BREXIT COMPETITION LAW WORKING GROUP: FIRST ROUNDTABLE

23 NOVEMBER 2016
GIBSON DUNN & CRUTCHER, LONDON

The first Roundtable of the BCLWG was held on 23 November 2016 and focused on the antitrust issues relating to Brexit. The discussion was divided into four sessions, namely:

1. Transitional issues;
2. Procedural issues;
3. Substantive law and policy; and
4. Litigation.

TRANSITIONAL ISSUES

The general consensus was that transitional arrangements would need to be negotiated to address the issues that are likely to arise following Brexit - given the length of time involved in antitrust investigations and appeals, there will in every likelihood be ongoing European Commission investigations or EU court cases which involve UK companies and/or conduct that took place in the UK or had effects in the UK.

Issues are likely to arise in two types of cases.

First, there may be a narrow set of cases where the overall conduct has effects on trade within the EU but UK-specific effects can be delimited (e.g. one overall infringement involving various and specific country-level infringements). In such cases, it may be appropriate for the UK authority to investigate the UK-specific conduct. The point at which this should occur would need to be agreed with the EU (opening of proceedings, issue of statement of objections).

Second, there may be international cases involving the UK and other countries, with Europe-wide or global effects including, but not specifically, in the UK. In such cases,

while it may be appropriate for the Commission to investigate the broader infringement, it will no longer have the jurisdiction to take into account the impact on the UK market. The question then arises as to whether the UK should investigate the UK conduct/effects in parallel with the Commission's investigation.

Specific issues that will need to be considered in relation to cases falling into either of the above categories include:

- Ensuring that companies involved in ongoing Commission investigations have the same rights of defence post-Brexit as they do now, including the ability to be advised and represented by UK lawyers.

- HMG should, if possible, negotiate to allow UK-qualified lawyers to continue to have rights of audience before the EU courts in relation to proceedings already in train. For such proceedings, legal privilege should continue to apply to documents that would have been privileged pre-Brexit.

- While it appears uncontroversial that the Commission should not have the power to carry out dawn raids in the UK post-Brexit, there is a need to ensure that detection and investigation of competition law infringements continues to be effective. This will require some form of cooperation mechanism to take effect immediately post-Brexit in order to avoid an "enforcement gap".

- Arrangement should be put in place to ensure that existing competition infringement decisions and commitment decision can be enforced.

PROCEDURAL ISSUES

In terms of procedural issues for antitrust enforcement post-Brexit, the loss of the current system (European Competition Network and the provisions of Regulation 1/2003) present challenges but also opportunities.

The primary opportunity for the UK in terms of civil enforcement will be the ability to investigate and reach its own conclusions in cases which currently fall within the exclusive jurisdiction of the EU.

Taking these cases will however be challenging particularly in resource terms. Would HMG provide the additional monies required at a time of "austerity"? It was noted in this regard that at least part of the funds required could come from an increase in penalties from these types of cases themselves.

If the UK were not run these types of investigations in parallel to the Commission, there are still a number of options open to it that would enable the CMA to play a role:

- It could follow the Brazilian competition authority's approach in cross-border cases – in essence it would wait until the Commission has investigated conduct and then "piggy-back" on that investigation to demonstrate and sanction UK elements of the infringement.

- Another option is to agree upfront and coordinate action with the Commission in relation to those areas in which the UK and EU have similar substantive and enforcement priorities. This would necessitate an agreement that covers procedural issues such as dawn raids and exchange of information. For areas where the UK may pursue a different industrial strategy (such as financial services), the negotiated agreement could allow for divergent approaches.

With both of the above, it is worth noting that reliance to any degree on the Commission's investigative efforts would likely lead to questions of contribution to the Commission's budget. This political issue will need to be resolved during the Brexit negotiations.

While it appears uncontroversial that the UK will need to negotiate and agree some form of ongoing procedural cooperation with the EU, the question is how deep it should be. Would cooperation akin to that between the EU and the U.S. suffice or should the UK seek a more comprehensive relationship, perhaps even going so far as to seek some form of "associate" membership of the ECN?

Brexit also provides an opportunity for the UK to develop further its criminal enforcement regime. Currently, the UK does not pursue criminal enforcement in cases where to do so might impact on the Commission's civil enforcement. This has had the consequence of limiting the criminal enforcement regime to smaller, UK-only infringements. Post-Brexit, this limitation would no longer apply and the UK could bring criminal enforcement proceedings in larger and more multi-national cases. Greater enforcement of this type would likely have a positive effect on both deterrence and leniency.

A further consideration in this respect is whether to marry criminal and civil enforcement in a manner similar to regimes such as Australia, where criminal proceedings can be followed by civil action against both companies and individuals.

SUBSTANTIVE LAW & COMPETITION POLICY

Post-Brexit, Articles 101 and 102 TFEU will no longer apply in the UK and the jurisdiction of the European courts will cease (subject to any transitional issues, as discussed). Would that result in UK competition law and policy diverging from EU jurisprudence and if so would that be a welcome or unwelcome development?

- The legislative wording of Chapter I and II of the Competition Act mirror that of Articles 101 and 102 TFEU. In the absence of a clear policy imperative, significant substantive divergence may be unlikely, at least in the short to medium term.

- The main exception to that would likely be in areas where EU law seeks to protect the Single Market (mostly verticals).

- However, overtime there is likely to be more general divergence. Two reasons were noted. First, the UK will no longer be bound by the duty of sincere cooperation under Regulation 1/2003. Some legislative change is likely in order

to remove or water down the requirements of section 60 of the Competition Act. For example, it seems likely that post-Brexit the UK authorities/courts would at most be required to "have regard" to the jurisprudence of the EU courts.

- Second, without the CMA's input through the ECN, EU policy may well evolve in ways with which the UK did not agree (reverting, for example, to the more traditional "form-based" approach it exhibited before the reform of the 1990s and 2000s). In this regard, the possibility of significant divergence in relation to unilateral conduct was raised.

PRIVATE ENFORCEMENT

It was noted that the impact of Brexit on private enforcement and litigation is an issue that goes beyond the competition law sphere.

In relation to competition law, the following were points however flagged:

- The enforceability of judgments in the UK could be negatively impacted in the event that both the Recast Brussels Convention and Regulation 1/2003 were repealed. Returning to the *old* Brussels Convention (to which the UK would still be a party) would arguably not fully address the legislative void, particularly as a number of Member States are not party to it.

- The loss of the UK as an "anchor" jurisdiction could have a significant negative impact.

- Some were in favour of retaining the binding effect of Commission decisions. If that were to happen it could be necessary to preserve the rights of the UK Courts to make references to the CJEU as well as their ability to liaise with the Commission on procedural points. Others felt that requiring Commission decision to be binding would run contrary to the Referendum result and was not necessary in any event to allow victims to sue. That is because Commission decisions would still remain "persuasive" post-Brexit.

- The UK would likely want to continue to follow the approach set out in the Damages Directive (due to be implemented at the end of December) in relation to key issues such as granting protection from disclosure for leniency submissions.