Competition

March 2016

COMPETITION BULLETIN





Welcome to the March edition of our Competition Bulletin

The Competition Bulletin covers developments in competition law, including merger control.

In this issue we discuss three topics:

- Brexit. On 23 June 2016 the UK will hold its referendum on European Union (EU) membership. A vote to leave the EU would have ramifications that would no-doubt fill the pages of legal text books for years to come. In this article we limit our analysis to merger control and competition law.
- Hong Kong Competition Ordinance. The new competition regime in Hong Kong has now come into full effect. The extent to which it is comparable to the EU regime (on which it is closely based) is discussed and a number of potential differences identified.
- Class actions. Increasingly the Competition Appeal Tribunal (CAT) is becoming a forum for class actions. We consider to what extent the UK can compete with other regimes, such as the US and Netherlands, in becoming a forum for claimants, taking into account changes brought in by the Consumer Rights Act 2015.

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Brexit: a competition law perspective

Until recently few believed that Brexit could ever actually happen. But, as the 2015 General Election made clear, public opinion in Britain is hard to predict. Given that Britain experienced a white-knuckle referendum on Scottish independence, we take this opportunity to consider the ramifications of a "leave" vote from a competition law perspective.

A clean break?

No Member State has ever left the EU and so there is no precedent for Brexit[1]. However, following the entry into force of the Lisbon Treaty in 2009, there is a specific clause in the Treaty on the European Union (the TEU)[2] covering Member State withdrawal. Article 50 TEU provides that *"any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements"; and furthermore that the "Union shall conclude an* ***agreement*** *with that state"* (emphasis added).

The TEU goes on to say that this agreement shall be negotiated in accordance with the other founding treaty, the Treaty on the Functioning of the European Union (the TFEU); in particular Article 218(3) TFEU, which governs agreements between the Union and third countries as well as international agreements.

Article 50(3) TEU states that the Treaties will cease to apply to the departing Member State only once the agreement is concluded, but in any event after two years from the notification of intention to withdraw. Any withdrawal agreement would not only require approval by the Council and the consent of the European Parliament, but potentially could require ratification by individual Member States as well as the UK's Parliament. Given the complexity and time it takes for the EU to negotiate and ratify free-trade agreements[3], the withdrawal of the UK from EU legal regime could easily take years not months.

How then is a business with exposure to both UK and EU competition regimes supposed to plan in the intervening period? To answer this question we now consider Brexit in two ways:

- How the competition regimes in the UK and EU currently overlap.
- What the potential alternative arrangements are if Brexit does occur.

Overlapping regimes

The two areas of competition law most commonly relevant to businesses operating across European borders are anti-trust and merger control.

Anti-trust regime

In the area of anti-trust the UK aligned its competition law with that of the EU following the enactment of the Competition Act 1998 (the CA). Chapters I and II of the CA mirror Articles 101 and 102 TFEU and are applied by English courts in a manner that is consistent with EU law. Similarly, most other Member States (particularly those with active national competition authorities) have adopted EU law within their domestic competition legislation.

The central difference between national and EU competition law is on the purpose of the legislation. The EU prioritises the "single market imperative", while Member States are concerned with economic effects felt at a more local level. EU anti-trust law may only apply where there is an "appreciable effect" on trade between Member States. Accordingly the European Commission's relationship with the competition authorities of Member States is one of delegation: the European Commission concentrates on the most serious cases of abuse, such as international cartels and other hardcore international infringements, and Member States focus on domestic cases, efficient markets and consumer protection.

From a competition law perspective, the consequences of Brexit would, therefore, be minor at least in the short-term. Behaviour that is currently illegal under EU law would generally continue to be illegal under English law. A substantial body of English case law already exists on the basis of the CA, that has been interpreted according to the consistency principle and so mirrors EU jurisprudence. Any change from this case law would need to happen either by gradual judicial evolution or by an Act of Parliament that no major political party currently advocates. Of course it is possible that export bans preventing exports from the UK to the EU, or vice versa, would no longer be unlawful, unless the UK continued to be part of the European single market.

