

FAQ: Brexit and UK Competition Law

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As a member of the EU, the UK's competition law and policy is intertwined with that of the EU's. Brexit will have an impact on the technicalities of the competition framework within the UK, but will also have a wider reaching impact in terms of enforcement with consequences for both businesses and consumers.

This FAQ discusses:

- Why we have a competition law regime
- The competition law framework currently in place in the UK
- The impact of Brexit on various aspects of competition law
- What this means for consumers and businesses

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Q: What is competition law and why does it matter?

A: Both the UK and EU competition law and policy reflect the international consensus that open and competitive markets are the best way of ensuring consumer welfare. Competition law steps in to deal with anti-competitive practices of private economic actors that may have negative effects on consumer welfare and the economy. Anti-competitive behaviour can take the form of restrictive practices and agreements, abusive conduct of firms with a lot of power in their market, and the actual or potential concentration of market power.

Competition law is seen as an important tool in ensuring consumer welfare and an important driver in the UK economy. The Competition and Markets Authority (CMA) [estimated](#) that it produces an annual average of direct consumer benefits of £745 million between 2012-2013 and 2014-2015. The pending UK departure from the EU raises the concern that any weakening of the competition law regime would ultimately have a negative impact on the consumer.

Q: What is the competition law framework as it stands?

A: The two main pillars of UK competition law are the Competition Act 1998 and the Enterprise Act 2002 on mergers and markets. Chapters I and II of the Competition Act 1998 are modeled upon Articles 101 and 102 TFEU (the EU competition law provisions), so from the outset there will be little change to the substantive competition law provisions.

The central enforcement body in the UK is the CMA. This came into being subsequent to the Enterprise and Regulatory Reform Act 2013 and in 2014 it took over the competition functions of the Office of Fair Trading and Competition Commission. The Enterprise Act 2002 transferred decision-making power on mergers and market investigations from government ministers to the CMA. Appeals against authority decisions and private actions are heard by the Competition Appeals Tribunal (CAT).

The Enterprise Act provides for the remedy, mitigation or prevention of mergers that may be expected to result in a substantial lessening of competition. Regarding market investigation references, the CMA has a duty to remedy, as comprehensively as is reasonable and practicable, any adverse effects on competition that it identifies.

Q: Will EU competition rules (Articles 101 and 102 TFEU) still apply to agreements and conduct of UK businesses after Brexit?

A: Yes, if they have an effect within the EU. This is in the same way that Asian and US businesses are subject to EU competition law where their agreements and conduct affect EU markets. For example, a UK participant in a global cartel will continue to face investigation and fines by the European Commission (the Commission). However, the Commission will have no power to carry out on-site investigations in the UK, nor to ask the CMA to do so. The Commission's powers of investigation would be limited to making written requests for information.

It is worth noting that claims based on infringements of Articles 101 and 102 TFEU might still be able to be brought in the UK as claims based on the law of a remaining EU Member State. Such claims are likely to be permitted or not permitted by the English courts on the same basis as other claims based on foreign competition laws so there is no reason to rule out the possibility of utilizing these provisions in the English courts in the future.

Q: What is the current relationship between the UK and EU regimes?

A: Following **EU Regulation 1/2003**, known as the 'Modernisation Regulation', the Commission shares its powers to apply Articles 101 and 102 TFEU with national competition authorities (NCAs). NCAs and courts are required to apply these provisions, where applicable, alongside the application of domestic competition law to unlawful agreements and abusive practices. At first glance, the CMA and UK courts will be significantly freer in the application of competition law as Regulation 1/2003 will no longer apply post-Brexit.

Section 60 of the Competition Act 1998 ensures consistency of approaches between the EU and the UK by requiring that questions arising under the Act relating to competition within the UK are dealt with in a manner consistent with competition questions arising within the EU. Specifically, UK courts and the CMA, when considering questions under the Act, must do so in a manner consistent with 'the principles laid down by the Treaty and the European Court, and any relevant decision of that Court.'

As regards merger control, cases with an 'EU dimension' generally fall under the exclusive jurisdiction of the Commission, to the exclusion of national competition authorities. This mechanism was established by the **EU Mergers Regulation (EUMR)** as a **one-stop shop**, not requiring any clearance of mergers by national competition authorities. However, national competition authorities, under **Article 9**, may seek to have specifically national aspects of mergers referred back to them. Furthermore, **Article 22** permits national authorities to request the Commission to review a case without an EU dimension, subject to certain criteria. After Brexit, the EUMR will no longer apply to the UK and subsequent consequences of this are outlined below.

