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Brexit and Competition Law: What to Expect

By John Ratliff and Cormac O'Daly

While we wait for the UK to clarify what sort of relationship it will be seeking with the EU after Brexit, it may be useful to highlight what appear to be the main consequences for the enforcement of competition law. We see those consequences as the following:

1. The European Commission ("EC") will no longer have authority to enforce competition law *in the UK* (unless the UK chooses to join the European Economic Area ("EEA"), which most think unlikely). Instead the UK's Competition Authority, the Competition and Markets Authority ("CMA") will become the main enforcement body applying UK Competition law (e.g. for cartels and mergers).

2. However, where business practices *have effects in the EU or the EEA*, companies *still will have to comply with the EU Competition rules* in many situations. So, for example, the territorial limits in exclusive distribution contracts and IP licences will have to be drafted with this in mind.

3. In addition, *parallel applications* may have to be made to the CMA and EC, *notably for cartel immunity or leniency and for mergers* affecting both the UK and the remaining EU 27 Member States.

4. In the short term, it is *unlikely that the substantive law will change materially*. However, *over time this may happen* (i.e. the UK may choose different approaches and the UK competition authorities and UK courts should no longer be bound to follow the EU courts' rulings and the decisions of the EC).

5. In addition, Brexit appears likely to reduce the attractiveness of the UK as a forum for litigating pan-EU cartel damages actions.

Competition agency law enforcement

The UK leaving the EU does not mean that EU law will not apply to UK companies. Particularly in view of its geographic closeness to the EU, much of existing EU Competition law will still be relevant, since the EU's jurisdiction would extend to practices occurring in the UK, but having an appreciable effect on trade between the remaining EU Member States.[1]

For example, if two UK companies entered into a market sharing agreement covering Northwest Europe, the EU Competition rules would still apply to the EU effects, while the UK effects would be caught by the UK rules. Similarly, if an EU tennis ball supplier banned its distributor in the UK from selling outside the UK, so that it could not sell in the EU, that would still fall foul of the EU rules, provided re-export of the balls from the UK to the remaining EU 27 Member States is viable.

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[1] See, in particular, Case C-306/96 *Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP)*, 28 April 1998; Case T-102/96 *Gencor Ltd v Commission*, 25 March 1999; and Case C-231/14 P, *InnoLux v Commission*, 9 July 2015.

Mergers and acquisitions

If Brexit occurs, companies that are acquiring or merging with other companies will have to consider submitting a *voluntary parallel notification to the CMA, in addition to notifying their transaction to the EC*.

Currently, if the revenues of parties to a transaction exceed certain EU-defined thresholds, the EC, rather than the CMA, has jurisdiction over the transaction, even if it has material anti-competitive effects in the UK.[2] The EU notification is a "one-stop shop" covering all other potential notifications that could be made to the 28 Member State competition authorities. Without this, companies often will have to file *a separate notification to the CMA* and await clearance from the CMA, *as well as* from the EC, which still will have jurisdiction to rule on the position in the remaining 27 EU Member States.

Parallel filings may not occur in all cases, because under the UK system notifying a transaction to the CMA is voluntary (i.e. unless the CMA indicates otherwise, parties do not have to obtain the CMA's approval before closing a transaction). However in practice, post-Brexit, in the more complex cases, usually it will be done (since the CMA actively monitors deals affecting the UK and can investigate transactions even if they have not been notified to it).[3]

We may also find that some deals will not be filed with the EC, because the relevant EU revenue thresholds will not be met, if UK revenue is not included in the EU jurisdictional calculations.

In the last few years some national governments have suggested that they should be entitled to protect their broader strategic national interests, rather than just letting the EC assess a proposed transaction in light of competition law. The new UK Prime Minister, Theresa May has raised such concerns, notably over *Pfizer's attempt to acquire Astra Zeneca* (fearing the effect on R&D in the UK) and over *Kraft Foods' purchase of Cadbury* (a "trademark" British chocolate manufacturer and significant employer).[4]

Under EU law, Member States have limited scope to raise matters of national interest to object to transactions and any action that a Member State takes must be compatible with the general principles of EU law.[5] If the UK is no longer a member of the EU, the UK government could therefore have more ability to intervene to prevent "unwanted" acquisition of UK companies. That said, the UK traditionally has been reluctant to allow broader political concerns to influence its competition enforcement.

