



# Brexit and Competition Law: The End of the Beginning

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The EU and the UK have now both set out their negotiating mandates for the forthcoming trade negotiations. On 25 February 2020, the Council of the EU adopted a formal [decision](#) authorising the commencement of trade negotiations with the UK, together with a revised version of the European Commission's mandate for the negotiations. The UK released its [position](#) on the future relationship two days later,<sup>i</sup> seeking a so-called “Canada-style” arrangement. Formal negotiations begin this week ahead of the end of the Brexit transition period on 31 December 2020.<sup>ii</sup> In principle, the parties will meet every 2-3 weeks with the possibility for more frequent informal discussions.

The role of competition law will inevitably play a key part in the negotiations. The EU-27's position is that:

*“Given the Union and the United Kingdom's geographic proximity and economic interdependence, the envisaged partnership must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. These commitments should be commensurate with the scope and depth of the overall envisaged partnership and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages so as to ensure a sustainable and long-lasting relationship between the Parties.”<sup>iii</sup>*

By contrast, whilst the UK recognises the “mutual importance of effective cooperation between the parties on competition law”, it rejects “legal or regulatory alignment” in this area in favour of “regulatory freedom to respond to new and emerging challenges”.<sup>iv</sup>

During the transition period, EU law will continue to apply in the UK. The relationship after the transition period remains subject to the forthcoming negotiations. However, even after the transition period expires, UK businesses will remain subject to EU competition law if they engage in agreements or conduct which affect trade between EU Member States, and their transactions will be subject to EU merger control if the relevant EU thresholds are satisfied.

In the short term, UK competition law will continue to align with past and future European Commission decisions and European Court judgments with UK legislation requiring the Competition & Markets Authority (“CMA”) and UK courts to avoid inconsistencies between their decisions and EU precedent during the transition period.

The CMA has been preparing for some time to take on an active and meaningful role as a domestic competition authority on a global stage. It has already assumed a significant role in major transactions, particularly those with a US dimension, and is pursuing investigations in a variety of sectors, including [pharma](#) and [aviation](#). In addition, the announcement of a market study and review of [online platforms and digital advertising](#) with a final report due in July 2020 would appear to set the tone for its future enforcement activities and the scope for international influence.

### *Recent CMA guidance on its competition law functions*

The CMA recently published [guidance](#) on its functions to explain the effects of Brexit on the application of competition law in the UK. The guidelines outline how national competition policy and enforcement in the UK will be conducted during and after the transition period. This recent guidance remains subject to change during the transition period. The CMA welcomes views from interested stakeholders on its contents.

#### **UK competition law during the transition period (i.e. until 31 December 2020)**

- The same rules will apply during the transition period for matters opened prior to the departure date. Likewise, matters opened by the European Commission during the transition period will remain under its jurisdiction.
- The CMA will increase intervention progressively towards the end of the transition period in preparation for an increased workload.
- Where there is some uncertainty about whether the CMA will obtain jurisdiction over a transaction before the end of the transition period, the CMA has reiterated that it remains within the discretion of the merging parties, in the interests of clarity and certainty, to consider requesting an earlier referral of a case to the CMA under Article 4(4) EU Merger Regulation. Similarly, the CMA may consider whether to request that a case should be referred to the CMA under Article 9 EU Merger Regulation.

#### **UK competition law after the transition period (i.e., from 1 January 2021)**

The CMA is already in the process of adapting its procedures to an increase in future competition law enforcement. This will not lead to immediate departure from the spirit of EU competition law but it will result in parallel investigations into businesses operating in both the UK and the EU. The elimination of the one-stop shop principle and the consequent stream of parallel investigations will therefore increase the scope for diverging decisions.

Key changes will include:

- **The one-stop shop principle will no longer apply to transactions involving the UK.** The UK will become a third-party jurisdiction to be considered independently as part of multi-jurisdictional merger control assessments. Whilst the CMA's notification regime will remain voluntary, where the target company has significant UK operations (i.e., turnover exceeding £70 million), or where the transaction will result in the creation or increase of a 25% share of supply in the UK, businesses should seriously consider a filing to avoid the consequences of non-notification if the CMA decides to investigate on its own initiative or as a result of third party complaint. Additionally, although still unconfirmed, a mandatory merger regime may be introduced for mergers above a certain threshold to ensure that the CMA can work effectively with its international counterparts.
- The CMA may assume jurisdiction for **enforcing and monitoring the UK elements of commitments** given by merging parties to the European Commission if the European Commission agrees to transfer responsibility.
- The CMA will assume **full responsibility for antitrust investigations with a UK dimension.**
- **The European Commission will no longer have the power to conduct dawn raids on UK premises.** However, UK businesses with European operations may of course still be subject to EU dawn raids if EU competition law infringements are suspected in EU Member States.

