



Antitrust and merger control

SEPTEMBER 2019

The UK exit from the EU will have limited impact as far as the EU antitrust rules are concerned (Article 101 TFEU on anti-competitive agreements and Article 102 TFEU on abuse of a dominant position), because these rules apply equally to non-EU companies who carry on business in the EU or whose activities affect trade in the EU. In addition, the UK competition rules (the Chapter I and Chapter II prohibitions of the Competition Act 1998) closely mirror the EU antitrust rules and businesses are therefore subject to a very similar regime where conduct has an impact in the UK only.

Antitrust

However, one impact of the UK exit from the EU will be that there will be many more cases where both the EU and the UK could in parallel open an investigation and impose fines and other remedies for anti-competitive conduct affecting both the continuing EU and the UK. While the UK is within the EU it cannot investigate where the European Commission takes jurisdiction. This could potentially add to risk and costs for affected businesses.

One of the main issues that will need to be addressed in the context of antitrust is the need for transitional arrangements which provide clarity on the allocation of existing and post-Brexit investigations, processes and remedies.

No-deal Brexit

On 24 January 2019 the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/93) (the '**Competition Brexit Regulations**') were published. The Competition Brexit Regulations amend current UK competition legislation where necessary in order to make the legislation suitable in a no-deal Brexit scenario. It is important to note that the Competition Brexit Regulations will only take effect in the event of a no-deal Brexit on 31 October 2019.

On 18 March 2019 the CMA also published [Guidance on the functions of the CMA after a no-deal exit from the EU](#) ('**CMA Guidance**'), which explains how a no-deal Brexit would affect the powers and processes of the CMA

The section is part of our [Brexit Legal Guide](#).

No Deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at that time will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments – this is called 'retained EU law'
- The [Competition \(Amendment etc.\) \(EU Exit\) Regulation 2019](#) (SI 2019/93) will take effect on exit day. These Regulations revoke Articles 101 and 102 TFEU, the EU Merger Regulation and related

for antitrust and cartel enforcement, merger control and consumer protection law enforcement after exit day. The CMA Guidance will only take effect on exit day in the event that the UK leaves the EU without a Brexit deal and the Competition Brexit Regulations come into effect.

The EU Commission has also published a [Notice to Stakeholders on the Withdrawal of the UK and EU Competition Law](#) (Commission Notice), setting out the Commission's view on the main implications for the application of EU competition law in the event of a no-deal Brexit.

After Brexit, the CMA will no longer have jurisdiction to apply Articles 101 and 102 TFEU and will no longer be part of the EU competition system. The Competition Brexit Regulations therefore remove all references in the [Competition Act 1998](#) to EU law and EU institutions and to any powers or duties on the UK authorities in relation to current EU obligations.

Section 60

Section 60 of the Competition Act, under which the UK competition authorities and courts must, in as far as possible, interpret UK competition law in a manner that is consistent with EU competition law and must have regard to any decision or statement of the Commission, will be repealed. A new Section 60A provides that competition authorities and courts will only be bound by an obligation to ensure consistency with EU competition case law and decisions that pre-date exit day. So UK courts and competition authorities will no longer need to have regard to EU case law and decisions adopted after that date and may diverge in their interpretation of common language and concepts where the EU law is uncertain at exit day.

Section 60A(7) further provides that the CMA and the courts may depart from pre-Brexit cases and decisions where it is considered appropriate in the light of specified circumstances, such as, for example, differences between UK and EU markets, developments in economic activity or the particular circumstances under consideration. The specified circumstances listed are very broad and Section 60A(7) may end up diluting the requirement for consistency with pre-Brexit case law considerably, but also will enable the UK to adopt post-Brexit developments in the EU which depart from previous case law, if the UK courts and authorities think this appropriate.

Block Exemption Regulations

The EU Block Exemption Regulations will become 'retained Block Exemption Regulations' after Brexit and will provide an exemption from the Chapter I prohibition on the basis of the same criteria and market share thresholds. On their expiry, the Secretary of State may decide to replace a retained block exemption with a new block exemption adopted under the relevant Competition Act powers.

Transitional provisions

Where the CMA is conducting an investigation immediately before exit day, it will no longer have jurisdiction to investigate any EU aspects of the case on or after exit day. Anything done before exit day for the purpose of or in connection with the EU elements of the investigation is to be treated, on or after exit day, as done for the purpose of or in connection with the domestic elements of the investigation.

