

The implication of Brexit on UK antitrust law*

"Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning"

(Sir Winston Churchill, Speech in November 1942.)

Abstract

This article focuses on the impact of Brexit on various elements of the UK Antitrust law and their practical implications for enforcement of the competition rules assuming the UK to be outside the EEA and the single market. The article looks at the main aspects of Antitrust Law that could change after the departure of the UK from the European Union, such as the public and private enforcement and the leniency programme, through two main themes: the legislative continuity of UK competition law and the transition to the post-Brexit environment. In particular, the article focuses on the observance of the principle of legal certainty for business, in order to avoid any radical change in the short term that may jeopardize the UK market. Accordingly, some proposals in relation to each of these matters are presented.

Résumé

L'article suivant traite des conséquences du Brexit sur les divers aspects de la loi antitrust en Grande-Bretagne et des implications pratiques sur l'application des accords anti-concurrentiels, dans le cas où le Royaume-Uni quitterait l'Espace Économique Européen et le marché intérieur de l'Union Européenne. L'article s'attache aux aspects principaux des accords anti-concurrentiels susceptibles d'être modifiés au terme de la sortie du Royaume-Uni de l'Union Européenne, à sa primauté au public comme au privé ainsi qu'aux accords sur la clémence en faveur du repent, chaque point étant observé à la faveur d'une continuité législative en matière de la loi antitrust au Royaume-Uni comme de la transition vers un après-Brexit. L'article insiste tout particulièrement sur le maintien du principe de la sécurité juridique au profit des entreprises afin d'éviter des renversements radicaux et de court terme, qui pourraient porter d'importants préjudices au marché britannique. Quelques solutions adéquates sont ainsi présentées et proposées ci-dessous.

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Zusammenfassung

Der Beitrag beschäftigt sich mit den Auswirkungen des Brexit auf die verschiedenen Teilbereiche des Kartellrechts im Vereinigten Königreich und der daraus resultierenden praktischen Folgen für die Durchsetzung der Wettbewerbsregeln in dem Fall, dass das Vereinigte Königreich den EWR und den europäischen Binnenmarkt verlässt. Der Beitrag betrachtet Hauptaspekte des Kartellrechts, die sich nach dem Austritt des Vereinigten Königreichs aus der Europäischen Union ändern könnten, wie seine öffentliche und private Durchsetzung und die Kronzeugenregelung, jeweils unter den Gesichtspunkten der gesetzgeberischen Kontinuität im Kartellrecht des Vereinigten Königreichs und dem Übergang in ein post-Brexit Umfeld. Insbesondere konzentriert sich der Beitrag auf die Einhaltung des Prinzips der Rechtssicherheit für Unternehmen um kurzfristige radikale Veränderungen zu vermeiden, die den Markt im Vereinigten Königreich gefährden könnten. Dementsprechend werden einige Vorschläge bezüglich jeder dieser Fragen präsentiert.

Introduction

On March 29, 2017, the British Prime Minister *Theresa May* notified the European Council the United Kingdom's intention to leave the European Union. Currently, the expectation is that the whole of the two-year period will be needed to negotiate the exit provisions, therefore, in practice the date of the British exit (Brexit) cannot be before 2019, i.e. March 2019. Withdrawal from the European Union is governed by Article 50 of the Treaty on the European Union (hereinafter TEU) that came into force in 2009, after amendment of the TEU by the Lisbon Treaty of 2007.

Since the UK joined the European Economic Community in 1973, the enforcement of competition law has been operated under the principle of supremacy of EU law, this means that UK undertakings were subjected both to the European competition law, set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU) and, since 1990, the EU Merger Regulation 139/2004 and to the UK competition law, set out in the Competition Act of 1998 (hereinafter CA98) and the Enterprise Act 2002 (hereinafter EA02). However, post-Brexit, the competition law landscape will change.

The aim of this paper is to analyze the impact of Brexit on a particular sector of competition law, the antitrust sector, that is to say the rules prohibiting anti-competitive agreements and abuses of dominant position (Article 101 and 102 TFEU). The nature of the impact will depend on the model adopted by the UK for its future relations with the EU. If the UK were to join the European Economic Area (hereinafter EEA), it would remain in the single market and much of the existing body of EU law would still apply. However, the Brexit White Paper published on February 2, 2017, states that the UK government does not seek membership of the single market, but it will pursue a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and anew customs agreement. Accordingly, for the purposes of this paper, it is assumed, the UK to be outside the single market and a free trade agreement to be in place. This would mean that UK will be no longer bound either by the European Court of

Justice's (hereinafter ECJ) jurisprudence or any Treaties obligations and derived legislation to apply European laws. It is possible, of course, that even if it does not pursue EEA membership it could still agree to observe EU laws through an alternative form of agreement with the EU. Switzerland, for example, is neither an EU nor an EEA member but has negotiated a multitude of bilateral agreements with the EU and individual countries, and through those agreements has committed to comply with certain EU laws. This is clearly an extremely complex route, which would take substantial time and diplomacy to negotiate, and the terms of such agreements would be highly dependent on the UK's negotiating position. It is important to note that Articles 101 and 102 of the TFEU will continue to apply post-Brexit to the agreements or the conduct of UK businesses that have an effect within the EU, in the same way as agreements or conduct of US and Asian businesses are currently subject to EU competition law where their agreements and conduct affect EU markets, and EU and US businesses are subject to the competition rules of Asian countries where there is an effect in those countries. A UK participant in a global cartel will, therefore, continue to face investigation and fines by the European Commission (hereinafter Commission).

