

COMPETITION LAW  
IN THE UK AND THE EU THE IMPACT OF  
DEAL AND NO-DEAL BREXIT



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## COMPETITION LAW IN THE UK AND THE EU THE IMPACT OF DEAL AND NO-DEAL BREXIT

The UK's withdrawal from the EU is scheduled to occur on the 29 March 2019, following a long period of tumultuous negotiations. The Withdrawal Agreement is intended to govern all outstanding issues regarding the relationship between the EU and the UK. It seeks to facilitate an orderly exit with a transitional period that lasts until 31 December 2020 (but which may be extended if so decided), allowing businesses to make adequate preparations for the UK's formal departure, and giving time for both sides to agree on the final form of their future relationship, which is formally broached in the Political Declaration. That document unlike the Withdrawal Agreement is non-binding and sets out the broad ambitions for the UK-EU future relationship.

But with the resounding rejection on 15 January of the current deal by Parliament in the "meaningful vote," Prime Minister May presented her plan B on 22 January. Little had really changed. Despite her assurances to build a cross-party consensus to bring the current deal to fruition, doubt persists regarding the future of the Withdrawal Agreement in its current form, and hence the outlook for the future relationship. At time of writing, the Prime Minister is trying to reopen negotiations with the EU with the support of her party regained on the basis of her promised changes to the backstop arrangement. It remains to be seen what changes to the deal May can feasibly make before the deadline on 31 March, the date when the default position – Britain leaves the EU without a deal – comes into effect. Mrs May maintains that the only way to avoid a no-deal Brexit is for her deal in some form to receive Parliament's backing.

A key policy area that will be profoundly affected by Brexit is that of competition. Post-Brexit policy decisions will shape the competition policy framework and its continued development, as competences are repatriated from Brussels to London. This may incur the creation of several new specialised bodies that will legislate and enforce competition law. Once the reality of Brexit crystallises, time will tell how close competition policy coordination between the UK and the EU will be, and how such legislation will be enforced in the new UK system. However, considering the fundamental importance of competition policy for the functioning of the EU Internal market, it stands to reason that in negotiations on any future regime for EU-UK relations, the EU will firmly push for a far-reaching alignment.

## COMPETITION LAW

### IN THE UK AND THE EU THE IMPACT OF DEAL AND NO-DEAL BREXIT

Competition law in the UK is currently an amalgam of EU and British legislation. The EU and UK competition regimes have largely developed hand-in-hand and rely much on the same premise: the openness and competitiveness of the market as the best means to ensure consumers welfare. In this context, the fact that responsibility has been largely shared means that Brexit is likely to have major and far-reaching impacts on the UK's framework in competition law enforcement.

In the status quo, UK competition legislation is underpinned by a European framework. The Competition and Markets Authority (CMA) is the key UK competition body, operated under HM Treasury, and it enforces the laws, remedies issues of competition and investigates mergers that could restrict it. The Department for Business, Innovation and Skills (BIS) establishes the CMA's action plans as well as much of the policy and legal framework for UK competition issues. The European Commission, itself responsible as such at the European level, is deeply involved in shaping UK competition legislation and many cross-border cases that affect the UK. The courts of EU member states and their competition authorities are required to apply EU antitrust law within the context of agreements and conduct that may influence competition and trade between member states. This is to ensure consistency between Member States actions and the decisions of the EU Court of Justice.

This text will deal with three particular Brexit scenarios: firstly the transitional period under the Withdrawal Agreement; secondly the future period thereafter under a new UK-EU free trade agreement; thirdly, the no-deal scenario.

#### **Three Brexit scenarios:**

Transition, post-transition, and no-deal

The Withdrawal Agreement provides for the continued application of EU law in the UK and continued jurisdiction of the European Commission and European Courts during the transition period. That means that EU competition law would continue to apply to the UK exactly as it does now until at least the end of 2021. The agreement as it stands provides that after transition, the UK would be expected to adopt rules equivalent to EU ones on anticompetitive behaviour, mergers and monopolies and to interpret them in line with the EU regulatory framework.

A second scenario is the Trade Agreement that the UK and EU will have to negotiate to settle their commercial relationship. Trade Agreements contain sections on cooperation in the application of competition rules and merger enforcement. Rules on state aid have an increasingly relevant role in these agreements. A close cooperation is envisaged in Trade Agreements between EU and those countries with which commercial exchanges are very deep (including a recent FTA with Japan and Canada).

In case of no-deal, on 13 September 2018, the UK government released a technical paper entitled "the Notice," which establishes that in the absence of specific conditions and accords, the regime of competition law and merger control in the UK will, from Brexit date on 29 March 2019, become separate from that of the EU both in terms of procedure and jurisdiction. That means that after Britain definitively leaves the European Union, European law will no longer have primacy. EU competition legislation will no longer apply. It will also signify the end to the binding force of European Court of Justice rulings in British case law.

## The transition period under the Withdrawal Agreement

### Mergers

Under the present merger arrangement known as the “one-stop shop” principle, all mergers that meet the EU thresholds fall under the exclusive jurisdiction of the European Commission. British merger control is thus part of a broader European system. Under the Withdrawal Agreement, the one-stop shop arrangement continues until the end of the transition period.

All mergers that have already been notified to the Commission prior to and during the transition period will remain under EU jurisdiction, unless any decision becomes annulled at a later point. UK turnover will no longer be included within the application of the EU Merger Regulation.

