

A Look At UK, EU And US Cartel Enforcement Trends

By **Werner Berg, Luca Crocco and Ludmilla Le Grand** (September 16, 2024)

Demonstrating both increased cross-border collaboration and the adoption of novel theories of cartel violations, the European Commission and the U.K. Competition and Markets Authority, together with the U.S. competition agencies, the U.S. Department of Justice and the Federal Trade Commission, **issued** a joint statement on July 23 on competition in generative artificial intelligence foundation models and AI products.



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The statement warned of "the risk that algorithms can allow competitors to share competitively sensitive information, fix prices, or collude on other terms or business strategies in violation of our competition laws."^[1]



Luca Crocco

It has become apparent that both the European Commission and the CMA are prioritizing ex-officio cartel enforcement, not least by increasing resources and devising new detection and enforcement tools in their efforts to prosecute cartel violations.

This article will provide a review of the similarities and differences among these jurisdictions' approaches to cartel enforcement.



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In terms of similarities, both jurisdictions have sought to:

- Expand the scope of what constitutes cartel conduct;
- Put less reliance on leniency applications to initiate cartel investigations;
- Improve detection techniques;
- Emphasize obstruction of justice prosecutions; and
- Increase communication and cooperation among enforcement agencies.

In the EU, the commission is the primary enforcer for all cartel offenses that cross member state borders. However, individual members states within the European Union also have their own independent jurisdiction to enforce cartel laws within their boundaries. In the U.K., the primary antitrust enforcer, including prosecution of cartels, is the CMA.

Similarities in Enforcement

Case Trends

Traditionally, the types of conduct that both enforcers have considered a cartel have focused on:

- Price-fixing, i.e., agreements between competitors to set, raise or stabilize prices;
- Bid-rigging, i.e., agreements between competing companies on how to coordinate bids, typically for government contracts: and
- Market allocation, i.e., agreements between competitors to divide products, geographic regions, or customers to avoid direct competition.[2]

However, both regulators have sought to expand what conduct constitutes a violation of their respective law to include information exchange, hub-and-spoke conspiracies, collusion on technological development, buyer-side cartels, and algorithmic price-fixing.

In addition, the commission is relying heavily on circumstantial evidence to establish a cartel, even where there is no evidence of direct and repeated contact between competitors.[3]

The CMA has also considered the impact of AI and related matters on competition and has provided reports on its concerns of the use of AI on competition and its effects on consumers.[4]

The commission and the CMA are able to capture a broad range of conduct, as Article 101, TFEU and its predecessors, as well as the U.K. equivalent under Chapter I of the Competition Act 1998, not only cover an actual agreement but also so-called concerted practices.[5]

This allows these regulators to prosecute certain forms of information exchanges as cartel-like violations.

Another common trend in enforcement has been an increased focus on stand-alone employee hiring and wage restriction cases, including no-poach agreements, which are defined similarly in each jurisdiction as agreements not to hire or solicit employees of another company, and wage-fixing.

This trend originally emerged in the U.S., but in May, the commission reaffirmed that wage-fixing and no-poach agreements will be treated as by-object cartel infringements and forms of market allocation and price-fixing.[6]

The commission carried out its first dawn raid in connection with suspected no-poach agreements in November 2023.[7]

Moreover, member states have been very active in bringing labor market cartel cases. Similarly, the U.K. has shown an interest in pursuing investigations focused, in part, on hiring and wage restrictions.[8]

Nonleniency Investigations and Detection Mechanisms

The threat of parallel civil damage claims has had a significant impact on enforcement efforts against cartels throughout the world. Enforcement officials, and those in the defense bar, have publicly stated that the threat of costly civil damage claims creates a significant disincentive to report cartel conduct to authorities. Also, that the drop in leniency applications over the last decade was largely attributable to the increase in damage claims.

In response to the drop in leniency applications, enforcers have increased investigations outside the leniency program through what they call ex-officio investigations, where they generate new matters from independent sources and without the benefit of a leniency applicant.

Since the introduction of leniency applications in the EU in 1996, where companies self-reported antitrust violations, they became the primary avenue used by enforcers to develop new cases. Now, in the EU and U.K., roughly 50% of cases are initiated through ex-officio investigations.

To detect cartel activity, enforcers in the EU and the U.K. use similar investigative techniques including the use of dawn raids, search warrants and document requests.

The commission can conduct dawn raids on business and domestic premises, and also issue voluntary and mandatory requests for information and production. In addition, the commission has historically relied on sector inquiries as another method of generating new cartel matters.

The CMA can conduct dawn raids in business and domestic premises, compel production by involved parties and third parties, and use various covert surveillance powers. These include cameras, recording devices, computer spyware, monitoring activity in public and quasi-public spaces,[9] sourcing information through relationships, and accessing telephone records.

In both the EU and U.K., hybrid dawn raids, where agents conduct on-site searches at a company's offices, remotely access a company's computer network, or search an employee's home at the same time to maximize the element of surprise, are also a possibility.

Regulators in both jurisdictions have also developed new techniques to uncover cartel conduct.

