

CLIENT ALERT

# Brexit - How Will Antitrust Cases and Mergers be Impacted?

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## AUTHORS

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### Key dates:

- 23 June 2016 – The British people vote to leave the EU in a referendum, with 51.9% voting to leave and 48.1% voting to remain.
- 14 November 2018 – Withdrawal Agreement and Political Declaration negotiated and published.
- 17 October 2019 – Renegotiated Withdrawal Agreement and Political Declaration agreed.
- 23 January 2020 – European Union (Withdrawal Agreement) Act 2020 (EU(WA)A) receives Royal Assent.
- 29 January 2020 – Ratification of EU(WA)A by the European Parliament.
- 31 January 2020 – UK exits the EU and implementation period begins.
- 31 December 2020 – End of implementation period. Extension expressly prohibited by EU(WA)A.
- 1 January 2021 – Application of a potential new EU-UK trade deal or 'no-deal' situation if no new trade deal is agreed before the end of the implementation period.

## The UK is leaving the EU

On 31 January 2020 at midnight CET (**Exit Day**), the United Kingdom (**UK**) will leave the EU after 47 years of membership, and over a year after the draft withdrawal agreement (the **Withdrawal Agreement**) was settled by EU and

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UK negotiators but rejected by the UK Parliament. In this note, we provide a summary of the legal process leading up to the Exit Day and the road ahead, focusing on the implications for competition law, including merger control matters.

The UK is leaving the EU on the basis of a final renegotiated agreement (the **Renegotiated Agreement**)<sup>1</sup> which has been ratified by the UK Government (with the adoption of the European Union (Withdrawal Agreement) Act 2020 (EU(WA)A) (the **WA Act 2020**)) on 23 January 2020 and by the European Parliament<sup>2</sup> on 29 January 2020.<sup>3</sup>

The terms of the UK exit under the Renegotiated Agreement are largely the same as under its predecessor, the Withdrawal Agreement, with the notable exception of the replacement of the so-called 'Irish backstop' with a new customs arrangement<sup>4</sup> (to read more about the draft Withdrawal Agreement see our earlier briefing [Publication of the Draft UK/EU Withdrawal Agreement](#)).

The Renegotiated Agreement and the WA Act 2020 set out the arrangements for the UK's exit and are intended to enable an orderly exit from the EU. However, neither provides any details for a long-term trade deal governing the future relationship between the UK and the EU beyond 2020. The foundations for such a long-term trade deal are set out in the Political Declaration on the framework for future EU-UK relations, reached alongside the Renegotiated Agreement on 17 October 2019<sup>5</sup> (the **Political Declaration**).

The Renegotiated Agreement and the WA Act 2020 do provide for a transition period (the **Implementation Period**) to minimise disruption between Exit Day and 31 December 2020 (the **IP Completion Day**) during which time the UK will remain subject to EU law whilst negotiations for a long-term trade deal are ongoing.

Whereas the Renegotiated Agreement itself allows for an extension of the Implementation Period up to "1 or 2 years"<sup>6</sup> if both the EU and UK agree to this prior to 1 July 2020, the WA Act 2020 prohibits the UK from agreeing any extension of the Implementation Period beyond 31 December 2020.<sup>7</sup>

By removing the possibility for extending the Implementation Period, the EU and UK now have only 11 months to agree on their future relationship before the IP Completion Day.

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<sup>1</sup> Available [here](#).

<sup>2</sup> By a vote of the European Parliament and final approval from the Council of the European Union.

<sup>3</sup> The Council of the European Union adopted the Renegotiated Agreement by written procedure on 30 January 2020.

<sup>4</sup> Through the new Northern Ireland Protocol.

<sup>5</sup> Available [here](#).

<sup>6</sup> See Article 132 of the Renegotiated Agreement

<sup>7</sup> See Section 33 of the WA Act 2020. Such provision could be repealed by the adoption of another Parliamentary Act.