The common thread of this article is mainly the legislative continuity of UK competition law and the transition to the environment post-Brexit in order to promote the legal certainty for business and avoid any radical change in the short term between the previous and future regime of the UK Antitrust Law that may jeopardize the stability of the UK market. Indeed, more and more companies located in the UK, such as food and beverage, life sciences and financial services, are considering relocating because of Brexit.¹ Leading international UK-based banks fear that a hard Brexit will result in the UK leaving Europe's single market and therefore signal the loss of crucial passporting rights, which allow them to sell their services freely across the rest of the EU and give firms based in Europe unfettered access to Britain.² Moreover, European leader won't talk trade until the divorce is largely agreed. That means firms in Britain may not know what kind of access they will have to Europe's vast markets for at least three years.³ Uncertainty is a business killer, and many companies cannot wait that long.⁴

Competition law and, more specifically, antitrust law, is one of the fields which may be affected by legal uncertainty with enormous consequences for the British market. In order to analyze the impact of Brexit on UK Antitrust law, this paper is divided in four main sections. Section A deals with the legislative accommodation of the UK legislation, that is what kind of changes needs to be brought at national level, in particular to those provisions referring to the European law, such as Section 10 (I), Section 60 and Section 62 (II) of the 1998 Competition Act. Section B deals with the public enforcement of EU competition law in particular the Regulation 1/2003 (I), and the allocation of competences between the Commission and the English Competition

1 Independent: "Brexit: 40% of US firms with British offices are considering relocating to the EU", 14 December 2016, available at: <http://www.independent.co.uk/news/business/news/brexit-us-firms-trade-threat-london-eu-move-uk-relocate-move-report-a7473251.html>.

2 Ibid.

3 Petroff, "Brexit has just begun and jobs are already leaving U.K." CNN, 31 March 2017, available at: <http://money.cnn.com/2017/03/30/investing/brexit-business-trade-timeline/index.html>.

4 Ibid.

Authority after Brexit (II). Section C deals with the Leniency application, both at European and British level (I), in particular with the summary application and the interaction between the cartel offence in UK and the Leniency Notice (II), and with the exchange of information between the Commission and other National Competition Authorities (hereinafter NCAs) (III). Section D deals with the private enforcement of the EU competition law in particular with the Directive 2014/104 EU (I), concerning the action for damages for competition law infringements, and the Brussels Regulation (Regulation (EU) No 1215/2012 which amended the Council Regulation 44/2001) on jurisdiction and recognition of judgments in civil and commercial matters (II).

A. Legislative accommodations of the UK Legislation.

The central pillars of competition law in the UK are the Competition Act 1998 and the Enterprise Act 2002. The central enforcement body is the Competition Market Authority (hereinafter CMA), which was created by the Enterprise and Regulatory Reform Act 2013 and on 1 April 2014 took over the competition functions of the Office of Fair Trading and Competition Commission. The CA98 deals with the antitrust rules (anti-competitive agreements and abuse of dominant position) while the EA02 deals with mergers and allows for investigation of markets where it appears that competition is being prevented, restricted, or distorted, but where there is no obvious breach of the CA98 provisions.⁵ Moreover, it created a criminal offence for individuals who engage in cartel agreements.⁶ The criminal offence subsists alongside the civil regime.

Articles 101 and 102 TFEU, as well as secondary legislation, will cease to have direct effect in the UK upon Brexit and will not be enforceable as part of UK law by either the CMA or the UK courts. However, the UK antitrust rules, found in Chapter I and Chapter II of the CA98 are substantively identical to the EU antitrust rules and, therefore, anti-competitive agreements and the abuse of a dominant position that affects markets in the UK will remain unlawful as a matter of UK law.

Post Brexit, the legislator has to deal with some provisions, which will be no longer compatible with a country, which is no longer a member of the European Union. The main challenge will be to adequate the previous legislation to the new status of the United Kingdom while increasing legal certainty for businesses and avoiding divergences between the previous and the new provisions in the short term.

I. Section 10 of the 1998 Competition Act

Section 10 of the CA98 refers to “parallel exemptions” from the Chapter 1 prohibition (agreements) and provides that any agreement that benefits from EU Block Exemption Regulation will also be exempted from Chapter I prohibition. An agreement is covered by block exemption as long as it does not contain any serious restrictions of competition and also meets the other conditions laid down by the relevant Regulation. At the state at

⁵ EA02, part 4.

⁶ EA02, part 6.

hand, the EU provides block exemption for: vertical agreements,⁷ motor vehicles,⁸ horizontal agreements,⁹ licensing agreements for the transfer of technology,¹⁰ and some specific sectors: agriculture,¹¹ insurance,¹² postal services,¹³ transport,¹⁴ and telecommuni-

