

British-European Relations Post-Brexit: A Legal Kaleidoscope



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Competition Law and Regulation

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Introduction

As a result of Brexit, the UK has ceased to be a member of the European Union (EU) competition law regime. The consequences are already being felt, and will become even stronger after the end of this year.

The EU-wide competition law regime is unique. The regime includes a one-stop shop for reviewing mergers (a regime which came into operation 30 years ago on 21 September 1990) and an EU-wide work-sharing and cooperation network for other investigations. Jurisdictions in Africa and Asia are seeking to create similar regional regimes but none is as established or integrated as the EU. Nor is there an equivalent regime among Federal and State level enforcers in the US.

Throughout the UK's membership of the EU, the UK has been a major influence in the formulation and enforcement of EU competition law contributing thought leading Commissioners, Judges, Advocates General, Directors General and many others in Brussels and Luxembourg. Several had strong Oxford connections.

EU competition law has also been an impetus for major reformulations of UK competition law.

This relationship will end when the transitional arrangements under the Withdrawal Agreement lapse on 31 December 2020. This gives rise to a number of questions, including: What will the post-Brexit competition world look like? How will the two regimes inter-relate in the future? Will they diverge over time? This note provides high-level answers to those questions².

Merger control

From 1 January 2021, the EU Merger Regulation's one-stop-shop merger control will cease to include the UK. This means that mergers may be reviewable by both the European Commission (EC) and the UK's Competition and Markets Authority (CMA) under the Enterprise Act 2002 if the relevant jurisdictional thresholds are satisfied. Also, the EC's thresholds will cease to include UK revenue.

In practice, the effect is being felt sooner than the year end. This is because the EC's lengthy pre-notification practices mean that mergers which are under discussion with the EC but unlikely to be formally notified to the EC before 1 January 2021 will also come under the CMA's jurisdiction (if the relevant UK merger thresholds are met). The CMA is already actively monitoring such mergers.

From 1 January 2021, the UK will become (just) another jurisdiction for international mergers covering multiple jurisdictions. On one view, there is nothing remarkable about that. Many international mergers involve investigations in 20 or more jurisdictions around the world – and the competition authorities in the various jurisdictions are becoming increasingly used to working alongside their counterparts investigating the same merger. The CMA has already had experience of this in some cases that were reviewable in the UK but not under the EU Merger Regulation (EUMR). From 2021, the CMA expects to have a 50% increase in its mergers caseload. The CMA has been allocated additional funds and staff to deal with the anticipated workload increase. Also importantly, the EU and UK substantive tests are very similar, at least on paper, so divergent outcomes may seem unlikely.

But, coincidentally or not, the CMA has become increasingly interventionist in the past couple of years. It has taken an expansionist view of its jurisdiction in some recent cases (e.g. *Amazon/Deliveroo*; *Sabre/Farelogix*; *viagogo/StubHub*). It referred 20% of the mergers it reviewed for an in-depth Phase 2 in 2019 compared with 8%³ by the EC. The EC and CMA timetables are not readily compatible and unless and until there are legislative changes in the UK, matching key decision points under the two timelines will be challenging. The processes for negotiating remedies are also different, and will raise similar challenges. In addition, the UK merger regime is one of the very few voluntary merger regimes in the world – in the sense that there is no legal requirement for the parties to pre-notify the merger although many do and the CMA can also call-in a merger for investigation before or after it has been completed. The EUMR – like most merger regimes around the world – requires mandatory pre-notification. The CMA has indicated it would favour a change to the UK regime but no change is likely in the short term. These

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² This note is subject to any changes brought about by any EU/UK Trade Agreement or other instrument.

³ This figure excludes simplified filings under the EUMR.

differences are relevant when merging parties agree how to allocate the antitrust risk between them when they negotiate their merger. Also unlike the EU, litigation is playing an increasing role in UK merger review with relatively quick timetables for appeals on both procedural and substantive issues. Taken together, these differences may increase the occurrence of divergent outcomes between the UK and the EU.

