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# Competition policy - Brexit and the exercise of devolved powers (republished)

Dr Arianna Andreangeli, University of Edinburgh

This briefing is the second of two which look at the Scottish Government's new competition powers. It discusses the consequences of Brexit for the competition powers devolved to the Scottish Government by the Scotland Act 2016.



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## About the author

Dr Arianna Andreangeli is a senior lecturer in the Law Faculty at the University of Edinburgh. Her research interests cover EU and domestic competition law. She sits on the Scottish Government's [Consumers and Markets Taskforce](#), which is discussed in this briefing.

Dr Andreangeli has been working with the Scottish Parliament Information Centre (SPICe) as part of its [Academic Fellowship programme](#). This aims to build links between academic expertise and the work of the Scottish Parliament.

The views expressed in this briefing are the views of the author, not those of SPICe or the Scottish Parliament.

# What this briefing does

The Scotland Act 2016 devolved new competition powers to the Scottish Parliament and Government. This briefing examines the framework in which those powers will operate, as well as the challenges and implications created by the UK's exit from the European Union (EU).

Competition policy is heavily influenced by EU law. [National competition authorities](#) work in close partnership with, and under the leadership of, the European Commission. Brexit stands to change this position, with significant consequences for the future exercise of these powers in Scotland.

The impact of Brexit on UK competition policy is discussed in more detail in the SPICe briefing [Competition policy - the UK framework and the impact of Brexit](#).

This briefing will explore competition policy in the broader context of the relationship between the central and devolved administrations. It will also consider what options may be available to ensure that the powers transferred to the Scottish Parliament and Government under the Scotland Act 2016 remain effective.

The briefing is structured as follows:

1. It examines the impact of the Scotland Act 2016 on competition policy in the UK. It will look at the nature and scope of the powers transferred to Scottish Ministers, against the broader background of the approach to inter-governmental relations between the UK and the Scottish governments.
2. It considers options for the Scottish Government to effectively engage with these new powers, even after the UK exits the EU.

# Main points

## **Brexit creates uncertainty for the exercise of the Scottish Government's competition powers**

More than three years since the Brexit referendum, it is still very hard to unpick the implications that exit from the EU is going to have on the UK. As this briefing seeks to show, this uncertainty affects the Scottish Government's recently acquired powers in the field of competition policy.

## **The risk is that, as UK Ministers see their competition brief becoming more extensive and potentially more open to protectionism, Scottish Ministers may see their influence diminish**

Brexit appears to have highlighted how the existing inter-governmental frameworks are put under considerable strain by a new generation of devolved powers. This is because these do not fit with the previous division between reserved and devolved matters.

Competition policy is technically complex, and knowledge - and evidence - driven. In this context, novel forms of ongoing dialogue and consultation, coupled with access for ministers to greater technical expertise, are likely to be needed.

Putting new communication arrangements in place may avoid weakening the powers enjoyed by the Scottish Parliament and Government under the existing devolution settlement. Perhaps more importantly, it may avoid jeopardising competitiveness in Scottish markets.

## **Traditional forms of communication between the Scottish and UK Governments do not provide a suitable forum for resolving competition issues**

Traditional forms of inter-governmental relations are based on conflict resolution as opposed to consultation and ongoing discussion. This appears to make them unsuited to the joint nature of the powers now enjoyed by Scottish Ministers in relation to market investigations.

## **The end of the EU frameworks for merger and state aid control may enable UK Ministers to introduce a more protectionist agenda**

Brexit is expected to end the applicability of the EU merger control and EU state aid regimes - in their current form - to UK markets. It is not clear how the Scottish Government can influence UK Ministers' industrial policy decisions, despite having a role in advocating for competition when it comes to Scottish markets.

This could be addressed by creating a framework for dialogue and consultation between the UK and Scottish governments. This could be taken forward in parallel with the creation of a UK mechanism for state aid scrutiny using the Competition and Markets Authority (CMA).

# Useful definitions

**Competition and Markets Authority** - The CMA is the UK's competition regulator. It is responsible for enforcing rules in relation to anti-competitive behaviour and merger activity. It also deals with consumer protection. It works closely with other UK regulators, such as the energy markets regulator Ofgem. It also works closely with the European Commission and competition authorities in other member states of the EU.

**Concentration:** According to the EU Merger Regulation (Council Regulation No 139/2004) the notion of 'concentration' is used to indicate the "change of control on a lasting basis" over a business. In practice this can include true mergers (i.e. where two or more entities become one), takeovers, joint ventures and, in exceptional cases, the acquisition of minority stakes in businesses.

**European Court of Justice:** This is a short-hand expression for the Courts of Justice of the European Union. These are the Court of Justice and the General Court, the two tiers of the judiciary of the European Union.

**Jurisdiction:** A court or organisation is said to have jurisdiction over a dispute where it has authority to hear and determine the case.

**Merger:** in business situations, this term identifies the coming together of previously distinct business entities. Economic activity is continued under control of one of the merging entities, or control is exercised jointly by both of them. In this briefing, the term "merger" should be read as including true mergers (i.e. where two or more businesses become one), joint ventures and other acquisitions such as takeovers.

