Kluwer Competition Law Blog

UK Competition Law Enforcement Post-Brexit: Choppy Waters Ahead

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CMA Brexit Draft Guidance

On 28 January 2019 the UK Competition and Markets Authority ('CMA') issued draft guidance on the effects of any no-deal Brexit on the CMA's functions and its enforcement approach. This guidance has been made more urgent by the continuing UK political divisions that have plagued the Brexit process and which could see the UK crash out of the EU without any deal in place on 29 March 2019.

In past speeches by CMA officials and other public announcements, the CMA seemed to suggest that any regulatory drift from the EU model was likely to be slow. However, the recent CMA draft guidance makes clear that there is a far greater potential for a significant regulatory shift in UK competition law enforcement. It strongly hints that the CMA will have to adapt its practices and policies in a potentially more wide-ranging and fast-moving fashion.

The CMA guidance and relevant UK legislation provide a roadmap for businesses seeking to determine their competition law options post-Brexit. Companies may benefit from future policy shifts, resource challenges confronting the CMA and procedural changes, but may also be threatened by regulatory uncertainty and a double regulatory burden, with policies in the UK diverging from those of the EU.

In this brief summary we set out our views on the messages to be derived from the CMA guidance and the existing and proposed UK legislative framework.

UK Legislative Background

The CMA guidance builds on earlier measures introduced in anticipation of the UK's exit from the EU, including the UK Withdrawal Act 2018 and related proposed secondary legislation (including the Competition (Amendment etc.) (EU Exit) Regulations 2019). These legislative changes adapt existing UK competition law to a post-Brexit landscape, with EU law no longer shaping the contours of UK law or its enforcement with the same impact that it has had pre-Brexit.

Existing elements of UK competition law have been strongly moulded around that of the EU. For instance Chapters I and II of the Competition Act 1998 prohibit anti-competitive agreements and

any abuse of dominance and do so in terms largely identical to that of Articles 101 and 102 of the Treaty on the Functioning of the EU (save as to geographic scope). Section 60 of the 1998 Act has required interpretive conformity with EU law when UK competition law has been applied in the past. The UK competition law regime also relies on EU 'block exemptions' in excluding certain restraints from the application of UK competition law, as well as that of the EU.

On the other hand, the existing provisions of UK law dealing with those mergers falling within the UK regime, sector inquiries and the criminalization of cartel activity (found in the Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013) do not fully echo the EU model. The Company Directors Disqualification Act 1985 enables the UK courts to disqualify those who have breached UK competition law (or EU competition law where that breach has an effect on the UK market) from holding board positions for significant periods of time.

UK Competition Law Post-Brexit

Following the UK's exit, UK competition law will have to be considered in the light of the UK's withdrawal legislation that either airbrushes out references to EU measures, or retains some, such as EU block exemption regulations, but amended to reflect their narrower UK-related scope. Post-Brexit, even retained EU law can be modified by UK government ministers through secondary legislation under the Withdrawal Act 2018.

After the UK's exit from the EU, EU Court of Justice jurisprudence will no longer enjoy supremacy and post-Brexit decisions of the EU Commission will cease to be grounds on which a claimant might rely in bringing UK competition law infringement proceedings in the UK courts. Follow-on actions may thus be more limited in the UK in the future. The UK courts will have a far greater say in the development of UK competition law and may adopt a more economic approach, possibly seeking more closely reasoned decisions from the CMA, which will have to expend resources defending its decisions before the UK judiciary in a potentially shifting legal landscape.

Resource Issues

When Brexit occurs, the CMA's regulatory cooperation with the EU Commission and the national competition authorities of the 27 EU Member States will be fractured. Thus the CMA will cease to be able to rely on the EU Commission or other EU27 competition authorities shouldering some of the workload, whilst at the same time it will have an expanded remit and bigger caseload (especially in relation to mergers) and also be constrained by a relatively limited budget.

Bigger fish?

Past CMA enforcement activity has often involved easy catches and taking prohibition decisions by making extensive use of the 'by object' categorization (similar to the '*per se*' standard under US antitrust law) to a wide range of presumptively anticompetitive practices. For example, when a business faced proceedings in relation to such presumptively harmful vertical restraints (e.g. resale price maintenance, minimum advertised prices or restraints on passive sales cross-border), it was

relatively defenceless and, irrespective of actual effects, usually sought to settle the case early in order to minimize the level of fines.

This approach enabled the CMA to overcome its lack of resources and notch up 'easy wins'. The CMA guidance acknowledges that, post-Brexit, the goal of achieving an integrated EU market will no longer apply in UK competition law. It is this goal that has underpinned to a considerable degree the existing 'by object' approach and reliance on EU jurisprudence. The disappearance of the internal market integration imperative post-Brexit could pave the way for the narrowing of the '*per se*' categorization of these vertical restrictions and force the CMA to (a) devote more resources to bolster those cases it does take and (b) trawl the waters of commerce for bigger and more threatening fish to catch, e.g. cartels and abuse of dominance cases.

UK Merger Control – The Catch

The CMA is likely to have a far heavier case load in the context of merger control. The UK notification system is a voluntary one, where filing fees are applicable. The UK merger regime will net a greater range of mergers than are currently captured by the EU Merger Regulation, with its higher threshold test based on significant revenues. Post-Brexit, the CMA will no longer be prevented from investigating UK-related mergers that would previously have fallen under the EU Merger Regulation.

The CMA has often tracked the EU Commission's analytical approach to mergers. However, a UK merger may, when viewed on a national basis, appear to raise different issues than those perceived to exist at a pan-European level when evaluated by the EU Commission. Thus, if a merger triggers UK merger thresholds and is investigated (either through voluntary notification or CMA intervention in relation a non-notified but qualifying merger), there is the risk of increased cost, additional management resource and potentially divergent UK and EU merger decisions.

A New Course

Historically, the CMA has said that its approach will remain aligned with that of the EU. However, the legislative anchorage necessary to ensure that this practice of alignment continues will be removed. With this legal linkage gone, the CMA may be driven by English jurisprudence to follow a different course, perhaps one based on greater economic analysis, thus making its enforcement role more arduous and exacting. Conversely, a changing political environment could drive it to take into account a broader range of industrial or social policy goals.

Post-Brexit, the CMA is undoubtedly likely to be subject to greater UK political and judicial cross-currents and, as the CMA guidance notes, neither it nor the UK courts will be required to act "with a view to securing consistency" with EU principles post-Brexit. The scene for this departure is set by the amending provisions of Section 60A Competition Act 1998 (proposed by the draft 2019 Regulations). This cuts the UK adrift from future principles laid down by the EU Court of Justice and allows for the introduction of divergences in approach in UK law based on UK market differences and "generally accepted concepts of competition law analysis".

Navigating turbulent and congested national waters could prove to be more difficult than deep

seas. To paraphrase Chief Martin Brody in the film ‘Jaws’, perhaps the CMA is going to need a bigger boat.

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