- 7 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices – Official Journal L 102, 23.4.2010, p.1-7.
- 8 Commission Regulation 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.
- 9 Council Regulation No 2821/71 on application of Article 85 (3) [now 81 (3)] of the Treaty to categories of agreements, decisions and concerted practices – Official Journal L 285, 29.12.1971 p. 46-48; Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements – Official Journal L 335, 18.12.2010, p. 36; Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialization agreements – Official Journal L 335, 18.12.2010, p. 43.
- 10 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (TTBER) – Official Journal L93, 28.3.2014, p.17-23.
- 11 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organization of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007; Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products – OJ L 214, 4.8.2006, p. 7–9.
- 12 Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector – OJ L 83, 30.3.2010, p. 1-7.
- 13 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.
- 14 Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (Codified version) – (Official Journal L 148, 11.6.2009); Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries; Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (Codified version), OJ L 79, 25.3.2009, p. 1.; Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services; Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway; Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (Codified version); Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges. OJ L 70, 14.3.2009, p. 11–16; Council Directive 96/67/EC of 15/10/1996 on access to the groundhandling market at Community airports, OJ L 272, 25.10.1996, p. 36.

cations.¹⁵ A consequence of the availability of the parallel exemption is that the parties to such agreements do not need a block exemption under domestic law. Section 10 (4) ensures that the duration of any parallel exemption is in line with the position in EU law. After Brexit, this provision has no more reason to exist. However the CMA could decide to recommend to the Secretary of State to copy the provision of the EU Block Exemption Regulations into “block exemption order”: Brexit does not mean that the UK is obliged to depart from the standards adopted by the Commission in its Block Exemption Regulations and Guidelines.¹⁶ Furthermore, schedule three to the CA98 exempts various categories of agreements from the domestic antitrust rules. The question is whether any of these exemptions should be modified post-Brexit, in particular paragraph 3 (EEA Regulated Markets), paragraph 8 (Coal and Steel) and paragraph 9 (Agricultural products).¹⁷ Paragraph 3 provides that the Chapter I prohibition does not apply to various matters concerning “EEA regulated [financial services] markets”, which means a market that is listed by another EEA State. Its revision will be assessed in light of the agreement reached between the UK and the EU on regulation of these markets. The revision of paragraph 8 is not relevant as the ECSC Treaty expired in 2002. Concerning paragraph 9, it is related to the common agricultural policy (Art. 39 TFEU). It provides exclusion from Chapter I prohibition for agreements that fall outside Article 101 TFEU by virtue of Regulation 1184/2006. If the European Commission decides that an agreement is not excluded from Article 101 by Regulation 1184/2006, the exclusion from paragraph 9 ceases on the same date.¹⁸ However, post-Brexit, neither Article 39 TFEU nor Regulation 1184/2006 will be applicable to the UK, therefore paragraph 9 should be removed.

II. Section 60 and 62 of the 1998 Competition Act

Section 60 of the CA98 requires to interpret UK competition rules in a manner consistent with the European Treaties and with competition case law of the European Courts. As illustrated above,¹⁹ post Brexit, the UK will be no longer bound either by the decisions of the EU Courts or by any Treaties obligations, therefore Section 60 of the CA98 could be removed. The abrogation of Section 60 will not have any relevant consequences in the short term: the CMA referring to the main cases of UK competition law, which developed consistently with EU law thanks to Section 60, will continue to follow the orientation marked by the EU Courts. However, in the longer term gaps are likely to emerge because UK courts will no longer have the possibility of referring preliminary questions of interpretation to the ECJ, currently an important driver of consistency in interpretation. The Brexit Competition Law Group, in its last

15 Notice on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles. Official Journal C 265, 22.8.1998, p. 2–28; Guidelines on the application of EEC competition rules in the telecommunications sector Official Journal C 233, 6.9.1991, p. 2–26.

16 See *Verouden* « Brexit and competition law », May 20, 2016 Kluwer Competition Law Blog (available at: <http://kluwercompetitionlawblog.com/2016/05/20/brexit-and-competition-law/>).

17 BCLWG Provisional Conclusions and Recommendations, April 2017, page 6.

18 1998 Competition Act, Schedule three, para 9 (2).

19 See page 1 and 2 of the Introduction.

report²⁰ concerning competition law and Brexit, recommends that Section 60 of the CA98 should be amended so that UK courts and regulatory bodies are required only to have regard to relevant EU Courts judgments and Commission decisions. Such amendment would reduce the likelihood of divergences in the short term between the two sets of provisions allowing the law to evolve over the medium to long term. Taking into account that business activities will continue to be required to comply with both the EU and UK rules, the reception of such a provision will promote the legal certainty without preventing the possibility of UK competition law from developing its own rules over the medium to long term.

The last provision to take into account is Section 62 of the CA98. It refers to the Commission investigation ordered by a decision of the Commission under a prescribed provision of European Law relating to Article 101 and 102 TFEU. However, after Brexit, the Commission will have no power to carry out on-site investigations in the UK, nor to ask the CMA to do so on its behalf. The Commission's power of investigation would be limited to making written request for information, as it currently does on a regular basis to the businesses based outside the EU. Therefore, this provision should be revised.

Concerning the EA02, as it is not modelled on EU law, there is no need to reform.

B. Public Enforcement of EU Competition Law

Public enforcement means that antitrust rules are enforced by state authorities. Following the adoption of Regulation 1/2003, and the ensuing decentralization of competition law, public enforcement essentially consists in the implementation of EU competition law as it is undertaken by the Commission and the NCAs, which can issue decisions to find an infringement of competition rules and impose the ensuing fines.