**National champions:** UK companies which are protected from foreign competition by the creation of barriers to entering UK markets for foreign businesses.

**National competition authorities** - the authority in each member state responsible for enforcement of the competition rules. The national competition authority in the UK is the Competition and Markets Authority.

**Phase-2 market investigation:** an investigation conducted by the CMA, which can be sought by the competent government minister, a sector regulator, or the CMA itself. It seeks to identify any feature or combination of features within a specific market that may distort competition and harm consumers. Its purpose is to determine whether the process of competition in a specific market is working effectively. The competent Minister can raise public interest issues that are relevant to the market covered by their reference. In that case, the CMA is required to consider the public interest matters alongside the competition law matters (see Section 141 of the Enterprise Act 2002).

**Public interest exception:** Under the Enterprise Act 2002, a UK Minister may ask the CMA to report on public interest matters raised by a particular merger. The public interest considerations which can trigger such a notice are:

- national security
- the need to protect freedom of expression, especially via the mass media
- the stability of the UK financial sector.

Ministers can add or remove public interest considerations using secondary legislation.

**Relevant merger situation:** in the UK, Section 23 of the Enterprise Act 2002 defines this as the situation in which two or more enterprises (ie. businesses) have ceased to be distinct. The CMA is competent to scrutinise relevant merger situations that meet either a turnover threshold or a minimum share of supply requirement. The CMA must refer the merger to a panel for appraisal within a set time frame.

**Section 63 decision:** a decision adopted under Section 63 of the Scotland Act 2016. This decision is adopted jointly by the Scottish and UK Ministers and is directed to the CMA. It gives the CMA notice to conduct a phase-2 market investigation on a market of “Scottish significance”.

**State aid:** any advantage that is granted to a specific business or businesses on a selective basis on the part of national public bodies. The TFEU prohibits aid of this form (whether monetary or in kind) that confers a selective advantage on the recipient and distorts competition in the market place.

**Treaty on the Functioning of the European Union (TFEU):** this treaty provides the institutional and constitutional infrastructure of the European Union.

# Competition policy and devolution in Scotland: the Scotland Act 2016

The purpose of this part of the briefing is to discuss to what extent - and how - competition policy powers were devolved to the Scottish Government in 2016. For a more detailed discussion of current UK competition powers see the SPICe briefing [Competition policy - the UK framework and the impact of Brexit](#).

The Scotland Act 2016 has gone some way towards devolving aspects of competition policy to the Scottish Government. It is, however, still unclear how these powers will be exercised in practice.

The Scottish Government has made concrete efforts towards equipping itself with expertise in this area. Nevertheless, it is not certain whether the current framework for discussion and decision-making involving the UK and devolved governments will make the exercise of competition powers a realistic possibility for Scottish Ministers.

This part of the briefing looks at:

- [the competition powers in the Scotland Act 2016](#)
- [how the market investigation process works](#)
- [joint decision-making within the current devolution settlement](#)
- [the need to embed specialist expertise in Scottish Government decision-making on competition](#).

## Competition powers in the Scotland Act 2016

### The Smith Commission

The Smith Commission was convened after the Scottish independence referendum in 2014. Its purpose was to bring representatives from the main political parties together to come up with proposals for devolving more power to the Scottish Parliament.

According to the Smith Commission final report <sup>1</sup>, the transfer of some form of competition policy function to the Scottish Government reflected a commitment to “delivering prosperity, a healthy economy, jobs and social justice”.

### Scotland Act powers

During the formulation of the Smith Commission report, there was debate about how extensive the Scottish Government's competition powers should be. There was also discussion over how the Scottish Government could be involved more closely in competition policy discussions and decision-making in practice.

The [CMA responded](#) to the Smith Commission's consultation. It questioned how a new relationship between the Scottish Ministers, the UK Government and itself could be framed without prejudicing the neutrality and effectiveness of the existing enforcement regime <sup>2</sup>.

Section 63 of the Scotland Act 2016 (2016 Act) ultimately introduced a new power for Scottish Ministers to make a joint reference to the CMA to initiate an in-depth investigation of a specific market. This is known as a [market investigation reference](#).

A reference can be made where it is suspected that competition has been distorted or the rights of consumers have been infringed. However, it is important to note that this power can only be used with the agreement of UK Government ministers.

No other powers—for instance in the field of merger review—were transferred to the Scottish Government. Nor did the 2016 reforms address the challenges that could potentially arise from the exercise of this power. For instance, the legislation did not indicate which intergovernmental framework could be used to manage discussion between Scottish Ministers and their UK counterparts.

## How the market investigation process works

**Market investigations are in-depth examinations of specific markets, conducted by a team appointed from an expert CMA panel.**

They are carried out independently of the CMA board and aim to identify any characteristics in the market that may have an adverse effect on competition. If problems are identified, the CMA enjoys wide powers to impose remedies (for example requiring businesses to be sold off).

Market investigations are triggered by a reference to the CMA. References can be made by the CMA itself, by a Minister (in accordance with section 132 of the Enterprise Act 2002) or by one of the sector regulators.

