

# IMPACT OF BREXIT ON UK COMPETITION LAW: PLUS ÇA CHANGE...?

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This article considers what the key implications may be for public and private enforcement of UK competition law if the UK leaves the EU.

Anneli Howard, Monckton Chambers

Since the original Treaty of Rome, the completion of an internal market free from distorted competition has been one of the flagship policies of the European project. The UK has contributed to the dissemination of a “competition culture”, not just in the UK but also more broadly within the EU, through its proactive and pragmatic advances in competition law. If the UK votes “out” on 23 June, where will this leave the UK in terms of public and private enforcement?

## SUBSTANTIVE LAW

In practical terms, there will be no immediate “fall-out” from the UK’s withdrawal from the EU. Article 50 of the Treaty on the European Union (TEU) provides for a two-year transitional period, which can be extended by consent. In any event, the Chapter I and II prohibitions in the Competition Act 1998 (1998 Act) are modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), so there will be little substantive change in the short term.

Many of the concepts underpinning the application of those provisions have been transplanted from the EU regime, so UK competition law will continue as before. Directive 2014/104 on actions for damages for breach of competition law (the Damages Directive), due to be implemented on 27 December 2016, will still be implemented, and its provisions will take effect through the domestic legislation in the form of amendments to primary and secondary legislation.

So it is just a case of *plus ça change, plus c’est la même chose*.... Or is it?

Interesting questions arise as to whether section 60 of the 1998 Act will continue to apply. Section 60 provides that any questions relating to competition within the UK are to be dealt in a manner which is consistent with the treatment of corresponding questions in EU law. Section 60(2) provides that an English court must ensure that there is no inconsistency between the principles that it applies under the 1998 Act and the principles laid down in the Treaty and any case law of the Court of Justice of the European Union (CJEU). The court must also have regard to any decisions or statements of the European Commission (the Commission).

If the UK decides to withdraw from the EU, then arguably an English court may determine that it is no longer under any obligation, either under Article 4(3) of the TEU or under its duty of sincere co-operation, to ensure consistency between national competition law and EU competition law. This means that, over time, there may be a gradual divergence between CJEU case law and Commission practice, on the one hand, and Competition and Market Authority (CMA) decisions and English case law on the other.

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While it is likely that an English court will still have regard to developments that are ongoing in the EU, the status of any CJEU rulings or Commission decisions will be relegated to persuasive rather than binding authority. It may also mean that there may be a “gradual drift” if our national courts start to pay more regard to developments in the US or in other countries such as Australia, Singapore or China as a source of inspiration for the development of competition law in future.

In practical terms, the risks of divergence may not be so great. However, there are well-known precedents in EU competition law which are founded more on the policy of achieving the internal market rather than pure competition law considerations. For instance, the jurisprudence relating to vertical restraints over parallel imports or e-commerce has more to do with creating a single market than economic efficiencies. Similarly, the case law on a dominant company’s ability to impose fidelity rebates is not so much underpinned by economic rationale but by the Commission’s theory of harm which is very different to US policy. It may be that, over time, English courts start to align UK law with policy considerations in the US.

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### PUBLIC ENFORCEMENT

The impact of Brexit on public enforcement will very much depend on the model that is used for the UK’s future engagement with the EU. If the UK were to become a member of the European Free Trade Association (EFTA) (like Norway and Iceland), public enforcement would be conducted by the Surveillance Authority rather than the Commission with an appeal to the EFTA court. In essence, the prohibitions and practice and procedure would remain the same.

If Brexit means complete exit, then the UK would no longer form part of the European Competition Network (ECN) and Regulation 1/2003 would no longer be of direct application in the UK. This in turn would mean that the CMA and other sectoral regulators in the UK would no longer be able to liaise and co-ordinate with their counterparts in the 27 other member states. In practical terms, they would negotiate a Memorandum of Understanding in a similar way to the ones negotiated between the Commission and the Department of Justice in the US or other anti-trust authorities around the world. That would provide for exchange of information and mutual assistance between regulators but would not necessarily provide the same degree of protections for undertakings caught up in any allegations of alleged competitive behaviour.

It is quite clear that as a result of the extra territoriality of EU competition law, any businesses in the UK would still be liable for any infringements of EU competition law that affect the EU market, so UK companies would be in no different position to US or Asian companies that have been the subject of cartel investigations under Article 101 of the TFEU or, like Microsoft and Google, abuse allegations under Article 102 of the TFEU.

