



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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CLA Afternoon Seminar: Implications of Brexit

Date: Monday 20 January 2020
Venue: Herbert Smith Freehills LLP, London

Public Enforcement Panel – 15:30 to 16:20

Speakers: Ann Pope and Cameron Firth

While exit day is on 31 January 2020, the transition period lasts until 31 December 2020 during which time the CMA is still bound by Regulation 1/2003. From exit day the UK loses the automatic right to attend European Commission meetings although the CMA still expects to attend meetings by invitation as appropriate.

From 1 January 2021, the CMA acquires jurisdiction for cases it is currently unable to take. The EC will retain jurisdiction over historical conduct if it formally initiated proceedings in a matter before the end of the transition period and any decision reached by the EC in such a matter will be binding in the UK. However, if the EC has not formally initiated proceedings by that date, even if it has an open case, then the CMA has jurisdiction.

Under the withdrawal legislation, the UK Supreme Court may decide to depart from EU case law; however there is a question whether lower courts, such as the CAT, or even the CMA may be granted this right in certain circumstances. We do not yet know if there will be a new s60a as proposed under the no deal arrangements.

The CMA is engaging with the government and intends to issue guidance on the implications of the UK's exit for competition law.

Enforcement priorities for 2020 and beyond

- The key areas where clients are asking queries: free movement of goods and supply chain considerations, compliance programmes, trade association discussions and the scope for parallel trade restrictions.
- The BA/AA JV was previously investigated by the EC pre-2010 with commitments given in 2010 on a 10-year basis. In 2018, the CMA opened an investigation due to the possible future effect on UK markets. This is seen as the first and only CMA "Brexit case" to date. The CMA felt comfortable it was not conducting a parallel investigation, as did the EC.
- The CMA will continue to apply its usual prioritisation criteria with the key priority to protect the interests of UK consumers and ensure there will be no enforcement gap in the UK.
- CMA cases may be expected in areas such as the digital sphere and the financial services sector. The CMA is currently conducting more Phase II merger investigations than previously and expects to carry out up to an additional five or six antitrust investigations each year.
- Current exemptions in the EU are being brought into UK law and are expected to be a key part of the UK regime going forward, but they may be replaced by UK block exemptions.

An enhanced role for concurrency, in a post-Brexit world?

There are expected to be additional cases in the UK, in light of Brexit-related factors and expanded jurisdiction, which involve regulated sectors (such as airports or financial services) and so it is likely there will

be an increase in concurrency. The CMA will apply its normal allocation process to any future cases - some may be undertaken by the CMA and others by concurrent regulators following discussion.

Substantive divergence

- Substantive divergence is seen as a key challenge for client's post-Brexit.
- While uncertainty remains in this area, there is scope for divergence if there is a new s60a and around block exemptions and the possibility of national interest and fairness criteria (for example, in merger control) which can raise questions of political interference. The expiry of certain MFN commitments may allow the UK to revisit this issue however there has already been divergence at a national level (e.g. a strict approach in Germany and new laws in France). Regulation in the digital sphere may also raise the prospect of divergence. There is however recognition that enforcement agencies need to work together to promote consistency where possible.

A future model of cooperation with EU post-Brexit

- The CMA has a strong relationship with the EC and other competition authorities across the globe. The exact framework for cooperation between the CMA and EC is still being worked out however the close relationship is expected to continue.
- There may be some duplication in matters but it will depend on the prioritisation choices of the CMA and EC. The CMA will try to avoid duplication but it will not shy away from cases that it considers need to be taken to protect UK consumers.

State Aid Panel – 16:20 to 16:50

Speaker: George Peretz QC

Although the current State aid regime will continue to apply in the transition period, the future of State aid in the UK thereafter is complex. The Conservative Party's current proposals are based on WTO rules and intend to move away from the EU regime. However the EU will be keen for the UK to remain aligned, as far as possible, with EU policies. The ongoing Brexit negotiations will likely result in an operable regime by the end of 2020, even if this is achieved by implementing a second regime in relation to Northern Ireland.

Recent history

- There have been two legislative tools which have outlined an approach to the future of State aid in the post-Brexit landscape: the Statutory Instruments in a "no deal" scenario and the first version of the Northern Ireland backstop. In a "no deal" scenario, the CMA would have had power in the place of the EC under a State aid regime enacted by domestic regulation but equivalent to that in the EU whereas under the original backstop the UK would have remained subject to EU State aid rules during a transition period pending the outcome of further negotiations.
- The current government prefers less alignment with the EU and certain members of the government may hold reservations regarding a State aid regime due to their support for intervention to protect industries and to invest in infrastructure.

