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Homogeneity after Brexit: The example of competition law

Summit of the highest courts in the EFTA pillar, 4 May 2017

A. Introduction

Great Repeal Bill:

UK CMA and courts will continue to base themselves on UK practice and case-law which has developed in a consistent line with EU law.

Implementation of the EU acquis into British law.

Even after time, there may even be a willingness to do that.

Homogeneity at the beginning.

Since UK courts will no longer have the possibility of referring any questions to the ECJ, consistency will inevitably be blurred with time.

B. Loss of British influence in European law

UK was the main supporter of the Commission's "more economic approach" (consumer welfare, focus on the facts, economic analysis).

French President *François Hollande* a few days after the Brexit vote:

EU competition law could be adapted with a view to promoting growth, investment and employment.

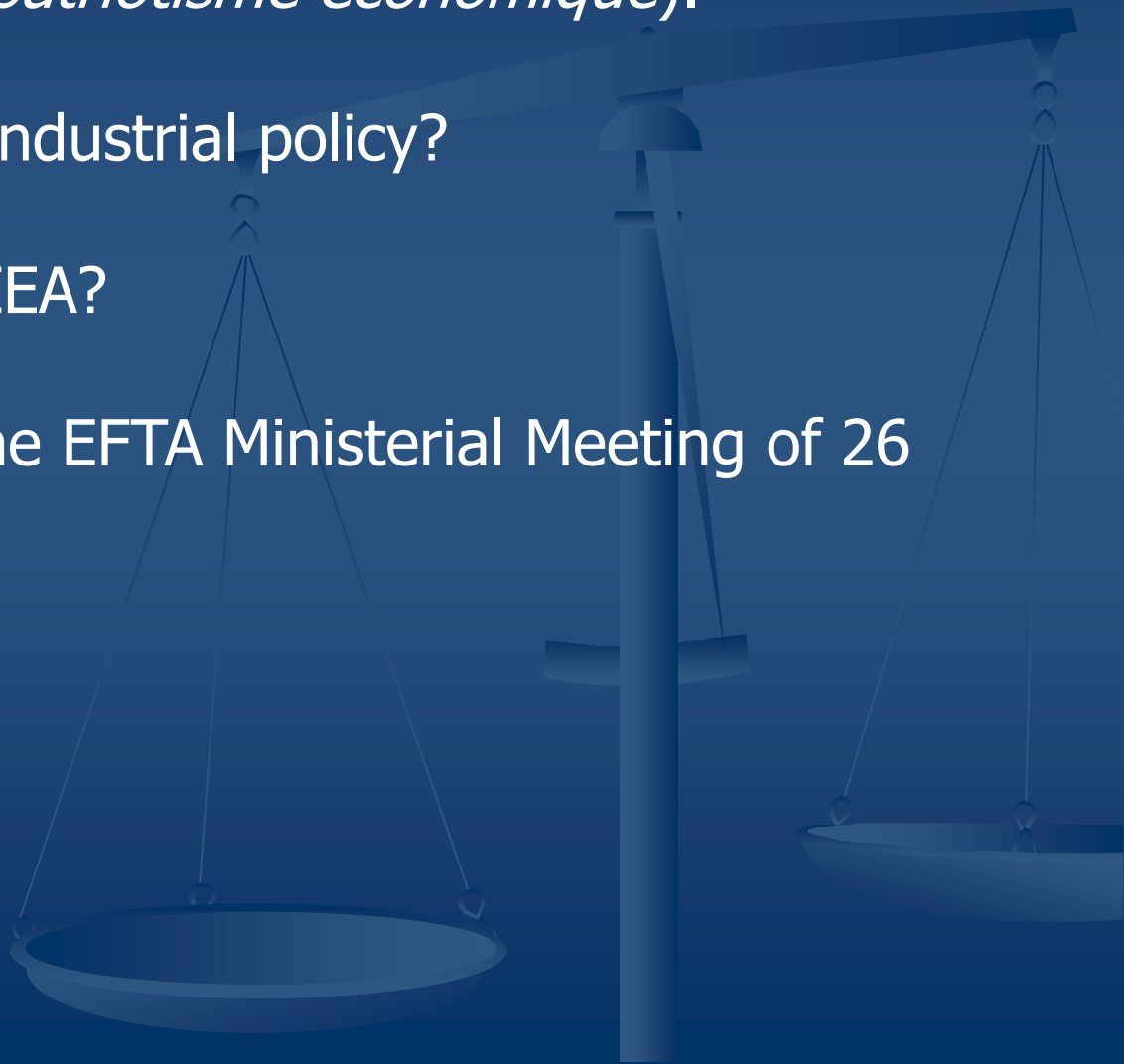
B. Loss of British influence in European law

