

“Brexit: Keep Calm and Follow-on or Stand Alone?”

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It is now 6.20am on the morning of the 24th of June 2016. The returning officer for the North-East Region of England has just announced the delayed result of the count in that part of the country, which is overwhelmingly for Brexit. Even with some other regions, including the whole of Northern Ireland, still to come, it is now mathematically impossible for Remain to win the referendum.

At 10.30am the Prime Minister David Cameron will emerge from No. 10 Downing Street and give a press conference in which he will announce that, later today, he will be offering Her Majesty his resignation, with the recommendation that he stay in post only until the Conservative Party has elected his successor. Further, that on Monday he will be seeking a resolution of both Houses of Parliament approving his proposal to serve the Article 50(2) TEU notice to the European Council of the United Kingdom’s intention to withdraw from the European Union.

I anticipate that prior to his final departure from Downing Street, the Prime Minister will serve that notice, possibly quoting Madame de Pompadour: *“Après moi le deluge”*, thus triggering the two-year period for the negotiation and conclusion of an agreement between the United Kingdom and the European Union, setting out the arrangements for withdrawal and (although there is some academic disagreement on this aspect) also the terms of our future relationship with the European Union.

One of the potential chapters in that negotiation will no doubt be competition law. It seems unlikely that this will be the chapter that principally captures the public imagination. Indeed, not much of the referendum debate is currently centred around the issue of whether or not, post-Brexit, the UK will still be part of the European Competition Network or whether or not Regulation 1 of 2003 will still have direct applicability in UK law. They are not arguing about that in the pubs in Rotherham and Rochester.

However, I can be pretty confident that in this particular audience – and perhaps even in the Cheshire Cheese or the Lord Raglan – these are issues that are keenly felt and where any possible consequences of Brexit may be anticipated with a degree of trepidation. Or possibly excitement. Some weeks ago *The Times* newspaper published an article on how a UK exit would constitute a bonanza for competition lawyers, which led my colleague Jon Turner QC to circulate an email around Chambers, possibly tongue in cheek, stating that this had certainly decided how he would vote.

The general premise for such predictions is that Brexit would generate considerable uncertainty and uncertainty is always good for lawyers. Well, up to a point, Lord Copper, up to a point.

There is one cast-iron certainty about what will happen to competition law on 24 June 2016. And that is – absolutely nothing. Of course, the day after the referendum, no matter which way it goes, the UK will still be a member of the EU, and it will remain so for at least another two years, that is until at the very least the end of June 2018, which is the earliest possible date when the automatic longstop of Article 50(3) TEU would kick in, if the Prime Minister had given notice – say – by the end of this month. Unless, that is, there was a unanimous decision to extend this period, which again would seem extremely likely in my view, since a full exit treaty could not feasibly be negotiated in two years. Greenland, the only known example of such a treaty, had exactly one issue to negotiate, namely fish, and with only 10 members and that took three years.

I have seen commentary that states, for instance, that the Damages Directive would not have been implemented by June 2016 and so that would lead to UK competition law being immediately different to EU competition law. But the Damages Directive is due to be implemented by the 27th December 2016, fully a year and a half before the earliest date when anything would change about the UK's EU law status, even if we gave notice at the very earliest moment and – again rather like Madame Pompadour – we suffer a guillotined exit after two years.

In the short term, then, there will be no change. Indeed, there can be no change. Regulation 1/2003 remains directly applicable and Articles 101 and

102 TFEU remain in force and directly effective. The *Masterfoods* doctrine and section 60 of the Competition Act 1998 remain in force – in other words, the UK Courts must continue to ensure that there is no inconsistency between UK and EU competition law and must have regard to the decisions of the EU Commission.

Follow-on actions will likewise remain possible within that period, and I anticipate that, either by way of specific transitional provisions or by recourse to basic principles of non-retroactivity and legal certainty, the applicable law at the time of infringement will continue to apply – at least in relation to follow-on actions brought during the period when EU law still has effect in the UK pursuant to the European Communities Act.

The question then is what will happen if and when the UK finally does exit the EU? That in turn depends crucially upon the great unknown within the Leave argument, namely: having left the EU, what alternative regime will the UK find itself in?

