The future of competition litigation in the UK

January 2018

The UK's competition law regime is intricately bound up with its membership of the EU. In this briefing, we consider what Brexit is likely to mean for potential claimants wishing to use the English courts to seek redress for losses suffered as a result of European cross-border cartels.

Although significant uncertainty remains as to the form in which Brexit will be implemented, and the scope of any transitional arrangements, we set out below our current thoughts on the potential future legal bases for standalone claims as well as follow-on damages actions based on infringement decisions issued by the European Commission. In each case, we do not anticipate a "cliff-edge" or sudden alteration in the long-standing willingness of the English courts to hear cases that are governed by or concerned with EU law.

Current law and practice

Anti-competitive agreements are prohibited at an EU level by Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**"). Chapter I of the UK Competition Act 1998 ("**CA98**") creates a free-standing but substantively identical prohibition in UK law, insofar as the infringing conduct may affect trade within the UK.

At the moment:

- Most standalone damages claims brought in England for infringement of the cartel prohibition are pleaded as a breach of the statutory duty to comply with Article 101. Because Article 101 applies across the EU, the same cause of action is sufficient to encompass damage suffered in the UK and any other EU Member State.

- Where the Commission has issued a decision to the effect that Article 101 has been infringed, that decision can form the basis of a "follow-on" claim for damages (i.e. a claim that relies on the authority's decision as proof of the infringement) in the Competition Appeal Tribunal (the "**CAT**") (pursuant to section 47A, CA98) or the High Court (on the basis of the tort of breach of statutory duty).

After exit day, the TFEU (and thus Article 101) will cease to apply to the UK. Will this mean an end to claims in the English courts which seek redress for pan-European cartel infringements? For the reasons set out below, we think not - although the legal formulation of such claims may change, particularly in the longer term.

Causes of action which accrue pre-exit-day[1]

Until exit day, the current legal regime will remain unchanged. So where a cartel is producing effects now, before exit day, those affected can seek redress for losses suffered in the EU (including the UK) in reliance on Article 101. Decisions issued by the Commission between now and exit day will continue to be actionable in the English courts in accordance with the CA98.

It should not matter if claims relating to pre-exit losses (whether standalone or following on from pre-exit Commission decisions) are not actually commenced until after exit day. This is because the law applicable to those claims will almost certainly be the law as it stood at the time the damage was suffered. Although in theory the law could be changed to prevent the bringing of such claims, we do not consider this to be a realistic prospect:

- It would run contrary to the UK Government's commitment to post-Brexit legal certainty, as well as the scheme of the legislation that the Government has proposed to implement Brexit (considered further below).

- Moreover, the principle of non-retrospectivity (i.e. that the applicable law affecting any person should not be changed in respect of past events) is a basic and important underlying principle of English law. It is therefore unlikely that the UK Government would retrospectively alter these existing rights by requiring that courts treat pre-Brexit Commission decisions as non-binding.

- Any such retrospective legislation could well place the UK in breach of its obligations under the European Convention on Human Rights (which the UK is not leaving)[2].

As the substantive law applicable to claims relating to pre-Brexit conduct will be the EU competition law regime that applied at the time the damage was suffered, there are similarly good reasons why Commission decisions in respect of such conduct which post-date exit day should continue to be actionable in England. The UK Government has strong incentives to ensure that there is no (private) enforcement gap in relation to pre-Brexit conduct affecting the UK, and this issue ought therefore to be addressed in any withdrawal agreement. The key issues that will need to be decided in this context are: (i) whether the Commission or the UK Competition and Markets Authority (the "**CMA**") will lead investigations into such conduct (or whether they could be conducted jointly); and (ii) what status Commission decisions will enjoy in the English courts (e.g. whether they will be binding or treated as *prima facie* evidence of an infringement)[3].

[1] In competition claims, the cause of action will normally accrue at the point at which the loss was suffered.

[2] Article 1 of Protocol 1 to the ECHR protects the peaceful enjoyment of property; that includes protection against the arbitrary or unlawful deprivation of legal causes of action. Article 1 has previously been relied upon to contest retrospective legislation which alters crystallised rights of action.

[3] Currently, under section 58A CA98, the CAT and High Court are bound by a Commission decision once it becomes final, and this forms the basis of a follow-on claim. In the CAT's response to a call for evidence in relation to the EU Internal Market Sub-Committee's inquiry concerning Brexit and competition law and policy (published on 17 November 2017), the CAT noted that if section 58A is not retained, then a defendant to a claim for compensation would be able to argue that the Commission decision was wrong. The CAT noted that this would be likely to increase significantly the burden on claimants and potentially deter many claimants from seeking compensation.

