Cartel Regulation

Contributing editor
A Neil Campbell

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GETTING THE DEAL THROUGH

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Introduction

On 23 June 2016, the UK electorate voted (by a 52 per cent to 48 per cent majority) to leave the EU. On 29 March 2017, the British Prime Minister, Theresa May, triggered article 50 of the Treaty on European Union, formally starting the two-year withdrawal process. The leave vote, or 'Brexit', as it is commonly known, has caused much political, economic and legal uncertainty. In particular, the terms on which the UK will leave the EU (including transitional arrangements), as well as the future trading relationship it may agree with the EU, remain highly unclear. The UK government has indicated that it will seek a 'unique' trading model with the EU, rather than adopting an 'off-the-shelf' solution such as the 'Norwegian' or 'Swiss' models.

The far-reaching impact of the Brexit vote will also be felt in EU and UK cartel regulation. At present, a cartel that relates to a market in the UK could be investigated by either the European Commission (the Commission) or the UK Competition and Markets Authority (CMA), with the latter able to apply both EU and national competition laws, depending on the geographic scope of the alleged infringement. The Commission and the CMA also closely cooperate with each other within the framework of the European Competition Network (ECN). The withdrawal of the UK from the EU may therefore have a significant impact on cartel regulation and enforcement in the UK (and also at the EU level).

The House of Lords EU Internal Market Sub-Committee has launched an inquiry into the impact of Brexit on UK competition policy to consider the issues surrounding parallel investigations, cooperation with the Commission and a transitional arrangement for antitrust enforcement. The subcommittee aims to publish its report and recommendations in early 2018, with a view to informing and influencing the UK government's position on UK competition policy.

Current cartel regulation and enforcement at the EU and domestic UK levels

The Commission, specifically the Competition Directorate General (DG Comp), and the CMA are the principal competition enforcement agencies in the EU and UK, respectively.

Pursuant to Regulation 1/2003, national competition authorities (NCAs) throughout the EU are fully competent to apply EU competition law. However, the Commission (rather than the CMA) is generally considered to be the most suitable authority to investigate a suspected cartel where:

- the relevant market covers more than three EU member states;
- issues raised by the case are closely linked to other EU rules that may be exclusively or more effectively applied by the Commission;
- a Commission decision is needed to develop EU competition policy; or
- it is more appropriate for the Commission to act to ensure effective enforcement of competition rules.

Cooperation between the Commission and NCAs with respect to cartel matters, among other things, is enhanced through membership of the ECN. The ECN facilitates the communication and coordination of the members of the ECN, to help ensure that EU competition laws are being applied consistently and effectively across the EU. In particular, within the ECN framework, the Commission and NCAs cooperate in relation to competition law enforcement, including cartels, and NCAs are entitled to consult the Commission on the domestic application of EU competition rules. Further, the Commission and NCAs are entitled to exchange, and use as evidence, information – including confidential information – for the purposes of applying articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The ECN also established a model leniency programme, which, although not binding, sets out the key substantive and procedural requirements that every EU member state's leniency programme should have.

For further information regarding EU or UK cartel regulation, see the EU and UK chapters.

Potential models post-Brexit

There continues to be a great deal of uncertainty about the UK's withdrawal from the EU – and, in particular, the trading relationship it will enter into with the EU post-Brexit. While it remains unclear what precise form any 'unique' trading model between the UK and EU will take, there are a number of existing models that provide for varying degrees of integration between the EU and non-EU countries. Two particular alternatives – the Norwegian model and WTO/FTA model (see below) – are illustrative of scenarios under which the UK could remain highly integrated with, or conversely, distinctly separate from, the EU.

Become a member of the European Economic Area (EEA) and of the European Free Trade Association (EFTA), the 'Norwegian model'

The EEA currently consists of the 28 EU member states, as well as Iceland, Liechtenstein and Norway (Switzerland is a member of EFTA but not of the EEA). Under the EEA agreement all EEA countries adopt all EU legislation in agreed policy areas, namely the free movement of goods, services, capital and people. Joining the EEA would mean that the UK would remain subject to the majority of EU legislation, including EU competition law.