On top of this, the CMA has said it intends to “*take on a more active role in global cases from January 2021*”.

Antitrust investigations

As regards anticompetitive agreements, cartels and abuse of dominant positions, EU Member States’ competition authorities (and courts) – including the UK’s until the year end – are required to apply EU competition law when considering anti-competitive agreements and conduct which may affect trade between Member States, and to ensure consistency with the principles applied and decisions reached by the Court of Justice of the European Union (CJEU). In addition, the European Competition Network (ECN) facilitates cooperation between Member States’ national competition authorities and between Member States and the EC. So does Regulation 1/2003 which includes provisions such as Article 12 that governs the exchange of information between Member States. All this ceases to apply in relation to the UK from 1 January 2021.

In terms of current investigations, if the EC has already formally “initiated proceedings” (which occurs at the latest when it issues a Statement of Objections) by 1 January 2021, broadly, the EC will retain exclusive jurisdiction over the matter. If proceedings have not been initiated by then, parallel investigations into the same conduct will be possible. The CMA may obtain jurisdiction over conduct even if the EC has initiated proceedings where the conduct is ongoing and may affect the UK – the CMA may only investigate facts that occur after the end of the transition period and only insofar as they impact the UK.

From 1 January 2021, the CMA and the UK sectoral regulators (such as those for the energy, financial and communications industries) will only be able to investigate potential infringements of UK competition law (i.e. under the Competition Act 1998 whose provisions are largely similar to EU competition law) and not under EU competition law itself. Conversely, the EC will be able to review effects only in the remaining EU 27 member states and not in the UK. There may therefore be parallel UK and EC investigations and potentially diverging outcomes, remedies and sanctions.

The CMA anticipates an additional 5 to 7 antitrust investigations a year. Much may depend on the extent to which the CMA wishes to make its mark on the global antitrust, as well as mergers, stage. I anticipate that it will - particularly in the digital space.

In relation to cartels, the criminal powers under UK competition law already mark the UK out from other EU member states and bring it more in line with the US antitrust regime. The US Department of Justice and the UK Serious Fraud Office, Financial Conduct Authority and CMA already have a track record of cooperation on cartel investigations, and that can be expected to continue. In addition, the CMA’s amnesty/leniency regime for cartel whistleblowers will be unchanged. Accordingly, if conduct has material effects in the UK, a company considering applying for amnesty or leniency at EU level will need to consider making a similar application also to the CMA.

The impact will not all be one way. The EC will also be affected. It will no longer be able to carry out inspections in the UK under Article 20 of Regulation 1/2003 although, as with all “third countries”, the EC will still be able to obtain information located in the UK under Article 18.

Antitrust litigation

After 2020, EC decisions will no longer have automatic binding effect in the UK for the purpose of follow-on damages claims. However, damages litigation in the UK courts is expected to remain active: cases in progress - both direct litigation and follow-on actions - will continue, and follow-on claims based on decisions preceding Exit Day (31 January 2020) or made during the transition period will still be able to be brought within the relevant applicable limitation periods.

Longer term, it remains to be seen whether UK courts will regard EC decisions as of persuasive value and whether follow-on claims will increasingly be based on (parallel) UK CMA and sector regulator decisions, rather than EC decisions. In addition, the UK litigation system has a number of litigation/claimant friendly characteristics, including a specialist tribunal and legal and economics experts, extensive disclosure rules, access to litigation funding and the option of bringing opt-out class actions, that may continue to make the UK an attractive forum for competition litigation after the end of 2020.

Cooperation between the CMA and other competition agencies

The upshot of Brexit is that the UK competition law system will become a standalone regime untethered from the EU's and will be working alongside – rather than as part of – the EU regime and other competition law regimes around the world when investigating the same or related cases. The UK government and the CMA have recognised from early on after the Referendum that cooperation between the CMA and other competition authorities will be increasingly important for the UK in the post-Brexit world.