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This leaves little time to negotiate a comprehensive deal governing the future relationship between the UK and the EU. Both the new President of the European Commission, Ursula von der Leyen, and the EU's Chief Negotiator, Michel Barnier, have noted that such a short period for negotiation may require the prioritisation of certain areas, such as a security partnership and access to UK fishing waters, where there are no other international convention rules in place on which the EU and UK may fall back on (e.g. WTO rules in relation to trade).<sup>8</sup> Absent a new trade deal, the EU and UK would end up in a 'no deal' scenario following the IP Completion Day.

### Impact on Competition Law

As far as competition law is concerned, there will be little immediate impact of the UK's departure from the EU on Exit Day, as the UK will continue to be treated as if it were an EU Member State and EU competition law will continue to apply within the UK during the Implementation Period.

Little is certain about what to expect following the IP Completion Day. The Political Declaration states that the EU and UK will agree on a wide-ranging and balanced economic partnership underpinned “*by provisions ensuring a level playing field for open and fair competition*”<sup>9</sup> which “*should maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition*”.<sup>10</sup>

In a written statement on its Brexit negotiation approach, published on 3 February 2020<sup>11</sup>, the UK government stated that “*the UK will in future develop separate and independent policies in areas such as (but not limited to) [...] competition and subsidy policy, [...] maintaining high standards as [it does so]*”. The UK government is therefore leaving the door open to rules being substantially the same as the EU rules. That said, diverging competition laws remain a distinct possibility when looking beyond 2020.<sup>12</sup>

We set out below a number of key practical takeaways of the impact of Brexit in relation to: (1) the interaction between EU and UK competition law; and (2) enforcement of competition law in the UK during the Implementation Period and after the IP Completion Day.

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<sup>8</sup> See FT's 8 January 2020 article Ursula von der Leyen: three takeaways from her Brexit speech [here](#) and Remarks by Michel Barnier at the European Commission Representation in Sweden [here](#).

<sup>9</sup> Paragraphs 17 and 21 of the Political Declaration.

<sup>10</sup> Paragraph 77 of the Political Declaration.

<sup>11</sup> UK / EU relations: Written statement – HCWS86 available [here](#).

<sup>12</sup> There has been extensive commentary on possible UK plans to seek to diverge from the EU State Aid regime's standards after the IP Completion Day. Developments in this area will be closely watched over the course of 2020.

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### Interaction between EU and UK Competition Law

The Renegotiated Agreement and the WA Act 2020 provide that the body of EU law (i.e. treaties, regulations, domestic legislation implementing directives) will continue to apply until the IP Completion Day, therefore UK law will not diverge from EU law during the Implementation Period.

Following the IP Completion Day, subject to certain specific exceptions, all EU law that was until then directly applicable in the UK, as well as all UK domestic legislation which has been enacted to implement EU instruments (such as EU Directives), will be converted or preserved in domestic UK law (**Retained EU Law**). Adaptation of Retained EU Law (e.g. to accommodate UK procedures or institutional processes) will be possible by way of delegated legislation (i.e. secondary legislation adopted by a Minister).

When interpreting Retained EU Law, UK courts and tribunals, with the exception of the Supreme Court, will be bound by EU case law decided up until the IP Completion Day (**Retained EU case law**). The UK Government may nevertheless designate specified courts and tribunals which may be permitted to depart from EU case law where certain tests (to be set out in delegated legislation) are met.

UK courts or tribunals will not be bound by judgments of the EU courts issued after the IP Completion Day but “*may have regard*” to them.