### **Once a market investigation reference has been made, the CMA exercises its investigative powers**

If the CMA finds that concerns are well-founded, it can order businesses to take specific action to address these problems. This power falls within the functions of the CMA as an independent agency, in accordance with Section 131 of the Enterprise Act 2002.

The report produced at the end of a market investigation is therefore very important. It contains the CMA's findings on competition in the market. It also lists the remedies that must be adopted in order to address any anti-competitive factors.

If a minister makes a [public interest intervention](#), the CMA report will also consider whether the market in question operates against the public interest. If it does, then the competent Secretary of State should take action to address concerns.

### **The market investigation notice is, at least in principle, a very effective weapon for Scottish ministers**

It allows them to bring to the attention of the CMA competition and public interest issues concerning markets in Scotland. However, Scottish Ministers cannot issue a notice to the CMA themselves, but must seek the agreement of UK Ministers.

## Joint decision-making within the current devolution settlement

Joint decision-making of the sort envisaged by section 63 of the Scotland Act 2016 is difficult to reconcile with the overarching devolution settlement. This works on the basis of the traditional distinction between “reserved” and “devolved” matters, where the administrations exercise their competencies separately rather than together<sup>3</sup>.

Recent studies have highlighted that section 63, on the one hand, widens the scope of devolved powers. However, on the other hand, it makes the exercise of these new powers dependent on interaction and agreement between the Scottish and UK governments. It is not clear whether the current processes for dialogue between the two administrations are appropriate to allow this new type of co-operation and consultation to happen<sup>3</sup>.

This question is especially relevant in the field of competition policy, which by its nature is very technical and evidence-based. It therefore requires specialist expertise in the adoption of any decision<sup>3</sup>.

This section will look at the strengths and weakness of the current arrangements, covering:

- [the Memorandum of Understanding between the UK Government and devolved administrations](#)
- [the Joint Ministerial Committee as a forum for discussion](#)
- [weaknesses in the Joint Ministerial Committee approach.](#)

### The Memorandum of Understanding

Competition decisions could be discussed and adopted in accordance with the existing framework governing the interaction between the UK Government and the devolved administrations. This is enshrined in the [Memorandum of Understanding](#) between the UK Government, the Welsh Executive, the Scottish Government and the Northern Ireland Executive<sup>4</sup>.

#### The Memorandum of Understanding is not a binding document

Instead, it is a “statement of political intent”. It sets out basic principles and procedures affecting the co-operation and interplay between central government and the devolved administrations.

It also provides for a Joint Ministerial Committee (JMC) and three Concordats with arrangements for the handling of: the co-ordination of EU policy and implementation; financial assistance to industry; and international relations.

### The Joint Ministerial Committee as a forum for discussion

A key feature of the intergovernmental relations (IGR) framework laid out by the Memorandum is the Joint Ministerial Committee (JMC). Its function is to provide a forum

for ministerial contact and discussion between central government and the ministers of the devolved administrations.

### **The JMC is called regularly throughout the year in its “functional composition”**

This is when it is constituted by ministers that are competent for the subject matter being discussed at each meeting.

Its role is to facilitate co-ordination between the central and devolved administrations by considering non-devolved matters that may have an impact on devolved competences and devolved matters whose management may affect reserved issues. The Committee also provides a forum for the administrations to discuss devolved matters which it may be beneficial to consider jointly.

The JMC is the place in which any conflicts concerning the exercise of devolved and reserved matters should be resolved. The procedure used in this process is set out in a Supplementary Agreement to the Memorandum.

### **It has been argued that the approach followed by the JMC aims to substitute negotiation with confrontation in cases of conflict**

This approach may be especially helpful in the following situations <sup>5</sup> :

- where overlaps in the exercise of devolved and reserved competences occur
- when joint decision-making in certain matters may be beneficial for both levels of government.

These arrangements are consistent with a pragmatic, problem-solving approach to the demands of a complex devolution settlement. Specifically, they provide a framework for competences - which differ in nature and scope between the different administrations - to be reciprocally accommodated <sup>6</sup> .

## **Weaknesses in the Joint Ministerial Committee approach**

The approach adopted in the Memorandum, and in particular the role of the JMC, has not been immune from criticism. Concerns include <sup>6</sup> :

- that the approach is by necessity piecemeal
- that there are no clear channels of accountability applying to the JMC, especially in relation to the parliamentary assemblies
- that decisions adopted are immune from judicial scrutiny, raising questions as to their legitimacy.

### **Can current arrangements address the demands of joint decision-making?**

It could be argued that the existing inter-governmental arrangements do not address the demands of joint decision-making powers. Here, a degree of continuity appears to be necessary. Could calling up a meeting of the JMC, either at ministerial or officials' level, be

justified in every case in which no agreement was forthcoming as regards the exercise of the Section 63 powers?

These questions raise wider issues about the rationale for the inter-governmental mechanisms set out in the Memorandum of Understanding. As previously discussed, this was designed to operate in a framework where powers were either reserved or devolved.

Conflicts under this model were likely to be occasional and - at least initially - there was limited space for joint decision-making. On this basis, the relations between the two governments could be managed in a relatively piecemeal and contractual manner, which was beyond parliamentary and judicial scrutiny<sup>6</sup>.