World Trade Organisation or free trade agreement model

The UK could choose to trade with the EU market pursuant to World Trade Organisation (WTO) rules, or negotiate a new (bespoke) free trade agreement (FTA). Either model would almost certainly see the UK ceasing to be subject to EU competition law. While it is still too early to draw conclusions about the features of any post-Brexit relationship with the EU, an analysis of how cartel regulation operates under these alternative models provides an insight into the potential extent of the effects of Brexit.

Cartel regulation under the Norwegian, WTO and FTA models

Norwegian model

Under the Norwegian model, UK competition law and cartel regulation would largely remain as it is now. From a legislative perspective, section 60 of the Competition Act 1998 would probably be amended to require the UK courts to interpret UK competition law in accordance with EEA (rather than EU) law. In practice, this would be unlikely to have a significant impact on the way in which UK courts interpret UK competition law, given that the key competition provisions of the EEA Agreement – namely, articles 53 and 54 – mirror articles 101 and 102 TFEU. The EFTA states are, however, subject to the jurisdiction of the EFTA Court, which is required, under the agreement establishing the EFTA Court, to pay due account to the principles laid down by

the relevant rulings of the European Court of Justice (ECJ). Practice has shown that the EFTA Court often refers to ECJ precedents in its judgments.

In terms of enforcement, the CMA would – as is currently the case – continue to deal with antitrust cases that only have effects in the UK. Where a specific case has effects across EU member states and EFTA states, jurisdiction could be assumed by either the Commission, EFTA or the CMA, depending on the specific circumstances of the case.

The EFTA Surveillance Authority (ESA) currently enforces the provisions of the EEA Agreement in Iceland, Liechtenstein and Norway. Article 56 of the EEA Agreement provides for a 'one-stop shop' whereby either the Commission or the ESA will assume jurisdiction in a specific case (although there are various 'cooperation provisions' by which the other authority can still assist with the investigation) as follows:

- The Commission assumes jurisdiction where trade between EU member states is appreciably affected (regardless of the effect on trade between EFTA states). As a result, the Commission typically deals with the majority of cases with an EEA-wide impact.
- The ESA assumes jurisdiction where only trade between:
  - the EFTA states is affected (for example, only trade between Norway and Iceland); or
  - an EFTA state and an EU member state (but not between EU member states) is affected (eg, trade between Norway and Belgium) and the undertakings concerned derive 33 per cent or more of their EEA-wide turnover from the EFTA states.

Under this model it is therefore likely that the Commission would still assume jurisdiction in most of the same cases it does today, given the relatively limited circumstances in which the ESA would assume jurisdiction.

The Commission would continue to have the power to conduct dawn raids of premises located in EU member states, but would be unable to do so in premises located in the UK. Instead, the ESA (as well as the UK authorities) would be able to conduct dawn raids in UK premises. ESA officials undertaking a dawn raid could be joined by CMA officials, at the request of either authority. The Commission would also be able to ask the ESA to carry out dawn raids in the UK related to Commission cartel investigations. As well as the CMA, Commission officials would then also be entitled to attend the dawn raid.

WTO and FTA model

The EU competition rules are effects-based. Businesses would therefore continue to be bound by these competition rules to the extent that their conduct has effects in the EU. As such, businesses would still be potentially subject to enforcement by the Commission and other NCAs. However, as the UK would no longer be an EU or EEA member state, any effects in the UK would be outside the scope of the EU competition rules.

UK competition law would continue to apply to cartel conduct that has effects in the UK. At present, the UK competition rules largely mirror EU competition rules. In the short term at least, it seems unlikely that UK competition law would significantly shift from this position.

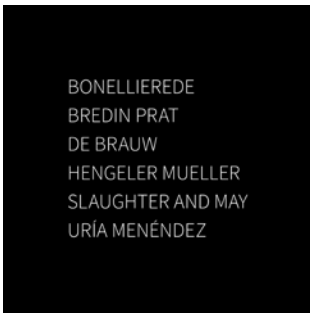
However, in the longer term, UK competition law could diverge from EU competition law. Under a WTO and FTA model, section 60 of the Competition Act 1998, which requires UK competition law to be interpreted in line with EU rules, would likely be repealed. Over time, UK competition law would develop independently of the EU rules, potentially resulting in a divergence between the two.