In practice, this means that:

- Article 101 Treaty on the Functioning of the European Union (**TFEU**) (anticompetitive agreements and concerted practices), Article 102 TFEU (abuse of dominance), the EU Merger Regulation, and EU Block Exemption Regulations will continue to apply during the Implementation Period;
- Following the IP Completion Day, Articles 101 and 102 TFEU and the EU Merger Regulation will no longer apply within the UK;<sup>13</sup>
- EU Block Exemption Regulations, such as the Vertical Agreements Block Exemption, will be retained until their expiry,<sup>14</sup> at which point the UK will decide whether to introduce its own domestic block exemptions. The extent to which any new rules will align with or diverge from any renewals at EU level is unknown; and

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<sup>13</sup> Competition (Amendment etc.) (EU Exit) Regulations 2019.

<sup>14</sup> Section 3 Competition (Amendment etc.) (EU Exit) Regulations 2019.

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- Retained EU Law will be interpreted and applied consistently with relevant EU cases handed down before the IP Completion Day, other than by the UK Supreme Court or designated courts and tribunals which have a right to diverge from such EU precedents.

Over time, the interpretation of UK and EU competition rules/principles could diverge, as EU case law handed down after the IP Completion Day will no longer be binding on UK courts, even in circumstances where a UK court is interpreting Retained EU Law.

### Enforcement of Competition Law in the UK

It is important to note that, even after the IP Completion Day, EU competition law will continue to apply to any arrangements or anticompetitive conduct in the UK (or indeed anywhere else in the world) that could have an effect within the EU. This means that the European Commission will retain the ability to investigate anticompetitive conduct and impose sanctions for such conduct where the conduct had the object or effect of restricting competition in the EU. In addition, the European Commission's merger control regime will continue to apply to mergers, including between UK companies, where the relevant EU turnover thresholds under the EU Merger Regulation are met. The UK's (then) new status as a 'third country' will not affect this.

What will change is that the UK Competition & Markets Authority (**CMA**) will be able to conduct its own assessments of suspected breaches of competition law and of mergers which affect the UK economy, in parallel to and independently of the European Commission's assessment. Regulations which were published by the UK Government in 2019 to expand the CMA's powers and to prepare the UK's competition framework for a 'no deal' Brexit<sup>15</sup> on Exit Day will instead enter into force, after the Implementation Period, on the IP Completion Day.

Given these changes, discussed in more detail below, the CMA expects an increased workload after the IP Completion Day, which is likely to go hand-in-hand with increased enforcement by UK sectoral regulators, including the Financial Conduct Authority (**FCA**) and the UK telecoms and media regulator, Ofcom, which currently have and will continue to have after the IP Completion Day concurrent powers to enforce UK competition law. Such sectoral regulators have in the past demonstrated a willingness to use their concurrent competition law enforcement powers, for example in last year's fine issued by the FCA for anticompetitive conduct (see our previous briefing, [The UK's Financial Conduct Authority Issues Its First Ever Competition Law Enforcement Decision](#)) or Ofcom's £50 million fine against Royal Mail in 2018.

In anticipation of its increased workload, the CMA was allocated additional funds of around £20 million for 2019 and 2020 and has increased its staff numbers by c. 40%. This means that the head-count of the CMA is now larger than the head-

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<sup>15</sup> Competition (Amendment etc.) (EU Exit) Regulations 2019 and Competition (Amendment etc.) (EU Exit) (No. 2) Regulations 2019.

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count of the European Commission's Competition Directorate (although the CMA also has responsibility for consumer protection issues which its EU equivalent does not).

### *(i) Suspected Breaches of Competition Law*

Under the current rules set out in Regulation 1/2003,<sup>16</sup> the European Commission shares the competence to apply Articles 101 and 102 TFEU with the national competition authorities (**NCA**s) of the EU Member States, including the CMA and certain designated UK sector regulators, such as the FCA and Ofcom.