### **Competition decisions raise additional challenges**

However, it is legitimate to query whether these arrangements are able to accommodate the negotiations leading to a joint decision under Section 63 of the Scotland Act 2016. The subject matter calls for technical expertise and for wide-ranging and evidence-based discussions. The political nature of the JMC - and the fact that meetings are held irregularly - may mean it is not the best forum for these sorts of discussions<sup>3</sup>.

More generally, a market investigation reference could have significant consequences for companies active in the affected markets. On this basis, it would be difficult to justify shielding these decisions from judicial scrutiny.

This question is especially relevant in the field of competition policy, which by its nature is very technical and evidence-based. It therefore requires specialist expertise in adoption of any decision<sup>3</sup>.

### **A Joint Ministerial Group was set up to aid communication in relation to joint powers on social welfare benefits**

The above concerns are, however, not exclusive to Section 63 decisions. Similar questions were also raised when the regulation of certain aspects of social welfare benefits were devolved to the Scottish Parliament.

This is an area in which there is considerable overlap and, consequently, scope for interaction between the UK Government and its Scottish counterpart. This is not least because of the way in which social welfare is financed. To allow for joint decision-making and avoid fundamental inconsistencies in the way in which benefits are regulated, a joint ministerial working group was established.

The [Joint Ministerial Group on Welfare](#) provides a forum for discussion and co-ordination at ministerial level. It acts as a framework for the exchange of information and for the resolution of any controversial issues arising from the transfer and the exercise of powers in this area.

# The need to embed specialist knowledge in Scottish Government decision-making on competition

There is a further question of whether and how Scottish Ministers should embed specialist knowledge into their own decision-making processes now that Section 63 has taken effect.

## **There have been previous proposals for the creation of an independent agency tasked with competition advocacy**

These argued that the input of an autonomous, expert body would create a “strong basis for the prioritisation” of “Scottish cases” before the CMA. This, in turn, would make any [market investigation reference](#) concerning Scottish markets more credible <sup>7</sup>.

Although these calls were abandoned, they nonetheless demonstrate the need for an evidence-base for Scottish Government decisions in this area.

## **The Scottish Government has established a Consumer and Markets Taskforce**

The Scottish Government opted instead for the establishment of a [Consumers and Markets Taskforce](#). The remit of the Task Force is to <sup>8</sup>:

“ (...) provide Scottish Ministers with strategic advice on priorities and actions relating to consumer and market issues in Scotland (...).”

For this purpose, the Taskforce offers a “forum to evaluate evidence (...), to develop innovative practice” aimed at addressing consumer and market issues. Its remit also encompasses the prioritisation of market and consumer issues and the oversight of the implementation of competition and consumer policy in Scotland.

Although the Taskforce is not independent of the Scottish Government, it could nonetheless provide it with a degree of expertise and constructive challenge. These will be useful for the formulation and implementation of policy in this area. They will also add weight to a decision to seek UK Ministers' agreement to make a market investigation reference.

# Brexit and Scotland's devolved competition powers

This section will explore what consequences Brexit may have on the competition powers devolved to Scottish institutions as a result of the Scotland Act 2016.

## **Scottish Ministers have powers to request investigations of markets and to advocate on behalf of consumers**

Scottish Ministers have no competence in respect of the enforcement of the competition rules. This remains reserved. However, they have gained the power to make a [market investigation reference](#), with the agreement of the UK Government.

More generally, the Scottish Government is committed to consumer advocacy<sup>9</sup>, by ensuring that its own policies do not adversely affect markets and the interests of Scottish consumers. It has recently brought forward legislation to establish an agency - Consumer Scotland - with responsibility for consumer advocacy and advice.

It is legitimate to query how the Scottish powers are going to interact with a much changed legal and policy landscape in the field of competition after the UK exits the EU.

The general framework for competition powers, and the impact of Brexit at a UK level, is discussed in more detail in the SPICe briefing [Competition policy - the UK framework and the impact of Brexit](#).

## **The lack of effective communication channels is likely to hamper the exercise of devolved competition powers**

Brexit is likely to have a number of unpredictable but significant effects on the competition powers devolved to the Scottish institutions. The lack of express and systematic consultation mechanisms between UK and Scottish ministers is a problem in several key areas:

1. It is likely to impact adversely on the ability of Scottish Ministers to work with their UK counterparts to make a market investigation reference.
2. It also means that there would be no way in which Scottish Ministers could have any meaningful involvement in decisions by UK Ministers to rely on the [public interest exception](#) in merger reviews or to supply state aid.

These issues may have a negative impact on the Scottish Government's role in supporting competitive markets.

This section of the briefing will look at:

- [a summary of the likely impacts of Brexit on competition policy](#)
- [the impact of Brexit on the Scottish Government's power to make a market investigation reference](#)
- [how the CMA prioritises market investigations](#)

- [the end of the EU's compulsory merger review regime and its impact on devolved competition powers](#)
- [the end of state aid control and its impact on devolved competition powers.](#)

## Summary of the likely impacts of Brexit on competition policy

It is clear that the UK's exit from the EU is going to impact on competition enforcement, on merger review and on the control of state aid. These issues are discussed in more detail in the partner briefing to this one - [Competition policy - the UK framework and the impact of Brexit](#).