Merger control regime

The position is slightly different for the merger control regime. The UK has its own voluntary notification process embodied in the Enterprise Act 2002 (as amended by the Enterprise

1 Greenland seceded from the European Economic Community (EEC) in 1985, but was never a Member State. Rather, it was an "associated territory" of Denmark which, as part of its gradual handover of governance to the indigenous population (largely Inuit), requested that the EEC Treaty be amended so that Greenland be excluded in accordance with Inuit wishes. Legally, therefore, in Greenland's case the Member State in question (Denmark) opted to re-define its borders rather than leave the EU.

2 Also called the Maastricht Treaty (1993).

3 A free-trade agreement with Singapore has so far taken five years and is still pending ratification.

"Britain could choose to enter into a series of agreements covering different regulatory areas, including one for the competition regime."

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and Regulatory Reform Act 2013). This operates alongside the EU's compulsory regime for concentrations having a "Community dimension". There is, however, a "one stop-shop" principle which avoids concentrations and mergers having to be notified at both national and EU levels. This process operates on the basis of turnover thresholds calculated on an EU-wide basis. Were Brexit to occur it is possible, depending on the alternative arrangement for Britain's relationship with Europe, that this system would cease to apply and an extra layer of red-tape would be imposed on mergers that are caught by the competition regime in both jurisdictions.

Post-Brexit alternatives

The key question for any business is therefore *will it be necessary for me to engage with two sets of competition authorities?* The answer will depend on the nature of the UK withdrawal agreement that is signed after negotiations. There are two clear front-runners for this.

Option 1: European Economic Area (EEA)

This would be the simplest option for the UK to adopt, as presumably it would be relatively easy to negotiate given that Norway, Iceland and Liechtenstein already use this model for their relations with the EU. Membership of the EEA would give the UK access to the single market, which most commentators agree is a good thing.

However, accession to the EEA is by no means instantaneous. Britain would first have to enter into a treaty to join the European Free Trade Association (EFTA) and then separately join the EEA.

There are also considerable disadvantages. The EEA has its own legal framework, which entails the primacy of the EFTA Surveillance Authority and the EFTA Court, which have similar roles to the EU Commission and Court of Justice of the European Union (CJEU) respectively.

Moreover, EEA members are obliged to comply with EU secondary legislation, but have very limited influence in the decision making process. Accession to the EEA also brings with it the obligation to interpret EEA provisions that reflect EU legislation in accordance with EU case law. EEA membership could easily be considered *"EU rule by the backdoor"*.

In terms of competition law, the rules would be substantively similar to those currently in place. The EEA Agreement mirrors provisions on anti-competitive agreements and abuse of dominance in the TFEU. Under this Agreement the EU Commission has authority to act wherever trade between Member States is affected. Although EEA-EFTA members are not in the European Competition Network (ECN), the relationship between their national regimes and the EFTA Surveillance Authority mirrors the current one in place between the UK's Competition and Markets Authority (CMA) and the EU Commission.

Similarly, for the merger control process, the EU regime would continue to apply to the largest transactions. The EEA-EFTA countries have an agreement with the EU whereby once the turnover thresholds under the EU merger legislation are met, the Commission will take over the case from the EFTA Surveillance Authority. In all likelihood the "one-stop shop" principle would not be lost.

Option 2: Bilateral arrangements

Britain could choose to enter into a series of agreements covering different regulatory areas, including one for the competition regime. This would clearly be a more complex route to pursue, but bilateral arrangements would entail at least potential freedom from EU institutions. Whether this option could become reality would depend on the bargaining power of the parties during negotiations.

For example, Switzerland is not obligated to apply EU law generally, but in certain circumstances follows EU legislation. On the one hand this model gives Switzerland the sovereignty that it desires, but it requires a complex network of agreements to govern the relationship.

The content of any future bilateral agreement is thus highly speculative. However, for the merger process businesses could, at least initially, have to make dual merger notifications where there is a "Community dimension" to the concentration. This would lead to increased red tape and cost and potentially there is the risk of inconsistent decisions from the two competition authorities.


Similarly, anti-trust investigations might have to be carried on in both jurisdictions. This would increase the workload of the UK authorities and also potentially could deprive litigants in follow-on actions (namely private claims against undertakings found guilty of an infringement of competition law) of a key means of proof. This is because findings by the EU Commission in the form of infringement decisions could potentially no longer be binding on national courts once Britain leaves the EU.