Interestingly, since the UK referendum, François Hollande, the French President, has also suggested that EU Competition law should take increased account of industrial policy considerations.[6] It also remains to be seen whether that will happen.

Immunity applications and anti-cartel law

If Brexit occurs there will be significant changes to the existing cartel enforcement system. The key point is that currently companies can report their participation in cartels to the EC and gain immunity from sanction, or a more lenient sanction, as regards their activity *in the whole EU*. In future, companies may be expected to consider applying for immunity or leniency *both to the EC (for activity in the remaining EU 27 Member States) and to the CMA (for the UK)*.

In some cases, this happens already, notably where there is a nexus between the cartel activity and the UK, such as subsidiary involvement or cartel meetings there, because of potential criminal liability for individuals who have participated in cartels in the UK. However, in the future, we expect more general immunity or leniency applications to the CMA.

While the general policy and legal principles applicable to cartels should be the same in the EU and the UK post-Brexit, we expect that arguments will be made about the extent to which the EU should fine companies for conduct in the UK that has an effect in the EU. The appropriateness of the EU fining

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2 See, http://ec.europa.eu/competition/mergers/procedures_en.html

3 See, https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger

4 See, http://www.wlrk.com/docs/TheresaMayJuly11Speech.pdf.

5 See, the EU Merger Regulation Articles 21(3) and 21(4).

6 See, http://www.ambafrance-us.org/spip.php?article7630

companies for conduct outside the EU always has been controversial, especially when, as may be expected here, authorities outside the EU bring parallel enforcement proceedings and also impose fines.[7]

Dominance investigations

It will be interesting to see if Brexit will lead to any changes in the way the CMA prosecutes companies with market power. Notably, we will have to see whether over time the CMA might take a different line, more influenced by US practice, or stay aligned with the EU rules to preserve consistency for businesses having otherwise to deal with two sets of rules.

In any event, after Brexit, the CMA will be able to investigate behaviour even if the EC is investigating the same behaviour (or has decided not to investigate it). This may provide an additional avenue for complainants trying to persuade an authority to investigate potential abuse of dominance.

Single-market inspired rules

Some EU Competition rules reflect the EU's aim to build a European "Single Market" as much as to protect competition. As UK law develops after Brexit, such considerations may no longer be relevant to the UK. Notably, conduct that divides the Single Market or discriminates between countries/nationalities has been central to EC enforcement. For example, the EC investigated arrangements for the sale of *Football World Cup* tickets (finding that they favoured residents of France).[8] Could such an investigation cover activities dividing the UK from the rest of the EU 27 Member States in the future? One would expect not but, as noted above, UK conduct *with an effect on trade between EU Member States* may still be caught by EU law.

Scope for divergence

If Brexit occurs, EU block exemptions will also not apply in the UK, so we will have to see if the UK will adopt parallel exemptions, or chart a different course.[9] The CMA and UK Courts likely also will not be required to maintain consistency with the decisions of the EC, nor will they be bound by rulings of the European Courts.[10]

It may be therefore that UK law will develop differently. However, many think that the UK may continue to have regard for EU law and that the UK may still chose to take it into account in its laws and rulings. There should also continue to be much international competition law convergence through the International Competition Network ("ICN") of competition authorities and the OECD.

Institutional cooperation

In practice, a new system of cooperation between the UK and the EU will have to be worked out. Currently, the UK, through the CMA, is a member of the European Competition Network ("ECN"), but only EU Member State competition authorities cooperate within the ECN. It is likely therefore that the UK will enter into a *separate cooperation agreement* with the EU, similar to its agreements with Switzerland, the U.S. and other countries.

Competition litigation

Over the last five to ten years, the English courts have become one of the *fora* of choice for purchasers suing cartelists for damages resulting from having paid allegedly inflated cartel prices. The UK's EU membership has greatly contributed to this.

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7 See, Advocate-General Wathelet's Opinion in Case C-231/14 P *Innolux Corp. v European Commission*, paras 35 to 68.