Although the EU is the leading example of cooperation between competition authorities on the basis of its unique legal instruments, there are other ways of achieving effective cooperation. Indeed, the UK is not a stranger to cooperation outside of the EU. The CMA and its predecessors, the Office of Fair Trading and Competition Commission, have cooperated with other competition authorities around the world – notably but not only the US Department of Justice and Federal Trade Commission – in mergers (when the EUMR did not apply), cartels (where the US and the UK both have criminal as well as civil enforcement powers) and in a few conduct cases. On 2 September 2020, the CMA, US, Canadian, Australian and New Zealand competition agencies signed a multilateral mutual assistance and cooperation framework for competition authorities.

As a third country after Brexit, the UK will need to establish its own cooperation protocols with the EU for those cases where the CMA and the EC will have parallel jurisdiction. In this regard, Executive Vice President Margrethe Vestager recently said she expects there to be “*seamless cooperation*” between the CMA and the EC “*regardless of the politics of the [Brexit] negotiations*” based on “*a culture of cooperation between agencies that serve shared missions*”.

Will UK and EU competition law diverge over time?

The UK Prime Minister and the CMA Chief Executive have both suggested that EU and UK competition law will diverge over time. The UK Prime Minister has said “*there is no need for a free trade agreement to involve accepting EU rules on competition policy...*” The CMA's Chief Executive has said “*the upside [of the UK leaving the EU] is that you take back control – genuinely – of the decisions*”.

Section 60 of the Competition Act 1998 that requires UK courts and regulatory authorities to interpret the UK competition law in a manner consistent with the decisions and principles of the CJEU and to have regard to the decisions and statements of the EC will, with effect from 1 January 2021, be replaced by section 60(A) under which, broadly, UK courts and regulatory authorities must ensure there is no inconsistency with EU court and EC decisions, principles and statements that pre-date the end of the transition period when interpreting UK competition law but may depart in “specified circumstances” including the development of post-Brexit EU case law, differences between EU and UK markets, developments in economic activities, and the particular circumstances under consideration.

No longer bound by EU law, this means that the retained EU law (which effectively replicates the EU rules in force in the UK immediately before the end of the transition period) can - subject to any future EU/UK agreement - be replaced over time by new UK laws and regulations. Divergence may therefore occur - e.g. in relation to vertical agreements where the Single Market objective has been a driver of EU competition law but will no longer be applicable in relation to the UK. However, the potential for divergence appears to be much greater than that for several reasons.

Brexit is occurring at a time of far reaching debates around the world about the purpose and effectiveness of competition law driven by concerns about globalisation, digitalisation and increasing wealth disparities within and between economies. Partly in response to this, the EU has launched “*one of the most comprehensive reviews*” of its competition law and tools, including whether to introduce a New Competition Tool which “*would allow us to address structural problems, in particular in digital markets, that can't be dealt with effectively under current rules. For example, conduct by not-yet-dominant companies aimed at monopolising a market. Or markets dominated by a few large players, with high barriers to entry.*” Somewhat ironically in light of Brexit, this new tool is inspired by the UK's market investigations regime.

As regards the UK, the Tyrie letter and the Furman report advocated changes to the UK competition law regime last year. The CMA has said “*the UK has an analogue system of competition and consumer law in a digital age*”. On 14 September 2020, the Treasury asked a Conservative MP (John Penrose) to prepare a “*short, independent*” report to be published by the end of the year examining how the UK's competition regime “*can be enhanced in the context of Covid-19 and the end of the transition period*”. A CMA report on the state of competition in the UK is also forthcoming.

Conclusion

Brexit had been regarded as a seismic shock to the EU and UK competition law regimes. But viewed against the broader backdrop outlined in this note, maybe it is just the start of further changes to come?