The main issues are:

1. The jurisdiction of the CMA and, consequently, its workload, are going to expand. After exit day, the CMA will become responsible for considering competition issues which previously fell within the jurisdiction of the EU.
2. Mergers affecting UK markets may be considered by the CMA and, where there is also an EU dimension, the European Commission. This could lead to uncertain outcomes and duplication of effort. Mergers affecting UK markets are subject to the voluntary notification system outlined in Part 3 of the Enterprise Act 2002.
3. The reciprocal EU state aid regime will no longer be applicable to UK public intervention in the economy. However, the CMA will become responsible for the scrutiny of financial assistance. The framework is expected to mirror current EU rules initially but may diverge over time <sup>10</sup>.

Note that the CMA has seen [its resources increased in light of the additional work expected to flow from Brexit](#) <sup>11</sup>.

## The impact of Brexit on Scottish Ministers' power to make a market investigation reference

**The scope of the UK's competition regime is likely to expand to include more transnational cases**

This means that all the competition enforcement tools, including market investigation references, will become applicable to a wider array of situations.

Up to exit day, EU competition rules will apply to competition infringements having an impact on trade within the EU. The enforcement of Articles 101 and 102 of the [Treaty on the Functioning of the European Union](#) (TFEU) is a shared responsibility between the European Commission and national competition authorities - which can act individually or in partnership.

The European Commission remains in a position of leadership within this network of competition authorities. In particular, it is well-placed to investigate practices affecting

markets within three or more member states and cases concerning new or unusual types of breaches. It can also take action whenever the EU interest requires it.

In all these circumstances, if the European Commission takes action, any [national competition authority](#) which is already investigating the matter will be relieved of competence to deal with it.

Once the UK exits the EU, the CMA, together with sector regulators, and the courts, will no longer be obliged to apply Articles 101 and 102 of the TFEU. Furthermore, the CMA will cease to be a member of the European Competition Network. This means it will no longer be obliged to give way if the European Commission starts to investigate an issue.

All apparent competition law infringements affecting UK markets will therefore be dealt with under the Competition Act 1998. This includes investigations which would previously have been dealt with under EU law.

Thus, it will be UK competition law which will provide the CMA, the sector regulators and the courts with their statutory remit, and with the substantive rules under which potential breaches will be assessed.

It is expected that the CMA's workload will increase as a result of these changes. More, generally, the extent of the activities to which UK competition law applies will expand.

### **Market investigation references are likely to increase in importance as a way of identifying anti-competitive behaviour**

The role played by [market investigation references](#) is also likely to increase. This is because the CMA, as well as UK and Scottish Ministers, might consider using this tool in order to detect anti-competitive practices in specific markets. It will be possible to make a market investigation reference for issues that, up until exit day, would have been dealt with by the European Commission.

### **The existing challenges in intergovernmental communication are likely to be compounded**

The [challenges of exercising newly devolved competition powers in the existing frameworks for inter-governmental relationships were discussed earlier in this briefing](#).

The conclusion was that it difficult to see how the power to make a joint market investigation reference could be exercised effectively. These concerns, however, do not end with the discussion surrounding a possible market investigation reference, in accordance with Section 63 of the Scotland Act 2016.

[The CMA publishes Prioritisation Principles which set out how it targets its resources](#). It is unclear whether and how these principles will be affected in practice by the agency's expanding jurisdiction.

In particular, it remains an open question whether transnational cases might be deemed to be of greater strategic importance compared with more local cases. This may have an impact on Scottish Ministers' ability to make the case for the investigation of a Scottish market, both with their UK counterparts and with the CMA.

The CMA has recently expanded its presence in Edinburgh <sup>12</sup>. It is therefore expected that the additional staff, and renewed commitment to working in the devolved nations, will contribute to monitoring regional and local markets in the future.

The devolved power to make a joint market investigation reference is not limited to Scottish markets. It would be possible for Scottish Ministers to initiate a request which related to a market which operated beyond Scotland.

## How the CMA prioritises its work

The remit of this briefing does not allow for an in-depth consideration of how the CMA decides which work to pursue. What follows is a brief outline of the approach that the agency adopts in determining which new cases to take up.

According to its [Prioritisation Principles](#) <sup>13</sup>, the CMA:

“only intervenes where necessary to protect competition or where it believes it can improve the way in which markets work.”

This approach is aimed at ensuring that the CMA’s limited resources are targeted at <sup>13</sup>:

“deterring and influencing behaviour that poses the greatest threat to consumer welfare and (...) in the process, drive higher productivity growth.”

### **Key issues for prioritisation are the impact of the work versus the resources required**

In developing its approach, the CMA considers the “impact of [its] work on consumers”, its “strategic significance” and balances these considerations against the “risks and resources involved” <sup>13</sup>.

In this context, the projected impact of a new case is measured in terms of loss of consumer welfare. A new case is also likely to be investigated if it “matches” with the CMA’s strategic priorities.

New work is usually undertaken if there is a reasonable likelihood of success, and if it entails a good use of the agency’s resources. If, however, another organisation is better placed to deal with it - for instance, a sector regulator such as Ofgem - the CMA may consider refraining from taking action.