8 EC Decision IV/36.888 *Football World Cup*, 20 July 1999.

9 See, Section 10 of the Competition Act 1998.

10 As currently provided for in Section 60 of the UK Competition Act 1998.

Nothing changes at first

Ongoing litigation will continue until Brexit happens. What is more questionable is whether all cases will continue after Brexit. Why would English courts continue to enforce ("EU") laws and rulings which were part of UK law, but are no longer part of UK law? It is arguable that certain claims could be struck out as of Brexit, or even before, on the basis that Brexit will occur before the English courts will have had the chance to consider these claims.

EC decisions no longer binding

After Brexit, EC decisions, such as those condemning cartels, will no longer be binding on UK courts.[11] Such decisions will have, at best, persuasive authority (similar to decisions or judgments of a third country's agency or court). This means that claimants will have to bring "standalone" damages claims (in which they will have to prove the underlying infringement of competition law), instead of bringing more straightforward "follow-on" claims relying on an EC decision as proof of the infringement.

It may be that the CMA will adopt more decisions finding infringements of UK Competition law (potentially some in parallel to EC decisions), but the CMA decisions would only prove infringements in the UK and not beyond.

A related issue is that, after Brexit, claimants in the UK may only be able to claim *for damage suffered in the UK*. Currently, a claimant can rely on breach of statutory duty and/or directly effective EU rights and often seeks damages suffered *throughout the EU* against all defendants concerned.[12] Therefore a claimant may have to initiate an action in the UK for UK damages and an action elsewhere to claim for damages suffered in the remaining 27 EU countries. Whether the UK signs new agreements with the EU and its Member States regarding jurisdiction and applicable law will be critical. Some claimants may also try to rely on older international treaties as a basis for claiming a wider category of damages before English courts.

Other EU fora for damages actions?

If the UK becomes a less attractive place to bring claims, which jurisdiction (if any) might replace it as claimants' forum of choice? Up to now, many actions have been brought before English courts, because wide-ranging pre-trial discovery is available. However, more discovery than before should be available in competition damages actions in other Member States from the end of 2016, once the EU's Directive on Competition Damages Actions comes into force.[13] Depending on how their national legislation implements and how their national courts interpret the Directive's provisions on discovery, the courts of countries such as *Germany and the Netherlands*, in which numerous damages actions have been brought already, may therefore become increasingly attractive *fora*.

It is also possible that claims might be brought in *Ireland* since discovery is already part of court procedure there and proceedings can be brought in English.

In all these countries, the claimant's initial challenge will be to establish that the relevant national court has jurisdiction over the claim. Much will turn on what link or nexus is required to establish jurisdiction. English courts have developed elaborate case law on this[14] and it remains to be seen whether other courts will follow the same principles as the English courts.

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[11] Article 16, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1–25 and Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, 14 December 2000.

[12] Article 8 (1) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012

[13] Article 5, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014.

[14] See, e.g. *Provimi Ltd v Roche Products Ltd and Others* [2003] EWHC 961, *Cooper Tire & Rubber Company Europe Ltd & Others v Dow Deutschland Inc & Others* [2010] EWCA Civ 864 and *Emerson Electric Co & Others v Mersen UK Portslade Ltd (formerly Le Carbone (Great Britain) Ltd)* [2012] EWCA Civ 1559.

Moreover, the participation of a UK subsidiary in a cartel often has been used to establish jurisdiction (to "anchor" the action) before English courts and, for example, it may be harder to identify a relevant Irish subsidiary for these purposes.

Class actions

Finally, it will be interesting to see whether there will be many class actions for cartel damages. The UK has recently introduced national legislation on this.[15] Unusually in Europe, the legislation provides for an "opt-out" system under which claims may be brought on behalf of an entire class of claimant, all of whom are bound by the result of the proceedings unless they opt-out of those proceedings. Neither the EU's Directive nor Brexit will directly affect this system.

FOR MORE INFORMATION ON THIS OR OTHER MATTERS, CONTACT:

John Ratliff +32 2 285 49 08 john.ratliff@wilmerhale.com

Christian Duvernoy +32 2 285 49 06 christian.duvernoy@wilmerhale.com

Frédéric Louis +32 2 285 49 53 frederic.louis@wilmerhale.com

Cormac O'Daly +44 (0)20 7872 1534 cormac.odaly@wilmerhale.com

[15] UK Consumer Rights Act, 2015.