Causes of action which accrue post-exit day – a transitional arrangement?

In a "hard Brexit" scenario where a cause of action accrues after exit day – in other words, at a time when the TFEU will no longer apply to the UK at treaty level – there are means by which Article 101 is likely nevertheless to produce legal effects in the UK, at least in the short term.

This is because the substance of Article 101 is reflected in current UK legislation. The UK Government's desire to ensure legal stability and continuity means this legislation may well continue to apply in the immediate aftermath of exit day. The Government's European Union (Withdrawal) Bill (the "**Withdrawal Bill**") would (if enacted by Parliament in its current form) domesticate directly applicable EU law (for instance Regulation 1/2003, which implements procedures at an EU and Member State level for the enforcement of Article 101) and preserve UK law which gives effect to EU legal obligations (for instance, certain provisions of the CA98, including section 47A which creates a statutory cause of action for breach of Article 101).

The aim of the Withdrawal Bill is to ensure legal continuity at the moment of Brexit. But because many of these preserved EU or EU-derived laws will no longer function correctly or be necessary or appropriate post-Brexit, the Withdrawal Bill also gives the Government broad powers to amend the preserved law. Immediately after exit day, there may well be good reasons to keep the preserved law substantively as it is; for example, by retaining the existing legislative framework to deal with infringing conduct which straddles pre- and post-exit periods, while consulting on any future changes.

This retained law could become the basis for a more formal transitional regime in respect of losses suffered in both the UK and the EU27 (whether by agreement with the EU27 or unilaterally). The UK could adopt unilateral solutions which would preserve the rights of those affected by anti-competitive conduct, but there are good reasons for some form of protocol to be agreed. The effects of such transitional arrangements could last for years, given that there is very often a long period of time between infringing conduct taking place and the filing of claims.

The longer-term picture

In the longer term, there are good reasons to think that Article 101 will lose its foothold in UK domestic law. Some would question the legitimacy of a UK legal provision which relates solely to conduct outside its jurisdiction, in the EU27. But there are already instances of UK laws which seek to regulate conduct overseas; the Bribery Act 2010 is a notable example. The more fundamental objection to a long-term place for Article 101 in UK law is the possibility of divergence over time between UK and EU law: the version of Article 101 preserved in the UK will be a snapshot of a moment in time; unplugged from the EU legal order, a UK version of Article 101 will almost inevitably become different from the version applicable in the EU27, shaped by the future decisions of the European Court. That is likely to be the case even in the absence of any conscious policy changes in the UK.

However, even if Article 101 ceased to be a part of UK law, there is no principled reason why the English courts could not apply Article 101 as an instance of the law of one of the remaining EU Member States: claims based on the substantive law of another state are very commonly litigated in England.

Where the English court is required to decide which country's laws apply to a dispute, and the damage at issue occurred after 11 January 2009, it applies an EU regulation called the Rome II Regulation. Article 6 of Rome II states that the law applicable to a restriction of competition is the law of the country where the market is affected. The rules in Rome II will almost certainly continue to be applied by the English

courts after exit day (because they will be domesticated by the Withdrawal Bill).

The net effect is that where a claimant suffers harm both in the UK and the EU and wishes to bring proceedings in the English courts, it may need to claim for: (i) UK losses in reliance on the CA98; and (ii) EU losses by invoking Article 101, pleading a breach of a foreign statutory tort.

Post-Brexit, defendant lawyers will therefore likely need to focus on the viability of foreign law competition law claims. Given the additional complexity that will be involved in pleading and proving a breach of a foreign law, it is possible that certain claimants will decide to bring claims in other Member State courts instead, where they will be able to plead breach of Article 101 as a matter of national law. However, if the English courts adopt a flexible approach to claims based on breach of a foreign statutory tort, there should be no material impediment to bringing claims for loss in the English courts, in much the same way as they do at present (provided always that jurisdiction can be established). Moreover, the key features of the English competition damages regime which have long been considered as advantageous to claimants seeking to commence claims (including favourable disclosure rules, the depth of expertise of the legal and expert economist market as well as the judiciary, and the presence of litigation funders), may well outweigh any potential downside of having to plead and prove a breach of litigation funders), may well outweigh any potential downside of having to plead and prove a breach of foreign law.

This article was written by William Turtle and Camilla Sanger.

If you have any queries on this Briefing or if you would like to discuss any aspect of competition litigation in the UK, please contact William Turtle, Camilla Sanger or your usual Slaughter and May contact. Further publications are available on our website.

William Turtle
T +44 (0)20 7090 3990
E william.turtle@slaughterandmay.com

Camilla Sanger
T +44 (0)20 7090 4295
E camilla.sanger@slaughterandmay.com