There would also be a significant shift in enforcement, as businesses would no longer be able to benefit from a 'one-stop shop' for cross-border cases involving the UK and other EU member states. Accordingly, businesses that are active in the EU and UK could face parallel investigations by the Commission and CMA; with the CMA having jurisdiction over a case insofar as the conduct has effects in the UK, and the Commission having jurisdiction insofar as the conduct affects trade between EU and EEA member states.

The risk of parallel investigations is particularly important for potential leniency applicants. Any potential leniency applicant that is subject to both the UK and EU regimes would need to consider lodging applications in both jurisdictions. Parallel investigations may also lead to the CMA and Commission arriving at different, and potentially, inconsistent, outcomes in relation to cartel cases arising from the same set of conduct. This could result in compliance becoming more complicated and difficult for multinational businesses.

From the regulators' perspectives, the WTO and FTA model may also make it significantly harder to gather information for the purposes of cartel investigations. As the CMA would no longer be subject to Regulation 1/2003, nor a member of the ECN, it may be unable to coordinate its cartel investigations, and share information relevant to such investigations, with the Commission (and vice versa). Further, there may be increased difficulties in obtaining information pursuant to compulsory information requests, where the specific business does not have premises located in the jurisdiction of the relevant authority (eg, the Commission may have difficulties in enforcing compliance with an information request in respect of a business where such a business resides in the UK only and has no premises in the EU).

The Commission would be unable to carry out dawn raids of premises located in the UK, nor would it be formally entitled to request that the CMA does so, irrespective of whether documents are available at those premises that are relevant to a Commission investigation.



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Some of these potential difficulties faced by regulators could be mitigated if the EU and UK were to enter into a bilateral cooperation agreement, similar to arrangements that the EU currently has with other non-EU states, such as Canada, Japan and the US. In its submission to the House of Lords EU Internal Market Sub-Committee inquiry on 15 September 2017, the CMA noted that new bilateral or multilateral arrangements will be required and that it will need to maintain a close cooperative relationship with the Commission and EU NCAs so that the post-Brexit arrangements are mutually beneficial for all parties. However, it is unclear whether any such cooperation agreements will facilitate the same kind of information-sharing and cooperation as is currently the case between the CMA and Commission through the ECN.

Other potential issues

Following Brexit, there are specific jurisdictional issues that are likely to arise. In respect of investigations that are already under way, or which involve historic (pre-Brexit) conduct, there will be questions as to which authority is best placed to investigate and enforce competition law. As noted above, the House of Lords EU Internal Market Sub-Committee is expected to report on these issues in early 2018.

Correspondence between a company and its EEA-outside counsel relating to the company's rights of defence in the context of a cartel investigation is covered by legal professional privilege under current EU rules and is protected from disclosure to the Commission. According to case law of the European courts, this privilege currently only applies to external counsel who are qualified to practise within the EEA (so would not apply, for example, to counsel who are only qualified to practise in the US). Upon exit of the UK, in the absence of an agreement between the EU and UK on acquired rights, this privilege may also no longer apply to counsel who are only qualified to practise in the UK (ie, as a solicitor, barrister or advocate in England and Wales, Scotland or Northern Ireland).

Owing to their significant experience with follow-on litigation and their rules on disclosure and limitation periods, UK courts – in particular the High Court and the UK's specialist competition judicial body, the Competition Appeals Tribunal (CAT) – have so far been a favourite place to bring actions for cartel damages in Europe. Whether this will still be the case after Brexit remains to be seen; particularly given the uncertainty regarding the enforceability of Commission decisions in UK courts post-Brexit. The EU Damages Directives aims at harmonising follow-on litigation by adding some features of the UK's regime, such as disclosure rules, to the legal order of other member states. Against this background, Brexit could encourage some claimants to shift cartel damage claims from UK courts to other increasingly important continental fora such as, for example, Germany or the Netherlands. The Department of Business, Energy and Industrial Strategy confirmed in December 2016 that the UK would take a 'light-touch' approach to implementation of the Damages Directive.

Conclusion

There is a great deal of uncertainty regarding what the trading relationship between the EU and UK will look like post-Brexit. Depending on the ultimate form of a post-Brexit EU and UK trading relationship, there may (or may not) be significant changes to cartel regulation and enforcement. As such, the post-Brexit developments will remain of high interest to businesses, legal practitioners and competition regulators alike.

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