Regulation 1/2003 provides for a cooperation mechanism between the European Commission and NCAs in order to ensure effective enforcement and a consistent application of EU competition rules within the Single Market. In practice, this means the following rules apply until the IP Completion Day:

- The CMA must apply Articles 101 and 102 TFEU (in addition to the UK's national competition rules) to suspected anticompetitive agreements or practices which may affect trade between EU Member States;
- Investigations into alleged anticompetitive agreements or practices which may affect trade between EU Member States are carried out by the competition authority (an NCA or the European Commission) which is best placed to deal with the matter (having regard to the ability to collect relevant evidence and sanction any infringements). Complex cases involving a number of Member States are therefore often dealt with by the European Commission, which also has the power to carry out dawn raids in Member States (with the assistance of the local NCA) and to impose sanctions or accept commitments on a pan-EU basis;
- With the exception of unilateral conduct under Article 102 TFEU, the CMA is prevented from applying stricter national competition laws to agreements capable of adversely affecting trade between EU Member States than specified under EU competition law; and
- The CMA needs to continue to actively cooperate with the European Commission and other NCAs within the European Competition Network<sup>17</sup> in relation the enforcement of EU competition law across the Internal Market and the UK.

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<sup>16</sup> Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>17</sup> The forum established to enable cooperation between NCAs and the European Commission.

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However, following the IP Completion Day the position will likely be very different:

- Investigations which have been formally initiated by the European Commission (e.g. by the issue of a Statement of Objections or the commencement of settlement discussions) before the IP Completion Day (**live EU investigations**) will remain within the European Commission's jurisdiction,<sup>18</sup> including any relevant UK conduct;
- The CMA may seek to obtain jurisdiction over elements of live EU investigations which have a UK element (and fall within the CMA's enforcement prioritisation criteria) and investigate conduct occurring after the Implementation Period. In its EU Exit Guidance,<sup>19</sup> the CMA notes that in such circumstances, the CMA (and the UK concurrent regulators) "*may approach the parties to begin gathering information*" before the IP Completion Day. The precise scope of any concurrent jurisdiction by the CMA in relation to the UK aspects of live EU investigations may be the subject of future legislation;
- The CMA will only investigate alleged anticompetitive conduct under UK competition law and will no longer enforce Articles 101 and 102 TFEU; and
- The European Commission will no longer be able to carry out dawn raids in the UK and will no longer assess (and sanction) the UK element of suspected anticompetitive conduct, insofar as such conduct does not adversely affect competition within the EU.

As a result, the CMA is likely to initiate parallel investigations alongside the EU for cases that would previously have been reviewed solely by the European Commission.

As regards leniency applications in cartel cases, there has never been a 'one-stop shop' regime in the EU. As a result, companies have had to consider the need for making separate immunity applications for the same conduct to the European Commission and the CMA under the current procedures to ensure the company is protected, irrespective of whether the case is ultimately investigated by the European Commission or the CMA. This will continue to be the case during the Implementation Period and after the IP Completion Day. That said, given the prospect of parallel European Commission and CMA cartel cases into the same identical conduct after the IP Completion Day, the need for seeking protection under all relevant leniency regimes across the EU as well as in the UK will be even greater in the future.

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<sup>18</sup> Article 92(3)(b) of the Renegotiated Agreement.

<sup>19</sup> Guidance on the functions of the CMA under the Withdrawal Agreement published on 28 January 2020.

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Although the CMA will no longer be a member of the European Competition Network which coordinates the enforcement of competition law across the EU between NCAs and the European Commission, it is likely that the CMA will continue to cooperate and work closely with its EU counterparts, including the European Commission, to promote competition both inside and outside the UK for the benefit of consumers. That said, it can be expected that the CMA will intensify its bilateral cooperation efforts with non-EU competition authorities, including the US Department of Justice and Federal Trade Commission.

### **(ii) Merger Control**

Under the 'one-stop shop' principle of the current EU Merger Regulation,<sup>20</sup> the European Commission has the exclusive jurisdiction<sup>21</sup> to assess mergers that satisfy certain specified EU turnover thresholds. There will be no immediate change in this regard during the Implementation Period. The UK will continue to be treated as if it were an EU Member State, including, importantly, for the assessment of the EU turnover thresholds.

