The Scottish Parliament
Pàrlamaid na h-Alba

SPICe The Information Centre
An t-Ionad Fiosrachaidh

SPICe Briefing
Pàipear-ullachaidh SPICe

Competition policy - the UK framework and the impact of Brexit (republished)

Dr Arianna Andreangeli, University of Edinburgh

This briefing is the first of two which look at the Scottish Government's new competition powers. It sets out current competition policy powers at UK and EU level and considers what Brexit will mean in practice in this area.

22 October 2019
SB 19-37 Revised

Contents

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.

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 exit of the United Kingdom from the European Union is likely to have significant implications for competition policy. Currently, the enforcement of the rules contained in the Competition Act 1998 and, for the review of mergers and the investigation of markets, in the Enterprise Act 2002, is a reserved matter. However, the entry into force of the Scotland Act 2016 led to the devolution of some limited aspects of this competence to Scottish Ministers.

The purpose of this briefing is to explore the impact of Brexit on the UK arrangements for the application of competition rules.

A second SPICe briefing addresses the implications of the UK's exit from the EU for the competition powers devolved to Scottish Ministers by the Scotland Act 2016. It's called Competition policy - Brexit and the exercise of devolved powers.

This briefing:

1. Considers the current competition policy powers at UK and EU level and looks at the way in which they are exercised in practice.

2. Looks at what Brexit actually means for competition enforcement and, more broadly, policy in the UK. In particular, it explores the implications of the exit from the EU for the Competition and Markets Authority (CMA) in respect of competition enforcement and merger cases. It also investigates the future of state aid control and the involvement of the CMA in this area.

Main issues

Brexit creates significant uncertainty as to the arrangements for the application of the competition and merger rules in the UK

Three years since the referendum, it is still hard to gauge the consequences of the exit from the EU for the future effectiveness of competition scrutiny, especially in the field of competition and merger control. This is due to the lack of an agreed framework governing the exit of the UK from the EU and of a common vision as to the future relationship between the two entities.

The Competition and Markets Authority may struggle with its expanded role

Without continued co-operation between the CMA, the European Commission and the competition agencies of the EU member states, the UK competition authority may see its investigative and detection capacity weaken.

More generally, Brexit is likely to see the expansion of the CMA's jurisdiction to encompass all apparent competition infringements affecting UK markets—even those previously dealt with by the European Commission. This is likely to put additional pressure on its resources.

It is not clear if the UK framework for merger control is fit for purpose

The compulsory notification regime for certain mergers, provided by EU law, will come to an end. The UK framework for merger scrutiny is based on voluntary notification and on CMA intelligence gathering. The increased workload is expected stretch the CMA's ability to effectively regulate merger activity.

In addition, the application of the domestic regime to transnational mergers may allow UK Ministers to increase their involvement in merger decisions by relying more often on the public interest exception. This could undermine the UK's reputation as a transparent place to do business.

Parallel merger control regimes may lead to conflicting outcomes

Mergers affecting UK markets will be subject to review by the CMA as well as, where there is an EU dimension, the European Commission. This could lead to uncertainty and duplication of effort, as well as conflicting outcomes.

The CMA will become the new UK state aid controller

The UK’s exit from the EU will end the role of the European Commission in enforcing the state aid regime. This regime has been argued to be beneficial for UK businesses because they have been protected from the effects of unfair subsidies provided to rivals in other member states.

The UK Government intends to confer on the CMA the power to scrutinise aid granted by UK public bodies. The new framework is expected to mirror current EU rules. However, the UK Government may choose to diverge from this in the future.

Useful definitions

Cartel: a serious infringement of Article 101 Treaty on the Functioning of the European Union (TFEU)/Chapter I, Competition Act 1998. It covers agreements and other forms of collusion aimed at:

- price fixing;
- bid rigging when tendering for public contracts;
- sharing markets or customer-bases; and
- conduct aimed at preventing the entry of new rivals into a specific market.

Claimant: the party who brings a legal action in the civil courts, also known as "pursuer" in Scots law.

Competition advocacy: according to the International Competition Network, this encompasses, "all those activities conducted by the competition agency that have to do with the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition" [1] .

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 shorthand 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.

Follow-on proceedings: a civil court action brought against someone (the defender) who has been found to be responsible for breaking the law by an administrative body. In competition law, follow-on actions are dealt with by Section 47A of the Competition Act 1998. This states that, where a person or body has been found responsible for breaching competition law by the European Commission or the CMA, follow-on proceedings are possible. Someone who has suffered loss as a result can claim compensation or another form of redress in the civil courts or before the Competition Appeal Tribunal (a specialist competition and regulatory tribunal).

Jurisdiction: A court or organisation is said to have jurisdiction over a dispute where it has authority to hear and determine a 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 competition authorities - the authority in each member state responsible for enforcement of 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, by sector regulators or by 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 Minster can raise public interest issues that are relevant to the referred matter in 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; and
- the stability of the UK financial sector.

Ministers can add or remove public interests 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 (i.e. businesses) have ceased to be distinct. The CMA can look at mergers which 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.

State aid: any advantage that is granted to a specific business or businesses on a selective basis on the part of 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.

World Trade Organisation - the international body responsible for negotiating the rules of trade and settling trade disputes between member nations.

Competition policy in the EU and the UK: a closely-knit relationship

The purpose of this section will be to examine briefly the current arrangements for the application of competition law in the UK and in the EU.

It illustrates how complex and interconnected the landscape for the enforcement of competition rules is in the UK. It is clear that close links exist between the formulation and the enforcement of the competition rules at EU and UK level.

