

EFFECT OF BREXIT ON UNITED KINGDOM'S COMPETITION LAW

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The historical Brexit poll was taken in United Kingdom on June 23, 2016 to decide whether United Kingdom should 'Remain' or 'Leave' the European Union. 'Leave' won the poll and now it is clear that United Kingdom will leave European Union. After the commencement of withdrawal procedure, United Kingdom will negotiate to decide its future relationship with European Union. This exit is going to bring major changes in political, economic and legal structure of United Kingdom. In this article the author will analyze the effect of Brexit on United Kingdom's competition law. Competition law and policy has potential to influence economic growth. Therefore, it is important to find out the effects of Brexit on United Kingdom's competition law. Currently United Kingdom's competition law is vastly based on European Union's competition law therefore after Brexit whether this legal regime will remain same or change partially or completely would depend on the possible option United Kingdom chooses after withdrawal. However one thing is clear that the European Union will be United Kingdom's largest business partner, and therefore it becomes imperative to observe what will be United Kingdom's choice outside European Union.

I. INTRODUCTION

This is not the first time that United Kingdom (hereinafter referred as "UK") is anxious about its sovereignty. On March 25, 1957, France West Germany, Italy, the Netherlands, Belgium and Luxemburg signed a treaty in Rome for establishing European Economic Community (hereinafter referred as "EEC") also known as common market¹. This was the first step taken by the above named European countries to eliminate trade barriers with the aim of economic prosperity. During that period Britain and other European countries i.e. Austria, Denmark, Norway, Portugal, Sweden and Switzerland founded European Free Trade Association (hereinafter referred as "EFTA") by Stockholm Convention in 1960². Indeed the aim of founding EFTA was to promote economic

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¹ Treaty Establishing the European Economic Community, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023>.

²The European Free Trade Association, <http://www.efta.int/>

cooperation among member states but at the same time it was established as an economic counterbalance to EEC. . In 1973, Britain left EFTA and joined 'European Economic Community' (hereinafter referred as "EEC") under the Conservative government of Edward Heath. This is how UK became member of the common market. However, during elections in 1974, the Labour party in its manifesto declared that their government will take a public poll on the continued membership of UK with EEC. As promised in the manifesto under the Labour Prime Minister, Harold Wilson, there was first ever UK referendum on continued membership of the EEC in 1975. The electorate voted 'Yes' by 67.2% to 32.8% to stay in Europe³

Brexit poll was the second referendum in the history of UK. Brexit- a referendum in which everyone of voting age can take part was held on 23rd June 2016, to decide whether UK should leave or remain in the European Union(EU).⁴ In this referendum popularly known as Brexit, UK voted in favor of 'leaving the EU', as the 'Leave' won 51.9% votes whereas Remain' won 48.1%of votes across the UK.⁵Immediate effect of this historical referendum was turbulence and uncertainty in almost all stock markets in the world. Perhaps the stock markets are now more stable after the turbulence but what next? Brexit will bring major changes in the legal, political and economic structure of UK. After joining EU in 1973, UK has enacted various laws in order to be consistent with EU laws. One such law was Competition Act, 1998. Competition is an influential factor affecting the businesses and consumers which forms biggest section of the society, thus it is very important to scrutinize what will be the effect of Brexit on competition law in UK.

Two major laws governing competition in UK i.e. The Competition Act, 1998 and the Enterprise Act, 2002 replicate the major provisions of EU competition law. The Competition Act, 1998 mocks up antitrust provisions of EU competition law and the Enterprise Act, 2002 replicate the merger control and market investigation provisions of the EU competition law. Therefore, it is important to observe that whether this law regime which is largely based on EU law will be the same or change partially or completely after Brexit. For all those companies carrying out business both in UK and other EU Member States, it becomes very important to know what will be UK's

³ UK Parliament, <http://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eec-to-single-european-act/> (last visited on 7September 2016) (UK Parliament).

⁴Wheeler Brian, Alex Hunt, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS(September 1, 2016), <http://www.bbc.com/news/uk-politics-32810887>.

⁵*Brexit: What happens next?* UK PARLIAMENT(June 30, 2016) <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632> (last visited 8September 2016) (UK Parliament).

competition policy after Brexit? Whether they will have to comply with different laws at same time for the same issues or not?

II. EFFECTS OF BREXIT POLL

First major political outcome of Brexit in UK was that Prime Minister David Cameron announced that he will not lead the withdrawal negotiations envisaged under the EU treaties. Immediately after the result of this referendum the European Council met on June 28 and heard a presentation from David Cameron in his last appearance as Prime Minister. On the following day, 29 June, 2016 the heads of State or Government of 27 EU Member States met in an informal session to consider UK's decision. They issued a joint statement which recounted their regret for the outcome of the decision, and their desire for negotiations to begin as soon as possible:

*"There is a need to organize the withdrawal of the UK from European Union in an orderly fashion. Article 50 of Treaty on EU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK's intention to withdraw from the union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place."*⁶

Hitherto, UK has simply voted in favor of 'Leave' however the actual process (as per the Lisbon treaty) of leaving EU is yet to start. Leaving the European Union would not mean that the UK could wash its hand of dealing with rest of the Europe. As Prime Minister David Cameron noted in his 2013 Bloomberg speech committing the Conservative Party to holding referendum,