After exit day the CMA will not be able to open investigations into infringements of UK competition law where the Commission had, before exit day, taken jurisdiction which precluded the application of UK competition law and reached a decision. The CMA will, however, have jurisdiction to investigate breaches of UK competition law which took place before exit day where the Commission took jurisdiction but had not yet reached a decision before exit day.

The Commission Notice makes it clear that it will continue to exercise its jurisdiction on agreements or conduct affecting competition within the internal market. The UK's jurisdiction under its national competition regime may also be applicable in parallel. The UK and EU positions open up the possibility of parallel investigations of both pre- and post-exit day conduct, except where the Commission has decided the case before exit day.

The Commission accepts that it will no longer be able to carry out dawn-raids under Article 20 of [Regulation 1/2003](#) in the UK. It will however still be able to request information under Article 18 of Regulation 1/2003.

All Commission decisions adopted under [Articles 101 and 102 TFEU](#) before the UK's withdrawal from the EU will remain valid.

competition regulations, and make the necessary amendments to UK competition legislation to reflect these changes

Deal/transitional period

- If approved by the UK Parliament, the Withdrawal Agreement, or some version of it, will set out arrangements for the UK's withdrawal from the EU – when the UK will cease to be a member state
- A transition period will follow the date of the UK's EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU competition law will continue to apply in the UK in the same way it did while the UK was a member state. The Withdrawal Agreement also contains provisions which provide what happens with ongoing investigations at the end of the transition period

Withdrawal Agreement

In the event that the current version of the [Withdrawal Agreement](#) is adopted, then the provisions agreed with the EU will apply. The Withdrawal Agreement provides for a transition period until the end of December 2020 (with the possibility of a one-off extension of up to two years) during which the status quo will continue. The Withdrawal Agreement contains some provisions specific to antitrust cases which provide what happens at the end of the transition period. Article 92, which deals with ongoing administrative procedures, provides that EU institutions and agencies will continue to be competent for administrative procedures which were initiated before the end of the transition period. Proceedings for the application of Articles 101 and 102 TFEU will be considered as having been initiated at the moment at which the Commission decides to initiate formal proceedings in accordance with Article 2(1) of [Regulation 773/2004](#) (typically at the stage it issues a statement of objections).

Future relationship

The Political Declaration on the future relationship refers to level playing field conditions and ensuring open and fair competition and it is possible that the future trade agreement between the EU and the UK could provide for close alignment between the EU and UK competition regimes and cooperation between their respective competition authorities. The Government has indicated that it is keen in any event to explore reciprocal commitments on competition transparency, procedural rights and safeguards with the EU and to reach agreement on cooperation in order to manage parallel competition work. Existing agreements between the EU and third countries on cooperation and information sharing, such as between the EU and the USA, provide a precedent for this sort of arrangement.

Private enforcement

Follow-on damages actions for breach of competition law, in which the claimant relies on an existing infringement decision, are increasingly common in the UK. Following Brexit, EU infringement decisions may cease to have a binding effect on the UK courts and claimants may look to other jurisdictions when choosing the forum to bring such claims, although this change should not affect claims dating back to when the UK was a member of the EU. In addition, the English courts are likely to be ingenious in finding a basis for jurisdiction in relation to claims against parties subject to the jurisdiction of the English courts for breach of EU competition law and, because

of wide English law disclosure rules, the English courts should remain an attractive forum.

No-deal Brexit

Under the Competition Brexit Regulations, sections 47A and 58A of the Competition Act are amended so that EU Commission decisions adopted after exit day are no longer binding on UK courts in follow-on damages claims. Decisions adopted before exit day will continue to be binding, even where they only become final (after any appeals have been exhausted or the time for bringing an appeal has expired) after exit day.

UK courts will no longer be bound to treat decisions by the national competition authorities as prima facie evidence of a breach of Articles 101 or 102 TFEU for the purpose of a follow-on claim for damages. Decisions reached before exit day, even if only final after that date, will retain their status of prima facie evidence.

Withdrawal Agreement

The Withdrawal Agreement is silent on the subject of private enforcement, but changes affecting jurisdiction and recognition of judgments may be relevant (see separate [Disputes](#) section of this guide).