The European Commission has direct jurisdiction in the assessment of practices having an impact on British markets. In addition, UK authorities have a statutory obligation to ensure that UK competition laws are interpreted as far as possible in harmony with the EU legal requirements.

This section also highlights the role of government ministers. The enforcement of the competition rules rests with the CMA as an independent agency. However, there is some limited space for the involvement of government ministers, in the form of a market investigation reference and a public interest intervention in merger control.

It will look at:

- EU competence in relation to competition;
- the competition laws in force in the UK;
- the role of the Competition and Markets Authority;
- EU-wide co-operation to enforce competition rules;
- EU-wide co-operation in the review of mergers and acquisitions; and
- EU rules on state aid.

EU powers in relation to competition

The Treaty on the Functioning of the European Union (TFEU) is the main constitutional document of the EU. According to Article 3(1)(b), the adoption and application of the competition rules that are necessary for the good functioning of the internal market falls within the exclusive competence of the EU. This means that the EU alone has power to regulate this area.

Responsibility for applying the competition rules in the TFEU is shared between the EU (in the shape of the European Commission) and member states. National competition authorities co-operate closely with one another and with the European Commission.

Article 101 of the TFEU outlaws agreements and other collusive practices that restrict or distort competition

It applies where the practice has an impact on the flow of trade between EU member states.

Unlawful arrangements are not legally valid, unless the parties can show that they can have beneficial effects and do not restrict competition more than is necessary to achieve the stated objectives. Beneficial effect could cover, for example, situations where less competition between the parties allows them to manufacture better products.

Transnational cartels - the roofing felt cartel case [2]

In 1986, the EU Commission fined a number of producers of roofing felt. Among other things, they had conspired to maintain an artificially high price for their product as well as agreeing a quota system for sharing production and customers. The businesses, along with their trade association, were also found to have agreed to limit cartel members' ability to sell or lease production equipment to third parties.

The European Commission found that the practices in question, even though only Belgian producers were involved, had an appreciable impact on trade between member states. This was because the activities reinforced the barriers to entering the Belgian market and thus increased its separation from EU-wide markets for roofing felt.

Article 102 of the TFEU prohibits the abuse of a dominant position

This covers practices adopted by powerful companies that exploit their leadership of a market to undermine competitors.

Abuse of a dominant position - Van den Bergh Ltd [3]

Van den Bergh was the dominant supplier in a number of European markets of "impulse ice cream". This is ice cream that is individually packaged and can therefore be eaten on the go. Van den Bergh had agreed to supply a number of small and medium-sized shops with a free freezer in which to store the ice cream.

However, the agreement contained an exclusivity clause, meaning retailers could only use the freezer to store Van den Bergh's products. A competitor complained, alleging that the clause prevented retailers, whose floor space was limited, from stocking competing brands. The European Commission upheld the complaint.

It agreed that the exclusivity clause had resulted in the retailers affected sourcing their supplies only or mainly from the dominant company. This prevented competing brands from entering, or expanding in, the market for impulse ice cream.

When the decision was challenged, the European Court of Justice accepted that provision of freezers on condition of exclusivity was standard practice in the relevant market. However, it agreed that, when adopted by a business which was already dominant, this breached article 102 TFEU [4] .

The competition laws in force in the UK

For the most part, the competition laws in force in the UK mirror those in the TFEU. The Competition Act 1998 is the key piece of UK legislation in this area.

Section 2 of the Competition Act prohibits agreements having as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and affecting trade within it.

The air fuel surcharge case [5]

In 2012, the Office of Fair Trading (the predecessor to the CMA) fined three major airlines for conspiring to fix the amount of fuel surcharge they imposed on their passengers. This was part of the price they paid for their air tickets. Staff within the businesses were involved in co-ordinating price increases, rather than setting them independently.

British Airways was fined £58 million by the OFT as a result. Virgin Atlantic received immunity from financial penalties under the OFT's Leniency Policy, on the basis of having reported the cartel.

Section 18 prohibits the abuse of a dominant position that may affect trade within the UK.

Abuse of a dominant position - Pfizer [6]

In 2016, the CMA fined pharmaceuticals giant Pfizer and one of its distributors, Flynn Pharma, for charging excessive prices for the sale of epilepsy drug Phenytoin. During the period in question, previous price caps ceased to apply to Phenytoin. The businesses took advantage of their dominant market position to impose prices which were in excess of 2,000% higher than the patented versions of the drug. The CMA took the view that the inflated prices were both excessive and unfair.

UK legislation must be interpreted in light of EU laws

The provisions of the Competition Act must be read in light of Section 60. This imposes an obligation on all courts and on the Competition and Markets Authority (CMA) to resolve any competition law questions arising from the application of the Act in a manner that is consistent with EU law.

In turn, this ensures that UK competition law is applied consistently with the approach adopted by the EU courts, in the interest of uniformity across the EU, even in cases having a purely UK dimension.

This position is going to change if the UK leaves the EU without a withdrawal deal

The Competition (Amendment etc.) (EU Exit) Regulations 2019 set out the law in a no-deal Brexit scenario. They prescribe that the CMA, the courts and various sector regulators will no longer be obliged to make decisions that are consistent with EU law. Instead, these bodies will be under an obligation to "have regard to" EU law in this area.

This duty is subject to further exceptions. For example, UK bodies will be able to make decisions which are inconsistent with EU law where there are differences between the relevant UK and EU markets. They will also be able to diverge where "accepted principles of competition analysis" point to such a course.