*"If we leave the EU, we cannot of course leave Europe. It will remain for many years our biggest market, and forever our geographical neighborhood. Even if we pulled out completely, decision made in the EU would continue to have a profound effect on our country. But we would have lost all our remaining vetoes and our voice in those decisions"*⁷

It is very clear from the statement of Prime Minister David Cameron that leaving Europe is not going to be an easy task because it will still be business partners with EU Member States and rest of the world. Leaving European Union would bring fundamental changes in UK's legal and economic system. Under Article 50(3) of Lisbon treaty⁸, the legal consequences of a withdrawal from the EU is the end of the application of the EU Treaties and the protocols thereto in the state concerned from the date of entry into force of the withdrawal agreement. So far UK has not given

⁶Brexit Brief Issue, IIEA(10:August 2016)http://www.iiea.com/ftp/Publications/BrexitBrief%20Issue%2010_03-08-16.pdf.

⁷Prime Minister David Cameron's Speech at Bloomberg, delivered on 23 January, 2013, available at: www.gov.uk/government/speeches/eu-speech-at-bloomberg.

⁸ Lisbon treaty is divided into two parts: the Treaty on European Union and the Treaty on the Functioning of European Union.. And Article 50 is part of Treaty on European Union..

notification to the EU about its withdrawal from EU, until then all the treaties and protocols are applicable to UK.

III. Brief Overview of Competition Law in UK

Competition is the flesh and blood of any market. In order to maintain fair competition in the market and to protect small businesses as well as consumers against the established business giants, competition law has to be framed painstakingly. Mere existence of competition law is not sufficient but the government should come up with effective implementation machinery. After globalization, competition law has gained much more importance and many countries in the world have recently drafted an exclusive competition law. Ireland very recently in 2014 amended its previous competition act⁹ and consumer protection act¹⁰ by passing the new enactment i.e. Competition and Consumer Protection Act, 2014. India during 8th five year plan i.e. 1992-1997 adopted liberalization and globalization strategy however it 10 more year to enact concrete statute on competition law which was passed only in 2002¹¹ which is subsequently amended by the Competition (Amendment) Act, 2007. UK is one of such country which has quiet recently enacted two major statutes¹² to govern the competition. Both the statutes are more or less a replica of EU competition law. Before passing of these two acts, series of laws were passed in UK in order to regulate the competition and prevent the use of dominant position. The Office of Fair Trading (hereinafter referred as "OFT")¹³ - a non-ministerial department was responsible for protecting consumer interest throughout the UK¹⁴. Before joining EU and even after joining EU, UK has enacted various legislations to govern fair competition in the market.

A. EVOLUTION OF COMPETITION LAW IN UK BEFORE JOINING EU

The doctrine of 'restraint of trade' is of early vintage in English law, with Dyer's Case(1414) often identified as a founding precedent. The doctrine holds that contractual limitations on party's wider behavior are prima facie void unless justified as reasonable. A restraint is identified where the parties agree that one party will "restrict his liberty in the future to carry on trade with other persons

⁹ Competition Act, 2002 No. 14 of 2002, available at: <http://www.irishstatutebook.ie/eli/2002/act/14/enacted/en/html>.

¹⁰ Consumer Protection Act, 2007, No. 19 of 2007, available at: <http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/html>.

¹¹ The Competition Act, 2002 No. 12 of 2002, available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

¹² Competition Act, 1998 and Enterprise Act, 2002.

¹³ Office of Fair Trading existed from 1973 to 1 April 2014.

¹⁴ UK government website <https://www.gov.uk/government/organisations/office-of-fair-trading>.

not parties to the contract in such manner as he chooses"¹⁵ Hence, not in as enacted statute but the principle of fair trade in the form of precedent was present in UK since 15th century. However, the process of legislation to maintain fair trade started by mid twentieth century i.e. in 1948 by passing of Monopolies and Restrictive Trade Practices(Inquiry and Control) Act, 1948 (hereinafter referred as "the 1948 act"). The primary aim of the 1948 act was to flesh out the intuition that monopoly and agreements while profitable for the firms involved were in some circumstances damaging to the wider public interest(viz. workers and small businesses)¹⁶. The legislation provided only limited coercive machinery. After the passing of the 1948 act shortly after that came the Restrictive Trade Practices Act, 1956. It appeared to curb restrictive practices, but the legislation had important loopholes. In particular, the act had provision of merely ensuring registration of potentially anticompetitive agreements rather than preventing them. After that came the series of legislations i.e. Resale Prices Act, 1964, Monopolies and Mergers Act, 1965 and Restrictive Trade Practices Act, 1968. Even after passing of series of acts and constituting various regulatory authorities under these acts such as Registrar under the Restrictive Trade Practices Act 1955, to regulate the market, they were found less effective.

B. LEGISLATIVE DEVELOPMENTS IN UK'S COMPETITION LAW AFTER JOINING EU

Soon after joining EU, the Fair Trading Act 1973 was passed which in introductory part clarified that, "*An act to provide for the appointment of a Director General of Fair Trading and of a Consumer Protection Advisory Committee...*"¹⁷ This Act also focused on making substitute provisions for laws passed earlier in this context such as Monopolies and Mergers Act, 1965. After that the Restrictive Trade Practices Act, 1976 was passed to consolidate the earlier enactments relating to restrictive trade practices¹⁸. After those enactments, two major acts i.e. the Competition Act, 1998 and the Enterprise Act, 2002 were passed which were enacted to be consistent with EU competition law.