### **Scottish cases may not have sufficient strategic significance to be prioritised**

Against this background, it is legitimate to query whether Scottish cases, namely cases affecting markets identified as mainly local to Scotland, would satisfy these criteria.

Cases having a local dimension often have a significant impact on the consumers they affect. This may be because, for instance, there are no feasible alternatives to the products affected for geographical reasons.

The Western Isles Fuel investigation provides a good example of this in a Scottish context.

### **The Western Isles fuel investigation**

In 2013, the Office of Fair Trading (the CMA's predecessor) launched an investigation into the market for the sale of oil fuels in the Western Isles of Scotland. The OFT had alleged that GB Oils Ltd (also known as Certas) had abused its dominant market position by imposing exclusive supply agreements on a number of local petrol stations. This may have limited entry into the market by other suppliers and thus reduced competition.

The CMA (which had by then taken over from the OFT) agreed to halt the investigation after receiving commitments from Certas relating to its contractual arrangements with retailers. Thus, no final decision was made as to whether the practices were unfair under competition law. Certas's commitments included ending its exclusivity agreements and opening up its sea terminal to competitors.

However, in other cases, it has been more difficult to argue that a case affected a specifically Scottish market, and that it was sufficiently strategically significant for the CMA to take action. It appears that the trend towards identifying markets as UK-wide, as opposed to regional in nature, may have been one of the causes of this outcome.

### **The Britvic/AG Barr merger**

The Competition Commission's decision in this merger considered its consequences in Scotland by emphasising Barr's presence in that market and its relationship with retailers. Nonetheless, the Competition Commission concluded that Great Britain was the appropriate market to look at. Thus, it was the effect of the merger on GB consumers as a whole which was considered, rather than its effect in Scotland.

Recent practice may signal greater attention to competition issues arising in markets localised in Scotland, with a particular concern for protecting local competition.

### **Student accommodation at University of Glasgow**

In 2016, the CMA finished a compliance review in relation to the University of Glasgow. It concerned its management of rental properties for students. A clause in the rental agreements preventing students from graduating if they had rent arrears was found to be unfair.

It therefore appears that the CMA may continue to engage with competition issues in Scotland, even though identifying specific Scottish cases may still be relatively problematic.

It should be emphasised though that competition law can be applied in Scotland through other channels - for instance civil litigation. On this point, it could be argued that private, court-based enforcement of competition rules, perhaps supported by consumer bodies, could be effective as an additional tool to protect the effective operation of Scottish markets <sup>14</sup>.

# The end of the EU's compulsory merger review regime and its impact on devolved competition powers

The Scottish Government is going to face further challenges exercising its devolved competition powers because the compulsory EU merger regime will cease to apply to the UK after Brexit.

## **It is unclear whether the voluntary merger regime currently in place in the UK will be able to cope with the impact of greater merger activity**

The UK merger regime enshrined in the Enterprise Act 2002 is voluntary in nature. The CMA undertakes intelligence-gathering and can refer mergers for investigation if it considers that the legal requirements have been met.

When the UK leaves the EU, it is likely that the merger review-related workload of the CMA will increase. This is because the CMA will take on the role of considering mergers with an EU dimension. These were previously dealt with by the European Commission. The CMA has been given additional resources to deal with the challenges of Brexit <sup>11</sup> .

Nevertheless, unlike the EU framework for merger review, it is optional for the merging parties to notify their deal to the CMA. Brexit is going to change much of the landscape in which the UK arrangements operate. This prompts questions as to their continued effectiveness.

Lord Tyrie, chair of the CMA, has [called for the establishment of a system for the compulsory notification of mergers](#) <sup>15</sup> . This proposal is based on a concern for safeguarding UK markets against concentrations of businesses capable of lessening competition.

If implemented, this proposal would go some way towards protecting competition in the UK, especially from the effects of structural changes in particular markets. Subjecting individual mergers to objective and impartial scrutiny would also be compatible with a commitment to ensuring market access for foreign companies on the same basis as domestic businesses.

## **Scottish Ministers have no involvement in the adoption of [public interest exception decisions](#)**

Conferring the power to clear mergers on an independent agency like the CMA ensures the neutrality of the process and shields it from undue political influence.

However, the Enterprise Act 2002 allows the Secretary of State to issue a public interest intervention notice. This enables a merger to be scrutinised on the basis of non-competition factors based on public interest concerns, such as national security and the stability of the financial system. This power has been exercised sparingly so far.

Nevertheless, the fact that a public interest intervention power exists could raise questions as to how it might be used in the future.

[The European Commission's role in merger control is designed to be immune from political interference from the member states](#) (and devolved or regional parliaments). The EU

Merger Regulation allows member states to take "appropriate measures" in respect of mergers affecting markets within their jurisdiction in order to protect certain interests, such as media diversity. In practice, however, the power of member states to act is limited by established principles of EU law - for example, free movement of goods and services.<sup>16</sup>

Scottish Ministers lack such public interest powers. There is no legal basis for them to have any involvement in the decision of their UK counterparts to invoke the public interest exception.

