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CLIENT MEMORANDUM

Brexit Vote – Key EU Competition Law Implications for Business

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The immediate consequences of a post-Brexit world to EU competition rules

EU competition rules are expected to continue to apply to the UK for a period of at least two years. Such period would span from the date the UK decides to notify the European Council of its intention to leave[1] (possibly in September 2016 when David Cameron's successor as Prime Minister has been chosen) until the end of the negotiation period upon reaching an exit agreement acceptable to all.

Legal certainty should thus be preserved during this interim negotiation period for undertakings required to file transactions before the European Commission or before the Competition and Market Authority (CMA), and for those subject to EU antitrust and State aid rules.

[1] In application of Article 50 of the Treaty on European Union.

How the Brexit's concrete implementation will affect the application of competition rules to undertakings in the UK

The power to stop cartels and the review of mergers and State aid schemes currently emanates directly from EU legislation that is incorporated into the UK's legal framework. Thus, an exit from the Union may have a considerable impact on how antitrust laws are applied in the UK.

Whether or not the legal landscape will dramatically change will depend on whether substantive EU antitrust rules would continue to apply in the UK by virtue of the country becoming a member of the European Economic Area (EEA). If this happens, the Brexit would not have material consequences on the applicable legal regime. If, however, a "total exit" strategy is implemented, the impact on the legal framework that will apply to the UK thereafter could be much more significant.

(i) If EU antitrust rules continue to apply in the UK

In this scenario, EU competition rules will continue to apply to the UK only if the country manages to successfully negotiate with the 27 remaining Member States to become party to the EEA Agreement[2].

- **Merger control rules** would indeed likely remain the same, with the European Commission continuing to act as a one-stop shop for filings and investigations. Indeed, the rules on jurisdiction in the EEA are such that in practice, the Commission handles all merger cases where EU thresholds are met.
- **Antitrust provisions** would also remain largely similar to those currently applying to the UK and the European Commission would continue to take on cases in which trade between EU Member States and competition in the EU is appreciably affected.
- **In terms of cooperation with national competition authorities** from other EU Member States, the CMA would also participate in horizontal discussions in the European Competition Network.
- **State aid** – The UK would remain bound by the EEA Agreement's similar prohibition of national governments' granting undertakings unfair advantages over competitors.

[2] The EEA currently unites the 28 EU Member States in addition to three of the four European Free Trade Association (EFTA) States (Iceland, Norway and Liechtenstein) to form a Single Market governed by rules that enable the free movement of goods, persons, services and capital. The EEA Agreement provides for several competition provisions, in particular Articles 53 to 57, which are very similar to the EC competition provisions. The rules prohibit agreements and conduct that distort or restrict competition as well as dominant firms from abusing their market power and provide for a merger control regime within the EEA.

In light of the above, it appears reasonably safe to anticipate that the regulatory risks for merging entities and for cartelists in the UK would remain largely unchanged.

However, it should be duly noted that there is no automatic right for the UK to become a party to the EEA Agreement, and some States have already expressed a certain degree of opposition to the UK's potential request to sign the EEA Agreement post-Brexit.

(ii) If EU antitrust rules cease to apply to the UK

In this scenario, the EEA agreement would not be signed by the UK, and the UK could either seek to become a member of the EFTA or to join EU Customs Union (like Turkey has done) or negotiate a new free-trade agreement from scratch with the EU.

None of the above-mentioned scenarios impose binding competition law provisions enforceable by the European Commission or by a third-party body external to national competition authorities.

The EFTA membership scenario – In such a scenario, the UK would be a member of the EFTA without being party to the EEA (like Switzerland) and would develop a unique relationship with the EU through a series of bilateral agreements.

Although the EFTA provides that competition law infringements are incompatible with the EFTA Convention[3], the Convention does not provide for a sanction mechanism. It is therefore up to each EFTA Member State to sanction antitrust infringements according to its own domestic law.

In addition, the EFTA Convention does not provide for a specific merger control regime. As a result, it is unclear which rules would apply to transactions where the jurisdictional thresholds are met in the EU as well as in the UK if it becomes an EFTA Member State without being party to the EEA[4].

