Competition policy after Brexit: what are the consequences for Scotland?

Arianna Andreangeli *explains why the current system for the management of inter-governmental relations between Westminster and Edinburgh may not be able to withstand the challenges brought by Brexit and affecting the role of the Competition and Markets Authority.*

Brexit will have a fundamental impact on competition policy in the UK. On the one hand, UK companies that continue to do business in the EU will remain subject to the competition jurisdiction of the EU Commission and of the European competition agencies. On the other hand, the scope of the powers of the Competition and Markets Authority – the UK competition agency – and more generally, the array of cases and markets to which the tools available under the current competition legislation (the Competition Act 1998) will be applicable is going to become much wider. The Competition and Markets Authority (CMA) will become competent to investigate and sanction all instances of anti-competitive behaviour that affect UK markets, including those that, before the exit from the Union, would have been tackled by the EU Commission. Mergers and acquisitions that affect UK markets will also come to fall within the scope of UK competition law.

The market investigation reference tool, which allows the CMA to investigate a whole market, is also very likely to be deployed more frequently. This is a very effective instrument, since it permits the competition scrutiny of entire industries within the UK and can lead to the finding of instances of consumer harm. The CMA can also oblige individual companies to change their conduct to redress the injury that consumers have suffered. Importantly, these references can be made not only by the CMA itself to a panel, but also by UK Government ministers, who consequently can participate in decision-making in competition policy issues, and in particular markets..

The aftermath of the Scottish independence referendum of 2014 led to a reconsideration of the boundaries of devolution. Led by the cross-party Smith Commission, this resulted in the conferral of several new powers on Scottish authorities. These would have an impact on the economy, including the power to refer markets for investigation to the CMA, with the agreement of the competent Secretary of State in the UK Government. However, the Scotland Act 2016, which conferred this new power on the Scottish Government, did not indicate a mechanism through which discussions around agreeing on competition law references should be made.

Instead, the normal mechanisms that characterise the relations between the UK and the Scottish governments should be deployed. These mechanisms have been found wanting in several respects, not least in that they are not very transparent, since many discussions take place among civil servants and rely on goodwill and personal relations, and current relations between the two governments are not good. The main organ of this framework, the Joint Ministerial Council, was originally designed as a forum for the resolution of conflict, as opposed to allowing for the continuing discussion that is often required in certain policy areas. It also meets infrequently and there is no possibility to have expert input in its deliberations.

Devolution of these very limited powers in the field of competition policy is promising, since it potentially gives the Scottish Government a more active role in policing the competitiveness of Scottish markets and therefore protect more effectively the interests of Scottish consumers. However, it may be de facto rendered ineffective by the lack of an appropriate forum where complex discussions that require technical expertise can be conducted. In addition, as UK ministers can potentially use their powers to review significant mergers in the public interest without input from Scottish ministers, there is a concrete risk that there will be no space for the appropriate discussion and assessment of the impact that these transactions can have on Scottish markets. In particular, it appears very unlikely that UK ministers will agree to refer a market to the CMA if they approved a merger affecting that market on public interest grounds, if competition and consumer interests in Scotland are adversely affected.

A rethinking is needed of both the scope of the Scotland Act 2016. This would aim to ensure that the impact of future mergers on Scottish markets is appropriately considered and, more generally, that Scottish ministers are associated more closely and effectively with debates with their UK counterparts when the latter seek to decide upon competition policy matters that overlap with or belong to Scottish competences. In this context, it is clear that the way in which the relationship between the two governments is managed needs to address the twin demands for more regular and wide-ranging dialogue and for ensuring expert input in these discussions.

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A model for co-decision may be offered by the Joint Ministerial Working Group on Social Security, which is tasked with ensuring the exchange of information, allowing for regular discussions and dealing with any contentious issue arising in the area of social security. It presents undeniable advantages such as a mixed membership of competent ministers and civil servants and as a result ensures informed dialogue in what is a complex policy area.

Another alternative model can be found in the current arrangements that are meant to govern the UK/Scottish Government relations in respect of foreign policy matters. This framework is based on close cooperation and provides for high-level contacts and discussions to take place more frequently and for any divergence to be dealt with via bilateral negotiations between the competent officials, with the Joint Ministerial Committee retaining its episodic nature. However, it lacks a space for expert input and discussions remain on the whole informal.

Brexit is a seismic change for the UK. Competition policy and the role of ministers in this area are but one field where there are weaknesses in the way in which reserved and devolved powers interact. Given the tense relationships between the Scottish and UK governments, a restructuring of current inter-governmental relations arrangements is clearly overdue. However, given its current trajectory, it is difficult to see how the UK Government might welcome the opportunity to engage in this process. This is regrettable since the existing ways in which the UK and the Scottish Governments discuss matters of mutual interest and aim to address conflict are not conducive to the type of shared decision-making that the Scotland Act 2016 introduced for competition policy matters. Competition policy by its nature requires expert input, a space for articulated discussions, as opposed to merely episodic meetings that are suited mainly to resolving conflicts. To retain the existing intergovernmental relations arrangements would therefore make it more difficult for the Scottish ministers to exercise their power to agree a market investigation reference with their UK counterparts and would therefore cast doubt on the effectiveness of this element of the Scotland Act 2016.

Note: the above draws on the author's published work in the *Journal of Antitrust Enforcement*.

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