### Antitrust

The European Commission and the CMA enforce a parallel system of antitrust enforcement, with the larger more transnational transactions usually coming under Commission review and the smaller, domestic transactions falling within the domain of the CMA. The EU, in accordance with the effects doctrine, will always claim competence as soon as there may be effects within the EU, even though a practice is only exercised or enforced outside its territory. Investigations by the Commission usually take several years, such that there will be numerous investigations already in play during the transition period and ongoing after it.

Under the Withdrawal Agreement, the arrangement includes competition provisions that would develop a UK legislation closely mirroring that of existing EU antitrust prohibitions, as clarified in Articles 101 and 102 TFEU. Article 92 of the Withdrawal Agreement asserts that the Commission will remain competent for formal competition proceedings that had begun during the transition period.

### State Aid

Predicting the Brexit effect on the field of state aid is more uncertain. This is an area of exclusive competence for the European Commission. In essence, the EU has sole competence in establishing whether state aid is compatible with the internal market. Only with the approval of the Commission may state aid be granted. Where in mergers and antitrust control the UK is at a high degree of legislative sophistication - the CMA is internationally well-respected and robust – its domestic state aid framework “... is very limited, as EU law applies directly and the Commission approves any aid not covered by block exemptions, such as the GBER,” according to a House of Lords assessment from February 2018.

Under a Withdrawal Agreement scenario, the Commission will have the competence to start and determine the outcome of new state aid proceedings, with respect to aid granted before the conclusion of the transition period, up until a four-year period afterwards. Additionally, the Withdrawal Agreement incorporates the EU law that prohibits state aid unless the Commission has been notified in advance and given its authorisation.

## The post-transition framework under a new EU-UK Trade Agreement

### Mergers

Will the post-transition Brexit arrangement allow the European Commission and the CMA to run parallel merger investigations regarding the same transaction? It would appear the short answer is yes. After Brexit has concluded, the CMA will be the only competition authority tasked with the assessment of UK mergers. The European Commission will no longer have direct jurisdiction over mergers affecting the UK market only but will continue to claim competence as far as UK mergers may affect EU territory. If a given transaction pertains to both the UK and the EU merger regimes, the Commission and the CMA will both investigate such a merger independently. Cooperation between the two competition authorities will have to be arranged in a specific agreement.

### Antitrust

Concerning antitrust, EU and UK will look at behaviours affecting their jurisdictions. However, concerns again are raised as to behaviours having effects on trade between EU and UK.

### State Aid

What is clear is that all other EU state aid legislation will no longer apply in the UK after the country leaves the bloc unless it remains part of the European Economic Area. What is unclear is which UK body would have power, after Brexit, to approve and assess state aid.

In the scenario of the successful implementation of the Withdrawal Agreement, perhaps after revision or alteration, the UK has also agreed to adopt updated state aid regulations that equate to existing EU ones, and state aid law in the UK will be subject to review by the CMA. European state aid legislation will apply to the UK only within the context of trade between parts of the Single Customs territory – for instance, trade between Northern Ireland and the Republic of Ireland if Northern Ireland remains part of the Customs Union indefinitely. These backstop arrangements will remain in force until a free trade agreement between the EU and the UK has been brokered.

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[1] According to this doctrine, domestic competition laws apply to foreign firms — but also to domestic firms operating outside the State's territory, when their transactions cause a given "effect" within the domestic territory.

[2] The General Block Exemption Regulation (GBER) (EU) N°651/2014 of 17 June 2014 declares certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

[3] <https://publications.parliament.uk/pa/ld201719/ldselect/ldecom/67/67.pdf>

## The no deal scenario

### Mergers and Antitrust

As with other areas of policy, British competition law and enforcement will be entirely removed from the European regime on the date of exit, be that 29 March 2019 or a later date, depending on whether the deadline of Article 50 is extended. Regarding mergers and antitrust, the Government stated in an explanatory memorandum that in the absence of an agreement, the CMA should not be tasked with enforcement and investigation of EU competition law, nor should reciprocal cooperation in investigations occur until an agreement could be brokered. Businesses should note the possibility that no agreement will be reached on jurisdiction over current EU merger and antitrust cases, with respect to their effect on UK markets. Bottom line, a no-deal would necessitate pragmatic approaches to UK merger review, antitrust and state aid legislation, particularly regarding the post-exit interplay between the CMA and Commission. EU will continue to claim jurisdictions as long as the internal market is affected and EU thresholds are met.

### State Aid

No-deal would mean that the CMA would become the default state aid monitor in the UK, with the UK transposing existing EU regulations on state aid into UK law. It is unclear if that eventuality would lead to the UK still accepting any EU state aid regulations beyond the implementation or transition periods. It is clear, however, that existing UK legislative frameworks with respect to state aid are very limited.

A further imperative is that any post-Brexit state aid framework is operated independently, rather than on a one-tier governmental basis with the government as regulator and beneficiary. The most likely authority to be tasked with state aid control is ultimately the CMA, thus grouping together expertise on state aid with other broader aspects of competition policy.

In addition, the Government has published a Statutory Instrument (SI) accompanied by an explanatory memorandum. In order to assist businesses in their forward planning for a no deal scenario, the CMA has also published a number of technical notices providing information on mergers and antitrust cases.

### Conclusion - An array of complicated implications for competition

It is abundantly clear that Brexit will subject the competition law framework to significant and widespread change, change that will necessitate careful management. The CMA will therefore need to be sufficiently resourced in order to respond to a significantly expanded remit in competition law enforcement. Ultimately, whatever Brexit scenario materialises over the next few weeks, the only certainty appears to be continued uncertainty - such times demand strong cooperation and clarity in all areas of policy.



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