Directives vs. Regulations

The effect of Brexit on competition legislation and on specific industries will depend on the regulatory framework in place. EU Directives, such as in the area of public procurement, require implementing legislation in order to have effect at domestic level. This is because Directives are not directly effective in Member States, but aim to achieve a specific goal that Member States must implement through their own legislation. The result is that industries or sectors with EU Directives in place may have UK legislation enacted that will continue in force regardless of Brexit. By contrast, EU Regulations, such as block (automatic) exemptions from the prohibition of anti-competitive agreements, are directly effective in EU Member States without domestic legislation. Perhaps ironically then, sectors and areas that have felt more centralised control from Brussels in the form of Regulations are the ones where there will be a more immediate regulatory gap should Brexit occur, as there is no domestic legislation in place to fill the gap once European law ceases to apply.

State aid

Following Brexit the EU State aid regime may cease to apply. However, it is likely that under any continuing free trade agreement, control of State aid by the UK Government would continue to apply in some form.

Specific risks

It is clear that full EU withdrawal would take some time. However, there are some noteworthy considerations for the short-term should a vote for Brexit occur:

- Firms active in all sectors should perform some due diligence to consider what the regulatory impact would be of Brexit. The starting point would be to consider whether there are any key EU Regulations in force which may no longer have effect should Brexit occur. If there are, it would be wise to consider contingency planning.
- Given that the UK competition authorities may see a large increase in their case-load in a post-Brexit environment, companies may experience delays in receiving clearance of transactions, although this need not hold up completion given that the UK merger regime is voluntary and potentially retrospective.
- For anti-competitive agreements/ abuse of dominance, the same point on delays holds true. In addition, those considering bringing follow-on actions in the UK, on the basis of EU Commission and EU Court decisions, would similarly be minded to do so sooner rather than later, as it is possible that these decisions on competition infringements would cease to be binding proof on UK courts in follow-on actions, given that the Anti-trust Regulation[4] and EU case law could cease to apply. Similarly, the disclosure provisions of the soon-to-be implemented Damages Directive would not be effective and claimants could not obtain disclosure of factual evidence held by the Commission in these cases.
- Companies under investigation by the EU Commission should be mindful that their communications with external lawyers are still governed by privilege, bearing in mind that under EU law only communications with external counsel registered in the EEA are privileged[5]. It could be sensible for those companies to ensure their law firms have solicitors that are registered in the EEA, for example in Brussels.

Conclusions

Companies and their advisors should be aware of the potential implications of Brexit when managing their legal workload (particularly within the UK) and ensure that if Brexit does happen in due course, they have taken appropriate steps.

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4 Regulation 1/2003

5 *AM&S Europe v Commission* 1982 155/79



The Hong Kong Competition Ordinance: how long is a piece of red tape?

Given that the new Hong Kong Competition Ordinance (the Ordinance) is closely modelled on the Treaty on the Functioning of the European Union (the TFEU), we consider to what extent Hong Kong's recently established competition authorities are able to adopt a similarly rigorous stance to their European counterpart.

The Competition Tribunal can fine infringers for any single contravention an amount up to 10% of total local turnover for the duration of the infringement...

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Background

Over 130 countries now have competition laws and Hong Kong has recently joined them. The Ordinance was adopted by the Legislative Council on 14 June 2012 and its operative provisions came into force on 14 December 2015. In the three years since its adoption, two competition authorities have been established:

- The Competition Commission - the enforcement body that carries out investigations, initiates proceedings, settles cases and decides on the applicability of exclusions and exemptions.
- The Competition Tribunal - the body which adjudicates whether a breach of the Ordinance has occurred (and which sits within Hong Kong's court structure).

Where the Competition Commission has reasonable cause to believe that a person has contravened a competition rule, it may initiate proceedings before the Tribunal. This split, with one competition authority responsible for investigation and enforcement and the other for sanctioning, is in contrast to the EU regime under which the EU Commission assumes both roles.

Central provisions

The Ordinance borrows heavily from the TFEU in its two central provisions:

- Section 6(1), the First Conduct Rule on restrictive agreements and practices, prohibits agreements that have the object or effect of preventing, restricting or distorting competition: *"An undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of an association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong."*
- Section 21, the Second Conduct Rule on unilateral conduct, prevents abuse of market power: *"An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong"*.