However, in terms of practical enforcement, there would be no clear guidelines for the assumption of jurisdiction. This means that, while the undertakings may be subject to investigation by the Commission, they would still remain a target for a separate investigation by the UK authorities. That duplication of cost and resource would be a heavy burden for any company.

Similarly, there would be no real certainty for leniency applicants as the Commission’s Notice on Co-operation between national competition authorities (NCAs) would no longer apply. In practical terms, a leniency applicant would have to make duplicate applications to the UK authorities as well as to the Commission and/or other authorities in the EU and around the world. Although the practical cost of duplicating a leniency application is not extensive by itself, the subsequent engagement and dialogue with multiple regulators would be a drain on resources.

As any leniency adviser knows, the real risk is not so much in making the application but in what happens subsequently to the information provided. The Commission’s Co-operation Notice and the provisions of Regulation 1/2003 and the new Damages Directive (2014/104/EU) provide extensive protections for leniency materials to prevent their disclosure to other NCAs which do not have a sufficient degree of protection and/or their subsequent disclosure and admissibility as evidence in court.

In their absence, it is hoped that the UK would manage to negotiate procedural safeguards that are equivalent, but there is no guarantee of that. That would increase the risk of a leniency applicant’s materials being disclosed to other regulators, whether in the EU or elsewhere, which might expose the company to further investigations and

infringement findings, with the risk of double fines. Any findings of infringement would provide material for fresh follow-on damages actions, which in the US attract treble damages.

There is also the risk that disclosure of leniency material could expose individuals to criminal prosecution in the UK, Ireland or the US. Legal uncertainties regarding these issues could be expected to have a dampening effect on leniency applications from companies in the UK, which might then reduce the number of cartels that are detected and enforced by the competition authorities.

Regulation 1/2003 also provides for extensive co-operation between the NCAs and the Commission in terms of co-ordinating warrant applications, dawn raids and investigations. Technically, the CMA and sectorial regulators in the UK would no longer be bound by any obligation of sincere co-operation, whether as a general principle or under Regulation 1/2003. This means that they would not have to defer to the exercise of authority by the Commission or by another NCA and be required to stay or renounce their domestic investigations.

Similarly, an English court, faced with domestic proceedings, would not necessarily have to stay its proceedings to avoid making a ruling that might run counter to a decision issued or in contemplation by the Commission, nor would a national court have to stay proceedings pending any appeal by the defendants to the European courts.

The absence of such co-ordination measures could result in a proliferation of investigations and concurrent court proceedings in relation to the same conduct in both the UK and across the EU, resulting in further expense and uncertainty for the companies involved.

The risk of double jeopardy is not fanciful. Although the companies may be able to raise *ne bis in idem* arguments against being prosecuted twice for the same conduct, the European courts have taken a very narrow view of what constitutes the same interest, and there is no guarantee that the accused companies would be able to successfully prevent multiple investigations and duplicate findings. For example, in the Visa Interchange proceedings, Visa Europe was investigated by the Commission in 2007 at the same time as being investigated by the Office of Fair Trading (OFT) in the UK. In that case, the OFT refused to relinquish its investigation on the basis that its investigation related to the UK domestic rate, rather than the cross-border rate.

The situation becomes all the more complicated when you take account of the wider scope of UK competition law such as the market investigation regime under the Enterprise Act 2002 and sectorial regulatory powers. For instance, a sectoral regulator may start to investigate the same conduct under its regulatory powers which is the subject of a concurrent anti-trust investigation by the Commission. For example, in *Telecom Polska*, the Polish incumbent telecoms operator was investigated and fined by the domestic regulator, the Office of Electronic Communications, at the same time as the Commission was investigating the same alleged conduct under Article 102 of the TFEU. *Telecom Polska* was indicted to pay two separate fines, one at national level and one at European level.

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## PRIVATE ENFORCEMENT

The UK has its own well-established private damages regime, which is far more extensive than that at EU level, as it also covers opt-in and opt-out collective actions under the new Consumer Rights Act 2015. In many ways, the UK regime is more advanced than the EU regime (especially in terms of disclosure and specialist tribunals). Most of the initiatives introduced in the Damages Directive were modelled on the UK regime anyway, those provisions will be implemented into the UK regime and, what is more, are likely to be “gold plated” so that they are equally applicable to EU infringements as well as to UK infringements.