The easiest answer to this, because it requires the least amount of original thought for your lecturer, is that the UK becomes a member of EFTA and the EEA. It is often said that there is no “Plan B” for Brexit at Westminster, but there is at least one “Plan B” and it is this: the relevant box on the ballot paper for the referendum contains only four words: “Leave the European Union”. It is silent on where we might go. Therefore, so I am told the current thinking goes, if there is a narrow vote for Brexit, it will be on the basis that the 51% or so pro-Brexit vote is split between people who want the Norwegian model or the Swiss model or the Canadian model, and so forth. Thus, the lawmakers at Westminster have every reason not to legislate for anything more than the minimum form of exit – in fact it may be argued that they would have no greater mandate other than that. That minimum would be what is called “the Norwegian model”, in other words the EEA. As former Judge David Edward put it at the Bar European Group conference in Sicily two weeks ago, citing *Exodus Chapter 8, Verse 28*:

“And Pharaoh said, I will let you go, that ye may sacrifice to the Lord your God in the wilderness; only ye shall not go very far away.”

Remember, we set up EFTA and then left it to join the cooler kids in the EEC. I point out here that constitutionally a return to EFTA would therefore also be justifiable as a return to the *status quo ante*, in other words: the closest thing Parliament would have, to guide it as to what the electorate could be taken to have meant when it spoke those four words “Leave the European Union”.

Now, it is another question whether EFTA and in particular the three little EEA pigs, Norway, Iceland and Liechtenstein, would welcome back the big, bad British wolf amongst the EEA fold. That would require careful negotiation. It would not be immediate.

But on the assumption that they would have us back, and on the (possibly hopeful) assumption that it could be neatly dovetailed with Article 50 TEU withdrawal, EFTA would mean very little change for the mechanics of competition law. We would be dealing with the EFTA Surveillance Authority rather than the Commission, but the laws would be familiar and the appeals, to the EFTA Court, would be broadly similar, albeit we would suddenly be a rather large kid paddling in a rather smaller pool. On the other hand, in the medium term the UK would once again come to dominate EFTA, with the influx of UK officials into the EFTA Institutions, which conveniently already use English. It could even be rather agreeable.

But what if we have a complete exit? What if, for instance, Boris Johnson wins the ensuing leadership contest and decides it would be intellectually dishonest not to press for leaving to the greatest extent possible, so that “Leave the European Union” is given its widest interpretation? One political consequence might be a split in the traditional parties, and in any event might well involve the departure of Scotland even within the two years, and a “disorderly exit” pursuant to Article 50(3) TEU.

Whatever the political and economic chaos that might ensue, in purely competition law terms, the consequence would be that on or about the 31 June 2018 (or whenever the two years were up), The Treaty, along with Articles 101 and 102 TFEU and Regulation 1/2003, would cease to apply. We would be floating adrift, or the captains of our own destiny, depending upon which nautical metaphor you favour. What happens next?

Well, the immediate answer is, again: nothing. Even if the ECA were repealed on the same day, the Competition Act 1998 will still be on the statute book and Chapters I and II of that Act are essentially identical to Articles 101 and 102. It is to be presumed that statutory instruments made under the ECA would also be preserved in force unless specifically repealed, as otherwise the fabric of all our legislation since 1973 would come apart at the seams: EU legislation and delegated legislation cannot be immediately unpicked from purely domestic measures. That could only happen from time to time on a case-by-case basis.

So, we would not suddenly fall back on a resurrected Restrictive Trade Practices Act 1956. The Competition Act would certainly remain in force for the foreseeable future, not least because competition law is unlikely to be the top priority of any Government having to cope with a post-Brexit legislative agenda.

But there would – in this scenario – be some immediate and very real consequences for competition lawyers and clients. There would now be two competition authorities to take into account, one in London (or possibly somewhere like Salford) and one in Brussels. EU competition law would not simply go away. As we have known at least since the *Dyestuffs* decision in 1972 (that is, even before UK accession), EU competition law has an extraterritorial application. Now, it may well be that the CJEU has so far been reluctant to go the whole hog and find a pure “effects doctrine” in such cases, whether in *Dyestuffs* (where it developed its “single economic entity doctrine”) or *Wood Pulp* (where it relied on public international law implementation ideas) and even in *Gencor* (which I call the “I-can’t-believe-it’s-not-the-effects-doctrine” judgment), but anyway: never mind the legal theory, feel the regulatory reality! The Commission’s writ runs whether you are Rewe in Germany or Google in California, and it would run in relation to any UK enterprise, even after a complete exit from the EU and the European Competition Network.