Finally, **Section 10 of the Competition Act 1998** provides for '**parallel exemptions**' whereby any agreement that benefits from a block exemption Regulation under EU law, such as distribution and technology, will also be exempt from the Chapter I on prohibition under UK law. Agreements that fall within the parallel exemption are then valid without specific authorization. These provide desirable legal certainty for firms and have reduced the need to promote exemptions at a domestic level.

Q: After Brexit, will there have to be new laws introduced or how will the law change?

A: If **Section 60 of the Competition Act 1998** was left as it is post-Brexit, this would mean that a wholly non-UK court would determine the meaning of a UK statute. While the provisions of the Competition Act 1998 and the Enterprise Act 2002 are contained in primary legislation and will not be formally removed by the repeal of the European Communities Act 1972, given the Brexit agenda of freeing Britain from the scope of the European courts, it is assumed that the Competition Act 1998 will have to be reformed. However, such reform will probably not extend to the substantive provisions of UK competition law, and will be limited to jurisdictional aspects of the law, such as s 60.

However, it has been stressed by numerous commentators that it is important that the UK preserves the power to enable courts and consumers to continue to enforce the decisions of the Commission. Without an arrangement which would allow UK customers to rely on decisions of the Commission, the enforcement of UK competition law may be substantially weakened due to a reduction in resources and the limited territorial scope of the CMA. Some have suggested that a revised s 60 could provide the UK courts and national authorities to 'have regard' to relevant judgments of the European courts as well as statements and decisions of the Commission.

Q: What implications will Brexit have for merger control in the UK?

A: The loss of the one-stop-shop regime of the EUMR has several consequences. First, it is likely that Brexit will result in parallel investigations between the CMA and the Commission. A transaction that qualifies under the EUMR may also be subject to UK merger control. Mergers, whether of UK or foreign businesses that meet both UK and EU thresholds will likely face scrutiny under both systems. Furthermore, the UK will not be able to seek a reference on the back of the national dimension of an EU merger. While the CMA could apply its own merger control rules in such a case, it will do so in parallel with the Commission, rather than in its stead. Effectively this will result in an extension in the scope of the CMA's jurisdiction over mergers.

The loss of the one-stop-shop for mergers and the referral mechanisms provided for in Articles 9 and 22 of the EUMR will mean that the CMA will have to undertake significant merger work. In practice, there is the risk that the CMA's resources will become considerably strained. Other areas of competition law, such as market investigations, may be weakened as the CMA will be required divert resources to its merger control function. Furthermore, parallel review raises the possibility of one authority permitting a merger and the other blocking one, or of diverging remedies between the UK and EU regimes.

It has been argued that it will be necessary to put in place some **provisional measures** for mergers that have already been notified to the Commission before Brexit. Such mergers should continue to benefit from the one-stop-shop and so should not come under the scrutiny of the CMA. However, this will require an amendment to the Enterprise Act 2002.

Furthermore, with a review of the competition law system in the UK that will come with Brexit, the Government may consider the implementation of a **mandatory merger notification system**. As it stands, the UK utilizes a voluntary filing system, meaning that businesses are not required to notify their mergers to the CMA. However, with the potential of merger filing fees to raise income for an underfunded CMA, the Government may reconsider the current position.

Q: What will the impact of Brexit be on state aid laws?

A: State aid rules in the EU competition regime prevent Member States and those countries coming under the EU competition regime from distorting competition through the favourable treatment of domestic businesses. First, in the absence of a specifically negotiated agreement between the UK and the EU, EU state aid law will not be applicable in the UK and there is no equivalent provision in UK competition law. This means that the Government will be able to support businesses financially and by other means if it so chooses. However, the Government will not be at total liberty to interfere in UK industry given its WTO obligations regarding subsidies. Furthermore, the UK will have no scope to oppose the grant of unlawful aid on businesses by other Member States.

Q: What impact will these changes have on businesses?

A: The loss of the one-stop-shop means that some transactions with a community dimension as well as UK element may be subject to investigations under both the UK and the EU regimes. This will inevitably result in higher transaction costs and businesses will be exposed to an increased risk of delays and regulatory uncertainty. The risk of contradictory remedies as regards merger control would also create legal uncertainty for businesses. As mentioned above, businesses benefit from the legal certainty afforded by the parallel exemptions regime between the UK and the EU. The loss of such block exemptions will result in further uncertainty for businesses unless the Government enacts UK exemptions itself.

Significantly, there is a risk of double jeopardy for firms operating in both the UK and the EU. This may be in the form of fines for the same conduct in the UK and by the Commission or other regulatory authorities in the EEA. Some coordination between UK and EU enforcement will be required in order to avoid these concerns. However, if the Government introduce provisional measures for those mergers notified to the Commission before Brexit, this should allay some of the uncertainties faced by businesses.

Furthermore, if the Government decides to replace the voluntary notification system for mergers with a mandatory one, as discussed above, this will inevitably raise costs for businesses wishing to merge. Such costs will be in the form of merger filing fees and increased paperwork.