A distinguishing feature of the UK competition regime is the availability of criminal sanctions

These apply to certain, very serious competition infringements. These are identified in Section 188 of the Competition Act 1998, and include price-fixing and bid-rigging. Such sanctions do not exist at EU level, since the EU lacks competence to create new criminal offences.

Competition law can also be enforced in the civil courts

Individuals or legal entities who claim to have suffered loss as a result of anti-competitive practices can seek compensation for the damage suffered. National courts also hear actions for annulment of agreements found to be incompatible with Article 101 TFEU or Section 2 of the Competition Act.

The role of the Competition and Markets Authority

The CMA is responsible for the public enforcement of the competition rules in the UK. For this purpose, it enjoys generous investigating and sanctioning powers, ranging from the power to ask for information to the ability to inspect business premises.

The CMA's decisions can be appealed in the first instance to the Competition Appeal Tribunal

The Competition Appeal Tribunal (CAT) enjoys the power to review CMA decisions "on the merits". This means it can substitute its own views of the case for those of the CMA, including the assessment of any sanctions.

Appealing to the CAT has several advantages, including a flexible procedure and the significant case management powers the tribunal enjoys.

Competition advocacy

The CMA also fulfils an important function in promoting the benefits of competition to other governmental bodies and agencies. This is known as competition advocacy.

It promotes the benefits of competition to other organs of government throughout the UK, and supports public agencies to assess the impact of their policy actions on competition [7] .

The CMA and government ministers can initiate market investigations by making a market investigation reference

As part of its power to ensure the observance of the competition rules, the CMA can also conduct inquiries concerning a whole market by means of a market investigation reference. Part 4 of the Enterprise Act 2002 allows the CMA to set up an inquiry group responsible for the investigation of a specific market or markets.

The basis for doing this is if it has reasonable grounds to suspect that:

> " "any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition (…) in the United Kingdom or a part of the United Kingdom". "

Importantly, section 132 of the Act also confers the power to make such reference to the "competent minister". As a result of the Scotland Act 2016, this covers not only ministers belonging to the UK Government, but also Scottish Ministers, in agreement with their Whitehall counterparts.

EU-wide co-operation to enforce competition laws

The CMA's role is facilitated through close co-operation with the European Commission and the national competition authorities of other member states. They work together in conducting individual investigations, sharing intelligence as regards new and current cases and gathering evidence in other jurisdictions.

The CMA is part of an informal network – the **European Competition Network** – with the other national competition authorities. This supports better co-ordination.

Council Regulation no 1/2003 [8] sets out the law in relation to the public enforcement of Articles 101 and 102 of the TFEU. Under its provisions, the CMA, the European Commission and the other national competition authorities all share responsibility for applying EU competition rules.

The job of applying competition law involves an assessment of which body is "well-placed" to deal with the specific allegation of anti-competitive behaviour

This might be because the effects of the practice are felt within their jurisdiction or because the relevant evidence is within their jurisdiction [9] .

The role of the European Commission

The Commission is responsible for investigating cases having a clear cross-border dimension. These are:

- when three or more member states are affected by the apparent restrictive effects of a certain practice; and
- for cases whose resolution is in the "Union interest" (for instance because the case raises a novel point of law) [7] .

For this purpose, the Commission relies on extensive investigative powers, backed up by sanctions for non-compliance. It can also impose sanctions on infringing businesses of up to 10% of annual worldwide turnover [8] .

Co-operation between the CMA and other national competition authorities

National competition authorities have the power to tackle allegations of anti-competitive behaviour that they are "well-placed" to investigate. As part of the functioning of the

European Competition Network, the CMA and the other national competition authorities, together with the Commission, are obliged to notify the Network members of new cases. They can exchange information and evidence and carry out investigations in their jurisdiction on behalf of other members [8] .

EU and UK laws for the review of mergers and acquisitions

The review of mergers and acquisitions constitutes a second prong of competition policy in the EU and the UK.

The European Commission investigates mergers which meet the relevant turnover thresholds

The European Commission has exclusive jurisdiction in scrutinising mergers between economic entities that have a "Union dimension". This is defined in the EU Merger Regulation (Council Regulation No 139/2004) by reference to the turnover (i.e. sales) of the merging entities.

The turnover thresholds are complex but are basically designed to cover large mergers that have an impact across the EU. The European Commission has complete jurisdiction over notified mergers. However, the EU Merger Regulation provides for the possibility for mergers to be referred to national competition authorities when certain conditions are met. In addition, there are circumstances where it is possible for member states to ask the European Commission to scrutinise mergers that do not meet the Union dimension thresholds.

This is known as the "one-stop shop" system and is designed to reduce regulatory burdens on business.

Businesses must notify the Commission if they meet the turnover thresholds

The European Commission's jurisdiction is compulsory. The merging parties must notify the Commission of changes of control if the turnover thresholds in the EU Merger Regulation are met. In addition, the transaction cannot go ahead until the Commission has given its approval. If businesses break this rule, the Commission can fine them up to 10% of their aggregate worldwide turnover [10] .

The UK regime applies to mergers which do not meet EU thresholds and is voluntary

The EU arrangements can be contrasted with the UK regime, which applies to all mergers which might have an adverse impact on competition in the UK, but do not meet the EU turnover thresholds.