This means that companies assessing whether they need to notify a merger to the European Commission must continue to include UK turnover within their EU turnover in their calculations during the Implementation Period. Where the relevant EU thresholds are met, the European Commission will continue to review the effect of such mergers across the EU and the UK.

Similar to live EU investigations, mergers which have been notified to and are under review by the European Commission before the IP Completion Day (**live EU Merger Reviews**) will remain subject to the European Commission's exclusive jurisdiction after the IP Completion Day.<sup>22</sup> In practice, this means that the merging parties must formally notify the European Commission<sup>23</sup> by 23 December 2020<sup>24</sup> to ensure that their merger will be reviewed under the 'one-stop shop' system of the EU Merger Regulation including the UK aspects of the deal.

Mergers that do not satisfy the EU turnover thresholds, but which may be the subject of a 'referral up' request from either the notifying party(ies) (under Article 4(5) EU Merger Regulation) or the CMA (under Article 22 EU Merger Regulation), give rise to specific timing considerations. Such requests must be made sufficiently in advance of 23 December 2020 to allow the European Commission to accept an EU notification by that date.

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<sup>20</sup> Efficiency is achieved by reducing the burden on companies having to submit multiple notifications. Use of the 'one-stop shop' also provides businesses with certainty by removing the possibility of divergent outcomes where multiple authorities assess the same transaction separately.

<sup>21</sup> Subject to certain exceptions where mergers have been referred up or down at the request of the notifying parties or an NCA.

<sup>22</sup> Article 92(3)(c) of the Renegotiated Agreement.

<sup>23</sup> And the European Commission must have accepted such notification.

<sup>24</sup> This takes into account the European Commission's public holidays for 2020.



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Commitments given in the context of live EU Merger Reviews, which have been accepted by the European Commission will continue to be monitored and enforced by the European Commission after the IP Completion Day, including in relation to any UK elements of such commitments. However, the Renegotiated Agreement provides that, if agreed between the European Commission and the CMA, the responsibility for monitoring and enforcement of such EU commitments or remedies in the UK could be transferred from the European Commission to the CMA.<sup>25</sup> The process for any such transfers is yet unknown and will be determined by way of delegated legislation in the future.

Where merging parties are unsure as to whether they will be able to formally notify the European Commission of a merger before the IP Completion Day, they should engage with the CMA and the European Commission as early as possible. In practice, given the increasingly lengthy pre-notification periods for complex transactions, this could mean engaging with the CMA and the European Commission as early as 6 to 8 months before 23 December 2020.

After the IP Completion Day, mergers which satisfy both the EU and UK review thresholds may be subject to review by both the European Commission and the CMA in parallel. While such reviews will be legally and procedurally independent, the regulators can be expected to cooperate closely. In this context, it is likely that the European Commission and the CMA will ask the merger parties for waivers to allow them to share information – mirroring the approach currently in place between the European Commission and other non-EU competition authorities, in cases where the same merger is subject to parallel reviews by a number of competition authorities around the world.

Despite these likely efforts to avoid inconsistent assessments and outcomes where possible, it cannot be excluded that the European Commission and the CMA will give different weight to different theories of harm and may come to inconsistent conclusions on the facts before them which may not always be readily explained by differences in prevailing market dynamics in the EU and the UK.

Given all of the above, the drafting of merger control related provisions in transaction documents (including conditionality and long stop date provisions) must be approached with care, given the jurisdictional and timing issues arising from the Brexit process.

### Conclusion

Despite the commitment of the EU and the UK to ensure the continued application of EU competition law until the IP Completion Day, it may, however, be the case that we will see a growing sense of independence in policy and

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<sup>25</sup> Article 95(2) Renegotiated Agreement.

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enforcement prioritisation terms of the CMA during the course of 2020, in anticipation of the 'new order' for competition law enforcement from 1 January 2021 onwards.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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