IV. Competition Law Regime in UK and its Co-Relation With EU Competition Policy

1. The Competition Act, 1998 is the governing law in UK and Competition and Markets Authority (hereinafter referred as "CMA") is the machinery which is responsible for effective implementation of Competition Act, 1998 (hereinafter referred as "the act of

¹⁵Scott Andrew, *The evolution of competition law and policy in the United Kingdom*, LSE https://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf.

¹⁶ *ibid*

¹⁷Fair Trading Act 1973, 1973 Chapter 41 available at: <http://www.legislation.gov.uk/ukpga/1973/41/contents>.

¹⁸ Restrictive Trade Practices Act, 1976, 1976 Chapter 34, Introduction, available at: <http://www.legislation.gov.uk/ukpga/1976/34/introduction/enacted>.

1998). The Act of 1998, at outset clarifies that "*this is an Act to make provision about competition and the abuse of a dominant position in the market; to confer powers in relation to investigations conducted in connection with Article 85 or 86 of the treaty establishing the European community*"¹⁹. When the Act of 1998 as well as the Enterprise act, 2002 were passed, OFT a non-ministerial department was responsible to maintain fair competition in UK. However from 1 April 2014 CMA took over many functions of the OFT. Today CMA work to promote competition within UK. CMA works closely with European competition network, International competition network and Organization for economic cooperation and development, to promote enforcement co-operation and the convergence of rules and standards²⁰.

2. The Competition Act comprises of four parts along with 14 Schedules;

2.1 Part one deals with competition provisions. It is further divided into five chapters. Chapter one deals with prohibitions which are largely based on Article 101 of Treaty on Functioning of European Union. Chapter two deals with prohibition on abuse of dominant position, such an abuse may also infringe Article 102 of Treaty on Functioning of European Union so far as it affects EU member states. Chapter three deals with investigation and enforcement, chapter four deals with the competition commission and appeals and miscellaneous provisions are included in chapter five.

2.2 Part two deals with investigations in relation to Article 85 and 86, part three deals with monopoly provisions and supplementary provisions are given in part four. Merger control is regulated through Schedule 1 of this act as well as the Enterprise Act 2002. The Enterprise Act²¹ also gives CMA wide powers (previously OFT was the responsible to maintain competition) to investigate markets where there concerns about the fair competition and it also has provisions for those merger cases which do not fall within the exclusive competence of European Commission. Hence it can be seen that the Act of 1998 and the Enterprise Act, 2002 and exercise of the principles are immensely based on EU competition policies.

3. The Enterprise Act, 2002 seeks to establish Office of Fair Trading which shall enforce competition laws in UK. By the amendment order 2014²² CMA took over various responsibilities of OFT which were prescribed under the Enterprise act, 2002.

¹⁹Competition Act 1998, 1998 Chapter 41 Introduction, available at: <http://www.legislation.gov.uk/ukpga/1998/41/introduction>.

²⁰ Government of UK, <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>.

²¹ The Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 came into force on 1st April 2014. available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111110690?view=plain>.

²²*ibid*.

4. Besides that CMA closely deals with European Competition Network (hereinafter referred as “ECN”) in order to restrain cross border practices restricting competition. The investigation of any infringement of competition law cases is made easy as the European Commission and the national competition authorities in all EU Member States cooperate with each other through the ECN. In addition to ECN, the EU Merger Working Group, established in Brussels in 2010, consists of representatives of the European Commission, National Competition Authorities of EU Member States and National Competition Authorities of European Economic Area. By and large UK competition law and its implementation mechanism is largely interlinked with EU competition policy and European Commission.

Various provisions of the Act of 1998 like the chapter of prohibitions or section 60 are all in consonance with EU competition laws. Section 60 of the act of 1998 incorporates certain principles such as UK law should not differ from EU law; the national courts must have regard to the decisions of European Court. By way of Section 60 (2) there is a positive obligation on national courts to keep consistency with European courts i.e. Court of Justice of European Communities. It is apparent that UK competition laws are harmonized with EU competition law to a greater extent. Yet it will not be wrong to say that in few areas of competition, UK laws are dormant.