Further developments

Two recent developments have been the State aid provisions in the new Northern Ireland protocol and the Conservative Party proposals for a new State aid regime.

Article 10 of the Northern Ireland protocol applies EU state aid rules in the UK to the extent that UK measures affect trade between Northern Ireland and the EU. These matters would be subject to the jurisdiction of the EC and EU courts. This may include, for example, any UK-wide tax measure or, if it were State aid, the current government assistance to Flybe.

- The Conservative Party has criticised the EU State aid regime as vague and slow and proposed a new regime based on WTO rules. The regime is framed as allowing the government to protect jobs more quickly when issues arise in an industry. The WTO framework is however based on disputes between states and has less case law than the EU regime.

- The EU may not accept this approach to State aid and will seek to ensure the UK remains aligned as far as possible to avoid, for example, competition from subsidised UK products which are not subject to tariffs on entry into the EU.

Potential precedents

- The EU does have precedents for imposing State aid rules on its neighbours, such as the EEA or Ukraine. However the position of the UK will be fundamentally different to those countries following Brexit since Ukraine, for example, still hopes to join the EU.
- It is not clear at this stage how the negotiations will unfold but there is a good chance there will be a new State aid regime in the UK before the end of the year, possibly with a second separate regime operating in relation to trade between Northern Ireland and the EU.
- The EC will retain jurisdiction for State aid granted before exit day for 4 years thereafter.

Mergers Panel – 17:05 to 18:00

Speakers: Simon Priddis and Colin Raftery

- The effect of Brexit will be to bring an end to the one-stop-shop merger process.
- While considerable no-deal planning was undertaken by the CMA, the Withdrawal Agreement means there will be no material change to merger control during the transition period (for example, UK turnover will continue to be taken into account in EU turnover and the UK will effectively be treated as an EU state for merger purposes) but jurisdiction will subsequently transfer to the CMA at the end of that period. The EC will retain jurisdiction for transactions notified prior to the end of the transition period.
- One key question that arises is: what does it mean to have notified? Notification involves acceptance of the Form CO by the EC. It is important to note that for transactions notifiable in three or more member states, jurisdiction may be transferred to the EC if there are no objections after 15 working days. This time period and the last EC working day in 2020 may be relevant when considering merger notification timing.
- While Article 9 referrals to member state authorities are not covered in the Withdrawal Agreement since the EC already has jurisdiction, a special provision needed to be inserted to allow for Article 22 referrals to Brussels.
- The CMA is keen to encourage early engagement where possible and is willing to give constructive feedback regarding possible views on jurisdiction based on information provided by the parties (as it did prior to previous scheduled Brexit dates).
- There is expected to be increased focus when constructing deal terms on risk allocation and granularity as regards requirements to engage with the CMA.
- The CMA considers it has a strong working relationship with the EC and expects in practice to continue working closely with the EC.

Transitional arrangements – legal and practical issues

- On the question of whether the CMA and EC may agree to start the merger analysis in Brussels with remedy negotiation and/or enforcement transferring back to the UK for UK-focussed mergers, it was noted that the EC has a strong merger control process and the CMA is unlikely to second-guess the outcome of that process. That will particularly be the case where a clear structural remedy exists although the CMA may be more involved through a transfer if, for example, the transaction involves a UK-focussed regulated industry with a behavioural remedy continuing post-Brexit.

After 1 January 2021 – procedure of liaison between CMA and EC

- Post-Brexit, the CMA will seek to be a significant global presence. The CMA works with other regulators already and, while it may be less prominent than the authorities in larger economies such as the US, EU and China, the CMA will fit in alongside authorities such as those in Canada, Brazil and Japan. However, where a deal is more focussed on Western Europe, the CMA may have a greater role.

- It has been suggested the CMA has one of the longest merger timetables among major jurisdictions and a relatively high intervention rate in terms of Phase II referrals and the imposition of remedies. One concern is that the likely increase in the size of transactions notified and subject to Phase II reviews may place a strain on the CMA, particularly since currently the CMA is generally used to looking at smaller transactions.
- There was a discussion regarding the CMA's review timetable and intervention rate relative to other jurisdictions like the EU and US. It was suggested that aligning the CMA timetable with other jurisdictions may be challenging at times and consequently global merger remedies may have already been negotiated in other jurisdictions prior to CMA consideration. This may, however, allow the CMA to 'bank' these remedies and focus on the remaining areas of concern.
- It was noted there could potentially be a more interventionist and uncertain regime for transactions which raise national security issues. At present, the public interest intervention powers are used relatively sparingly but may be viewed as a lever to extract commitments.

