



Brexit snapshot

BREXIT AND COMPETITION LAW ISSUES

FEBRUARY 2020

Background¹

The European Union (Withdrawal Agreement) Bill, which paved the way for the UK to leave the European Union (“**EU**”) with a deal on 31 January 2020, received royal assent on 23 January 2020 and became the European Union (Withdrawal Agreement) Act 2020 (“**WAA**”). The UK’s exit from the EU was then approved by the European Parliament on 29 January 2020; and as of 11 p.m. on 31 January 2020, the UK exited the EU. A Transition Period now runs in effect as of 1 February 2020 until 31 December 2020.

The UK’s Competition & Markets Authority (“**CMA**”) has now published guidance on how Brexit affects the CMA’s powers and processes for antitrust enforcement and merger control during the Transition Period, towards the end of that period and after it ends. The guidance also explains the treatment of ‘live cases’ which are those cases that are being reviewed by the European Commission (“**EC**”) or the CMA during and at the end of the Transition Period.²

Nothing will change immediately because of the Transition Period. The UK will continue to be treated as if it were still an EU Member State and EU law will continue to apply – in particular, competition law will remain unchanged during this period. The only significant change will be that the UK will no longer send, or appoint representatives to the EU institutions (except, on invitation, as observers) and will have little, or no influence whatsoever over the new EU laws enacted during the Transition Period.

However, what will happen after the end of the Transition Period and beyond is only partly known today. The reason for this uncertainty is due to the fact that, following the end of the Transition Period, the legal regime in the UK governing EU and UK matters is up for negotiation between the UK and the EC. The negotiation of any future UK-EU Trade Agreement will influence the extent to which EU competition law rules will continue to be of any relevance to businesses based in the UK after the end of the Transition Period.

Set out below are key changes businesses need to know in terms of the impact Brexit will have on UK and EU competition laws.

¹ For further information on the current position in relation to the negotiation of a Free Trade Agreement between the UK and EU, refer to our client briefing [“Brexit: where do we go from here?”](#) (February 2020).

² See *Guidance on the Functions of the CMA under the Withdrawal Agreement* (28 January 2020).

Merger Control

General

- The EC currently acts as a 'one-stop shop' for qualifying transactions (mergers) that meet the EU Merger Regulation ("**EUMR**") thresholds, such that there is no need for merger filings in individual EU Member States, including the UK. Therefore, the UK turnover generated by merging parties will still need to be taken into account when establishing whether a merger satisfies the EUMR thresholds during the Transition Period. The EUMR also provides that, in certain circumstances, parties or Member States can request that a qualifying merger is referred to the EC for review and likewise the parties, or Member States, can request that the EC refer an EUMR qualifying merger back to the Member State for review.
- The EUMR will continue to apply during the Transition Period. Therefore, the division of jurisdiction between the EC and the CMA over mergers which are notifiable under the EUMR or the UK merger control rules will remain the same during the Transition period.
- At the end of the Transition Period, the UK will no longer be part of the EU's "one-stop shop". As a result, UK turnover will not count towards the EUMR thresholds. Deals involving businesses with significant UK turnover that would currently be notifiable to the EC may therefore fail to trigger the EU thresholds and need to be notified to the UK's CMA and other individual EU Member States.
- Parties will have to consider the parallel application of both the UK and EU merger control rules to a proposed transaction after the Transition Period. The CMA believes that this could result in 50 further notifications per year, nearly doubling its current workload.
- Unless otherwise agreed, where the EC has accepted commitments from the merging parties,³ the EC will also continue to be responsible for monitoring and enforcing all aspects of those commitments, including any UK elements, after the end of the Transition Period. This will also be the case when the commitments have not been agreed before the end of the Transition Period, but the EC has exclusive jurisdiction to review mergers.

Mergers already approved by the EC

- If the EC issues a merger clearance decision on or before the end of the Transition Period, the CMA will have no jurisdiction to review that same transaction unless the decision is annulled, in full or in part, following an appeal.

Mergers notified during the Transition period to the EC but not yet approved

- At the end of the Transition Period, there will be some merger cases which are under review by the EC and where a final decision has not yet been taken (i.e. "live cases"). The EC will retain exclusive jurisdiction to review a merger (including in relation to any effects on any UK market) and, as such, the CMA will not have jurisdiction where the merger has been formally notified to the EC before the end of the Transition Period and where the EC has accepted a referral request.
- Note that the CMA will have jurisdiction to review a merger that has not yet been formally notified or subject to referral to the EC before the end of the Transition Period. If such a merger raises material substantive issues in the UK, the merging parties may wish to consider the possibility that the CMA will ultimately have jurisdiction to review the merger and consider engaging with the CMA early on in advance of the end of the Transition Period given the potential for parallel UK and EC merger investigations of such cases.

³ Or commitments or remedies in the case of antitrust cases.

