EU competition authorities. The process of extricating the UK from EU law, and then ensuring maximum harmonisation and ongoing dialogue with the Commission and EU competition authorities will very likely consume most of the available resource of the CMA.

However, in theory Brexit will present an opportunity for the UK to cast itself as a global leader in the development of competition policy especially around supporting innovative and disruptive companies of today, such that they can become the successful workhorses for the economy of future. The problem here, as we have already highlighted, is the relatively small size of the UK market, in comparison to the EU. Global regulators are more likely to seek to replicate competition policy which impacts the greatest number of people – in this case the EU.

Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK’s withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

A transitional arrangement in the field of antitrust enforcement will only be helpful if it can be agreed in the very near future. Businesses do not want to adapt twice to Brexit. A period of transition negotiated at the last minute, which has to give way to a different regime shortly after, will result in higher costs for businesses, and reduce rather than increase certainty about the terms under which business will be conducted.

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