

Kluwer Competition Law Blog

What will cartel enforcement look like post-Brexit?

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The result is in. The United Kingdom will leave the European Union, with profound economic, social, and, naturally, legal consequences. As the dust settles, lawyers practising across a wide range of specialisms will be squinting into their crystal balls to identify what the consequences of Brexit will be across the disciplines that are now matters of competence for European law, but soon will not be.

What competition law would look like in this new legal order, and what this in turn would mean for cartel enforcement, played no part in the referendum debate. Until now, the UK has been required to model its domestic laws on the prohibitions on anti-competitive agreements, as well as abuse of dominance, and has largely adopted the administrative system of competition law enforcement that the European Commission has deployed so effectively against cartels. Only in its criminalising of individuals for cartel conduct has the UK stood out from many of its EU neighbours. A key question now is the extent that Brexit result in any meaningful change in cartel enforcement in the UK.

The answer to this question will depend on what approach the UK and its European neighbours are able to agree to in relation to the UK's continuing membership of the single market.

There is the much touted Norwegian approach. Here, the UK would remain a member of the European Economic Area, and re-join the European Free Trade Association (EFTA) remaining a member of the European Economic Area (EEA). Alongside Norway, this is the position adopted by Iceland and by Lichtenstein. This option is unlikely to result in any marked changes to competition law enforcement in the UK, in relation to cartels. The EEA agreement replicates the competition law provisions that are applicable to EU member states, and to which the UK is presently subject. In cross-border cases, where the cartel operates in both EU and EFTA states, the European Commission would retain jurisdiction in exactly the same manner as it does at present. In the event that the cartel was limited exclusively to EFTA states, the EFTA Surveillance Authority would have jurisdiction to investigate.

The second alternative model is the Swiss system, with the UK / EU relationship governed by a number of bilateral treaties. This arrangement, which has been widely

criticised as being unwieldy, only touches on competition law in one area - that of commercial passenger flight. Otherwise, competition matters are exclusively the province of the Swiss competition authority.

Given that the EEA / EFTA route would require capital contributions to the EU budget, and most probably a free movement of workers requirement, it remains to be seen whether this would be palatable to those that advocated Brexit, and bilateral agreements are likely to present their own political obstacles (particularly where the Swiss model is acknowledged as not a resounding success). This makes the final option a distinct possibility; a legal uncoupling, with the UK's trading with the EU predicated on a bilateral trade agreement of some kind, or in line with the World Trade Organisation's rules.

Whilst nothing can be guaranteed, legal detachment may not immediately produce a paradigm shift in the substantive law applicable to cartel enforcement. The prohibitions on anti-competitive agreements in chapter I of the Competition Act 1998 would remain, as would the criminal cartel offence. Over time, no longer subject to the jurisdiction of the EU courts in competition cases, UK judges would be free to develop applicable legal principles in divergence from European law.

Far more significant would be the jurisdictional and procedural reforms that are an inevitable consequence of that detachment:

- The UK would no longer be a member of the European Competition Network.
- Undertakings suspected of anticompetitive conduct in the UK market would not be able to participate in the ECN "one stop" leniency scheme, adding an additional layer of both risk and cost for undertakings considering disclosing an existence of a cartel.
- The investigative and information sharing powers which are, at present, split between the UK competition authorities, principally the Competition and Markets Authority, and the Commission would become invalid - no longer would the Commission enjoy investigative powers exercisable in the UK.
- New mutual legal assistance agreements would need to be struck, and whilst there are precedents, the terms of those agreements are difficult to foresee and would take time (the Swiss/Commission agreement took years to negotiate).

Critically, Regulation 1/2003 - which requires national competition authorities to cede jurisdiction to the Commission in Brussels in multijurisdictional cartel matters - would no longer hold weight. The CMA and other UK sectoral regulators would now be empowered to investigate those cartels impacting on inter-member state trade.

What does this mean in practice? Put simply, UK competition agencies would have the opportunity to investigate many more alleged cartels. Figures from the Commission website tell us that as at December 2015, over the past decade the Commission has dealt with 297 cases, the UK 81. Given the size and importance of the UK economy within the EU - second only to Germany in terms of gross domestic product - and if past experience is anything to go by, it is fair to infer that the UK could found jurisdiction in many of these cases

Clearly this would complicate the legal and regulatory landscape for business. However, for the CMA and other competition regulators, this could present a welcome opportunity. One of the criticisms directed against the CMA, most recently in the National Audit Office report, is that its enforcement record scores poorly in terms of activity. Yet, having torn up Regulation 1/2003, suddenly the UK competition authorities would be presented with a new workstream of complex, multi-jurisdictional cartel cases to investigate. If properly resourced to take on this challenge, Brexit could, perhaps, be the making of the CMA.

Brexit could also present an opportunity for a wholesale reimagining of competition law enforcement to a more 'Anglo-Saxon', prosecutorial model. With a greater number of cartels to investigate, the CMA could put the recently amended cartel offence to better use, focusing on individual liability as the primary enforcement mechanism, in place of simply imposing substantial administrative fines on undertakings in the manner of the Commission. The UK could even move towards the US model of criminalising corporates for cartel conduct - after all, the US Department of Justice anti-trust division is the most successful competition regulator in the world.

Amidst the anxiety and uncertainty, Brexit offers the possibility of reinvigoration and renewal of cartel investigations in the UK, through a greater number of investigations, and both procedural and substantive law reform. Whether this opportunity will be grasped, only time will tell.

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