Brexit's implications for UK antitrust enforcement

Brexit transformed the practice of UK competition law, empowering the Competition and Markets Authority (CMA) to review major transactions, cartels, and unilateral conduct previously assessed by the European Commission (EC). To explain Brexit's implications, Cleary Gottlieb's award winning UK antitrust team sat down for a roundtable for *The In-House Lawyer*.

In a short period of time, and without any change in UK law, the CMA's enforcement of UK merger rules has become much more interventionist. Can you explain how CMA enforcement has changed?

Jackie Holland, partner, Cleary Gottlieb: There have been a number of important changes. First, the CMA has become more creative at claiming jurisdiction over mergers it believes may have a negative impact in the UK. We have two jurisdiction tests in the UK – a turnover test and a share of supply test. The share of supply test allows the CMA to review a merger where the parties will achieve a 25% share of the supply of goods or services of any description in the UK. This is not a market share test and has been interpreted more flexibly by the CMA to a point where it can be difficult to exclude CMA jurisdiction.

Second, the CMA has become more aggressive at calling in mergers for review that it thinks could have a negative impact on competition in the UK. We have a voluntary notification regime for mergers in the UK, but the CMA has power to call in a merger for review up to four months after closing. A number of cases called in by the CMA have been US-US mergers, such as Sabre/Farelogix and Facebook (Meta)/Giphy.

Third, a much higher proportion (around 75%) of mergers referred for a Phase 2 investigation have been prohibited over the past few years. Recent examples include Facebook (Meta)/Giphy and JD Sports/Footasylum. The CMA has also been tougher on remedies, and we are starting to see cases where the CMA has not been prepared to go along with remedy packages agreed with the EC under the EC Merger Regulation, such as Cargotec/Konecranes.

Fourth, some of the problematic cases have involved novel theories of harm or the dynamic competition concerns, such as a concern that one party may have entered the UK in the future. This can make it difficult to predict whether their merger is likely to raise concerns.

Fifth, the CMA is requesting a greater volume of data and internal documents than it did in the past. This increases the burden on the parties. Internal documents are often relied on by the CMA to support their case, especially to analyse the closeness of competition between the parties and the way the market may develop in the future.

Finally, when the CMA investigates completed mergers it routinely imposes an Initial Enforcement Order, requiring the businesses to be held separate until the end of the CMA investigation. The restrictions imposed by IEOs are very burdensome on both the acquirer and the target and the CMA has the power to impose significant fines of up to 5% worldwide turnover for breaches. We spend a considerable amount of time monitoring compliance with IEOs and applying for derogations to take actions that are prohibited by the IEO.

The CMA was for many years criticised for not having used its antitrust enforcement powers to bring cartel and dominance cases. What effect, if any, has Brexit had in these areas?

Paul Gilbert, partner, Cleary Gottlieb: The short answer is yes. The CMA has become a stronger and more confident agency across all areas of its work. This is true of cartels and dominance cases, just as it is for mergers.

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Before Brexit, international cartel and dominance cases fell mainly to the EC. The CMA was left targeting local cartels and conduct specific to the UK: the way pharmaceutical companies sold products to the National Health Service, for instance. Since Brexit, we have seen three things. First, the CMA is targeting much of its enforcement activity on large technology companies. Second, the CMA is investigating conduct that extends beyond the UK. Third, the CMA is willing to take the intellectual lead in international cases and encourage agencies in other countries to develop parallel investigations.

It's not all about digital markets, either. The CMA has the largest number of ongoing cases that it's had for many years, and at a time when it has been difficult to use dawn raids to gather evidence because of Covid-19. These include investigations into retail markets, construction, pharmaceuticals, airlines, ferries and financial services. Many of these cases have a long way to go and it's probably too early to know if the CMA has bitten off more than it can chew, but all the indications are that the CMA is up for the challenge.

The CMA has expressed some frustration about the legislative delay in establishing a Digital Markets Unit to regulate the leading digital platforms. What's going on and what should we expect?
Henry Mostyn, partner, Cleary Gottlieb: The Government first announced plans to introduce a Digital Markets Unit (DMU) in 2020. The DMU was supposed to be given powers to devise codes of conduct for tech companies. It was established in shadow form last year, and is operating with around 60 staff. But it has no powers beyond the CMA's existing capabilities. The bill to put the DMU on a statutory footing was dropped in this year's Queen's Speech and won't be introduced in this Parliamentary session.

The CMA is, however, still pursuing antitrust cases in tech, and trying to reach resolutions swiftly. It recently agreed commitments with Google about its removal of third-party cookies in Chrome, has ongoing probes into Google's and Apple's app stores, is investigating Facebook's collection of data from advertisers to enhance its downstream services, and is consulting on a market investigation into browsers and cloud gaming. We expect these cases will continue – and the CMA to open new cases – while the Godot-like wait for the DMU goes on.

Many predicted that Brexit would slow the growth of competition litigation in the UK and that follow-on damages actions on the back of EU cartel decisions would no longer be brought in London. Were these predictions correct and what's going on?
Paul Stuart, counsel, Cleary Gottlieb: Although we were always optimistic that England would remain a vibrant jurisdiction for competition litigation post-Brexit, the last 18 months have surprised many with the amount and variety of cases being brought in English courts.