So Brexit alone is unlikely to dampen the recent enthusiasm for competition damages litigation.

However, there may be a “softer” impact of Brexit on the general appetite and confidence for bringing competition law damages in the UK. The recent upsurge in damages actions has largely been the result of an injection of funding for follow-on claims, where funders have been willing to commit because of the legal certainty provided as a result of the binding nature of Commission decisions. After Brexit, such decisions are likely to carry less weight in the UK regime. Their precise influence will depend on the Brexit model: if there is a complete exit where the UK relies on a

bilateral free trade agreement or the WTO (World Trade Organisation), then Commission decisions may have some persuasive authority, but the exact scope and weight will be up to the national judge.

The judge will be free to depart from the Commission's findings and economic analysis and may substitute his own assessment of the evidence before him and his own interpretation of the law. If section 60 of the 1998 Act were repealed or national judges chose to depart from Commission decisions, then it can be expected that follow-on litigation in the UK will shrink.

Follow-on litigation will become much more "parochial" as the scope of damages actions will be limited to regional or national findings of infringement by the CMA or the sectoral regulators or possibly those within EFTA. Whilst it remains open for claimants to bring standalone actions, and there may be some room for claimants to rely on a Commission decision against non-addressees in the UK and ask the national courts to extrapolate the Commission's findings to facts beyond the scope of the decision, there is no guarantee that the national courts would do that.

The increased complexities and uncertainties may not give claimants and funders the comfort that they would require to commit to litigation in the UK opposed to Germany or the Netherlands. A shift in the costs-to-risk ratio could undermine funding incentives, with particular impact on the nascent development of opt-in and opt-out collective actions. It would be a real shame if the specialist Competition Appeal Tribunal (CAT) with its new powers and highly geared expertise were deprived of the oxygen and momentum provided by litigation funding for the fledgling development of collective actions.

The Brussels I Regulation would no longer have direct applicability in the UK post Brexit, which means that there would be a lacuna in the co-ordination of parallel litigation proceedings across the EU. The Regulation has not been implemented directly into national UK law so the rules governing jurisdiction and *lis alibi pendens* would no longer apply.

The UK used to have a well-developed system of private international law in the common law, or it could conceivably adopt the previous rules in the Brussels or Lugano Conventions. However, even relatively small divergences create opportunities for forum shopping, as procedural differences (such as limitation or the extent of disclosure) can make a substantial difference to the outcome of a trial.

The UK is currently enjoying a pre-eminent position as "one-stop shop" for private competition law damages, attracting claimants from all over Europe suing defendants from all over the world simply by finding an "anchor defendant" in the UK. If there are no clear jurisdiction rules, which co-ordinate with the other EU member states, then there will be an increasing amount of jurisdiction challenges and concurrent related proceedings, increasing litigation cost and uncertainty. Further, the hallmark judgment from the UK courts may not be as easily recognised and enforced in the other 27 member states, which would compromise the attractiveness of litigating in the UK.

Lastly, the UK courts would no longer qualify as a "court" for the purposes of the Article 267 of the TFEU preliminary reference procedure. This means that UK litigants would no longer be able to challenge the validity of Commission decisions by bringing domestic proceedings or refer questions regarding the interpretation and application of the provisions of the Damages Directive to the CJEU. The UK government would no longer have the automatic right to intervene in preliminary references from courts in the other member states. That means that the UK's influence in shaping the practice and procedure in Europe would be lost.

The whole aim of the Damages Directive is to encourage competition damage claims, by alleviating the legal and evidential burdens on claimants via increased access to information and the introduction of presumptions of harm and pragmatic estimates for quantum and pass-on. The resulting divergences between the UK and the rest of the EU in the long term might start to unpick some of the vital toolkit that claimants need to start and pursue their claims. If the UK becomes an "outlier" where claimants cannot take the same advantage of those initiatives, the attractiveness of the UK as an international forum for competition law damages may be somewhat reduced.

This is not a simple case of *plus ça change* as a river never runs twice. Although the stream of competition law would look very similar, the ebbs and flows of competition litigation would feel very different.

*Anneli Howard, MA, BCL is a Barrister at Monckton Chambers.*