In contrast to the situation at EU level, the merging parties are not obliged to notify qualifying mergers: notification to the CMA is voluntary. Therefore, even though a merger may appear to have considerable consequences for competition, it can be executed without approval from the CMA. However, if they do this, businesses face the risk of the

CMA using its powers to carry out an investigation which may result in termination of a completed transaction through disposal of the acquired businesses and/or assets.

Government intervention on public interest grounds

Another important feature of the current UK regime is the possibility, in limited circumstances, for the Secretary of State to refer a merger to the CMA on public interest grounds (Section 42, Enterprise Act 2002).

In public interest cases, the CMA is obliged to review the merger on normal competition grounds.

If the CMA finds that competition has been reduced, the Secretary of State can still decide to allow the merger to go ahead on public interest grounds. Essentially, where the Secretary of State's view is that the public interest considerations counterbalance any anti-competitive effects, the law allows the merger to proceed. The Secretary of State can also block a merger on public interest grounds.

This power has been used in relation to the merger between Lloyds TSB and HBOS, which followed the financial crisis in 2008. The takeover was allowed to go ahead on the ground that it was essential to protect the financial stability of the UK. This was despite the fact that it had been found to lead to a reduction in competition in various banking markets.

EU rules on state aid

A further power held by the EU is the control of state aid.

The European Commission is responsible for scrutinising financial assistance from national governments aimed at particular businesses or economic sectors. Member states wishing to provide such financial assistance must notify their measures to the European Commission and must await its approval before implementing their decisions (articles 107 to 109 of the TFEU).

Aid found to be incompatible with TFEU rules on the ground of being selective must be repaid by those who have received it. Aid is selective if it places those receiving it at an advantage in relation to their rivals.

There are no UK regulatory bodies which scrutinise financial aid granted by public authorities

This is a key point to note in the context of Brexit. State aid scrutiny happens at an EU level based on EU rules.

- State aid if the UK leaves with a deal

The issue of state aid compliance was addressed by the UK and the EU in the course of the negotiations which led to the Withdrawal Agreement. [11] It forms part of the commitment to ensuring a "level playing field" for UK and EU businesses post-Brexit.

Under the Withdrawal Agreement, the UK would be committed to outlawing selective state aid. For this purpose, sections 3 and 4 of the EU (Withdrawal) Act 2018 bring the state aid provisions contained in the TFEU into UK domestic law.

The Withdrawal Agreement also commits the UK to establishing an independent body responsible for the control of new state aid in light of competition principles.

- State aid if the UK leaves without a deal

In the event of no-deal, the State Aid (EU Exit) Regulations 2019 would introduce a number of modifications to the retained law concerning state aid. For example, state aid which replaces various EU funding streams would be exempt.

New state aid would have to be notified to the CMA, which would be responsible for scrutinising the measures in accordance with competition rules. The CMA is in the process of consulting on a number of procedural arrangements that will be necessary to discharge this function.

The impact of Brexit on UK competition policy

The UK's exit from the EU and the enforcement of competition rules

Competition policy has been heavily influenced by EU law and action. Therefore, the UK's exit from the EU is likely to have wide-ranging effects on how the national competition rules will be interpreted and applied in the future.

The purpose of this section will be to explore some of the key changes that the UK's exit from the EU is likely to introduce in the field of competition policy.

The impact of Brexit on the way which competition rules are applied in the UK will very much depend on the arrangements that are negotiated for the future relationship between the UK and the EU.

This part of the briefing will look at the current state of Brexit negotiations in relation to competition policy.

It will also look at the likely impact of Brexit on:

- the legal services industry and competition cases in the UK courts; and
- the enforcement of competition law in the UK.

Brexit negotiations and competition policy

The Chequers Statement

The UK Government's position has evolved since the Chequers Statement (July 2018). [12] In that statement, the UK Government had pledged to cut off its links with the EU's internal market and to repudiate the supremacy of EU law.

The Withdrawal Agreement and Political Declaration

The Political Declaration [13] agreed in December 2018, however, sends out a more nuanced message on the nature of the future relationship. The Declaration envisages the creation of a free trade area for the trade of goods, based on "deep regulatory and customs co-operation", so that checks can be kept to a minimum.

The parties would seek to build on this free trade area to create arrangements for services and investments that allow for greater cross-border activity than World Trade Organisation rules currently provide for.

The Political Declaration would also pave the way for closer co-operation in areas such as security, transport, law enforcement and judicial collaboration.

The Withdrawal Agreement contains a commitment to create a level playing field

Importantly, the UK and EU agreed to maintain a "level playing field" in relation to state subsidies and, more generally, the role of public bodies in the economy. According to the Political Declaration, a commitment to open and fair competition should extend to, among other things, state aid. While each party would be able to determine the nature of their own regulatory arrangements, there is an obligation to avoid unnecessary barriers to trade.

Paramount to these aims is the commitment to maintaining dialogue and co-operation in their implementation via an "overarching institutional framework". This would be designed to set the direction of future co-operation and to resolve any dispute arising from implementation of the agreement.

Rejection of the Withdrawal Agreement by the UK Parliament means that future arrangements remain unclear

The Political Declaration and Withdrawal Agreement, however, were rejected twice by the UK Parliament. The Agreement was rejected a third time when tabled on its own.

The House of Commons went on to reject a number of possible options for future relations between the UK and EU in a series of "indicative votes" in March 2019. Thus, it remains unclear to what extent the post-exit arrangements will reflect those enshrined in the Political Declaration.

This briefing looks at likely issues in the following scenarios:

- a UK-EU relationship along the lines indicated in the Withdrawal Agreement; and
- a no-deal Brexit.