V. Competition Law in EU

Now let's discuss how European competition policy and European Commission helps the Member States (for here UK) to maintain fair competition in the country;

1. Council regulation (EC) No. 1/2003 of 16 December, 2002 was adopted in order to implement the EU competition rules laid down by Article 101 (i.e. concerted practices that restrict competition) and Article 102 (i.e. abuse of dominant position) of the Treaty on Functioning of European Union (formerly articles 81 and 82 of the Treaty establishing the European Community²³). It introduced rules that changed the enforcement aspects of the European Union competition policy. It allows for competition rules previously applied by the European Commission to be enforced on a decentralized basis by European Union Member States competition authorities. It thus enhanced the role of national antitrust authorities and courts in implementing European Union competition law. This allows the

²³ Treaty Establishing European Community, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT>.

commission to focus its resources on enforcing the most serious competition infringements with a cross border dimensions.²⁴

2. The European Union commission and competition authorities of the European Union Member States cooperate with each other through the ECN by coordinating investigations, exchanging evidence and other necessary information, informing each other of new cases, discussing various competition issues which are of common interest. The objective of the ECN is to build an effective legal framework to enforce European Commission competition law against companies who are engaged in cross border business practices which restrict competition.²⁵
3. Antitrust rules are contained in various legal instruments adopted by the European Union. The basic European antitrust policy is developed from two Articles i.e. 101 and 102 of the Treaty on Functioning of European Union²⁶. The commission is committed to assisting national courts in application and enforcement of Article 101 and 102 of the Treaty on Functioning of European Union. Moreover, if national courts apply national competition law, they also have to apply European Union competition law where there is effect on trade between Member States²⁷. Action against Cartel is one of the important type of antitrust enforcement. The commission has been engaged in leniency policy²⁸ in order to curb the Cartels. Leniency policy offers companies involved in a cartel and act as whistleblower and hand over evidence either complete immunity from fine or a reduction of fines which the commission would have otherwise imposed on them. Leniency policy has proved very effective to curtail cartels.²⁹
4. One stop shop merger control - The council regulation of 2014³⁰ provides that the provisions to be adopted in this regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one member state. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of 'one stop shop" system and in compliance with the principle of

²⁴Treaty on Functioning of European Union, Implementing EU competition rules: application of articles 101 and 102 , available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A126092>.

²⁵ European Commission, http://ec.europa.eu/competition/ecn/more_details.html.

²⁶ Treaty On Functioning Of European Union, Article 101 and 102, available at: http://ec.europa.eu/competition/antitrust/overview_en.html.

²⁷ Council Regulation (EC) No. 1/2003 of 16 December 2002, available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>.

²⁸ 2006 Commission notice on immunity from fines and reduction of fines in cartel cases, available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208\(04\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04)).

²⁹European Commission, http://ec.europa.eu/competition/cartels/overview/index_en.html.

³⁰ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0139>.

subsidiarity.³¹ This reduces the burden of multiple notifications, especially for international businesses, which could otherwise in principle face up to 31 separate procedures.³²

5. State aid is one of the area over which European Commission has control. State aid is nothing but an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities³³. To maintain fair competition in the market it becomes very important to control state aid, as the company which receives government support gains an advantage over its competitors. Article 107 of the Treaty on Functioning of European Union prohibits state aid unless it is in furtherance of economic development. To ensure that this prohibition under Article 107 is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that state aid complies with European Union rules. Article 107 of the Treaty on Functioning of European Union³⁴ ensures that aid granted by Member State or through state resources does not distort competition and trade within the European Union by favoring certain companies or the production of certain goods.³⁵

This is how through various competition control measures European Commission maintain fair competition in all its Member States. UK being one of the Member States of EU, its competition policy is largely based and governed by EU. This being the current status of UK competition law and policies, how UK competition law will survive after Brexit? How will be the future relationship of UK and EU? As EU competition law is of critical importance to the interpretation and application of UK competition law, will it be changed completely? How the changes in laws and the changed status of UK in EU will affect Businesses? Indeed citizens have opted for political sovereignty but will businesses accept this political sovereignty at the cost of their economic loss and depreciation in investment? These issues need to be addressed while negotiating the future relationship of UK with EU.

VI. Possible Options for UK After Brexit

After Brexit, UK competition law depends on the nature of UK's post-Brexit relationship with EU. Following are the few possible options for UK post-Brexit:

³¹Council Relation(EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, para 8

³² Lindsey Alistair, Berridge Alison, *Brexit, merger control and "one stop shop"*, MONCKTON(July8,2016), <https://www.monckton.com/brexit-merger-control-one-stop-shop/>.

³³ European Commission, http://ec.europa.eu/competition/state_aid/overview/index_en.html.

³⁴ Treaty of Functioning of the European Union, 2012/C 326/01, Article 107.

³⁵ European Commission, http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.

Option1. JOINING EUROPEAN ECONOMIC AREA

The European Economic Area (hereinafter referred as “EEA”) was established in 1994, with the objective to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties³⁶. The EEA comprises all members of the EU together with three non-EU countries i.e. Iceland, Liechtenstein and Norway³⁷. Members of the EEA are part of the Single Market and there is free movement of goods, services, people and capital within the EEA along with these four freedoms it covers competition. EEA also covers the horizontal policies such as research and development, environment, education and social policy,³⁸. Through Article 6 of the EEA agreement, the case law of the Court of the EU is also of the relevance to the EEA agreement, as the provisions of the EEA agreement shall be interpreted in conformity with the rulings of the Court given prior to the date of signature i.e. 2 May 1992.³⁹

EEA membership would mean that EU competition rules will still be applicable to UK and many companies carrying out business in UK as well as in other EU countries would not be affected to a great extent. It might not face dual investigations in trans EU cases of illegal behavior which causes unfair competition in the market. Also being EEA member it might have access to ECN and one stop shop for merger control provided it meet turnover threshold⁴⁰.