In addition to the First and Second Conduct Rules (collectively referred to as Conduct Rules), the Ordinance contains a Merger Rule, providing that an undertaking may not *"carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong"*, unless specifically exempted or excluded on the ground of economic efficiencies. The Merger Rule covers direct or indirect mergers, so it may apply to transactions outside Hong Kong if they have the effect of substantially lessening competition in Hong Kong, but the application of the Merger Rule is currently limited to licence holders within the meaning of the Telecommunications Ordinance (Cap 106). Given this sector-specific scope, the Ordinance is therefore unlikely, at least for the time being, to become another jurisdiction where a merger notification has to be considered outside the telecoms sector.

Concurrent jurisdiction

While the Competition Commission is the principal competition authority responsible for enforcing the Ordinance, under section 159 of the Ordinance, the Communications Authority may, pursuant to its concurrent jurisdiction with the Competition Commission, perform the functions of the Competition Commission under the Ordinance

in so far as those functions relate to the conduct of certain undertakings operating in the telecommunications and broadcasting sectors. As required by section 161 of the Ordinance, the Competition Commission and the Communications Authority have prepared and signed a Memorandum of Understanding for the purpose of coordinating the performance of their functions under the Ordinance. However, while the Competition Commission has issued a Leniency Policy, the Communications Authority has not followed suit.

Warning Notices

Where the Competition Commission has reasonable cause to believe that a contravention of the First Conduct Rule has occurred and the contravention does not involve Serious Anti-Competitive Conduct, the Competition Commission must, before bringing proceedings in the Competition Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a Warning Notice to the undertaking concerned. The Warning Notice procedure affords an undertaking an opportunity to cease or alter the investigated conduct within a specified warning period.

In cases of **Serious Anti-Competitive Conduct** (including price fixing, market sharing, output restriction or services and bid-rigging) the Competition Commission may institute proceedings before the Tribunal without following the Warning Notice procedure – in other words the Warning Notice does not have to be issued but the Competition Commission may still issue one.

If an undertaking offers a Commitment, the Competition Commission may, subject to procedural requirements set out in Schedule 2 of the Ordinance, decide to accept it and terminate its investigation, subject to its right to enforce the Commitment. If a recipient of a Warning Notice chooses not completely to cease its offending conduct or make any Commitment which is accepted, it will be at risk of prosecution.

By modelling the Ordinance on the TFEU's competition provisions, the Hong Kong government has given its competition authorities a broad set of powers.

Penalties

Breaches of the Conduct Rules do not give rise to criminal penalties, although substantial civil penalties can be imposed relating to the turnover of the breaching party or parties at the time of breach. The Competition Tribunal can fine infringers for any single contravention an amount up to 10% of total local (Hong Kong) turnover for the duration of the infringement (up to three years). The Competition Tribunal may also make any order that it considers appropriate, including an order to pay the costs of investigation, disqualification orders for directors for up to five years and interim orders to cease and desist from anti-competitive conduct.

A wide range of other civil penalties might also apply, as may criminal sanctions, for obstructing the Competition Commission in exercising its enforcement powers.

The Ordinance also provides for follow-on actions to be initiated by those who have suffered a loss caused by an infringement of either Rule, once it has been determined. Under Section 110 of the Ordinance, claimants can rely on the infringement decision and do not have to re-prove the facts of the infringement. However, there is not yet the ability to bring stand-alone actions prior to a Competition Tribunal decision and Hong Kong law does not permit class actions. For the time being then, victims of anti-competitive agreements/abusive conduct are left without private redress; they must first persuade the Hong Kong competition authorities to investigate and even then it may frequently be the case that the losses suffered by each individual potential claimant do not justify the expense of a follow on action under Section 110.

Leniency

One potential weakness of the split system is that the Competition Commission is unable by itself to produce an all embracing leniency policy. The Competition Commission can only decide whether or not to prosecute. It cannot promise binding discounts on penalties because it is the Competition Tribunal which is alone responsible for sanctions. This dilemma is reflected in the Leniency Policy for Undertakings Engaged in Cartel Conduct issued by the Competition Commission (which is the only leniency policy so far issued). To our knowledge, the Competition Tribunal does not intend to issue corresponding sentencing guidelines. The consequent lack of certainty for subsequent whistleblowers may in the early years, until a body of case law clarifies the discounts available, deter potential whistle blowers and undermine the leniency regime.