This is the case even for mergers having a significant impact on Scottish markets. Accordingly, after the UK exits the EU, the Scottish Government may be placed at a disadvantage by the fact that public interest interventions are the preserve of the UK Government.

This raises questions about the continued effectiveness of the powers conferred under the Scotland Act 2016 and could also be argued to undermine the consumer advocacy functions bestowed on Scottish Ministers by that Act.

### **Current inter-governmental communication channels are unlikely to be of use**

The role that the [current inter-governmental communication mechanisms](#) could play, as provided for in the 2011 Memorandum of Understanding, has already been discussed.

As was noted, the Joint Ministerial Council meets infrequently and is "conflict-focused". It is therefore not clear whether it would provide a suitable forum for discussing highly technical and fact-based matters such as the issues arising from a merger<sup>3</sup>.

## **The end of state aid controls and its impact on devolved competition powers**

Moving away from the [state aid](#) mechanisms enshrined in the EU Treaties could raise additional questions as to the future effectiveness of the competition powers provided by the Scotland Act 2016.

### **There are no formal mechanisms for Scottish Ministers to discuss or challenge decisions to provide public funding to businesses**

Direct economic intervention by UK Ministers may influence the functioning and structure of markets in Scotland. However, there is no formal mechanism through which Scottish Ministers can scrutinise the impact in Scotland. As with the public interest exception in merger scrutiny, this lack of formal involvement could adversely affect the role of the Scottish Government in supporting competitive markets.

### **The CMA will have a role in scrutinising public funding to businesses**

State aid scrutiny powers will be transferred from the European Commission to the CMA post-Brexit, as part of the withdrawal arrangements. The CMA has suggested that this decision will help the UK to remain aligned with the EU in maintaining open markets and avoiding the creation of [national champions](#)<sup>10</sup>.

The CMA's independence and reputation are expected to go a long way towards ensuring that these new powers are exercised free from political interference. Nonetheless, it will be crucial that the agency is provided with sufficiently strong safeguards to protect its independence from possible government influence.

This point is particularly important for the devolution settlement as, unless the CMA is genuinely independent of government, its decisions could quickly be seen as political ones in the various devolved nations. A good example would be a decision by the CMA to block aid granted by the Scottish Government to a key local industry. If the CMA is not seen as independent, its decisions may not be fully supported in Scotland.

The CMA has committed to appoint a state aid decision-making committee which operates separately from the CMA board. This is consistent with the need to protect the autonomy of the CMA and paves the way to subjecting economic support on the part of UK public authorities to independent scrutiny. However, no detail has yet emerged as to the mechanism through which this scrutiny will take place<sup>10</sup>. More work, therefore, needs to be done on this point.

### **The direction of future UK Government policy on support for business is unclear**

It is not yet clear whether the UK or the Scottish Government may adopt a more proactive stance in relation to supporting specific industries. For example, at the end of 2018, the [UK Government announced the launch of a wide-ranging industrial strategy programme](#). The programme featured commitments to invest in support to research and development, as well as the creation of new transport infrastructure<sup>17</sup>.

The Scottish Government was identified as a key partner in the implementation of these strategic objectives. The [Scottish Parliament's Economy, Enterprise and Fair Work Committee has called for meaningful engagement](#) between the UK and Scottish Governments on this issue<sup>18</sup>.

Securing effective channels of communications between the UK and Scottish Governments is going to be key to the effective implementation of the industrial strategy. A commitment to transparency and mutual discussion is needed, especially in relation to decisions to provide financial support to specific industries. This, in turn, will contribute to safeguarding the interest of the Scottish Government in maintaining competitive markets.

Such an approach is also likely to facilitate the exercise of the scrutiny powers enjoyed by the CMA in relation to state aid. It will put the Scottish Government in a better place to provide a comprehensive picture of the impact measures are having on markets in Scotland.

# Competition policy in Scotland - recommendations for the future

This section considers what options might be available to protect the integrity of devolved competences in relation to competition policy.

As the UK exits the EU, communication is likely to be the key to the effective exercise of Scottish Ministers' competition powers. The [nature and efficacy of the mechanisms for inter-governmental relations between the Scottish and UK Governments](#) and for communication with agencies, such as the CMA, will be important.

Underpinning these issues is the need for the Scottish Government to boost its access to expert advice in competition policy matters. In addition, the Scottish Parliament should enjoy meaningful oversight, not only of the role of the Scottish Government in supporting competitive markets, but also of CMA activity which concerns Scottish markets.

This part of the briefing looks at:

- [weaknesses with the current JMC arrangements](#)
- [a new concordat on competition policy issues](#)
- [development of technical capacity in competition issues in Scotland](#)
- [enhancing democratic accountability in competition matters](#).

## Weaknesses in the current JMC arrangements

[It has been previously argued that the current framework for inter-governmental relations seems ill-suited to the type of devolution envisaged by the Scotland Act 2016 in this area.](#) What is needed is a mechanism which supports co-decision-making between UK and Scottish ministers on complex and often technical issues. However, the present focus is on occasional conflict resolution.