Membership of EEA would mean that UK would get an entry into Single Market however for being an EEA member it has to pay fee to be part of the Single Market. EEA members do this by contributing to EU's regional development funds⁴¹. Therefore becoming an EEA member would not generate substantial fiscal savings for UK. Apart from financial drawback of adopting this option there is one more important drawback and that is political. Non-EU members of the EEA must accept and implement EU legislation governing the Single Market, however the rules governing single market are set by EU and not by EEA⁴². This means giving up more sovereignty than earlier. And apparently to keep its sovereignty UK has reached to the result of leaving EU.

³⁶ Agreement On The European Economic Area, Article 1, available at: <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>.

³⁷ The European Free Trade Association website , <http://www.efta.int/eea/eea-agreement>.

³⁸ Supra note 37.

³⁹ The European Free Trade Association, <http://www.efta.int/eea/eea-agreement/eea-basic-features#4> (last visited on 8 September 2016) (EFTA website).

⁴⁰ Agreement on European Economic Area, Article 56 and 57 available at: <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>.

⁴¹ Legal basis for the regional development funds is given in Article 174 to 178 of Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C326/01. also see Article 115 and 116 of the Agreement on European Economic area.

⁴² Agreement on European Economic Area , Article 105 to 111 <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>.

Option 2. JOINING EUROPEAN FREE TRADE ASSOCIATION

EFTA") was founded by a Convention agreed in Stockholm in November 1959, and entered into force on 3rd May 1960. EFTA was founded on the premise of free trade as a means of achieving growth and prosperity among its Member States by providing a framework for liberalization of trade in goods amongst its members. As well as promoting closer economic co-operation between the western European countries.

The Stockholm convention established a framework with certain guiding principles and a set of minimum rules and procedures to be applied, with details focused on provisions for tariff reductions and the elimination of quantitative restrictions as well as rules of origin. In 1999, the EFTA Ministers decided to initiate an updating of the Stockholm Convention to reflect the increasing importance in the global economy of trade in services, foreign direct investment and intellectual property rights. The agreement amending the EFTA Convention, the Vaduz Convention, was adopted in 2001⁴³

EFTA was established as an economic counterbalance to the more politically driven European Economic Community (EEC) which later known as European Community (EC) and now known as European Union (EU). In 1970s EFTA concluded various free trade agreements with the EC⁴⁴. However, UK left EFTA in 1973 to join EC⁴⁵. At present EFTA has four members i.e. Iceland, Liechtenstein, Norway and Switzerland.

If UK opts for this option it can have opportunity to access all free trade agreements which EFTA has already concluded with EU and many other countries. Currently, the EFTA states have 27 free trade agreements covering 38 countries which include countries such as Canada, Republic of Korea, Mexico, and Singapore etc.⁴⁶.

If UK opts for this it need not join EEA as is the case of Switzerland. In addition to that if it is only EFTA member it need not adopt EU legislation governing the Single Market and in this way UK will not lose its political sovereignty. Also it would have access to ECN through EFTA Surveillance Authority⁴⁷.

⁴³The European Free Trade Association, <http://www.efta.int/sites/default/files/publications/fact-sheets/General-EFTA-fact-sheets/ef-ta-50-years.pdf>.

⁴⁴ Centre Virtuel de la Connaissance sur l'Europe (CVCE) http://www.cvce.eu/content/publication/2005/6/7/5daf365f-aa88-4f5b-a2ef-f0a2bae8a7b8/publishable_en.pdf.

⁴⁵The European Free Trade Association, <http://www.efta.int/about-ef-ta/european-free-trade-association>.

⁴⁶ The European Free Trade Association, <http://www.efta.int/free-trade/free-trade-agreements>.

⁴⁷ ECN brief special issue December 2010, A look inside ECN: its members and its work, http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf.

However, with this option, UK will have to negotiate many agreements with European countries as well as rest of the world those are not covered by EFTA free trade agreements. Hence UK's competition policy would largely depend on the particular agreements it concludes with EU and rest of the world. To add to that unless UK wishes to opt out of all forms of economic integration except tariff removal, rejoining EFTA is not a standalone solution to the problem of what should follow Brexit.⁴⁸

Option 3. SWISS MODEL

Switzerland is member of EFTA but it is not the member of EEA⁴⁹. Switzerland's economic and trade relations with the EU are mainly governed through a series of bilateral agreements where Switzerland has agreed to take on certain aspects of EU legislation in exchange for accessing the EU's single market. In overall, around 100 bilateral agreements currently exist between the EU and Switzerland. These bilateral agreements between the EU and Switzerland are currently managed through a structure of more than 15 joint committees.⁵⁰

The European Commission has engaged actively in co-operation with competition authorities of many countries outside EU so is with Switzerland too⁵¹. Cooperation with some of the countries including Switzerland is based on bilateral agreements dedicated entirely to competition.⁵² EU has entered into such dedicated agreements with Switzerland, China, India, Republic of Korea, etc. In some other cases, competition provisions are included as part of wider general agreements such as Free Trade Agreements, Partnership and Cooperation Agreement, Association Agreements, etc. such agreements are entered between EU and Brazil, Faroe Island, Switzerland, Ukraine, etc.⁵³

If UK prefers the Swiss model it has choice to decide whether to enter into dedicated agreement as far as competition law is concerned or to enter into general agreements⁵⁴ and have competition provisions as a part of it. In addition to these benefits all other benefits as available with EFTA option discussed above in this article.