This conference is entitled “Keep Calm and Follow-on or Stand Alone”, but of course the consequences would not be quite so binary. An important question is whether, on – say – the 31st June 2018 section 60 of the Competition Act would also be repealed. If the legislator were on the ball, one would expect that to be the case. There would be no political justification to follow EU competition law after Brexit. On the other hand, whether out of pragmatism or

negligence, it might not be. There might still be EU follow-on claims even *after* a final Brexit. One could make a strong economic case for such a possibility. London is *the* jurisdiction for “one stop shop” competition law damages claims. Those present in this room are part of the professions that are an important reason for this development. Our courts are highly expert and respected in this field. It would be careless to say the least to jeopardise this source of revenue (what used to be called “Invisibles”) purely for a political gesture to do with sovereignty.

Apart from those commercial factors, there would also be a number of ironies arising from a successful Leave campaign in this field:

From a regulatory standpoint there would now be a certain amount of duplication of effort necessary for any company. Ironically, given the Leave camp’s arguments in the referendum debate, this is one area where leaving the EU would indubitably *increase* red tape for industry. And do so in an area that affects every player, in the most direct and potentially fundamental ways. To pick the most obvious example, any leniency application, for instance would now need to be brought twice (or at any rate, one more time than at present).

Further in any event, the UK would lose the opportunity to bring challenges via domestic proceedings in their own, home court, through the Article 267 TFEU reference procedure. Again this is not without irony: the Leave campaign emphasises the sometimes unwelcome decisions of the CJEU. Yet if we were to leave, the main instrument whereby the UK courts are able to influence EU law, the reference procedure, would be lost. Similarly, the second main instrument for UK forensic influence, the automatic right of UK Government Intervention in Luxembourg would likewise be lost. And in this case this would be in a field – competition law – where the EU Commission’s decisions will inevitably continue to have a direct and unavoidable effect on UK companies. I am not here making a political point, but from a competition lawyers’ perspective it would seem almost as if no-one had properly thought this through.

Whilst these point about the CJEU will apply in any event, there is one further possible reality to consider: one in which UK Courts are no longer bound by EU competition law or the acts of the EU or EEA Institutions at all. In that case,

most obviously, follow-on damages claims (other than new, purely domestic UK damages claims) would not be automatically available in the UK Courts. There remains scope for the development of what might be termed “quasi-follow-on damages claims”, in other words, we may be able to persuade UK Courts to continue to regard Commission decisions as quasi-binding (barring manifest error), applying as they would essentially the same law as is enshrined in Chapters I and II of the UK Act (potentially even without section 60).

That would be fine at least until such time as UK law might start diverging from EU law, as it might do in the longer term. For instance aligning more with US practice. As Anneli Howard of Monckton Chambers is about to comment in the June issue of the Cambridge Law Journal, which I have had the privilege of reading in draft:

“For instance, the jurisprudence relating to vertical restraints over parallel imports or e-commerce has more to do with creating a single market than economic efficiencies. Similarly, the case law on a dominant company’s ability to impose fidelity rebates is not so much underpinned by economic rationale but by the Commission’s theory of harm which is very different to US policy. It may be that over time, English courts start to align UK law with policy considerations in the US.”

And there are other relevant considerations. To the extent that we could no longer follow-on and there was uncertainty over the exact direction – and potential degree of divergence from EU law – of UK competition law, it would generate that thing which *The Times* thought would be so exciting for competition lawyers – uncertainty. Now, I like a good bit of legal uncertainty as much as the next litigator, but it is not to understate matters to say that clients *hate* it. And not only clients. A significant amount of the follow-on work which is now being generated – albeit still in its infancy – depends upon the creative and vibrant litigation funding industry here in the City of London. Without the (relative) certainty of a Commission decision, litigants can of course still bring a standalone action, but will it be as willingly funded? Will the smaller pond of UK-only national (or even regional) competition decisions attract similar interest, especially from abroad? One doubts it, and since

funding is the lifeblood for the follow-on industry, there are real questions in the event of a full exit, which our sector would have to address.

Having said that, it is also true that in some respects competition law generally would increase, rather than decrease, in volume. Whatever the exact fate of the follow-on claim in UK law, competition law has been around for as long as people have bought and sold things, held land and produced things. It is not for nothing that the ancient Greek for a “right of exclusive sale” is “*μονοπώλιον*”.

More parochially, there has been UK competition law for over half a Century, and I am confident that clients will continue to seek out UK competition lawyers’ expertise, inside or outside the EU. Although we may, if we wish to preserve our rights of audience in Luxembourg, have to look around for practising certificates from Dublin or – perhaps – Edinburgh.

On that note: thank you and enjoy the conference.