This is on the line of the traditional French approach (national champions, *patriotisme économique*).

The EU on its way to industrial policy?

Repercussion on the EEA?

Cf. my statement at the EFTA Ministerial Meeting of 26 June 2016 in Berne.



C. Loss of European influence in British law

I. First possibility: British competition law will return to the public interest approach

Before the 1998 Competition Act.

Fear of GC Judge *Ian Forrester*.

This could in turn have a influence on EU law (similar approach as in France).

General mood of our time: Protectionism (most appaling example: U.S. President *Donald Trump*).

C. Loss of European influence in British law

II. Second possibility: British competition law will move into the direction of US antitrust law (i)

1. Substantive law

EU and EEA law are based on a two goals approach (competition and integration).

Commission/ESA practice and case law of the courts on parallel imports and on RPM aim at fostering integration.

After Brexit, British law will probably focus on competition alone.

II. Second possibility: British competition law will move into the direction of US antitrust law (ii)

2. Enforcement model

Possible switch from the current inquisitorial to a prosecutorial model.

Stronger focus on private enforcement?

Stronger focus on criminal enforcement?

Repercussions on EU/EEA law?

What if POTUS tweets?

D. The Swiss experience

I. Starting point

1995-2003: Swiss competition law aligned with European law by the legislature.

2003: Federal Supreme Court held that autonomously implemented EU law must "in case of doubt" be interpreted in conformity with European law.

As far as "national methodology" allows.

Reference to "national methodology" is a backdoor, is circular reasoning.

II. Non-compete clause is no "agreement"

Federal Supreme Court, 13 November 1998:

A non-compete clause between two former partners was unilateral and therefore did not constitute an agreement affecting competition pursuant to Article 4 CartA. As a result, the CartA was deemed to be inapplicable.

The Court came to this odd conclusion because it interpreted the new CartA in light of the old Federal Constitution.

III. Imposing unfair prices

In *Swisscom Mobile*, ComCo had imposed a record fine of CHF 333m for abuse of a dominant position in the wholesale market for incoming telecommunication services.

Swisscom Mobile was reproached that it had imposed unfair termination fees on other telecommunication services providers.

Article 7(2)(c) CartA is virtually identical in substance to Article 102(2)(a) TFEU (case of exploitative abuse).

III. Imposing unfair prices

Federal Supreme Court, 11 April 2011: In other respects the Swiss legislature distanced itself from the EU model.

Autonomous interpretation of the word “imposition” is therefore required.

Overly strict interpretation of the notion of “imposing.”

Ruling in favour of an undertaking which is controlled by the Federal Government.

3:2 votes. Majority from the anti-European Swiss People’s party.

IV. Restriction by object

In Swiss law, the concept 'restriction by object v by effect' has found expression in the pair 'qualitative v quantitative appreciability.'

