

No-Deal Brexit Competition Law Implications

Highlights

A no-deal Brexit would have significant and immediate effects on UK competition law enforcement:

- Parallel investigation of mergers, cartels, and dominance cases by the UK Competition and Markets Authority (“CMA”) and European Commission (“EC”);
- Possible delay to transactions notified to the EC but not cleared by Brexit day;
- A significant increase in the CMA’s caseload, stretching its resources;
- New challenges for claimants bringing EU follow-on damages cases in the UK courts.

If the UK leaves the EU on 31 October 2019 without a withdrawal agreement, it will affect how UK and EU competition law applies to businesses with UK activities.

This briefing note summarises the main changes and implications in the event of a no-deal Brexit.

Merger Control

- ▶ **Will businesses still benefit from the EC’s “one-stop-shop” merger control regime?** No. After-Brexit, the one-stop-shop principle will no longer cover the UK. Mergers involving UK and EU markets may undergo parallel review by the CMA and the EC.
- ▶ **What will happen to ongoing merger reviews before the EC?** The CMA will be able to investigate mergers that are in the process of review by the EC (as long as they meet UK merger control thresholds). The CMA will have the power to open its own investigations into mergers that have not already been cleared by the EC. In an effort to be ready, the CMA is already shadowing transactions notified in Brussels and is encouraging companies to engage with it on a voluntary basis.
- ▶ **Will there be any impact on the EU rules?** UK revenue will no longer form part of EU turnover when determining whether the EU Merger Regulation applies.
- ▶ **What will happen to remedies covering UK markets that are already in place?** Existing EU remedies that cover the UK will continue to apply and be enforced by the EC. The CMA will also have new powers to enforce EU remedies in the UK.



“Parallel investigations by the EC and the CMA would represent a very significant change, increasing the burden on businesses with UK activities and elevating the CMA to the top table of global antitrust enforcers.”

Nicholas Levy
Cleary Gottlieb, London & Brussels



“Companies will now need to think carefully about whether to notify in the UK as well as Brussels and how to coordinate the different review processes.”

Paul Gilbert
Cleary Gottlieb, London

Antitrust

- ▶ **Are parallel UK/EC investigations into anticompetitive agreements and conduct likely?** Yes. The CMA will be able to enforce UK competition law, even if the EC is investigating the same facts under EU law. The CMA will not be able to open cases into conduct that has been the subject of a final EC decision before Brexit.
- ▶ **Will there be any changes to the EC's powers?** Yes, but only minor. For example, the EC will no longer be able to carry out dawn raids in the UK—but the CMA will. UK Businesses will still have to comply with EU competition law if they also operate in the EU.
- ▶ **Where an investigation is ongoing, will existing EC leniency applications be valid before the CMA?** No. Parties to ongoing cartel proceedings before the EC should consider making a UK leniency application if the conduct impacts the UK market.
- ▶ **Will the CMA still be required to follow EU precedents?** Pre-Brexit decisions by the European Court and EC will remain binding. The CMA (and UK courts) will have greater freedom to depart from EU law in future.

Private Damages

- ▶ **Will claimants still be able to rely on EC decisions to bring follow-on claims before the UK courts?** EC decisions taken before Brexit may form the basis for future follow-on claims in the UK courts, even if they are still subject to appeal. Post-Brexit EC decisions will not be binding in the UK but can provide the basis for a foreign law tort claim before the English courts, provided there is a jurisdictional nexus to the UK.
- ▶ **So will private damages claims in the UK have to be standalone actions that are not based on EC decisions?** Not necessarily. If the EC has not reached a decision before Brexit, the CMA and other UK regulators with competition enforcement powers (like the FCA) may investigate the conduct under domestic law. Any decision they reach can form the basis for a follow-on claim.
- ▶ **What will be the status of pre-Brexit case law?** Courts will be bound by pre-Brexit case law, but may depart in appropriate circumstances. Over time, new UK precedent will likely develop.

Other Issues

- ▶ **Will the CMA and the EC cooperate in their activities post-Brexit?** The CMA will cease to be a member of the European Competition Network, which allows for co-ordination and information-sharing between competition agencies. The CMA will need to enter reciprocal arrangements between the UK with other national competition authorities to allow similar co-ordination in future.
- ▶ **What will happen to State Aid regulation in the UK?** The CMA will take control of State Aid regulation. State Aid already approved or given under a block exemption before Brexit will not be investigated by the CMA. State Aid that has been notified to the EC but on which there has been no decision will need to be notified to the CMA.
- ▶ **And will EU block exemptions still apply?** European Block Exemption Regulations will be transposed into English law and continue to apply in the UK until their current date of expiry or they are replaced by separate UK rules.



“Today, competition law in the UK and EU is more or less identical. After Brexit, we could start to see the UK diverging from the EU as the CMA pursues different policy objectives.”

Maurits Dolmans

Cleary Gottlieb, London & Brussels



“Parallel investigations will generate a new stream of CMA antitrust decisions that could form the basis for follow-on actions in the UK court, and the UK courts may find creative ways to give effect to EC decisions that are no longer strictly binding.”

Paul Stuart

Cleary Gottlieb, London



“It will be fascinating to see whether, and if so how, the EC's application of EU competition rules changes once the UK has left the EU.”

Romano Subiotto QC

Cleary Gottlieb, London & Brussels