Antitrust

General

- For the moment, during the Transition Period, no substantive changes are expected to the UK's Chapter I and Chapter II of the Competition Act 1998, given their equivalent provisions to Article 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**").⁴ Accordingly, the CMA continues to enforce UK and EU competition rules in the UK during the Transition Period. Likewise, the EC continues to have power to enforce Articles 101 and 102 TFEU in relation to the UK during this period.
- After the end of the Transition Period, the CMA and the UK sectoral regulators with concurrent competition law powers will no longer have any power to apply Articles 101 and 102 TFEU to competition law infringements in the UK. However, unless agreed otherwise, if anticompetitive conduct has had an effect on trade within the UK and also in other EU/Member States, it may be investigated by both the CMA/UK sectoral regulators and the EC at the same time. Therefore, businesses need to continue to ensure that their agreements and practices comply with both EU and UK competition rules. It will therefore be possible that the CMA and the EC may reach different conclusions/decisions for the same anticompetitive conduct affecting both the EU and the UK markets.
- Section 60 of the Competition Act 1998 will be repealed at the end of the Transition Period and replaced by Section 60A. Section 60A in effect provides that the CMA, sectoral regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law when interpreting UK competition law, but that they may depart from such pre-exit EU case law where it is considered appropriate in the light of specified circumstances. These specified circumstances are broad, including where there are differences between EU and UK markets, and developments in economic activity. There will be no such obligation to have regard to EU judgments and EU decisions post-exit day, albeit the relevant UK courts and authorities may well do so if they wish.
- The existing EU Block Exemption Regulations⁵ will be retained in UK competition law, until they expire. Agreements that met the criteria of these EU Block Exemptions Regulations will therefore remain exempt from the UK competition law prohibitions. Upon expiry, the UK government will decide whether to adopt any new block exemptions. It is advisable to continue to draft commercial agreements so they benefit from the block exemptions.
- The leniency regimes of the EC, CMA and other national Member State competition authorities will remain separate during the Transition Period. The fact that a party has made a leniency application to the EC whether before or after the end of the Transition Period will not provide it with any protection from fines with respect to any UK antitrust investigation. Nor will such an application provide its employees or directors with any protection from prosecution for the criminal cartel offence in relation to that cartel activity in the UK or from director disqualification proceedings. Therefore, when considering whether to make a leniency application to the EC, parties are encouraged to consider whether it is also appropriate to make such an application to the CMA and vice versa.
- After the Transition Period, EC officials will not have jurisdiction to conduct dawn raids in the UK for breaches of EU competition law. Nor will the EC, or other EU Member State competition authorities, be able to ask the CMA to conduct for them a dawn raid in the UK, as continues to be the case until the end of the Transition Period. They may only write to request information from businesses situated in the UK.

⁴ These two prohibitions are the main prohibitions against anticompetitive agreements and abuse of a dominant position.

⁵ The relevant block exemption regulations are: (i) liner shipping regulation expiring on 30 April 2020; (ii) transport regulation; (iii) vertical agreements regulation expiring on 31 May 2022; (iv) motor vehicle distribution regulation expiring on 31 May 2023; (v) research and development regulation expiring on 31 December 2022; (vi) specialisation agreement regulation expiring on 31 December 2022; and (vii) technology transfer regulation expiring on 30 April 2026

Antitrust infringement decisions already taken by the EC

- No impact. The CMA will not be able to open investigations into infringements of UK competition law covered by an EC infringement decision taken on or prior to the end of the Transition Period, which has not been subsequently been annulled on appeal.

Antitrust infringements which are not yet the subject of an investigation

- The CMA may conduct investigations into any breaches of the UK competition law prohibitions, which are not covered by an EC decision before the end of the Transition Period. This could cover cases where the EC had jurisdiction but subsequently decided not to pursue the case on prioritisation grounds or where the EC is yet to decide whether to pursue a case.
- After the Transition Period, the EC will be unable to open new EU competition law investigations into infringements (e.g. pan-European cartels) that affect the UK markets. Therefore, after the Transition Period, the CMA/UK sectoral regulator is likely to open a parallel investigation to such infringement, if its effects extend to the UK markets. Leniency applications and settlement considerations would need to be assessed under both the EU and the UK regimes and processes at the same time.

Ongoing EC antitrust investigations

- In ongoing EC competition law investigations, or EC competition law investigations formally opened during the Transition Period with a UK market element but where a decision has not yet been reached, the EC will continue to be the competent authority for the proceedings after the Transition Period.
- After the Transition Period, the CMA and UK sectoral regulators may assume jurisdiction over any UK element of the investigation and apply UK competition rules (not the EU prohibitions). The CMA or a UK sectoral regulator may open a parallel investigation into the same conduct.

State Aid

- During the Transition Period, the current State aid regime will apply to the UK, and the EC (and European Courts) will remain competent up to 4 years after the end of the Transition Period to deal with UK State aid that is granted before 31 December 2020. There is a potentially indefinite application of EU State aid law in Northern Ireland to the extent that measures affect trade between Northern Ireland and the EU.
- As for the future relationship between the EU and the UK, the Political Declaration expresses a commitment to prevent distortions of trade and unfair competitive advantages. However, it is not clear as yet whether the UK government will align itself to the EU State aid rules or not, given that the UK government has expressed a belief that it needs a different State aid regime to protect British industry after Brexit and to make it faster and easier for the government to protect jobs in struggling industries.
- Therefore, while the previous UK government had indicated that it would import EU State aid law wholesale into the UK and had passed legislation to empower the CMA to enforce it, the extent of the current UK government's commitment to independent and robust State aid control remains to be seen.

Private damages actions

- EC competition law infringement decisions made before the end of the Transition Period will continue to have the same legal status as they have now, so that claimants may bring follow-on damages claims in the UK courts based on those EC decisions.
- However, the CMA and UK courts will no longer be bound to accept as a legal basis EC competition infringement decisions or case law of the European Courts issued after the end of the Transition Period; as such, claimants will no longer be able to rely on those future EC decisions as a binding finding of an infringement.

- Claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after the end of the Transition Period will nonetheless be able to do so on a standalone basis, as a foreign tort claim (a legal claim in the UK relating to a violation of foreign law).
- If businesses or consumers wish to claim damages based on infringement decisions issued by both the EC and/or the CMA after the end of the Transition Period, it may be necessary to make parallel claims before the UK courts and the courts of an EU Member State.
- On the face of it, it seems likely that the UK will be a less attractive forum for damages actions for EU-wide breaches of the competition rules going forward.

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