The Customs Union scenario – In such a scenario, the UK would become a member of the Customs Union, like Turkey is, without being party to the EEA Agreement nor a member of the EFTA. A Customs Union membership would impose at least the introduction of binding competition rules to the UK compatible with EU competition provisions[5].

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[3] Article 18 of the EFTA Convention.

[4] This situation currently applies to Switzerland and has not been clarified to this date. Indeed, where merger thresholds are met both in the EU and in Switzerland, there is no special rule for exemption from notification of the transaction before the Swiss Competition Commission.

[5] Indeed, the EC-Turkey Customs Union Agreement provides for the implementation by Turkey of competition law provisions within its internal legislative framework and to potential referrals to an arbitrator in case of disagreement between the EC and Turkey on the implementation of these rules.

The negotiation of a new free-trade agreement with the EU scenario – In such a scenario, the UK would negotiate its entire relationship with the EU and potential access to the Single Market through a series of bilateral agreements.

Whether the UK is accepted to become a member of the EFTA, is offered to join the EU Customs Union or opts to negotiate a new free-trade agreement with the EU, the following identical consequences can be anticipated in terms of implementation of competition law in the UK:

- **In terms of merger control**, the European Commission would no longer cooperate with the UK, meaning that mergers meeting both the EU and the UK filing thresholds would need to be assessed by both the European Commission and the CMA. This situation would inevitably lead to a significant increase of the administrative burden already imposed upon merging entities, as well as to further legal costs, potentially diverging timetables and higher uncertainty as to the outcome of the parallel investigations[6]. Furthermore, the UK will have to find transitional agreements with the EU on how to handle transactions for which an EU filing has been made during the period leading up to the UK's withdrawal from the EU and that will still be under EU review at the time of exit.

- **Antitrust infringements** – UK companies infringing antitrust rules in a way that affects the EU will continue to be subject to EU competition rules. However, EC officials would no longer be able to dawn raid companies located in the UK or ask the CMA to carry out the *in situ* investigation on its behalf. The European Commission would be restricted to merely making written information requests to UK-based companies. The CMA will have sole jurisdiction to investigate and sanction infringements of antitrust rules affecting the UK market. The same conduct, for example an EU-wide cartel, could therefore be potentially subject to both an EU and a CMA investigation simultaneously, which will lead to increased legal costs and potentially diverging timetables and decisions. In addition, the UK will have to find an agreement with the EU on how to handle (i) antitrust cases under EU review when the UK's exit will actually materialise as well as (ii) antitrust cases investigated by the Commission post-exit relating to infringing behavior carried out before the UK's actual exit from the EU.

- **In terms of cooperation with national competition authorities** from other EU Member States, the CMA would no longer be admitted to participate in the European Competition Network.

- **State aid** – The UK would be able to grant State aid to undertakings within the limits set out by the World Trade Organisation (WTO) without the European Commission or Member States being in a position to sanction such behavior.

- **Private enforcement** – It is likely that the UK's decision to leave the EU will negatively impact the UK's competition damages litigation market, which has been thriving despite significantly higher litigation costs. Indeed, the country's competition damages litigation scene is largely fueled by binding EU enforcement decisions

[6] Beyond the consequences of the Brexit for the UK, it is also a possibility that the Commission will try to lower the EU merger thresholds in order to retain as much of its jurisdiction as it can over mergers affecting the European territory.

sanctioning anticompetitive conduct within the Single Market. It is likely that France and Germany will take this opportunity to increase their visibility and attractiveness as damages-friendly jurisdictions for clients aiming to recover their loss as a result of infringement to competition rules.

- **Representation before the European Court of Justice (ECJ)** – Outside counsels in the UK will no longer be automatically admitted to represent clients before the ECJ. As a result, a growing number of UK attorneys have started applying for admission to the Irish court system.

- **Legal privilege** – UK attorneys will lose legal professional privilege for their communications with clients in the context of procedures before the European Commission.

An opportunity for reform?

A number of Member States and companies have suggested that the UK's vote to leave the EU should be taken as an opportunity to rethink the Union's current approach to mergers so as to better take into account a number of industrial policy objectives rather than pursuing an overly dogmatic approach in certain sectors. At this stage, no formal or informal statement has been made by any EU antitrust official in this respect.

If you have any questions regarding this memorandum, please contact:

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