Finally, the removal of the UK from the state aid regime of EU competition law may also have consequences for businesses. If the UK did choose to support a particular business or industry, then competitors would not have recourse to state aid rules to challenge such measures. As regards the impact of WTO law, a UK recipient of favourable treatment may be subject to anti-dumping duties on its goods or services if it tried to export them. Finally, if a competitor EU business receives state aid and affects the UK market, the Government would have limited ability to challenge such behaviour. Competing UK companies could bring a complaint to the Commission, but it would be unlikely to act on such a complaint if the behaviour did not have an anti-competitive impact in the EU.

Q: Will there be a difference in approaches between the Commission and the CMA in the future?

A: If the relevant provisions are repealed, the CMA will no longer be required to follow the approach of the Commission and will have greater freedom to interpret UK rules differently from equivalent EU competition rules. However, it is not likely that any effects here will be seen immediately as the CMA will rely on the significant body of UK case law that is consistent with EU competition law due to the requirements of s 60. EU competition law will nevertheless remain influential due to the similarity of UK and EU substantive provisions. However, over time a path of divergence may become clear, especially as the UK courts will no longer be able to refer questions of interpretation of EU law to the European Court of Justice, which is the main promulgator of consistency in interpretation.

Q: What impact will these changes have on consumers?

A: Essentially, consumers will lose the enhanced protection that consumers and businesses receive due to the Commission's enforcement action within the UK as an EU Member State. The UK's private enforcement regime provides that a decision of either the UK regulator or the Commission that there has been a breach of competition law, is binding upon national courts for the purposes of a competition damages action. This has been seen as hugely beneficial for consumers as claimants do not need to prove a breach of competition law, but just the damages they have suffered as a result. This is especially so as regards cartels given their often secret and international nature, the asymmetry of information involved and the difficulties in obtaining evidence.

The removal of s 58 A (and s 47A) of the Competition Act 1998 would result in a considerable limitation in the ability of private individuals to claim damages for competition breaches. Because of this, there may be a reduction in stand-alone claims, given the difficulties and costs faced by a private party in re-proving liability. However, consumers are still protected post Brexit by the Consumer Rights Act 2015, providing consumers with the option to claim damages for various breaches.

Furthermore, the dual regulatory burden that would result from an independent UK regime running parallel to the Commission's enforcement of competition law would result in an inefficient duplication of work at the expense of the UK tax-payer.

Q: How is competition law currently enforced?

A: The CMA and other sectoral regulators are responsible for public enforcement of competition law in the UK. The Commission is responsible for enforcement at EU level.

Decisions of UK authorities are confined to anti-competitive behaviour within the UK. The Commission considers distortions of competition in cases with an effect on trade within the EU. The scope of the Commission's enforcement extends to cartels which distort competition in the UK and worldwide. In practice it serves to expand the reach of enforcement action within the UK, beyond that of the CMA, and greatly enhance the protection for which consumers and businesses receive in the UK.

As regards private enforcement, companies or individuals may bring claims for injunctive relief and damages. **s 58A (read in conjunction with s 47A) of the Competition Act 1998** provides that a decision of either a UK regulator or the Commission that there has been a breach of competition law is binding upon national courts for the purpose of a competition damages action. This has been seen as being beneficial to consumers as it essentially permits Commission decisions to be relied upon in private enforcement of competition law and claims for damages.

The CMA is also embodies a consumer protection function. Consumer law has recently undergone a complete overhaul with the **Consumer Rights Act 2015**, dealing with rights and remedies in relation to the supply of goods, digital content and services. In some areas, such as the rights and remedies for UK consumers when buying defective digital content, the UK is actually considered steps ahead of the EU.

Q: What effect will Brexit have on antitrust enforcement?

A: What has been regarded as one of the main risks that Brexit poses to antitrust enforcement is its potential for neglect. As the CMA has discretion to priorities its antitrust enforcement, it must respond to the flow of merger activity. This has the risk that, unless the CMA's resources are supplemented to deal with this pending burden, UK antitrust enforcement could suffer at the hands of increased merger work.

Moreover, with a reduction in CMA resources, antitrust enforcement could take years and raise major transitional issues around Brexit, especially concerning cases that are in the middle of being investigated when the UK leaves the EU and situations where pre-Brexit conduct is discovered post-Brexit. This latter consideration is especially important as regards cartel activity. Currently, an application by a cartel member for a leniency arrangement in one Member State is sufficient to trigger leniency across the EU. Following Brexit, the loss of this efficient approach would potentially diminish the incentive to apply for leniency arrangements, considering that they may offer lesser protection as before or may require multiple filings in different jurisdictions.