I. Regulation 1/2003

Regulation 1/2003,²¹ adopted by the Council on 16 December 2002, implemented the rules on competition laid down by Articles 101 and 102 TFEU. It brought a radical change in the way in which the EU antitrust prohibitions are enforced. The previous enforcement regime, under Regulation 17, which dated from 1962, was characterized by a centralized notification and authorization system for Article 101(3) TFEU. Regulation 1/2003 abolished this system and replaced it by a system of decentralized ex post enforcement, in which the Commission and the NCAs of the EU Member States, forming together the European Competition Network (hereinafter ECN), pursue infringements of Articles 101 and 102 TFEU. In particular, Article 3 of the Regulation provides that when NCAs apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101

20 BCLWG Provisional Conclusions and Recommendations, April 2017, page 5.

21 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

(1) TFEU, they shall also apply Article 101. Moreover, it provides that what is permitted under the EU competition law cannot be prohibited under national competition law. Post Brexit, the system set up by Regulation 1/2003 will inexorably change. First, Regulation 1/2003 will be no more applicable to the UK and the CMA will enforce UK rather than EU competition law. Therefore, the UK competition law may also provide stricter rules than EU competition law rules and prohibit what is permitted under the EU competition law. In other words, the Commission will have no more oversight authority. Second, the CMA will be no longer a member of the ECN, and, therefore, the UK will terminate its role in the development of EU competition law and policy. The scope of the ECN is to facilitate the cooperation between the Commission and NCAs while applying competition law rules as well as to facilitate the exchange of information. In particular, the ECN should ensure both an efficient division of work and an effective and consistent application of European Competition rules. The Commission Notice on Cooperation within the Network of Competition Authorities²² (hereinafter Network Notice) establishes the criteria to follow in order to divide the competences between NCAs and Commission and in order to avoid the risk of multiple investigations. Currently, Regulation 1/2003 provides that once the Commission has initiated proceedings, NCAs can no longer start their own procedure with a view to applying not only Articles 101 and 102 TFEU but also part of their domestic law²³ to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.²⁴ At the state at hand, therefore, concurrent proceedings in the EU are currently impossible (between a NCA and the Commission) or highly unlikely (between two NCAs). This could no longer be the case after Brexit and the CMA may be likely to open its own investigation irrespective of whether there is already an investigation by the Commission or another NCA. For example, where the Commission is investigating cartel activity or other antitrust infringements within the EU Member States the CMA may wish to investigate any effects occurring in the UK market, whether under civil or criminal procedures.²⁵

II. The Toshiba case-law

A question arisen in doctrine,²⁶ concerns which competition authority (the Commission or the CMA) should investigate potential violations investigated or discovered post-Brexit that relate to conduct occurring pre-Brexit.

To answer this question, the famous *Toshiba* case-law²⁷ may be taken into account, in an *a contrario* situation. In *Toshiba*, the ECJ was questioned about the allocation of

22 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53.

23 Judgment of the Court of 14 February 2012, *Toshiba Corporation e.a.*, C-17/10, EU:C:2012:72, para. 75.

24 Art. 11 (6) Regulation 1/2003.

25 Jones, “Brexit: implications for UK Competition Law”, King's College London Law School Research Paper No. 2017-21, page 13-14.

26 Ibid. page 14.

27 Judgment of the Court of 14 February 2012, *Toshiba Corporation e.a.*, C-17/10, EU:C:2012:72.

respective competences between the Commission and NCA, and the possible violation of the *ne bis in idem* principle, in an international cartel implemented both in the EU and the Czech Republic, before its accession to the EU and whose action was taken after accession. After Brexit, the same situation may come up if a cartel is implemented during the permanence of the UK in the EU but whose action is taken after Brexit. In this case, as also stated by the ECJ, Article 101 and 102 TFEU do not apply to a cartel which produced effects, in the territory of a Member State, during periods prior to the date of accession to the European Union.²⁸ In an *a contrario* situation, Article 101 and 102 TFEU will not apply to an hypothetical cartel, which produces an effect in the UK during periods after Brexit. Moreover, the interpretation of Article 11(6) in conjunction with Article 3 (1) of Regulation 1/2003, which precludes the application of both European and National law once the Commission initiates proceedings for the adoption of a decision under Chapter III of Regulation 1/2003, will be no longer applicable to the UK and, therefore, the UK will not be precluded to apply national legal provisions on competition such as Section 2 of the Competition Act.²⁹ Therefore, it may be foreseen a situation in which a cartel, implemented during the permanence of UK in the EU and whose action is taken after Brexit, may be investigated both by the Commission and the CMA and punished by both of them. As stated by the ECJ,³⁰ this dual sanction does not entail a violation of the *ne bis in idem* principle because of the lack of the identity of facts. Indeed the conduct of the undertaking must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect.³¹ Therefore, in this hypothetical situation, the potential sanction of the Commission would cover the period in which the UK was still a member of the European Union while the CMA's sanction would cover the anti-competitive consequences of the said cartel in the territory of the UK in the period after Brexit.³²

As this outcome is inevitable for a state, which is no longer a member of the European Union, it would be recommended that the Commission and the CMA develop new ways to cooperate together in order to ensure that parallel investigations are handled as efficiently as possible while reducing the risk of diverging outcomes.

C. Leniency Application

Leniency is a general term that refers to a system in which a firm, which is in a secret cartel, receives a total or partial exoneration from the penalty that would otherwise have been imposed upon it in return for reporting its cartel membership to a competition authority.³³ To be more precise, leniency is defined as reduction of the fine for

28 Ibid. para. 67.

29 Ibid. para 91.

30 Ibid. para 98.

31 Ibid. para 99.

32 Ibid. para 102.

33 See Prof. Richard Wish at King's College – video available at <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

the firms, which cooperate with competition authorities by revealing the information about the existence of cartel before the investigation has started, or that provide additional information that can help to speed up the investigation. The leniency programmes rely on the principle that undertakings, which break antitrust law, might report their crimes or illegal activities if given proper incentives. Both the European Union and the UK apply their own leniency programme.