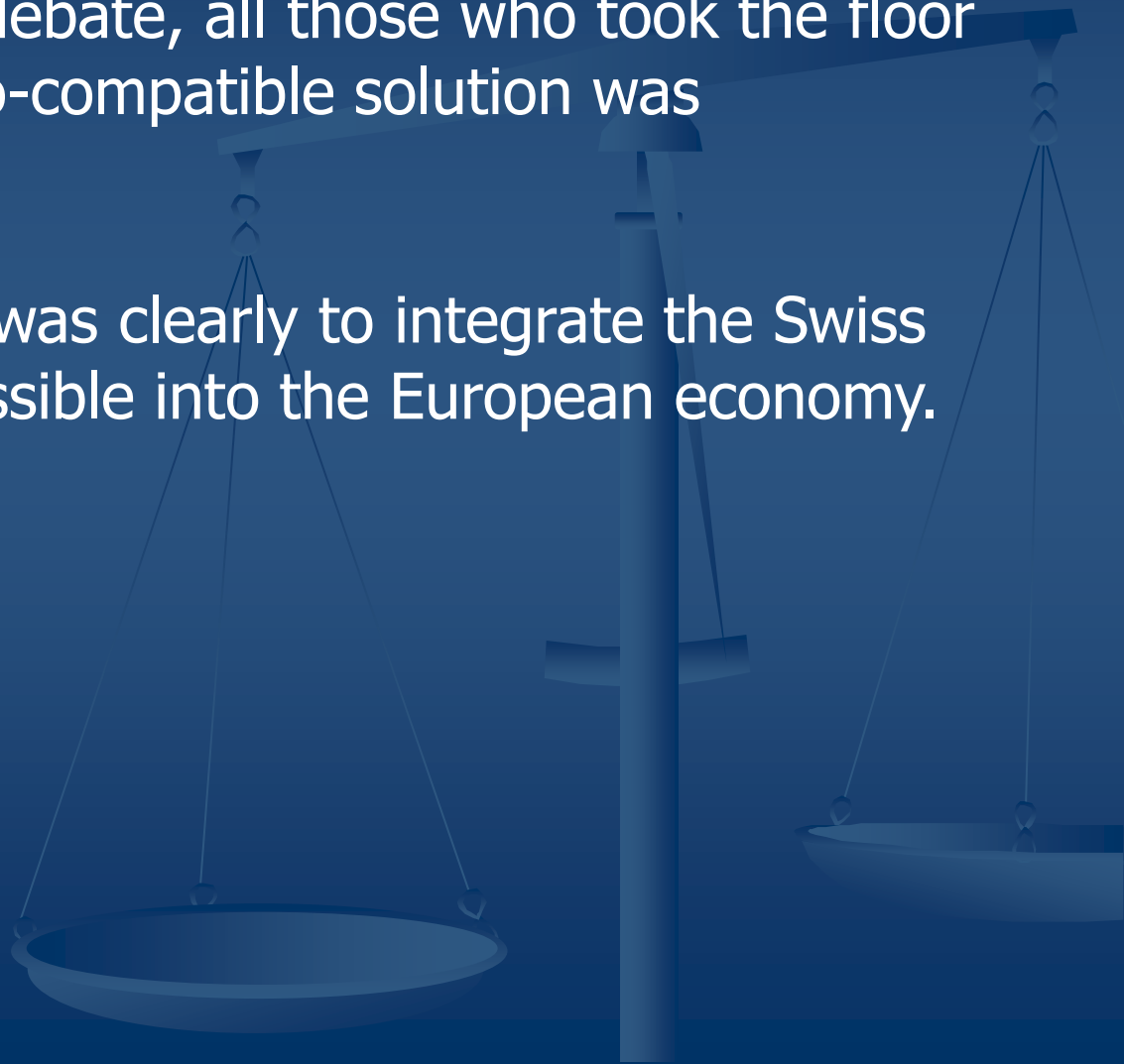
Federal Administrative Tribunal held in December 2013 in *Elmex* that in case of a contractual prohibition of parallel trade qualitative appreciability of a restriction of competition is deemed to be established.

Whether the restriction is also quantitatively appreciable must not therefore be assessed by ComCo.

IV. Restriction by object

In the parliamentary debate, all those who took the floor had stated that a euro-compatible solution was warranted.

The legislature's goal was clearly to integrate the Swiss economy as far as possible into the European economy.



IV. Restriction by object

After this, lobbyists argued that although under European law a prohibition of parallel trade would qualify as a restriction by object, this was different under Swiss law.

On 28 June 2016, the Federal Supreme Court upheld the Administrative Tribunal's judgment in all points.

3:2 votes; different composition.

E. Conclusions

After Brexit, EU law may develop in a new direction.

The input of the common law will be lacking.

At the same time, British law will step by step deviate from EU law.

All this will have repercussions on EEA law.

But regulatory competition could also have its positive aspects.