
Brexit - Competition Law in the UK During the Transition Period and After

June 15, 2020

The United Kingdom (UK) left the European Union (EU) on 31 January 2020. Since then, under the EU-UK Withdrawal Agreement, a transition period has been in force, in principle until 1 January 2021. During this period most EU law, including its competition law, continues to apply in the UK.

The Withdrawal Agreement allows the EU and the UK to extend the transition period by one or two years, but only if an extension is agreed before the end of June 2020. While this may change, the UK government has repeatedly stated that it does not intend to request an extension.

As we approach the potential midpoint of the transition period, it is useful to consider what will change at the end of the transition in terms of competition law enforcement and how to plan for the end of the transition period. In particular, companies that are involved in ongoing proceedings before the European Commission (EC) should be aware that the UK's Competition and Markets Authority (CMA) may acquire jurisdiction over the UK parts of these proceedings as early as 1 January 2021. This will be of particular relevance to companies that are preparing to notify the EC of merger or acquisition transactions.

More generally, at the end of the transition period, the CMA will be empowered to review more mergers and conduct than before, and it is expected to be a key agency to consider when assessing risk and planning large global deals.

Background and ongoing negotiations

In the June 2016 UK Brexit referendum, a majority voted to leave the EU. From late 2016 to late 2019, the EU and the UK government negotiated the terms of the UK's departure. A (revised) Withdrawal Agreement was finally agreed in October 2019.¹ Following the UK General Election in

¹ See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN).

December 2019, the Withdrawal Agreement entered into force on 31 January 2020 when the UK formally left the EU.

The Withdrawal Agreement establishes a transition period until the end of 2020, during which most EU law, including its competition law, continues to apply in the UK.² This period can be extended by one or two years, but only if an extension is agreed before the end of June 2020.³ As of today, the UK government has not requested an extension, and prominent government members have stated that they will not seek an extension.⁴

Meanwhile, negotiations are ongoing on the future trade relationship between the EU and the UK. Currently, however, there is no certainty regarding the nature of this relationship or whether a trade agreement will be negotiated by the start of 2021.

EU competition law in the UK during the transition period

While the UK has now left the EU, EU competition law continues to apply in the UK as before.

If parties to merger or acquisition transactions have sales (turnover) exceeding certain thresholds globally and in the EU,⁵ they must notify the EC of their transactions, and the EC—rather than the UK's CMA—examines the transactions' effects on competition in the EU and in the UK. This “one-stop shop” aspect of EU merger control means that during the transition period, parties to such transactions still need to make only a single notification to the EC rather than separate notifications to the EC and the CMA.

For cartels and non-M&A competition investigations, the EC continues to investigate conduct that took place in or affected the UK and other countries in the EU and—unless the EC is already investigating it—the CMA can enforce both UK and EU competition law in relation to such conduct.

² Withdrawal Agreement, Article 126.

³ *Id.*, Article 132.

⁴ In the UK legislation implementing the Withdrawal Agreement (The European Union (Withdrawal Agreement) Act 2020), Ministers are even prohibited from agreeing in the Joint Committee established under the Withdrawal Agreement to an extension of the transition period; see section 33, available at <http://www.legislation.gov.uk/ukpga/2020/1/section/33/enacted>.

⁵ The parties' UK sales continue to count as EU sales for the purposes of these thresholds.

The end of the transition period

M&A transactions

Unless the EU and the UK agree otherwise, at the end of the transition period, the EC will no longer be empowered to examine a transaction's potential effects on competition in the UK.⁶ Also, there is no indication that the EU and the UK are currently discussing such competition law procedures.

Instead, the CMA will have the power to investigate UK effects and, where the CMA considers it necessary, to order remedies or even prohibit the transaction. The CMA will be able to review transactions in parallel with the EC. The EC's one-stop shop will no longer cover the UK. This means that there could be a risk of diverging outcomes (especially if there are UK-specific competitive circumstances). A recent CMA publication (the CMA Brexit Guidance) notes, however, that where possible and appropriate, the CMA will "endeavour to coordinate merger reviews relating to the same or related cases" with the EC, which would appear to envisage both procedural and substantive cooperation.⁷

The UK has a voluntary system of merger control. Unlike in most countries, in the UK it is not mandatory to notify the CMA of transactions before closing and then await approval. Instead, the parties may choose to notify the CMA voluntarily. However, even when the CMA is not notified of a transaction, it has extensive powers to investigate transactions and, in the most extreme cases, prohibit unconsummated transactions or order that closed transactions be undone.

The CMA has long been a vigorous investigator of mergers, and this will continue. For example, the CMA has spent the past 12 months investigating Amazon's acquisition of a minority stake in the food delivery company Deliveroo.⁸ It also opposed Sabre's merger with Farelogix, a transaction that was cleared elsewhere in the world.⁹ Moreover, the CMA recently started to investigate the already closed viagogo/StubHub transaction.¹⁰

When the transition period ends, the CMA will be able to investigate the "bigger" mergers that previously would have been notified only to the EC. The CMA is therefore poised to become a major player in evaluating those transactions. For example, in its recent Annual Plan, the CMA anticipates that it will investigate 50% more transactions than before, and it has recruited more staff

⁶ Moreover, the parties' UK sales will no longer count as EU sales, so some deals that would have qualified for EC review during the transition period will no longer qualify afterward.

⁷ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf, paragraph 3.31.

⁸ See <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>.

⁹ See <https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry>.

