

What does Brexit mean for public and private enforcement of competition law in England and Wales?

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Competition analysis: Following the UK vote to leave the EU, Edward Coulson, partner and head of the competition litigation practice, and Julia Joseph, senior associate at Berwin Leighton Paisner, examine the impact of Brexit on public and private enforcement of competition law.

Jurisdiction and competition enforcement in the UK

If the UK remains part of the EEA, the UK's Competition and Markets Authority (CMA) would share responsibility for competition law enforcement with the EFTA Surveillance Authority, rather than the European Commission.

In the event that the UK leaves the EEA entirely (full Brexit), the CMA is likely to see a significant increase in its caseload. From a merger control perspective, companies active in both the UK and the EU would lose the benefit of the Commission's 'one-stop shop' regime. Accordingly, if a merger satisfies both UK and EU thresholds, it may require notification to both the CMA and the Commission. Not only does this expose companies to greater legal uncertainty in the event of conflicting approaches and decisions, it also substantially increases the costs and administrative burdens associated with such transactions.

Increased regulatory burden may also arise in the context of antitrust investigations. Full Brexit will mean that companies could be subject to parallel civil investigations by both the CMA and the Commission--as a result, they could face two fines in respect of the same conduct or inconsistent decisions, resulting in further uncertainty for the parties affected.

Competition litigation in the UK

EEA membership should largely mean business as usual for competition litigation in the UK. In the event of full Brexit, the landscape could see greater future change, although only after a long tail on the current position. There would be a long tail because damages claims relying on a Commission infringement finding should still be brought in the same way for any existing or forthcoming Commission decisions, where those decisions are produced prior to Brexit, ie before the end of the article 50 process.

Later decisions may only have a persuasive, rather than binding, effect on the English court. This will increase the evidential burden on claimants and may as a result push a number of them to litigate instead in the UK's main competitor jurisdictions, namely Germany and the Netherlands. Some claim funders may also look towards those jurisdictions as the binding effect of decisions there will appeal when analysing the risk profile of a case.

That said, the English court's traditional strengths and experience would still make it an attractive forum. A key factor in this is the wide ranging disclosure available in England. Despite the forthcoming implementation of the Damages Directive's (2014/104/EU) disclosure provisions across Member States, the English court will still in practice offer the broadest disclosure.

In addition, the English court will also likely have some Brexit quirks which would make it attractive to claimants. In the absence of the Damages Directive, the English court could order the disclosure of cartelists' leniency statements. The English court could also bring claims to trial more quickly, without waiting years for the final determination of the cartelists' appeals to the European courts.

The policy appetite for the private enforcement of competition law in the UK remains strong and the innovation and potential of the new tools available to litigants here are market-leading, notably the enhanced dedicated court (the Competition Appeal Tribunal), the opt-out collective action regime, and the fast-track procedure. These are features that will create a case-load for the UK in any Brexit scenario.

Existing jurisprudence

Following Brexit, the English courts would no longer be obliged to apply EU jurisprudence, nor would they be bound by the decisions of the Court of Justice of the European Union (CJEU). Any departure from EU case law would happen over time, when we may see a divergence in the application of UK and EU competition law. In the short term, however, and until a fuller transition has taken place, CJEU rulings are likely to remain persuasive in practice and influence English jurisprudence.

Interviewed by Jenny Rayner.

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