The current block exemption regulations will continue under UK law as “retained exemptions”. This is reflected in the Competition Amendment (EU Exit) Regulations 2019 which introduced every provision of the current block exemption regulations by removing any reference to the EU or internal market. This means that post-transition, the retained exemptions will operate as exemptions from domestic competition law prohibitions for as long as they remain in force.

The power to vary, extend or revoke the retained exemptions will lie with the Government in consultation with the CMA.

**State aid law: dynamic alignment or a new UK regime?**

EU state aid rules will continue to apply to the UK during the transition period. Whilst the Government has previously announced an intention to develop and enforce new national state aid / subsidy control rules after this date and reiterated in its negotiating mandate a desire for “its own regime of subsidy control [with] an obligation on both parties to notify the other every two years on any subsidy granted within its territory”,<sup>9</sup> the proposals remain subject to the outcome of the forthcoming trade negotiations.

In its recent Annual Plan consultation 2020/2021, the CMA noted its planning for state aid enforcement powers (subject to formal conferral). The EU’s negotiating mandate proposes that the “envisaged partnership should ensure the application of Union State aid rules to and in the United Kingdom” and that the UK should establish an authority with effective enforcement powers to work “in close cooperation” with the EU, i.e., the so-called ‘dynamic alignment’. The UK Government has, however, reportedly expressed an intention to adopt a different State aid regime. Considering that EU state aid rules will continue to apply to Northern Ireland until 31 December 2024 (and potentially for subsequent four year periods), it remains to be seen how the UK will effectively develop and enforce a divergent regime. The final outcome may ultimately limit incentives for the UK to grant aid to companies based in the UK for activities with even an indirect effect on trade between Northern Ireland and the EU. The UK would need to assess the possibility of such indirect effect (which would likely be very easily triggered). If triggered and aid is granted, the UK would in theory need to comply with EU state aid rules. As yet, there is no indication on how the CMA and the European Commission might resolve a difference of opinion on the presence of an indirect effect on trade.

The State aid arrangements therefore risk becoming one of the more politicised aspects of the negotiations. Recent public complaints relating to non-notified state aid in the UK may also prompt the European Commission to begin a review of any potential UK investigations it might pursue without having to announce any action during the course of the negotiations. Under the Withdrawal Agreement, the European Commission will be able to launch investigations into non-notified State aid (granted before the end of the transition period) for a period of up to four years post-transition.

**Summary of the current and future jurisdiction of the European Commission and CMA over UK competition law during the transition period (assumed to end on 31 December 2020) and after**

WHO RETAINS JURISDICTION?	
<b>Merger control</b>	
<b>European Commission</b>	<p>Transactions formally notified before the end of the transition period.</p> <p>Where the European Commission has expressly accepted a referral request before the end of the transition period.</p>

CMA	<p>Transactions formally notified after the transition period.</p> <p>Notification declared incomplete before the transition period and completed after the transition period.</p>
<b>Antitrust investigations</b>	
European Commission	<p>Ongoing investigations opened before the end of the transition period.</p> <p>Investigations opened during but decided before the end of the transition period.</p>
CMA	<p>European Commission’s decisions taken prior to the end of the transition period which are subsequently annulled.</p> <p>After the transition period ends, the CMA may obtain jurisdiction over certain elements of any ongoing investigation which may affect trade within the UK. The precise scope of such jurisdiction may be the subject of future legislation and the CMA may issue further guidance in due course. The content of UK competition law may also depart from EU law after the transition period.</p>
<b>State aid</b>	
European Commission	<p>Notifications of state aid before and during transition period.</p> <p>Investigations into non-notified state aid before and during transition period (and, in theory, for a period of four years after the end of the transition period where aid granted before 31 December 2020).</p> <p>EU state aid rules will continue to apply to trade between Northern Ireland and the EU until 31 December 2024 (at a minimum and for further four year periods subject to the provisions on democratic consent under the Protocol on Ireland/Northern Ireland).</p>
CMA	<p>The Government has stated that the UK will have its own state aid regime after the transition period. It has not yet formally confirmed how any new state aid rules will operate after the transition period, including whether the CMA will have a role to play in this regime.<sup>vi</sup></p>



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<sup>i</sup> The Future Relationship with the EU: The UK’s Approach to Negotiations.

<sup>ii</sup> Notwithstanding the possibility of extension, it is assumed (in line with UK Government policy) that the transition period will end on 31 December 2020.

<sup>iii</sup> Paragraph 94, Annex (“Negotiating Directives”) to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 25 February 2020.

<sup>iv</sup> Paragraphs 66-67, The Future Relationship with the EU: The UK’s Approach to Negotiations.

<sup>v</sup> Paragraph 64, The Future Relationship with the EU: The UK’s Approach to Negotiations.

<sup>vi</sup> <https://www.gov.uk/government/news/the-uk-s-withdrawal-from-the-eu-the-cma-s-role-post-brexit>.