Private Enforcement Panel – 17:40 to 18:10

Speaker: Ben Rayment

Private enforcement has been a relative success story over the last 10 years with an array of high value and complex litigation. While the impact of Brexit and the landscape following the transitional period is still unclear, the statutory instruments drafted for a "no deal" Brexit may provide a way to discern the possible future landscape, particularly in relation to jurisdiction and applicable law.

Impact of Brexit

What will be the impact of Brexit on the issues of jurisdiction, applicable law and the enforcement of judgments?

- **Jurisdiction:** The arrangements regarding jurisdiction remain uncertain, including whether the Lugano Convention, a bespoke regime or no arrangement will be in place. It is, however, unlikely that a bespoke arrangement will be agreed upon in time.
- **Applicable law:** Claims based on EU law will remain common as EU law will continue to apply until the end of the transition period. In addition, the substance of the prohibitions under Articles 101 and 102 of the TFEU will remain in domestic law.
- **Decisions:** EU Commission decisions made during the transitional period will continue to be binding on the UK. The European Commission will also retain jurisdiction over proceedings initiated prior to 31 December 2020 and decisions adopted after that date in those matters will be binding with direct effect. Therefore, there is likely to be a significant number of existing and future decisions which will continue to affect the UK and provide a basis for damages claims.

Future landscape

- Although subject to further changes, the Brexit Statutory Instruments ("SI") provide the closest snapshot of the future legislative landscape.
- A stand-alone claim, based on anti-competitive behaviour whilst the UK was an EU member state, will be permitted. However, the current position (that the limitation period for claims is suspended whilst EU competition authorities investigate) will be affected if the proposed approach in the SI is brought into force. This approach would only allow for a one-off suspension of the limitation period for a period of one year from the end of the transition period. This should be kept in mind for pending claims as at the date of exit.
- Following the transitional period, EU Commission decisions will no longer be binding and nor will the UK courts be bound to consider decisions by the competition authorities of other member states as prima facie evidence of an infringement. However, Commission investigations and decisions are still likely to have a practical effect. A European Commission investigation or decision regarding anti-competitive behaviour in a global market may alert parties to the possibility of a UK infringement and provide certain evidence. Parties seeking leniency in the EU may make a similar application in the UK. Commission enforcement activity relating to broader European conduct may also assist parties to defend against strike-out applications in

UK claims. However, once the initial stages of proceedings have passed, Commission decisions may become less useful and the underlying evidence provided during disclosure will likely be of greater importance.

- The current Competition SI revises (by repealing s.60 of the Competition Act 1998) the current approach of the UK courts which is to maintain consistency with EU law so far as possible. Nonetheless, the Competition Act 1998 is fundamentally premised on EU law. The courts will therefore continue to have regard to EU law, unless the facts of the case justify departure from it. UK practitioners' knowledge of EU law will, for that reason, remain of use in a post-Brexit landscape.

Jurisdiction

- The SI effectively repeals the Brussels and Lugano conventions in the UK. By reverting to common law rules, this returns the UK to a regime which is less restrictive in some ways. One consequence is that the greater flexibility may assist claimants seeking to bring proceedings in the UK since, for example, it will be possible to locate a claim in the UK where one aspect of the damage arose in the UK and other aspects were suffered in the EU.
- It remains to be seen how the courts of member states will approach proceedings in the UK, which will be deemed a third state from the end of the transition period. Under Articles 33 and 34 of the Brussels Regulation, courts of member states may stay proceedings in favour of a third state, such as the UK post-transition period, only if it is expected the third state will give a judgment capable of recognition and enforcement and where it is necessary for the proper administration of justice. Therefore, the attitude of member states may depend on their view of the enforceability of UK judgments. It is likely that member states will order a stay in favour of UK proceedings but this cannot be taken for granted, especially if the post-Brexit arrangements are not in working order. On the other hand, where proceedings are first seized in an EU court, UK courts will not be obliged to stay proceedings in favour of that court under forum convenience rules but may nonetheless be inclined to do so. Therefore, commencing proceedings in one's jurisdiction of choice will remain important.

Applicable law

- The current proposal is to adopt Rome I for contractual claims and Rome II for tortious claims, with some amendments to improve workability.
- Article 6 of Rome II, which will also be adopted, deals specifically with competition law and will bring its own complexities. Of particular interest is that where the market is likely to be affected in more than one country, Article 6 allows the court seized to apply its law to the entire claim (providing its market was also affected). The proposed amendment to the legislation will mean that this includes the UK and not just member states. A first reading may suggest that the entirety of the claim can be subjected to UK law however this is unlikely to be correct as Rome II functions by applying a tort within the EU and the EU in this case will not include a post-Brexit UK. Justification will therefore be needed for a breach of UK competition law to apply to member states and this is an interesting area that will need further consideration as Brexit unfolds.