I. The European and the UK leniency programme

Under the European Leniency Programme,³⁴ immunity from fines may be granted to the undertaking that is the first to submit evidence which, in the Commission's view, would enable it to carry out a targeted inspection (Type 1A) or find an infringement of Article 101 of the Treaty in connection with the alleged cartel (Type 1B). A reduction in fines may be granted to the undertakings that provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession (Type 2). The Commission will only grant immunity from or a reduction of the fine under its leniency programme if, at the end of the administrative proceedings, the undertaking has met the requirements and cooperation conditions set out in the leniency programme. The sanctions provided by the Commission are of an administrative nature.³⁵

Under the UK leniency programme, an undertaking which has participated in a secret cartel may receive total or partial immunity from fines if it comes forward with information about the cartel itself, provided certain conditions for leniency are met. The first cartel member to report and provide evidence of it will be granted total immunity, if the CMA is not already investigating the cartel and does not otherwise have sufficient information to establish its existence. In this case, immunity from criminal prosecution is granted also for any of its cooperating current or former employees or directors (Type A). If the CMA has already started an investigation, the granting of total immunity and protection for criminal prosecution to the first applicant is discretionary (Type B). For the subsequent applicants, a reduction of fine without blanket criminal immunity may be granted (Type C). Leniency is also provided for individuals who comes forward with information about their involvement in a cartel and who may receive immunity from prosecution (a 'no-action letter') provided they satisfy certain conditions, including admitting taking part in the cartel and cooperating completely and continuously throughout the investigation.

The Leniency policy throughout the EU is not based on a harmonized system but is based on a system of parallel competences between the Commission and NCAs. Therefore, an application for leniency to one competition authority is not to be considered as an application for leniency to another competition authority and it is in the interest of the applicant to apply for leniency to all NCAs which have competence to apply Article 101 TFEU in the territory which is affected by the infringement and which

34 Commission notice on immunity from fines and reduction of fines in cartel cases – Official Journal C 298, 8.12.2006, p. 17 and ECN Model Leniency Programme (As revised in November 2012).

35 Art. 23(5) Regulation 1/2003.

may be considered well placed to act against the infringement in question. To alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed,³⁶ the ECN introduced a model (the ECN Leniency Model) for a uniform summary application system. Moreover, it evokes special safeguards established in the Network Notice concerning the exchange of leniency information between the Commission and NCAs in order not to jeopardize the efficiency of their respective leniency programmes. Towards this direction goes the Commission proposal directive³⁷ which empowers the NCAs to be a more effective enforcer of the EU competition rules and seeks at the same time to harmonize the main elements of the leniency programme. However, the directive will not be implemented by the UK as the implementation deadline will be probably post Brexit.

After Brexit, also the system of leniency application and coordination between the Commission and CMA will inexorably change.

II. Summary Application and Interaction between the cartel offence in the UK and the Commission Leniency Notice

The UK, as all the other Member States which apply a leniency programme, accepted the summary application model proposed by the ECN, through which the applicant, who is in a Type A position in the UK, submitting a short description of the cartel, protects its position under the national leniency programme for the alleged cartel on which it has submitted, or is in process of submitting, a leniency application to the Commission. The CMA will not process summary applications, they will only acknowledge receipt to the applicant and grant the applicant a summary application marker to protect his position before the CMA, in particular during the phase of case allocation between the Commission and NCAs. Compared to other Member States, the leniency application before the Commission and the CMA is more delicate as the UK applies not only financial penalties on undertakings but also criminal sanctions on individual employees or officers. Only Type A of immunity guarantees blanket immunity from criminal prosecution. Therefore, the CMA was aware about the main concern that some practitioners might have approaching the Commission under the Leniency Notice, namely, increasing the exposure for the undertaking's current and former employees and directors to the risk of criminal prosecution in the UK. However, the UK leniency programme sets out a set of measures to allay any concerns concerning this last point.³⁸ Indeed, based on past experience, the OFT expects that most undertakings that qualify for immunity under the Commission Leniency Notice will also be

36 Paragraph 14 of the Network Notice (Official Journal C 101, 27.4.2004, p. 43-53): "The Commission is particularly well placed if one or several agreement(s) or practice(s), [...] have effects on competition in more than three Member States [...]".

37 Proposal for a "Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" – 2017/0063.

38 The new directive proposal "Proposal for a "Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" – 2017/0063, establishes an automatic protection from individual sanctions for employees and directors if

able to gain a blanket criminal immunity in the UK for current and former employees and directors, by virtue of that undertaking applying separately to the UK and gaining Type A immunity.³⁹ Indeed, applicants are able to request a no-names marker in the UK before they even approach the Commission. In case in which neither Type A immunity nor blanket immunity for a Type B applicant is available, an undertaking may nonetheless qualify for immunity under the Commission Leniency Notice. If so, the CMA will normally be prepared to grant a no-action letter or a comfort letter⁴⁰ to any implicated current or former employee or director of such an undertaking and it would be so even if another undertaking had already qualified for UK Type A immunity and consequent criminal immunity for all of its current and former employees and directors. Therefore a possible outcome is that the current and former employees and directors of two undertakings could be granted criminal immunity, in the one case, because the undertaking obtains Type A immunity in the UK and, in the other case, because the undertaking obtains immunity under the Commission Leniency Notice and then obtains criminal immunity for all of its current and former employees and directors on the back of its grant of Commission immunity.