These include:

- Enhanced communication with enforcers from other jurisdictions and training noncompetition law enforcers to source potential leads;
- Sourcing leads from whistleblowing tools, merger reviews, second requests, market studies, web scraping and data collection; and
- Monitoring industries, pricing trends and public announcements. In addition, the U.K. offers financial incentives to report cartel conduct.

Destruction of Evidence

With the increase in the use of ephemeral messaging, enforcers in the EU have emphasized their concerns about obstruction of justice and document destruction in the course of a cartel investigation.

In the U.K., Parliament passed the Digital Markets Competition and Consumer Act, which strengthens the CMA's ability to enforce obstruction laws and increases company responsibility for preservation if it believes there may be an open investigation.[10]

In the EU, the commission recently imposed a €15.9 million (\$17.7 million) **fine** on International Flavors & Fragrances Inc. after a senior employee deleted messages during a dawn raid.

At the 2024 International Cartel Workshop in June, Maria Jaspers, director of the cartel directorate, stated that despite the company having done everything it could to cooperate in the investigation and to instruct its employees to preserve evidence, the commission still pursued the case against IFF to send a message that obstruction cases will not be taken lightly. The IFF case is consistent with the commission's long-standing efforts to punish any efforts to obstruct its investigations.[11]

Increase in Cross-Border Cooperation

In another sign of increased enforcement, there has been an increase in cross-border cooperation during investigations and prosecutions of cartels.

Enforcers from the EU and the U.K., as well as several others at the workshop, which brought together enforcers from over 13 countries, stated that they have increased collaboration through open lines of communication, development of relationships, willingness to intervene through court letters and public comments, and coordination on the timing of investigations.

For example, in March 2023, the commission coordinated with U.S., U.K., and Swiss competition agencies to execute dawn raids of fragrance manufacturers, and, in October 2023, the commission worked with the U.S., U.K. and Turkish competition agencies to execute dawn raids of construction chemicals companies.

In March 2022, the CMA and commission also carried out the first post-Brexit dawn raids on car manufacturers regarding alleged conduct in relation to the collection, treatment and recovery of end-of-life cars and vans.

Key Differences

Criminal Prosecution

Criminal enforcement, in practice, does not play a crucial role in either jurisdiction. In the U.K., criminal penalties are available for both the CMA and Serious Fraud Office.

To date, although individuals have been sentenced to imprisonment through plea bargains with the DOJ,[12] there have not been any successful individual prosecutions for cartels in contested cases, and the few cartel cases that have been brought to trial have resulted in losses.

The CMA, however, is still an active and aggressive enforcement agency, and companies face threats of investigation. For example, the CMA can disqualify cartel participants from holding director positions, and to date, there have been 35 disqualifications.

The commission does not have criminal penalties and instead relies on high administrative fines against companies, but no enforcement tools against individuals.

However, even without criminal sanctions, the commission has been extremely active in investigating cartels and is a global leader in pursuing violations. In recent years, it is common for cartel investigations to be initiated by the commission and then spread to other jurisdictions, including the U.S. It should also be noted that criminal penalties exist in many member states.

Practical Takeaways

Given the increased level of cross-border cooperation among enforcers, companies who face cartel investigations in one jurisdiction should anticipate and prepare for related investigations to arise in other jurisdictions.

This is particularly true given the level of communication among enforcers, and the global nature of the world economy where products and services easily cross borders.

Companies' antitrust compliance training must expand beyond the traditional concerns about price fixing, bid rigging and market allocation. Now companies must be on the lookout for:

- Conduct involving extensive information exchange with competitors, either directly or through a third party such as a trade association;
- Conduct that hampers technical innovation;
- The use of software products that aggregate competitively sensitive information and provide so-called recommended pricing to customers;
- Any AI or algorithmic tools that are used by competitors and purport to offer increased revenue or profitability;
- Any concerted action involving labor restrictions including no-hire and nonsolicitation agreements; and
- Wage-fixing.

Finally, special attention needs to be given to document preservation during the course of a cartel investigation.

Therefore, companies should understand how their employees are using ephemeral messaging apps and institute policies that require employees to preserve these messages to the extent they are used for company business.

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[1] <https://www.justice.gov/atr/media/1361306/dl?inline>.

[2] Article 101 of the Treaty on the Functioning of the EU, and the Competition Act of 1998 and the Enterprise Act of 2002 in the UK, using similar language, each prohibit price-fixing, wage-fixing, market sharing, and allocations of customers, workers, and markets.

[3] <https://www.lw.com/en/insights/2024/07/10-key-takeaways-developments-in-international-cartel-enforcement-and-observations-from-workshop>.

[4] <https://www.gov.uk/government/publications/ai-foundation-models-update-paper>.

[5] Defined as a "form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".

[6] https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en?filename=kdak24002enn_competition_policy_brief_antitrust-in-labour-markets.pdf.

[8] <https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-fragrances-and-fragrance-ingredients-51257>.

[9] Section 26 Regulation of Investigatory Powers Act 2000 (RIPA).

[10] <https://www.legislation.gov.uk/ukpga/2024/13/section/80>.

[11] https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1725.

[12] https://www.justice.gov/archive/atr/public/press_releases/2008/237809.htm.