Competition policy issues in a UK-EU relationship in line with the Withdrawal Agreement

The CMA is unlikely to be able to rely on the same levels of co-operation when dealing with transnational cases

In relation to the enforcement of competition rules in transnational cases, reference in the Withdrawal Agreement to "co-operation" in competition matters is likely to imply a less intense type of collaboration when compared with the European Competition Network.

The CMA would have a role in scrutinising all mergers with an impact in the UK

The UK's exit from the EU would also spell the end of of the applicability of the EU Merger Regulation in the UK. Thus, all concentrations having an impact on UK markets would be liable to scrutiny by the CMA, applying UK legal requirements.

However, the European Commission would also have jurisdiction to review mergers which had an impact in member states and met EU threshold requirements.

A domestic framework would be put in place to control state aid

The UK would cease to be subject to the EU state aid regime. However, a domestic framework would be put in place to ensure that public intervention in the economy does not adversely affect competition in UK markets.

As noted, the Withdrawal Agreement enshrined a commitment to maintain a level playing field between the UK and the EU. In that scenario, the current EU state aid principles

would also apply in the UK, with the relevant provisions of the TFEU being brought into domestic law.

Competition policy issues in a no-deal Brexit situation

The lack of a post-exit deal is expected to create significant uncertainty. This would affect:

- future arrangements for trade between the UK and the EU;
- the relationship between the CMA and its erstwhile partner agencies as part of the European Competition Network;
- the role of public authorities in the UK economy (which could, in turn, affect access to UK markets).

The UK Government has made a commitment towards the creation of a state aid regime. No deal statutory instruments put the CMA in charge of scrutiny. It will enjoy the power to review all financial assistance given by UK authorities.

No deal statutory instruments would put the CMA in charge of state aid scrutiny. In addition, the UK would be bound by the World Trade Organisation obligations on state subsidies.

However, without a deal, much of the effectiveness of the commitments made in relation to state aid will depend on the political direction of future UK Governments as regards national industrial policy. It remains to be seen whether a post-Brexit government will opt to become more interventionist in economic matters - for instance, by seeking to support specific industries.

The impact of Brexit on the UK legal services industry

One of the significant consequences of Brexit would be that the common, EU-wide rules to determine the appropriate jurisdiction for transnational commercial and civil claims will no longer apply. These are provided in Council Regulation No 1215/2012, also known as the "Brussels Regulation (recast)".

This piece of legislation allows civil and commercial claimants to identify with relative ease the court that is competent to hear their case. As a result, it enables them to understand which procedure and evidence rules apply to their claim.

The Brussels Regulation allows free movement of judicial decisions

The Brussels Regulation also provides a simple process for the mutual recognition and enforcement of judgments between the legal systems of different EU countries. The rules limit the discretion of national courts to reject decisions of the courts of other EU countries. The regime could therefore be described as allowing the “free movement” of judicial decisions.

This section will look at:

- the role of the UK courts as the favoured forum for competition claims;

- foreign recognition of UK court judgments; and
- the status of European Commission infringement decisions.

The role of the UK courts as the favoured forum for competition claims

Competition claimants have been able to shop around for the best place to raise legal action

The Brussels Regulation has proven especially beneficial to competition claimants, due to the frequent cross-border nature of competition cases. Thanks to the Regulation, claimants have been able to shop around to a degree, to find a forum which would be more favourable to them. This may be, for instance, because evidence in support of their claim could be obtained more easily in that jurisdiction than elsewhere.

As noted above, judgments can be executed in another EU country relatively easily. Therefore, bodies can obtain redress in the UK courts and enforce the decision in other jurisdictions without major difficulties.

The current regime has been particularly beneficial for the UK courts and legal services industry

Efficient courts, favourable evidence rules and a claimant-friendly attitude to the jurisdictional rules have resulted in the UK courts becoming the destination of choice for European competition claimants. The Competition Appeal Tribunal and the English High Court have been the forums most favoured.

New court rules are needed to minimise the impact of Brexit

Brexit, however, stands to change this status quo. If the Withdrawal Agreement is approved, the current rules contained in the Brussels Regulation would continue to apply during the transition period.

After the transition period ends, much would depend on the future relationship that is negotiated between the EU and the UK. On this point, according to the Political Declaration accompanying the Withdrawal Agreement, the UK and the EU are committed to pursuing judicial co-operation in criminal matters and law enforcement.

By contrast, a related commitment on civil legal issues is confined to specific matters - matrimonial issues and parental responsibility. Thus, it remains unclear to what extent the parties would seek agreement on a bilateral instrument replacing the Brussels Regulation.

In the event of a no-deal exit, UK rules on jurisdiction and on the execution of judgements would apply to all disputes which arise after exit day. These differ between Scotland and England and Wales.

Secondary legislation establishing special rules in a number of areas has been brought forward to deal with any deficiencies in these domestic frameworks. This provides, for instance, a set of rules aimed at determining jurisdiction in disputes concerning contract, employment and consumer law.

There are situations where the Brussels Regulation will continue to apply

Nevertheless, a dispute may be governed by a contractual agreement which gives jurisdiction to the courts of another EU country. In this situation, the Brussels Regulation will still apply in transnational cases, even if one of the parties is based in the UK.

Foreign recognition of UK court judgments

International cartel behaviour is relatively frequent, as is anti-competitive behaviour which affects more than one country. For these reasons, it is vital for a successful claimant to be able to execute a foreign judgment in his or her own jurisdiction without having to go through complex recognition processes.