This procedure will inevitably change after Brexit. First, no summary application will be allowed anymore; the UK will be an independent jurisdiction and leniency applicant needs to submit a complete leniency application both to the Commission and the CMA. Second, the system of competences between the Commission and the CMA is not available anymore: if the Commission decides to deal with a case, the CMA will do the same, pursuing the leniency application only under its national leniency programme. Obviously, blanket criminal immunity will only be granted at national level, if the undertaking fulfils the requirements of Type A or Type B of the UK leniency programme: even if the undertaking would obtain immunity at European level from the Commission, this would no longer have any influence on the UK process. .

III. Exchange of information between the Commission and other members of the ECN

One of the main concerns for a leniency applicant, deals with the exchange of information within the ECN and, in particular, if the information exchanged is used by the NCA as evidence during a trial or as intelligence to start an investigation. Obviously, such a concern is much wider if the NCA applies criminal sanctions.

The exchange of information is regulated by Article 12 of Regulation 1/2003. However, any information disclosed by the Commission to the CMA under Article 12

they cooperate with the authorities. However, because of Brexit, this Directive will not be implemented by the UK.

39 Paragraph 8.2 of “Applications for leniency and no-action in cartel cases – detailed guidance on the principles and process”: “The comfort letter will state that after analysis of the evidence it has been concluded that there is insufficient evidence to implicate the individual in the cartel offence and that the OFT (CMA nowadays) does not, therefore, consider that there is any risk of prosecution for the cartel offence by either the OFT or any other agency.”.

40 Ibid.; para. 8.4.

can only be used for the purpose of applying Articles 101 and 102 of the TFEU and cannot be used as evidence to impose criminal sanctions against natural persons.⁴¹ Moreover, such an exchange can take place only if the conditions of paragraphs 40 and 41 of the Network Notice are met.⁴²

But the information the CMA received from the Commission (whether from leniency source or otherwise) could not be used as evidence in a criminal cartel prosecution because of the limitation set out in Article 28 of the Regulation 1/2003 and the case law of the ECJ.⁴³ Furthermore, in leniency cases, the effect of paragraph 39 of the Network Notice is that if a Commission case starts as a result of a leniency application, the CMA will not be able to rely on the information received from the Commission in order to start its own criminal investigation under EU competition law or under national competition law or other national laws. No mention is made about using such information for an on-going criminal investigation. However, the CMA could consider that interpreting the provision of paragraph 39 in this way would be contrary to the spirit of the Network Notice.⁴⁴

While the Network Notice seems to protect leniency information sufficiently, it will be no longer applicable after Brexit. The exchange of information between the Commission and the CMA will be regulated either on the basis of bilateral agreements between the European Union and the UK or by the principles set out by the International Competition Network.

Generally speaking, national competition authorities within the EU do cooperate with one another; the European Union has stipulated several cooperation agreements with a number of competition authorities in the field of competition law enforcement. In particular, cooperation amongst competition authorities may be required because of the international scope of cartels. It can also be required because immunity applications are simultaneously filed in multiple jurisdictions (e.g. under the Commission and the CMA). In other words, cooperation concerns both investigation strategies as well as gathering and preserving evidence. Cooperation may also require exchange of specific information obtained from the leniency applicant. In this case, information received from the leniency applicant will be exchanged only if the applicant provides a waiver permitting the authority to share information related to the identity of the applicant and to specific information submitted by the applicant. In the absence of a waiver, competition authorities can only exchange general information, such as the outline of the alleged cartel, which is not considered to be a confidential information of undertaking even if there must be quite a few international cartel cases where such general information exchange is not sufficient to make the investigation successful.

41 Art. 12 (2) (3) Regulation 1/2003.

42 The Commission would only be permitted to transmit leniency information to the CMA with the consent of the applicant or where the applicant had also made a leniency application to the CMA relating to the same cartel or where the CMA had made a written commitment not to use the information to impose sanctions on the leniency applicant or any current or former employee or director of the leniency applicant.

43 See Judgment of the Court of 16 July 1992, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others*, C-67/91, EU:C:1992:330.

44 Footnote 102, page 79 of ‘Applications for leniency and no-action in cartel cases – detailed guidance on the principles and process’.

In conclusion, after Brexit, the regulation of exchange of information following a leniency application between the CMA and other competition authorities, including the Commission, will depend on the kind of agreements on cooperation the UK intend to negotiate. If no agreement is signed, cooperation may be based on other types of instruments such as “soft law” instruments. Having said that, cooperation between competition authorities shall never undermine the interest of the applicant.

D. Private Enforcement of EU Competition Law

Private enforcement has an important role to play in order to complement the activities of national competition authorities within the EU. Article 101 and 102 TFEU are directly applicable to undertakings and produce direct effect: they give rise to rights and obligations which national courts have a duty to safeguard and enforce.⁴⁵ The ECJ itself clarified that Member States have an obligation, as a matter of EU law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of competition rules.⁴⁶

To promote damages actions in competition cases within the EU, there have been a number of initiatives, most importantly the “Damages Directive” adopted on 26 November 2014.⁴⁷ However, the directive will be no longer applicable to UK post-Brexit. Therefore it is important to quickly establish what will be the impact of Brexit on private litigation in the UK.