However drawback of this model is if UK prefers this option and enter into bilateral agreements and may have to change its statute as per the terms decided vide such agreement. Secondly, if such

⁴⁸Dhingra Swati, Sampson Thomas, *Life after Brexit: What are the UK's options outside the European Union*, CEP.LSE <http://cep.lse.ac.uk/pubs/download/brexit01.pdf>.

⁴⁹ The European Free Trade Association, <http://www.efta.int/about-efta/the-efta-states>.

⁵⁰ European Commission, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/>.

⁵¹ European Commission, <http://ec.europa.eu/competition/international/bilateral/>.

⁵² European Commission, <http://ec.europa.eu/competition/international/bilateral/>.

⁵³*Ibid.*

⁵⁴ General agreements includes Free Trade Agreements, Partnership and Cooperation Agreements, etc.

an agreement is not comprehensive enough to cover all the areas of free trade then the council of EU may limit the access to single market. Unlike the comprehensive agreements like EEA , the nature of bilateral agreements with Switzerland is static, given that there are no proper mechanisms to adapt the agreements to evolving EU legislation, nor are there any surveillance or efficient dispute settlement mechanisms. In order to resolve these problems, EU-Swiss negotiations for a framework institutional agreement were launched on 22 May 2014. The negotiations are aimed at settling the problems stemming from the evolving nature of the EU acquis related to the internal market and at introducing a dispute-settlement mechanism into the current bilateral treaty network. The institutional framework negotiations are crucial, because the council of the EU is determined not to allow Switzerland any further single market access e.g. as regards electricity, without this framework agreement⁵⁵. Therefore such an agreement will be more subjective.

Option 4. *WORLD TRADE ORGANIZATION (WTO) OPTION/ COMPLETE BREXIT*

If none of the above mentioned options are preferred by UK, its trade with EU and rest of the world will be governed by WTO of which UK is a member. As per Article 50 Two years after notification to leave EU is given by UK if no alternative arrangements are concluded between UK and EU or the period of two years is not extended with mutual consent, the treaties shall cease to apply to the withdrawing state⁵⁶. Therefore if UK fails to negotiate and conclude the agreement, with EU to set out its future relationship with EU then WTO rules will be applicable to trade dealings of UK. If so happens UK would no longer be obliged to follow EU treaties and it may change its approach in application of competition law. There will not only be change in application of competition law but there could be major changes in law provisions too. Currently UK's competition policy is largely based on EU competition policy be it application of Article, 101 and 102 of Trade on Functioning of European Union or be it principle of consistency of interpretation or the modernization regulation. Therefore after complete Brexit- with this option, would mean that application of competition policy in UK will be the sole responsibility of the CMA and adherence only to UK laws. Now WTO authorizes the ever-growing regional trade agreements and preferential trade arrangements, therefore with WTO option UK can enter into such reciprocal preferential trade agreements with two or more business partners. This type of agreements includes free trade agreements and customs unions etc.⁵⁷. With this as the only option and no other exclusive competition related arrangements with EUUK would no longer be able to

⁵⁵ European Parliament, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.5.3.html.

⁵⁶ Supra note 7.

⁵⁷ World Trade Organization https://www.wto.org/english/tratop_e/region_e/region_e.htm.

implement One Stop Shop or would have no access to ECN. In absence of One Stop Shop principle companies which are operating in UK as well as in one or more EU Member States has to face investigation simultaneously from CMA as well as European Commission. This kind of simultaneous investigation would lead to unnecessary monetary loss also the investigation process will be longer and last but not the least result of both the investigations could be inconsistent⁵⁸. This will create huge monetary burden on the businesses.

In addition to that some offenders have to pay fines twice while operating and following two different competition rules. With these kind of problems, Brexit without negotiating trade and trade related (such as for competition issues, movement of laborers, etc.) agreements may have bad effects on the businesses operating in both UK and EU. After Brexit, if UK chooses to opt for WTO option then in cases of cartel, merger investigations or in any other competition law infringement cases companies have to face dual investigations if they are carrying a business in UK and EU too. Also in cartel cases cartel members who carry business in UK will not be able to protect themselves under commission's leniency policy. As the provisions to deal with the whistleblower may vary in UK and EU therefore the whistleblower may get protection under EU laws however UK might prosecute the whistleblower company. Further with this option UK will not have access to ECN which is a very helpful instrument of coordination among the European Commission and the National Competition Authorities i.e. CMA as far as UK is concerned. Complete detachment from EU would also mean that all EU legislations will cease to apply to UK. Hence UK will not be able to get benefit of 'One Stop Shop' perhaps UK could, like Norway, allow the Commission in Brussels to adjudicate on its merger cases but this may create the cardinal question of UK's sovereignty as UK will not have any voice to sway Commission.