Courts in other member states may continue to be willing to recognise and enforce UK judgments [14] . Nonetheless, it is likely that the simplified procedure enshrined in the Brussels Regulation would no longer apply.

Instead, this issue would be governed by the law in force in the member state where a successful party seeks to enforce the decision. This would add complexity, time and costs to legal procedures [15] .

The status of European Commission infringement decisions

A question also arises as to the evidentiary value to be attached to infringement decisions adopted by the European Commission. Infringement decisions are issued when the Commission decides that there has been a breach of EU competition law.

According to Article 16 of Council Regulation No 1/2003, the national courts of member states must follow these decisions in related court proceedings. Claimants with a connection to the UK can therefore initiate further proceedings before the Competition Appeal Tribunal to claim compensation without having to satisfy the onerous burden of proving the existence of anti-competitive behaviour [16] .

As the UK leaves the EU, this provision will no longer be applicable, which raises questions about the future of follow-on competition litigation.

It could be expected that, at least for a while, the Commission's infringement decisions may continue to carry significant authority in the eyes of UK courts [17] . However, in the long term, litigants could be exposed to legal uncertainty unless special rules are introduced to clarify whether European Commission decisions should maintain their legal effects post-exit [18] .

The impact of Brexit on competition enforcement

Brexit will also have an impact on competition enforcement. It is expected that the CMA will see its workload increasing significantly.

This is because the CMA will need to consider all alleged competition infringements having an impact in the UK. This will be the case regardless of whether the infringements are also subject to consideration by the European Commission [17] .

The CMA enjoys discretion as regards which cases to investigate. This discretion is exercised according to its Prioritisation Principles [19] . However, given its expanded jurisdiction, it is expected that its ability to prioritise new investigations will become critical.

The CMA will need to build new co-operative relationships with member states' competition agencies

Brexit raises concerns about the ability of the CMA to continue investigating and sanctioning anti-competitive practices which have an impact across many countries. It will therefore be essential for the UK to negotiate alternative arrangements in this area, perhaps as part of a free trade agreement with the EU.

However, until such arrangements are put in place, the CMA is likely to face difficulties in its investigations. Any future co-operation is unlikely to offer the level of co-ordination and support provided currently through the European Competition Network.

Article 23 of the Withdrawal Agreement commits the UK and EU to "co-ordinating" and "co-operating" in relation to investigations of mutual interest, but only where "possible and appropriate". However, information sharing obligations are vague, and not as strong as those provided for at present.

It is therefore legitimate to ask whether the effectiveness of the CMA's detection and enforcement functions will be undermined by Brexit.

This section will look at:

- the future development of competition law;
- the cartel criminal offence; and
- the CMA's approach to future cases.

The future development of competition law

Brexit may create complications for the future development of substantive competition law

In an academic paper by Lyons, Reader and Stephan, it was noted that the European Union (Withdrawal) Act 2018 should secure continuity between UK competition law and the corresponding EU law in this area. However, they argued that it is still possible that “UK competition laws may (…) begin to diverge from those of the EU” in the future [20] .

These commentators doubted that the UK Government would wish to go as far as to revert to the previous regime. This used to rely on a public interest framework to evaluate potential competition infringements rather than an economic one based on substantial lessening of competition.

There is a need for ongoing alignment between EU and UK competition law

Lyons et al submitted that special rules should be put in place to ensure that UK competition law remains at least aligned with the European Court of Justice's case law in the future. A key argument in favour of a "soft convergence" with European standards is that this would avoid imposing an excessive regulatory burden [21] .

One option would be to require a court which wished to depart from EU precedent to justify its decision. However, the authors suggest that this could prove onerous. The burden is likely to increase after a lengthy period of time post-exit, when peculiar UK competition issues might have started to emerge [21] .

More generally, it could be argued that giving the European Court of Justice such a strong (albeit only persuasive) role in UK competition law might be difficult to justify in light of the political commitment to "taking back control" of UK laws [21] .

The UK's criminal cartel offence

The application of the UK's criminal cartel offence could also prove problematic post-Brexit.

Currently, the criminal offence is applicable to very serious competition infringements which impact on markets within the UK. The European Commission does not have the power to use criminal sanctions, so it is not relevant to investigations which take place at an EU level.

After Brexit, the CMA is likely to tackle transnational cartel cases which so far have been investigated by the Commission. Therefore, there might be greater scope for cartel offence investigations in relation to behaviour and companies operating at an international level.

Parallel investigations run the risk of conflicting legal outcomes

On the one hand there is an argument that the expansion of the scope of the UK's criminal cartel offence in this way could lead to greater deterrence of collusive behaviour. However, multiple investigations involving the CMA and the European Commission (as well as other EU competition authorities) are likely to be complex.

Accordingly, individuals may be subject to criminal investigation and prosecution in the UK while the same competition infringement is subject to investigation by competition agencies in other jurisdictions. It is expected that great legal uncertainty would surround cases involving parallel investigation.

This is because the possibility cannot be excluded that the outcomes of different sets of proceedings would be inconsistent. This may be due to the different impact a particular practice has in different national markets, or because of the different legal standards applied.

Impact on resources

There is also a risk that more frequent recourse to criminal sanctions would impinge upon the limited resources of the CMA and of the Serious Fraud Office [20] . Note though that the CMA has had a budgetary increase and staff expansions in preparation for Brexit [22] .

CMA's approach to future cases

The CMA has endeavoured to ensure clarity as regards its future approach to new and current cases, especially in the event of the UK leaving the EU without a deal.