Strength of the Rules

The lack of a general merger rule, outside of the telecoms sector, is a deliberate gap in the Ordinance. If two businesses wish to engage in cartel behaviour, as things currently stand, they can choose to merge and remove any competition law risk.



On the other hand, the Conduct Rules are extra-territorial in their effect. They apply to agreements conceived outside Hong Kong, if they have the *"object or effect"* of preventing, restricting or distorting competition in Hong Kong, regardless of where the conduct takes place or where the parties are located. Therefore, there is nothing to prevent the competition authorities imposing penalties on businesses operating abroad if either an *"object"* or *"effect"* infringement occurs in their eyes.

Such broad scope is not uncommon. Both the US and EU competition regimes are frequently applied to arrangements that are carried out by overseas companies. Under the US regime disclosure of evidence located abroad is facilitated through bilateral agreements with other countries and the extradition of foreign executives to the US is not uncommon. In Europe, the EU Commission has traditionally found liability for foreign based companies either on the basis that such agreements were "implemented" within the jurisdiction, or, if a local subsidiary exists, the non-EU parent can be held liable as part of a broader "economic entity". The fundamental question is whether harm is suffered in the EU.

Test case: resale price maintenance

Resale price maintenance (RPM) will be an interesting test-case for the assertiveness of the Hong Kong competition authorities in using their powers. RPM is the practice of suppliers forcing their distributors (via their distribution contracts) to maintain a certain price level on goods sold within their territory. In Hong Kong RPM is an important economic issue given the large retail sector.

In the Guideline to the First Conduct Rule, the authorities have indicated a willingness to be accommodating by taking an open view on whether RPM will be considered an infringement: *"the case turns on a consideration of the content of the agreement establishing the RPM, the way the arrangement is implemented by the parties and the relevant context"*[1].

Conclusions

By modelling the Ordinance on the TFEU's competition provisions, the Hong Kong government has given its competition authorities a broad set of powers. But in some respects the competition regime is incomplete; particularly given the lack of stand-alone or class action suits and the limitation of the new Merger Rule to the telecommunications sector. Having a split regulatory regime coupled with the Competition Tribunal not having issued sentencing guidelines mirroring the Competition Commission's Leniency Policy may undermine the attractiveness of the leniency regime to all but the first whistleblower. Furthermore, the approach outlined in the Guidelines with respect to RPM and the granting of potential exclusions, indicates that the competition authorities intend to be flexible at first. As things stand therefore the new regime is far less stringent than the European regime, however, it may be that ancillary legal mechanisms are bolted on at a later date and, as ever, the interpretation of the Ordinance and its Guidelines will take a number of years to develop into a body of law.

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1 Paragraph 6.72

Will the Competition Appeal Tribunal become a popular venue for international class actions?

Following the entry into force of the Consumer Rights Act 2015 (the CRA), class actions by a far wider category of claimants can now be brought in the Competition Appeal Tribunal (the CAT). In this article we analyse the potential use of the CAT as a forum for corporate class-actions with a multi-jurisdictional dimension.

Key issues

England and Wales is already one of the most popular jurisdictions for both follow-on and stand-alone competition claims in Europe. The shortage of reported judgments is not reflective of volume, given that many of these claims are settled at an early stage or are brought via an arbitration. But this has not been the case with class actions. However, following the entry into force of the CRA on 1 October 2015, not only are a far larger number of follow-on class actions permissible, but the CAT now has the power to make a determination of the facts itself in stand-alone cases. Looking forward, some of the factors that will determine whether the English legal system will attract more class action claims by the victims of cartels and abuse of dominance include:

- The ease by which a collective action can be initiated.
- How such claims can be funded.
- Cross-border issues (particularly concerning evidence).

Collective actions

Under English law the assignment of a number of existing actions to a single claimant can happen under a group litigation order[1]. This is a case management tool by which, following an application, the court can conjoin multiple claims involving "common or related issues" of fact or law. But, each claimant has to initiate its own claim beforehand, so clearly this is unsuitable for large class actions. Representative claims are also permitted where more than one person has the "same interest" in a claim[2]. This is theoretically similar to a class action, but is rarely used in practice.

Prior to the introduction of the CRA, collective actions were permitted in consumer competition cases. These were only for "opt-in" cases, where claimants had to elect to join an action in order to be entitled to any damages. This clearly limited the efficacy of collective redress, as did the fact that only consumer organisations, such as Which?, could bring collective claims before the CAT. Now, for competition disputes, this representative function is available to any person or body, so long as the CAT determines that it is "just and reasonable" that it assumes this role.