### **The lack of appropriate frameworks for intergovernmental communication leaves Scottish Ministers without routes to influence UK Government decisions across the spectrum of competition policy decisions**

It is in fact unclear how Scottish Ministers will be able to interact with their Westminster counterpart when it comes to dealing with relevant merger situations. This is despite the fact that the impact on Scottish markets may well justify a [phase 2 market investigation](#) or a decision on whether to invoke the [public interest exception](#).

A lack of effective channels for communication and discussion of competition issues may also impair the role of Scottish Ministers in supporting competitive markets. As Brexit impacts on current [state aid](#) arrangements, there is a risk that the UK Government may develop industrial policies involving public financial assistance which distort markets in Scotland. Scottish Ministers have no formal routes to influence these decisions

### **Current JMC arrangements are not appropriate for resolving competition policy issues**

It seems unclear whether the current JMC arrangements could allow the Scottish Government to raise competition concerns effectively – at least before a decision is taken and any conflict arises as a result. Against this background, it is legitimate to ask what can be done to prevent the powers acquired in the area of competition policy become ineffective.

## **A new concordat on competition policy issues**

An alternative option might be the negotiation of a new Concordat between the UK and Scottish governments. This would set out arrangements for mutual communication and co-ordination in matters of competition policy. This could be similar to the one already in force in the area of foreign affairs<sup>4</sup>.

### **The Concordat on International Relations recognises mutual interest in foreign affairs**

The [Concordat on International Relations accompanying the Memorandum of Understanding](#) reiterates the reserved nature of the competence in the field of foreign affairs. At the same time, the Concordat makes clear that devolved administrations are responsible for the implementation of international obligations in so far as they relate to devolved competences. It also accepts that they hold “an interest in international policy-making”, especially when it touches upon areas of policy for which the devolved administration are responsible.

### **The Concordat provides for ongoing contact between administrations**

The Concordat enshrines a mutual commitment to close co-operation in the area of foreign relations insofar as they affect the exercise of devolved competences and vice versa. Importantly, it sets out a commitment to “maintain full and detailed working level contacts” in this area. This includes meeting once a year, as well as at the request of either party, to review these co-operation arrangements.

### **Conflict resolution processes emphasise communication**

Any conflict is to be dealt via bilateral consultations between the responsible officials. If a conflict cannot be resolved, the matter will be taken by the First Minister for Scotland and the UK Foreign Secretary to the Joint Ministerial Committee. However, the JMC process will not be initiated until after “an ample opportunity has been allowed for consultation and discussion” between the parties.

The Concordat on International Relations could offer a model framework for the discussion of competition policy matters of mutual interest to the UK and Scottish Governments.

The commitment to maintaining stable “working level contacts”, as opposed to occasional JMC meetings, would allow both administrations to exchange views. If required, they could also adopt joint decisions which took into consideration the relevant evidence and appropriate expertise.

### **Ongoing discussions could provide the direct communication the Scottish Government needs on merger and [state aid](#) issues**

These discussions would also provide the Scottish Government with a clear voice in [public interest exception](#) merger cases or public financial assistance decisions which affected Scottish markets.

## Development of technical capacity in Scotland

It is worth bearing in mind that the participation in the adoption of decisions in the field of competition policy is going to require complex, technical knowledge on the part of the Scottish Government.

### **The Task Force on Consumers and Markets can boost expertise in this area**

On this point, the [creation of an ad-hoc Taskforce on Consumers and Markets](#), chaired by the Minister for Business, Fair Work and Skills, is to be welcomed. It is expected that this will contribute expert advice and impartial, evidence-based oversight in respect of new policies.

In particular, it is expected that the Taskforce will facilitate the adoption by Scottish Ministers of [market investigation decisions](#) through its prioritisation and stakeholder engagement functions.

### **An objective, evidence-based approach will enhance the Scottish Government's position**

The Scottish Government can neither require UK ministers to make a market investigation reference nor petition the CMA directly to initiate one. Instead, they must work to persuade UK Ministers to make a joint reference.

However, providing Scottish Ministers with objective and evidence-based advice is going to be, if not essential, extremely helpful in the adoption of a decision in this area. As a result, conferring to the Taskforce formal consultative powers would be highly desirable.

### **The concordat should enable direct communication between the Scottish Government and the CMA**

Building technical capacity must be complemented by forging clear and direct links between the Scottish Government and the CMA, as the UK-wide enforcer of the competition rules. To support this, a new concordat between the UK and the Scottish Government could be supplemented by a specific memorandum of understanding allowing for direct communication with the CMA.

## Enhancing democratic accountability in competition policy matters in Scotland

Some consideration should also be given to what form scrutiny of the Scottish Government's competition-related activities should take.

These areas of work will automatically be subject to the full array of scrutiny mechanisms available to the Scottish Parliament. However, these may need to be tailored to take into account the technical and evidence-based nature of competition policy work.

**A specific obligation on the Scottish Government to report on its competition-related work may enhance scrutiny**

The Scottish Government's role in supporting competition and its interaction with the UK Government in relation to market investigation references will not necessarily be transparent. On this basis, a requirement for Scottish Ministers to report specifically on these activities to the Scottish Parliament may be beneficial. This could form the foundation for decisions about the need for further investigation by the Scottish Parliament.

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