Future CMA decisions will aim for consistency with pre-exit EU law

The CMA issued guidance in the event of a no-deal exit [23] in March 2019. This states that, after exit day, the CMA will still be required to adopt decisions that are consistent with pre-exit EU law, including European Court of Justice decisions. However, in accordance with the new Section 60A of the Competition Act 1998 (introduced by the Competition (Amendment etc.) (EU Exit) Regulations 2019), it will be empowered to depart from that precedent in certain circumstances.

Thus, the CMA may take a decision that is incompatible with EU competition case law. For instance, this could happen where:

- there are "differences between markets in the UK and markets in the EU" that would justify adopting a different decision; or
- the application of "generally accepted principles of competition analysis" would justify reaching conclusions which are at odds with EU precedent.

The likelihood of parallel investigations by the EU Commission and the CMA will increase

Exiting the EU is likely to have significant repercussions on the CMA's role more generally. As the no-deal guidance notes, the CMA will be able to apply the rules of the Competition Act 1998 to any individual case it deals with [23] . It will no longer be bound to recognise the jurisdiction of the European Commission, or other member state competition authorities. It can therefore undertake parallel investigations if it chooses.

A similar approach will be applied to merger cases.

Thus, it is clear that parallel proceedings before the EU Commission and the CMA are going to become more likely after Brexit day.

There remains significant uncertainty about the likely direction of development of future UK competition law

The CMA's no-deal guidance goes some way toward assuaging concerns that may ensue from Brexit. Nonetheless, section 60A of the Competition Act 1998 introduces significant uncertainty as to the likely direction of development of future UK competition law. These concerns are especially relevant in the event of a no-deal Brexit. However, they apply even in the case of an orderly departure, after the expiry of any transition period.

Merger review and state aid: casualties of Brexit?

Competition enforcement is not the only area of competition policy in which the effects of Brexit will be felt. There will also be an impact on merger control and on the scrutiny of state aid.

This section of the briefing looks at:

- the end of "one-stop shop" merger review arrangements;
- the role of the CMA in merger control post-Brexit;
- problems created by parallel merger regimes;
- public interest interventions; and
- state aid.

It concludes that Brexit is likely to lead to numerous problems for competition policy in the UK. The key consequences are:

- an increase in the workload of the CMA in the field of merger control; and
- the loss of a mutual framework for the control of forms of state intervention in the economy, to ensure that competition is not distorted.

The end of "one-stop shop" merger review arrangements

The EU Merger Regulation has established a compulsory notification system for all mergers with a Community dimension. This is determined on the basis of the turnover (i.e. sales) of the businesses concerned.

The UK, by contrast, has in place a voluntary notification system, with the CMA being responsible for monitoring merger activities. Merging companies can - but do not have to - notify the CMA that they are merging.

The CMA is in charge of keeping an eye on markets and identifying relevant merger situations, in light of the rules contained in the Enterprise Act 2002. It is responsible for appraising mergers that are either notified to it or are otherwise detected as a result of this supervisory function. It will take steps to address activities which have a significant impact on competition.

The one-stop shop EU regime will end

The effect of the EU regime is to create a "one-stop shop" mechanism, with many concentrations only being assessed in Brussels. However, this will end with Brexit.

When a large merger has an impact in the UK as well as in the EU, it will be replaced by “two shops”. In other words, where the relevant legal thresholds are met, merging entities may have to contend with review in both the UK and in Brussels [17] .

As a result, they may be subjected to distinct, perhaps parallel proceedings. This will expose them to the possibility of diverging decisions and consequently of having to lodge separate appeals in both jurisdictions [17] .

The role of the CMA in merger control post-Brexit

Brexit is going to have a significant impact on merger review in the UK. However, the scope of the impact will depend on whether or not the UK leaves the EU with a deal.

The Withdrawal Agreement provides for parallel EU and UK reviews

The Withdrawal Agreement would outlaw certain mergers, unless changes are negotiated to address their anti-competitive effects. The ban would apply to mergers which:

- are notifiable to the UK authorities, the EU Commission or the competition agencies of EU member states;
- distort competition; and
- have an impact on UK/EU trade.

The competent authorities (whether in the EU or the UK) would be able to review individual mergers and address any competition concerns, if necessary by co-operating with each other. However, the outcome of the CMA's investigation would have no impact on EU proceedings, and vice versa.

There are no procedures for co-ordinating merger review in a no-deal scenario

The UK may leave the EU without any withdrawal agreement. In this situation, there would be no express commitment to co-ordination or co-operation in merger control. The CMA's approach is outlined in recent guidance - Merger cases if there's no Brexit deal [24] .

As noted previously, there are no compulsory notification requirements in the UK. To address this, the CMA has made a commitment to closely monitor notifiable mergers and to approach those involved informally ahead of exit day. Thus, it is expected that the CMA will have additional horizon-scanning work as a result of the UK's exit from the EU.

As was discussed earlier, parallel merger proceedings in the UK and EU are likely and, as a result, it cannot be excluded that there may be different outcomes in each jurisdiction. Accordingly, ensuring effective mechanisms for co-operation with other competition agencies in multi-jurisdictional mergers is going to be essential. This will enable legal and procedural uncertainties to be minimised.

Brexit is likely to significantly increase the CMA's merger workload

The UK’s exit from the European Union is very likely to have more general, systemic consequences for the functioning of the CMA. It is expected that its workload will increase. This is because all mergers affecting UK markets will be drawn into its jurisdiction, regardless of whether they also meet the turnover thresholds enshrined in the EU Merger Regulation.