Merger control

In respect of merger control, again the impact of exit is likely to lead to many more parallel investigations. The [EU Merger Regulation](#) ('EUMR') introduced a so-called 'one stop shop' regime, under which a transaction that qualifies under the EUMR is no longer subject to the merger control regime(s) of the relevant member state(s) (subject to some exceptions). Once the UK is no longer a member state, the EUMR and UK merger control regimes would run in parallel. A transaction that qualifies under the EUMR may also be subject to UK merger control (provided the jurisdictional threshold for UK merger control is met). This could add a burden and cost for businesses, in particular in view of the level of the UK merger fees (ranging from £40,000 to £160,000, depending on the UK turnover of the enterprises acquired) and the longer time frames for UK merger control clearance. The CMA has estimated that this will lead to an increase in UK merger investigations by up to 40% and the Government has committed to increase the CMA budget with an extra £2.8 million a year.

As for antitrust cases, it will be important to have clear transitional arrangements in place on the allocation of existing and post-Brexit investigations and remedies.

No-deal Brexit

The Competition Brexit Regulations make a number of changes to the [Enterprise Act 2002](#). The EU Merger Regulation will be revoked on exit day and any references to the EUMR regime and its interaction with the UK merger regime will be removed in order to clearly separate the two merger control regimes.

Transitional provisions

The CMA will not be able to launch a parallel investigation for a transaction where the Commission has reached a decision before exit day.

For merger cases which are live on exit day (these are cases that have been notified or referred to the EU Commission under the EUMR but on which a decision has not been reached on exit day), the UK aspects of the transaction will come under the CMA's jurisdiction (provided the transaction meets the jurisdictional thresholds of the Enterprise Act). Similarly, where a Commission decision is subsequently annulled, the CMA may have jurisdiction over the UK aspects of the transaction.

The CMA has a four-month statutory deadline to call in completed mergers for review and refer for a phase 2 investigation. In order to make sure that the CMA will not be time barred from investigating completed mergers, for mergers completed before Brexit but for which the Commission has not yet issued a decision, the statutory four-month period will apply from Brexit day or from the point at which the CMA is considered to have been provided with notice of the material facts about the merger, whichever is later.

The Commission Notice provides that the relevant date for establishing its jurisdiction is the date of conclusion of the binding legal agreement, the announcement of a public bid or the date of the first merger notification, whichever is earlier, and that these rules will not be altered in the event of a no-deal Brexit. If the relevant event takes place prior to the UK's withdrawal from the EU, UK turnover will be relevant in order to determine whether the EUMR thresholds are met. If the relevant event takes place after Brexit, UK turnover will not be taken into account to determine EUMR jurisdiction.

On substantive assessment the Commission Notice accepts that after exit day it will no longer be competent to assess the impact of a merger on the UK market.

Commission decisions adopted under the EUMR before Brexit will remain valid after the UK's withdrawal from the EU. Parties may, in certain circumstances, consider requesting the Commission to waive, modify or review certain commitments under the standard review process.

The CMA Guidance advises merging parties to contact the CMA at an early stage where they anticipate that their transaction will be a live transaction with the Commission on exit day and may raise potential competition concerns in the UK. The CMA may suggest to the merging parties that they should start pre-notification discussions with the CMA.

The CMA will continue to monitor non-notified cases, including those falling under the jurisdiction of the Commission but over which the UK may obtain jurisdiction over the UK aspects of the transaction after exit day.

The BEIS has also published no-deal guidance on its [website](#) warning that "businesses should be aware that it is possible that there will be no agreement on jurisdiction over these cases".

Withdrawal Agreement

In the event that the current version of the Withdrawal Agreement comes into effect, Article 92 which deals with ongoing administrative procedures provides that the Commission will continue to be competent for transactions which have been notified to the Commission in accordance with the EUMR (Articles 1, 3 and 4) before the end of transition.

Future relationship

There will also need to be further guidance as to how the CMA and the EU Commission will work together and share information in cases where dual notification is required. The Government is aware that such information sharing between jurisdictions can reduce the administrative burden on businesses and hopes to negotiate a close relationship of cooperation with the EU Commission and with the national competition authorities to allow for information sharing in merger cases.

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