That's down to several factors. First, the collective proceedings regime has taken off, with the Supreme Court's judgement in *Merricks* leading to a raft of CPOs being certified. Second, we've seen growth in standalone claims, which don't rely on a prior infringement decision, and usually relate to non-cartel conduct that

(L-R) Paul Stuart, Jackie Holland, Maurits Dolmans

doesn't require an agency to uncover. Third, the transitional provisions mean there's a long-tail of EC decisions that can still be used for follow-on cases, and those continue to be brought in England. Fourth, we're seeing competition litigation used in ever more creative ways, with cases covering a more diverse range of conduct, including what would historically have been thought of as consumer protection issues.

There's every reason to expect this growth to continue. The CMA is among the most active competition authorities in the world, and its docket of enforcement cases will generate a new set of follow-on cases, including because the increasing availability of third party funding is enabling a wide array of cases to be brought. The current trajectory suggests that the number and breadth of competition disputes is set to increase.

It's now six months since the UK's national security screening regime came into force. What's your experience been to date?

John Messant, senior attorney, Cleary Gottlieb: The new national security regime was expected to affect a large number of UK-related transactions and that has been borne out in the first few months. According to a report published by the Government in June, the new Investment Security Unit (ISU) received around 220 notifications in the first three months of the regime. 17 transactions were called in for in-depth review, around half of which related to the defence sector. The sectors covered by the mandatory notification regime are broad so it can take time to exclude investments that have no obvious relevance to national security.

The good news is that the ISU has been efficient in dealing with the large number of anodyne filings. There was some concern that the ISU would be overwhelmed with the number of transactions reported and would take its time before accepting filings as complete. Instead, according to the Government report, the 30-working-day screening period has started on average within three days from notification and has lasted on average 24 working days. This is consistent with our experience.

One significant concern thus far is the lack of transparency. Though the ISU has been open to questions on interpretation of the new legislation, there has been little engagement on specific cases once a filing is made. In most cases parties have not heard anything from the ISU between the filing and the decision. This is not a problem when the transaction is cleared, but we have also heard of cases where the decision to call in the transaction for further review arrived without any questions during the screening period.

It will also take time for any clear pattern in the Government's enforcement practice to become apparent since decisions will largely be taken out of the public eye. There are many other uncertainties in the legislation that are yet to be resolved and the ISU, investors, and their advisors will all be learning on the job. So watch this space.

You've been in London for 10 years. How has the practice changed?

Maurits Dolmans, partner, Cleary Gottlieb: We have seen huge changes over the last decade. Cases have become more complex and fact-intensive across the board. Economic analysis has become

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more nuanced, taking into account multisided platform competition, behavioural economics taking account of irrational consumer conduct, and the implications of market failures and collective action problems in assessment of sustainability agreements. It took a few years of discussion, but competition authorities are finally beginning to recognize the importance of integrating climate change and sustainability in competition policy.

In the high-tech area, there is increased attention to protection of innovation, but also a trend towards regulation of conduct regardless of competitive impact or effect, to address the societal impact of online platforms. Regulation may be needed, but there is no one-size-fits-all for different online platforms, and I have the feeling not only that online platforms are increasingly seen as scapegoats of all societal ills, but also that competition law is seen too much as a panacea.

Brexit added to that heady mix, which is making compliance more complex and costly, as a result of inefficient duplication and greater risk of divergence. We live in an integrated world, and coordination of antitrust advice worldwide is more needed than ever, whether in the online economy or as it relates to sustainability and the climate crisis. To address these challenges, it is important to plan well ahead, and do so with an integrated team that has a deep understanding of the UK, EU, US, and other jurisdictions’ regimes.

You came to London shortly after the Brexit vote with a plan to develop Cleary’s London practice. How’s it gone and what are your plans for the future?

Nick Levy, partner, Cleary Gottlieb: With leading practices in Brussels, Washington DC, Rome, Paris, and Cologne, we’ve long wanted to develop a London competition practice. Brexit gave us that opportunity and made it a strategic imperative to develop our UK practice.

The practice’s growth has exceeded our initial plan – we now have seven senior lawyers, 25 junior lawyers in London, and 10 UK and Irish-qualified lawyers in Brussels. Demand is strong across all areas of the practice.

We’ve worked on a raft of significant mergers, including NVIDIA/ARM, Sainsbury’s/ASDA, Ecolab/Holchem, Veolia/Suez, Facebook/Giphy, Telefónica/Liberty Global, Adevinta/eBay, and Sony Music/AWAL, are advising Google on the CMA’s on-going investigations, have been involved in several cartel matters, and have a thriving antitrust litigation practice, representing, among others, ‘K’ Line in defence of collective proceedings relating to the Maritime Car Carriers infringement, and LG Display in successfully challenging jurisdiction in relation to contribution proceedings arising out of the LCD infringement.

We’re really excited about our prospects and see considerable scope for further growth as the UK competition enforcement becomes more challenging and client demand for high-quality advice increases. ■

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