¹⁰ See <https://www.gov.uk/cma-cases/viagogo-stubhub-merger-inquiry>.

to do this.¹¹ The CMA's annual budget for 2020–21 is almost £92 million;¹² in past years, it had an annual budget of between £60 million and £70 million. The CMA also has stated that it intends to have “a bigger role on the world stage” after Brexit.¹³ Parties will need to take account of the CMA's enhanced role when planning M&A deals.

Ongoing cases

The Withdrawal Agreement contains rules for investigations that are ongoing before the EC at the end of the transition period.¹⁴ The CMA also has published helpful guidance on this.¹⁵ Generally, if the EC has been notified of the merger or acquisition transaction before the end of the transition period, it will retain jurisdiction over the transaction and the UK will not be able to investigate.¹⁶ In contrast, if the EC has not yet been formally notified of the transaction, the UK will obtain the power to review its UK aspects even if—as is common—the parties have been in pre-notification discussions with the EC for many months.

The CMA's guidance suggests that—to avoid delays—if there is a likelihood that the EC will not have been formally notified of a transaction before the end of the transition period, the parties should start to discuss the transaction with the CMA “significantly in advance” of the end of the transition period.¹⁷ The CMA has indicated that it will encourage such contacts and be willing to discuss how potential CMA notifications could be prepared expeditiously; it also suggests that parties may want to share draft EC notifications with the CMA before the end of the transition period.¹⁸

When it looked like the EU and the UK might not agree on the Withdrawal Agreement (the original “no deal” Brexit scenario), the CMA developed a practice of screening deals that might be pending when Brexit happened, to see whether it might want to intervene post-Brexit. In particular, the CMA examined whether deals raised specific effects in the UK that the CMA might want to investigate

¹¹ CMA Annual Plan 2020, paragraph 2.6. See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860186/Annual_Plan_2020-21.pdf.

¹² *Id.*, paragraph 4.1.

¹³ See <https://www.gov.uk/government/consultations/cma-annual-plan-consultation-201920/cma-annual-plan-consultation-201920>.

¹⁴ Article 92(3)(c).

¹⁵ See the CMA Brexit Guidance,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.

¹⁶ For cases before the end of the transition period, the EC also will continue to monitor and enforce merger remedies imposed in relation to the UK, including where the decision was taken after the end of the transition period in a procedure started before the end of that period. However, the Agreement also provides for the possibility that the EC and the relevant UK competition authority could agree to transfer that monitoring and enforcing role to the UK authorities in the future (see Article 95(2) of the Withdrawal Agreement and the CMA Brexit Guidance, paragraph 3.11).

¹⁷ CMA Brexit Guidance, paragraph 3.13.

¹⁸ *Id.*, paragraphs 3.19, footnote 68 and paragraph 3.23.

and address, or whether the CMA could satisfy itself that the EC's review already would address any potential concerns.

Overall, therefore—depending on the transaction, and on its potential effects in the UK—parties should consider contacting the CMA some months before the end of the transition period to brief the CMA on the transaction, and should coordinate this with the EC in order to head off possible surprises and delays to closing. If companies in pre-notification with the EC do not approach the CMA near the end of the transition period, they may well find that the CMA contacts them, and that there is a risk of delay and further substantive discussions which might have been avoided with earlier engagement.

Cartels/other antitrust investigations

Unless the EU and the UK agree otherwise, at the end of the transition period, the CMA (and other UK sectoral regulators such as in the energy, financial and telecoms industries) will only be able to investigate potential infringements of UK competition law and not also EU law. Similarly, if the conduct has transnational aspects (such as an international cartel), the EC will be able to review its effects only in the remaining 27 EU Member States, but not in the UK.¹⁹

As a result, there may be parallel UK and EU investigations and potentially diverging outcomes, remedies and sanctions. The possibility of such divergence may increase over time because EU case law and EC decisions no longer will have precedential value in the UK, and there may be areas where UK law takes an approach that differs from that of EU law.

The CMA's amnesty/leniency regime for cartel whistleblowers will remain unchanged during and after the end of the transition regime. If conduct has material effects in the UK and a company is considering applying for amnesty or leniency at the EC level, it will need to consider whether making a similar application to the CMA is also advisable.

Ongoing cases

The Withdrawal Agreement also includes rules for cartel and other antitrust investigations that are ongoing at the end of the transition period. The EC will retain jurisdiction over these investigations if it formally has initiated proceedings.²⁰ However, the CMA may obtain jurisdiction over conduct, even if the EC has initiated proceedings, if the conduct is ongoing and it may affect the UK. In such instances, the CMA may only investigate facts that occur after the end of the transition period.

¹⁹ The EC will continue to monitor and enforce UK elements of remedies imposed and commitments given to the EC in settlement of antitrust proceedings (see the CMA Brexit Guidance, paragraph 4.23) unless the EC and the CMA agree that the CMA should assume this responsibility.

²⁰ Withdrawal Agreement, Article 92(3)(b). The EC normally initiates proceedings by issuing a Statement of Objections or by issuing a preliminary assessment that conduct infringes EU law.

The CMA's Brexit Guidance again notes that it may approach parties to EC investigations before the end of the transition period to gather information for a potential investigation after the end of this period.²¹ Overall, the scope of the CMA's powers over antitrust investigations that are ongoing before the EC at the end of the transition period is less clear than it is for ongoing mergers; the CMA's Brexit Guidance states that legislation may be required in order to establish the contours of these powers, and that the CMA may issue more guidance on this area.²²

As so often is the case with Brexit, we will have to wait and see what happens. However, the CMA's role is poised to increase significantly in practice.

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²¹ CMA Brexit Guidance, paragraph 4.20.

²² *Id.*, paragraph 4.19.