I. The Damages Directive

On March 2017, the UK implemented the provisions of the “Damages Directive” through the Claims in respect of Loss or Damages arising from Competition Infringements (Competition Act 1998 and Other Enactments Amendment) Regulation 2017.

The Damages Directive seeks to harmonize procedural and substantive rules across Member States relating to private actions by persons who have suffered harm caused by an infringement of competition law. Currently, Commission infringement decisions, as well as CMA infringement decisions, can be the basis for a claim for damages, thus giving the possibility to claimants from across the EU, who have suffered from a violation of Article 101 or 102 TFEU, to bring a claim before the UK courts if they satisfy the relevant jurisdictional criteria for bringing a claim in the UK courts.⁴⁸ Clearly Brexit does not have any impact upon the ability of claimants to bring standalone actions based on a breach of UK competition law or follow-on actions based on UK authority infringement findings. However, the main question is whether or not, post-

45 Judgment of the Court of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para. 23.

46 Ibid; Judgment of the Court of 13 July 2006, *Manfredi*, C-295/04.

47 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

48 UK Competition Act 1998, s. 47A and 58A.

Brexit, Commission decisions establishing a violation of Article 101 or 102 will still be the basis for a follow-on action. The Brexit Competition Law Group⁴⁹ affirms that such actions should continue to be possible and they propose to retain sections 47A⁵⁰ and 58A⁵¹ of the CA98 as currently drafted. If maintaining these provisions would help to provide certainty to UK activities and consumers thanks to the possibility for the UK courts to continue offering a means for redress for any infringement of the EU competition rules that harm consumers, it “is politically unacceptable for Commission infringements decisions to continue to bind UK courts”.⁵² Regardless of whether sections 47A and 58A of the CA98 are retained, claimants will still be able to bring actions to UK courts for breaches of Article 101 or 102 TFEU as claims for breach of a foreign tort based on a breach of a foreign law. However, in such cases, it is usual that expert evidence would be required in order to prove the content of the foreign law as a matter of fact. As suggested by the Brexit Competition Law Group,⁵³ such expert assessment would be inefficient and unnecessary given the effectively identical nature of the EU and UK competition rules and the familiarity of the UK courts with them. Therefore, it is better to expressly remove the requirement of “expert evidence” for the content of the EU Antitrust rules in case of claims brought following an EU infringement decision.⁵⁴

As with the directive provisions concerning the disclosure of evidence, limitation periods, joint and several liability and passing on overcharges, already implemented into national law, there is no reason why these provisions should be modified. As for their interpretation, it may be useful for the UK courts to, having regards to decisions of EU courts apply in effect the same legislative rules even if they are not obliged. Moreover, the Brexit Competition Law Group⁵⁵ would expect the decisions of the UK courts applying the regulations to be influential in the EU courts. However, it may be that the EU courts are better influenced by the other European member states’ courts which, unlike the UK courts, are obliged to apply European Law. Therefore, it is more likely that their decisions are in line with the ECJ’s jurisprudence and potentially influential for the EU courts.

49 BCLWG Provisional Conclusions and Recommendations, April 2017, page 7.

50 CA98 s 47 A provides for follow-on actions for damages or any other sum of money to be brought before the Competition Appeals Tribunal (CAT) where there has been a finding of an infringement of UK or EU competition law by the CMA, the CAT or the Commission.

51 CA98 s 58 A provides that findings by the CMA or the CAT of infringements of UK or EU competition law are binding on courts in which damages or other sums of money are claimed once any appeal periods have elapsed.

52 Jones, “Brexit: implications for UK Competition Law”, King’s College London Law School Research Paper No. 2017-21, page 15, para. 61.

53 BCLWG Provisional Conclusions and Recommendations, April 2017, page 7.

54 Ibid.

55 Ibid.

II. The Brussels Regulation

The question of which Member States' court have jurisdiction over an EU competition Law claim is currently determined by the Brussels Regulation.⁵⁶ The Brussels Regulation provides general rules with respect to jurisdiction, in particular, it facilitates the choice "where to sue" for the plaintiffs.⁵⁷ The basic principle is that the courts of the EU Member State in which the defendant is domiciled will have jurisdiction to hear the dispute, regardless of the defendant's nationality.⁵⁸ However, the Regulation provides for some special rules allowing the defendant to access a jurisdiction other than that identified on the basis of the domicile principle: for instance, if the action is "contract-based" competent will be the court of the place of performance of the obligation,⁵⁹ if the action is in tort, (not relate to a contract) the claimant will be able to sue the defendant in the courts for the place where the harmful event occurred or may occur, according to Article 7(2) of the Regulation. The most important Article concerning competition law claims is Article 8 of the Regulation, which allows "the combination of cross border actions in multi-defendant cases",⁶⁰ so that individual plaintiffs may litigate their case in the same court against all respondents if "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".⁶¹ This is particularly the case concerning joint and several liability for cartel members.⁶² The Brussels Regulation also deals with the possibility of parallel proceedings pending in different Member States and concerning claims brought against different defendants involved in the same breach of the competition rules: according to Article 29, "any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established [...]. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court." Furthermore, Article 30 of the Regulation provides that if "related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. Where the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidati-

56 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

57 *Andreangeli*, 'The consequences of Brexit for competition litigation: An end to a "success story"?' (2017), *European Competition Law Review*, Vol 38, page 3.