In theory this permits the creation of companies to amalgamate claims and litigate for profit. Already a number of high-profile US law-firms with class action practices have opened offices in London. But it is unclear to what extent English judges will accept the more aggressive practices of some litigation funders. Traditionally, the courts have analysed the assignment of a claim, necessary where a funder sues in its own name, and assessed whether the arrangement poses a risk of corrupting public justice. Whether

Crucially, under section 47B of the CRA, class actions can now be brought on an "opt-out" basis. Under this system, class representatives have the power to bring claimants into a class action through the definition of the class.

FELICITY BURLING, ASSOCIATE

the CAT will be flexible in granting authorisation to be a representative of a class in this new era is therefore a moot point, but it is noteworthy that an initial proposal explicitly to exclude lawyers and litigation funders from the representative role was reversed. It would therefore appear that this should not be an insurmountable hurdle.

Similarly, the test for certification of a claim, namely being allowed to join the class action as a claimant, appears to be less burdensome than it might have been. It will not require a deep analysis of the merits, merely that there should be "some basis in fact" for the claim. By contrast, in the US obtaining permission to join an existing class-action will often require factual and expert analysis.

Crucially, under section 47B of the CRA, class actions can now be brought on an "opt-out" basis. Under this system, class representatives have the power to bring claimants into a class action through the definition of the class. So long as these claimants meet the relevant criteria (for example customers of a certain company) they will be bound by the court's judgment, unless they have previously opted-out of the class. However, this will **not** apply to non-UK claimants, who will still need expressly to opt-in for any class action brought in the English courts. This will, to some extent, limit the scope of multi-jurisdictional cases as it will be necessary to persuade foreign claimants to litigate in the UK.

Another limiting factor on these new actions will be the definition of the "class" of claimants. Representatives will attempt to make this as wide as possible, in order to increase the class-size, but ultimately it is the CAT that will decide on the description of persons whose claims are eligible for inclusion in the proceedings.

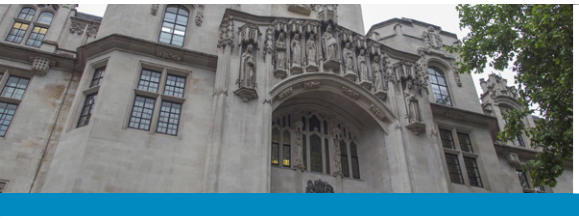
Funding

Deterrents against bringing class actions are the:

- Heavy cost of bringing litigation.
- Fact that under English law the loser typically pays a significant proportion of the winner's legal costs.

The second of these has been intentionally retained within the CRA

1 CPR Rule 19.11
2 CPR Rule 19.6



and was an attempt to limit the excesses of the US class-action regime, where each side pays its own costs regardless of who wins, hence incentivising the bringing of claims.

Generally England and Wales is considered a flexible jurisdiction for litigation funding. There is no statutory regulation, although a voluntary code does exist and safeguards are imposed by the courts to avoid vexatious litigation. One way that a claimant can manage its costs risk is via insurance, either under an existing policy or after the event (ATE) insurance which covers the costs arising from the loss of a claim. However, there are limits to what is permitted in English courts.

- The Criminal Law Act 1967 abolished the crimes of champerty (the division of legal spoils) and maintenance (wanton and officious intermeddling in the disputes of others), but the Act maintained the common law position that for reasons of public policy some funding agreements will be found illegal. Each case will be assessed separately by the courts. Therefore, where a third party funder attempts to exercise control over the conduct of litigation, it risks finding that its funding agreement is unenforceable.
- Claimants are permitted to enter into a conditional fee arrangement (CFA) under which the client only pays its lawyer's fees if the claim is successful, and where the lawyer receives a success fee as a percentage uplift on the normal costs (to a maximum of 100%). Of course, even with a CFA, an unsuccessful claimant could face a large legal bill from the opponent, which is where the ATE insurance comes into play.
- However, under Schedule 8 (para 6.8) of the CRA, lawyers acting in class actions are prohibited from issuing claims on damages-based agreements (DBAs). These are contingency fee arrangements, permitted in certain civil claims, under which the legal team is paid a proportion (%) of the award received.