The only benefit of this option is UK will not lose its political sovereignty however it will come at the cost of economic turbulence. As the Pound has collapsed to its lowest level in over 30 years, it was dropped 7% to about €1.2085, immediately after referendum. Banks were hard hit, with Barclays and RBS falling about 30%.⁵⁹

Table 1: AFTER BREXIT WHAT WILL BE THE FUTURE OF UK COMPETITION LAW

| Sr. No. | Possible Options | Status of UK Competition Law |
|---------|------------------|------------------------------|
|---------|------------------|------------------------------|

⁵⁸ Marco Hickey, *The Implications of brexit for Competition Law*, LKSHIELDSL (June 24, 2016), <https://www.lkshields.ie/?ACT=24&path=pdf%2Fpublication%2Fthe-implications-of-brexit-for-competition-law&size=a4&orientation=portrait&key=&attachment=1&compress=1&filename=lkshields-the-implications-of-brexit-for-competition-law.pdf>.

⁵⁹ *Pound plunges after leave vote*, June 24, 2016, BBC NEWS, <http://www.bbc.com/news/business-36611512>.

| | | |
|----|--------------------------------|---|
| 1. | Joining European Economic Area | Current law will remain unchanged. However UK will lose its voice to influence EU Competition policy ⁶⁰ |
| 2. | Joining EFTA | Few changes in current law are possible. Need not follow EU competition policy, still access ECN and through EFTA Surveillance Authority. |
| 3. | Swiss Model | Changes in current law depend on the type of agreement will be entered between EU and UK. A good a' la carte option for framing competition policy. |
| 4. | WTO Option | Current law could be changed as no need to interpret and follow EU legislation. |

Table 2: COMPETITION LAW PILLARS PRE AND POST BREXIT

| Competition Law Pillars | Pre-Brexit | Post-Brexit |
|-------------------------|---|--|
| Antitrust | The Competition Act 1998 which is largely based on Article 101 and 102 of the Treaty on Functioning of European Union is the governing law. National Courts are positively obliged to maintain consistency between its decisions and the decisions given by European courts in the similar case ⁶¹ . | In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depend on the kind of agreement entered between UK and EU. In case of option 4 UK can completely change its current competition law and need not to be consistent with the decisions and the interpretation of European courts. |
| Merger | Mergers that meet EU threshold are controlled by commission. | In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depends on the kind of agreement |

⁶⁰Georgios Petropoulos, *Brexit and Competition Policy in Europe*, BRUEGEL (July16, 2016) <http://bruegel.org/2016/07/brexit-and-competition-policy-in-europe/>.

⁶¹ Competition Act, 1998 1998 chapter 41, Section 60, available at: <http://www.legislation.gov.uk/ukpga/1998/41>.

| | | |
|-------------------|--|--|
| | | entered between UK and EU and in case of option 4 mergers might be investigated on the set of recommendations issued by Organization for Economic cooperation and Development (OECD). International Competition Network(ICN) may play important role. |
| Cartels | Heavy fines are imposed on companies involved in cartels in member state. Leniency policy is one of the strongest tool used by commission to curb cartels ⁶² . | In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depends on the kind of agreement entered between UK and EU. In case of option 4 businesses operating in UK may not access EU's leniency policy. UK's CMA play important role in controlling cartels and it can follow 1998 recommendation on hard-core cartels issued by OECD ⁶³ . |
| State -aid | The European Commission has vast powers of investigation and decision making. State aid can be implemented after approval of Commission. Commission may recover incompatible state aid in case of final negative decision. ⁶⁴ . | In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depend on the kind of agreement entered between UK and EU. In case of option 4 UK will have follow WTO Agreement on Subsidies and Countervailing Measures which disciplines the use of subsidies and also provide measures to minimize the adverse effects of subsidies. |

⁶²European Commission, <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

⁶³ Recommendation of the council concerning effective action against hard core cartels (adopted by the council at its 921st session on 25 march 1998[C/M(98)7/PROV]), available at: <https://www.oecd.org/daf/competition/2350130.pdf>.

⁶⁴ European Commission , http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.

VII. Suitable Options for UK After Brexit

As mentioned above, UK has few options available after Brexit. Also there is time to choose more suitable option after Brexit as it has not yet started the withdrawal procedures. To maintain its political sovereignty but not at the cost of loss in investments is the biggest challenges before UK while choosing its option after Brexit. EU was and will be the nearest international market for UK therefore it has conclude some kind of trade agreements with EU. Considering all these factors this rejoining EFTA seems to be a good option for UK after Brexit.

UK was once upon a time member of EFTA therefore it is aware of the possible benefits as well as drawbacks of being an EFTA member. This option would help UK to maintain its political sovereignty as it need not follow EU legislation. At the same it need to negotiate multiple trade agreements with EU as well as non EU countries as such trade agreements already exist. Further considering the about the other benefits of this option, access to ECN would be possible through EFTA surveillance Authority⁶⁵. Also as per the requirement UK can enter into reciprocal preferential trade agreements with two or more business partners as permitted by WTO⁶⁶. Also with this option UK is not be obliged to be member of EEA and incidentally member of EU.

If UK chooses to rejoin EFTA, the procedure for same is prescribed under the Article 56⁶⁷ which states that,

"Any state may accede to this convention, provided that the council decides to approve its accession, on such terms and conditions as set out in the decision. The instrument of accession shall be deposited with the Depository, which shall notify all other member states. This convention shall enter into force in relation to an acceding state on the date indicated on that decision"

UK may rejoin EFTA after invoking this article.