58 Brussels Regulation, Art. 4. A company is domiciled at the place where it has its: statutory seat; central administration; or principal place of business, (*Ibid.*, Art. 63.)

59 *Ibid.*, Art. 7(1)(a).

60 *Andreangeli*, 'The consequences of Brexit for competition litigation: An end to a "success story"?' (2017), *European Competition Law Review*, Vol 38, page 3.

61 Brussels Regulation, Art. 8(1).

62 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Art. 11.

on thereof.” Finally, the Regulation provides for the mutual recognition of judgments in a Member State other than the Member State in which the judgment is given without any special procedure.⁶³

According to recent studies,⁶⁴ the UK seems to be a destination of choice for private competition claims: the English High Court has attracted an increasing number of plaintiffs not just from within Britain but also, thanks also to the application of the Brussels Regulation, from other EU Member States. However, post-Brexit, the Brussels Regulation will be no longer applicable in the UK, opening a new scenario. Firstly, there will be a period of uncertainty concerning the plaintiffs who will not be able to clearly identify the competent jurisdiction because of inapplicability of Brussels Regulation’s rules. Secondly, there is a serious risk of parallel proceedings due to the inapplicability of Article 29 and 30 of the Brussels Regulation: post-Brexit other EU courts would no longer be required to decline jurisdiction in favor of the English courts. Lastly, legal uncertainty will concern also the recognition and enforcement of judgments as Member States are no more obliged to recognize UK judgments. It could be possible that the UK decides to enact rules that mirror the Regulation itself. However these rules are based on reciprocity and even if the UK decides to recognize judgments of other EU courts, there is not guarantee that the latter will do the same with the UK judgments.⁶⁵

Conclusion

It is clear that a “hard-Brexit” will have significant implications for antitrust law in the UK. However any change will substantially depend upon the precise terms of the UK’s exit. Moreover, the full effects of Brexit in the field of competition enforcement will take some time to emerge.

The first impact of Brexit will be the legislative accommodation of the UK provisions, which are no more compatible with a state no longer a member of the EU. In particular, the abolition of Section 60, which requires to interpret UK competition rules in a manner consistent with the European Treaties and with competition case law of the European courts, will lead to more divergence between the EU competition law and the UK antitrust law.

Second, the inapplicability of Regulation 1/2003, will inevitably lead to the risk of parallel investigations between the Commission and the CMA, because of the inapplicability of Article 11 Regulation 1/2003, which forbids NCAs from starting an investigation if the Commission is dealing with the case, something which may lead to sanction twice the same undertakings, thus increasing the costs and uncertainty for undertakings themselves. First, the undertaking in question, shall be at the disposal of the two authorities (the Commission and the NCA), concerning, for example, the requirement of information or the possibility of inspections; this means a double use of time for the undertaking’s directors and employees. Furthermore, the loss of a harmo-

63 Brussels Regulation, Art. 36(1).

64 *Andreangeli*, “The consequences of Brexit for competition litigation: An end to a “success story”?”, (2017), *European Competition Law Review*, Vol 38, page 1 and 5.

65 *Ibid.*, page 7.

nized system, as granted by the Regulation 1/2003, will increase the uncertainty of undertakings which have to deal with two different procedures and rules: the European and the British ones.

Third, Post-Brexit, the ECN Leniency Model will not apply to the CMA, so undertakings will not be able to benefit from the summary application, forcing them to submit a complete application before the Commission (if the cartel affected the European Market) and the CMA. Moreover, obtaining immunity under the Commission Leniency Notice will not guarantee, under the UK national law, the criminal immunity for current and former employees, which must fulfil the requirements of Type A or Type B of the UK leniency programme to benefit from blanket immunity.

Fourth, concerning the private enforcement, the Directive 2014/104 EU, recently transposed into national law, raises the question of admissibility before UK courts of follow-on actions based on Commission decision violations of Article 101 or 102 TFEU. Furthermore, the inapplicability of the Brussels Regulation concerning the competent jurisdiction will open a new scenario of uncertainty for claimants who wish to establish jurisdiction in the UK courts, first because of the probably lack of recognition of UK judgments in other Member States, secondly, because other EU courts will be no longer obliged to decline their jurisdiction in favor of the English courts, if the first are seized after the English ones, leading to the risk of parallel proceedings.

Antitrust rules prevent anti-competitive agreements and abuse of dominance which is fundamental to a free market economy. Brexit will not change that. The interests of the UK economy, businesses and consumers may serve to guarantee the continuity of UK competition law and policy so far as is possible following Brexit. Continuity means the possibility for the UK courts to have regard to relevant EU Courts judgments and Commission decisions; to bring actions in the UK courts for breaches of Article 101 or 102 TFEU as claims for breach of a foreign tort based on a breach of a foreign law without the expert assessment; to develop a system in which the Commission and CMA may coordinate their investigations; to coordinate, as far as possible, related actions pending in different jurisdiction in order to prevent parallel proceedings and to guarantee the mutual recognition of European Member States' judgment in the UK and vice versa.

The European Union has granted a free common market thanks to which British and European undertakings have exercised their activities together and will continue to do so also after Brexit. The principle of legal certainty should be kept in mind during the negotiations of a new agreement, so that businesses and consumers will not face a completely new scenario but can continue to rely on the common rules in force until today.