The restriction on DBAs is likely to have a chilling effect on some types of class action. Without them lawyers will be less likely to take up marginal or lower-value cases. Furthermore, unlike in the US the CAT will be restricted from awarding "exemplary" damages, so by comparison with the American regime the pickings for litigation funders could well be relatively slim.

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Cross border issues

Evidence

The key advantage of a follow-on claim is that the facts do not need to be proved. Claimants can use the findings of a UK or EU competition authority as evidence of the existence of the cartel. EU Commission decisions are binding on English courts, while the findings of other European National Competition Authorities constitute *prima facie* evidence that an infringement of competition has occurred. Frequently, however, the problem has been the asymmetric distribution of key evidence that is necessary for a claimant to prove causation of damages and quantification of loss.

This was the reason behind changes introduced by the EU Damages Directive[3]. This will be implemented in the UK by 27 December 2016, and will facilitate discovery in class action cases. It stipulates that the files of competition authorities of a Member State are discoverable by claimants in the same Member State. The files of the EU Commission are in theory discoverable in follow-on actions in the courts of any Member State.

There are however limits to what is discoverable:

- Any request must be reasoned and proportionate, so not a fishing expedition. The generic disclosure of documents is not permitted, rather claimants must provide proper categories of evidence of which they seek disclosure.
- The following may only be disclosed after the competition authority has closed its proceedings:
  - Information prepared by a natural or legal person specifically for the proceedings of a competition authority.
  - Information that the competition authorities have drawn up and sent to the parties during the proceedings.
  - Settlement submissions in early resolution cases that have been withdrawn, by infringers who have pulled out of settlement talks.
- Disclosure of the following is never possible:
  - Leniency statements by whistleblowers, except for evidence that exists irrespective of the proceedings, whether or not this is in the competition authority's files.
  - Settlement submissions in early resolution cases by applicants seeking a reduction in fines.

3 2014/104/EU


Conflict of laws

In order to attract large-scale class actions the new regime will have to work effectively with international conventions that aim to solve conflict of laws issues. The requirement of non-UK claimants having to opt-in reflects in part the practical limits of public international law: an opt-out system is in theory a final determination for all those who fall within the class, so having this determination made in the English courts would arguably impinge on the sovereignty of claimants in other legal systems if it precluded actions there under the doctrine of *res judicata*. However, some jurisdictions, for example the Netherlands, permit courts to approve settlements that cover non-domestic parties who have failed to opt-out. The danger therefore is clear: forum shopping. Ideally it would be clear what the effect of any future CAT decision is on the rights of potential claimants and defendants situated in other jurisdictions.

However, given that the recast Brussels Convention does not cover these types of actions, this is not the case. While the enforcement of judgments on defendants is theoretically possible, there is no uniform methodology of application for enforcement within the EU, which is not surprising given that the law on collective proceedings varies by Member State. It remains to be seen whether opt-out settlements will be accepted by the courts of other Member States and in particular whether these settlements would pass a local "public policy" test. It is possible that Member States will take different views on the enforceability of opt-out decisions emanating from other EU jurisdictions with looser rules on class actions, in which case public policy could theoretically be used as a ground for refusing recognition and preventing enforcement.

In 2013 the European Union published a recommendation on collective redress. Although non-binding, it included various principles that each Member State is encouraged to pursue: for example that procedures are *"fair, equitable, timely and not prohibitively expensive"*. However, the recommendation stipulated that opt-in systems were preferable to opt-out systems. Whether this undermines the ability of UK opt-out decisions to be enforced in other Member States remains to be seen.

Conclusions

There is no doubt that the new class action regime introduced by the CRA is flexible in terms of the structure of collective actions but, by comparison to the US, England is relatively restrictive in terms of funding options and the damages available. Meanwhile, the EU regime is becoming pro-claimant regarding the rules of disclosure, but the ease of enforcement of CAT judgments outside of the UK remains open to question.

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hfw Conferences and events

3rd Annual Petrochemicals conference

Amsterdam
3-4 March 2016
Presenting: Daniel Martin

Wolters Kluwer 5th Annual Global Competition Law Forum

Hong Kong
1 April 2016
Presenting: Anthony Woolich and Caroline Thomas
HFW will be sponsoring this event.

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