VIII. Practical Implications of Brexit on Competition Law Regime in UK

Till today, competition laws for EU and UK have gone hand in hand and succeeded in implementing effective competition policy both in UK as well as in Member States. Indeed EU competition law supersedes UK competition law in certain policy areas such as merger control where it meets threshold⁶⁸. Also EU has exclusive competence in certain areas such as customs

⁶⁵ Supra note 49.

⁶⁶ Supra note 59.

⁶⁷ Convention Establishing the European Free Trade Association(last amended on 20 September 2010), Article 56, available at: http://www.wipo.int/edocs/lexdocs/treaties/en/efta/trt_efta.pdf.

⁶⁸ Supra note 31.

union, establishing of competition rules necessary for functioning of internal market, etc.⁶⁹. Whether the Current competition law will remain same or it will change completely depends on the possible option UK prefers. In case of complete detachment from EU Section 60 of the act of 1998 has to be changed thoroughly as the national courts need not maintain consistency with the decisions of the European Court. All companies working in UK as well as EU Member States will be obliged to follow competition law of both the jurisdictions irrespective of Brexit. However, while dealing with trans- border competition law, infringement cases what kind of cooperation will exist between UK and EU that completely depend on the post Brexit agreement between UK and EU. Indeed some of the economic and political effects are coming out since the result of Brexit referendum. As the European Commission enforces the EU competition rules with the national competition authority of the member states⁷⁰ and CMA being a national competition authority in UK closely coordinate with European Commission and this could be diluted after Brexit. As the European Commission is very keen on cooperation on competition with many other countries outside EU, it will enter into cooperation agreement with UK after Brexit but still such cooperation may not be as concrete as current cooperation between EU and UK competition provisions.

Any country's competition policy has the potential to influence its economic growth; therefore, while adopting new competition policy it is very important to foresee whether it will be beneficial or harmful to the economy. All the drawbacks of above mentioned possible options may lead to some economic loss. As the businesses are going to be hampered to great extent even if UK opts for any of the above possible options, as the current status of being EU member gives far more benefits to businesses than Being EEA or EFTA member. Any change in arrangements of competition policy itself has potential to affect UK's economy if UK chooses wrong option regarding competition policy. Therefore, while deciding on the future policy, UK has to examine other related factors too which may affect country's economy. Currently, UK's businesses are benefited by EU's common trade policies by virtue of being EU member. One of such benefits is UK's representation in global markets by EU. This gives good bargaining power to deal in all international trade. However, complete separation of UK from EU, may lead to changed import and export tariffs on UK. Perhaps, UK could choose to reduce its import tariffs as compared to EU import tariffs and import tariffs of other non-EU countries. This may help the consumers and

⁶⁹ Treaty on Functioning of European Union 2012/C326/01, Article 3, available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT>.

⁷⁰ European Commission Website http://ec.europa.eu/competition/general/overview_en.html.

the businesses in UK, due to increased competition in the businesses and possibly solve the issue of unemployment.

Post Brexit, if UK opts for option 2, 3 or 4 it has to enter into dedicated competition agreements with EU and rest of the world which is quite a time taking process. However, UK will have the opportunity to deal only with those countries which are its close business partners and need not to deal with EU as a whole. At this point of time it is very difficult to predict what will affect UK's economy more, will it be a greater autonomy to choose its business partner or lesser bargaining power in international trade.

If UK chooses complete sovereignty in competition law regime by opting option 3 or 4 then CMA - its competition authority will be over-burdened to deal with various competition related cases. Working parallel with European Commission (in case of selection of option 1) or with EFTA surveillance authority (in case of selection of option 2) burden on CMA will be less as the transnational cases will be investigated either by European Commission or the EFTA Surveillance Authority. Currently CMA works very closely with European Commission and being a member of ECN it gets completion information and can share its experience with competition authorities of member states, However the case complete separation will deprive CMA from the privilege of being part of ECN, in short term perhaps it will impede smooth and well-timed working of CMA.

IX. Conclusion

The vote to 'Leave' has already caught fire and now it is up to UK to get benefitted from this fire or get burnt. The new competition policy will be framed in these two years of negotiations. However these two years are going to be uncertain for the businesses, investors, share market, EU citizens staying in UK as well as UK citizens staying in EU Member States⁷¹. If UK chooses right option and try to find out more business partners outside Europe then the negative impact on economy after Brexit will be lessen. Competition plays a key role in stimulating economic growth. A well framed competition policy is always beneficial for consumers, new businesses as well as old businesses, theses all together strengthen the economy of nation. To maintain fair competition in the market was and is always the fundamental component in order to strengthen the economy. In today's world of globalization it is vital to have strong competition policy and effective mechanism for its implementation as it encourages businesses to improve its quality and helps to buy goods

⁷¹ James Blitz, *Brexit Briefing: An Uncertain future for EU nationals in the UK* FINANCIAL TIMES, July15, 2016, available at: <https://www.ft.com/content/43e9c2ee-4a67-11e6-b387-64ab0a67014c>.

and services at appropriate prices. Therefore, after Brexit, UK has to carefully decide its competition policy and it should try to maintain close cooperation with EU and rest of the world.