According to the agency's own estimate, there is expected to be between 30 and 50 new merger control cases decided at phase 1, and about 12 phase 2 investigations, in the three years following Brexit [21] .

The CMA's proposed transition regime is likely to stretch its resources further. This is because it will take on mergers that have already been notified to the European Commission but in relation to which no decision has been taken as at exit day.

The CMA's budget and staff have been increased significantly

This step has been taken to address the resource issues discussed above. According to the National Audit Office, the CMA has been allocated an extra £20million in 2018/19 to cope with its increased workload, especially in the field of merger control [22] .

In a recent report, the National Audit Office acknowledged the CMA's progress in its plans to expand its workforce and increase its operations with a view to addressing the challenges of Brexit. It concluded that the "successful delivery of its EU Exit plans appears feasible". [25]

Problems created by parallel merger regimes

Different EU and UK timescales for assessing mergers will create uncertainty

Under the EU Merger Regulation, decisions on a merger that does not raise significant competition issues are usually taken within 25 working days of the initial notification. If the merger appears capable of restricting competition, it will be subjected to an in-depth examination. In this case, a final decision will usually be adopted within 90 working days of initial notification.

The UK rules are enshrined in the Enterprise Act 2002. It is important to remember that there is no obligation to notify a merger to the CMA.

If a merger is notified, the CMA has up to 50 working days to examine a merger which does not, on the face of it, raise serious issues for competition. This can included negotiation with the businesses concerned. If, at the end of this process, a merger still raises competition issues, a reference for a full investigation will be made.

This requires a panel to be convened to examine the merger. The standard deadline for the final report to be published is 24 weeks (although this can be extended). This is a much longer period than at EU level. For a summary of these procedures, see the CMA Merger Guidance (2014) [26] .

The UK and EU have competing regimes for assessing merger remedies

The European Commission and CMA can both require businesses to propose measures - known as remedies - which are aimed at solving competition problems caused by a merger. Remedies include the permanent sale of parts of a business (divestments) and other structural remedies. They also cover changes focused on the conduct of an organisation, such as price regulation - these are called behavioural changes.

Both bodies prefer structural remedies to behavioural remedies. This is because behavioural changes require continued monitoring and are unlikely to restore the state of competition which existed prior to the merger.

However, both organisations have their own market-testing procedures and monitoring processes. The remedies required by each may not be co-ordinated, so may overlap with each other. This is likely to add to the uncertainties highlighted above.

It is unclear how much European Commission activities will influence CMA decision-making. Commentators have suggested that, particularly when assessing remedies, the

CMA should co-operate closely with the European Commission and accept as far as possible the Commission's remedy proposals. This would reduce the likely burden on business in complying with two sets of unco-ordinated requirements [27] .

However, is it open to question whether such a significant measure of convergence would be palatable for the UK Government, given the "take back control" message underpinning Brexit [27] .

Public interest interventions

The possibility for UK Ministers to make a public interest intervention in respect of a specific merger may become problematic post-Brexit [20] . Over time, the UK's exit from the EU could undermine the "economic, effects-based approach" to merger review introduced by the Enterprise Act 2002 [28] .

The general approach to merger review in the UK is based on an objective assessment of the merger's impact on competition. However, public interest intervention constitutes an exception to this.

The UK Government may be more prepared to intervene on public interest grounds post-Brexit

Brexit, however, raises several issues with the future development of the public interest exception. For example, might there be greater scope for ministers to invoke the public interest clause, especially in respect of sizeable mergers?

This issue has proved controversial, both in the run up to - and since - the 2016 referendum. The Secretary of State for Business, Enterprise and Industrial Strategy, for instance, proposed a new set of recommendations for the assessment of foreign takeovers in sensitive industries such as key infrastructure [29] , on national security grounds.

Under the proposals, UK and foreign companies which wish to merge with UK-based businesses would be encouraged to inform the UK Government of the proposed takeover. However, commentators have argued that any compromise in the way the UK applies its merger rules would be a step backward and could damage its reputation as a pro-business jurisdiction [30] .

Ultimately, whether the public interest tests should be reformed to make it easier for the UK Government to block mergers on national security grounds is a political decision.

If the UK adopts a more protectionist approach, there is a risk the EU will take counter-measures

Such an approach could lead to protectionist outcomes. For example, it could result in the emergence of "national champions". These are UK-companies which are protected from foreign competition through the creation of barriers to entering UK markets for foreign businesses [20] .

It is acknowledged that the EU has also enacted legislation allowing for the scrutiny of foreign takeovers of EU companies (Regulation (EU) 2019/452 establishing a framework

for the screening of foreign direct investments into the Union). This can be argued to show a concern for protecting the strategic economic interests of the EU and its members.

However, should the UK wish to pursue an agenda concerned with the protection of its own internal assets, it is unclear whether the EU might rely on these rules to prevent British businesses acquiring assets located in EU countries.

State aid

Another visible change flowing from Brexit is the end of the current EU arrangements for the control of state aid.

As was outlined previously, the European Commission is responsible for scrutinising whether financial assistance given to undertakings by public authorities breaks EU rules. Aid that is selective - in other words, aid that puts the recipient at a competitive advantage in relation to its competitors and distorts the functioning of the EU internal market—is prohibited. It must be repaid to the public body which provided it.

It is important to acknowledge that not all state subsidies are prohibited under EU law. For instance, the TFEU expressly allows the granting of “aid to make good the damage caused by natural disasters or exceptional occurrences”.

This part of the briefing will look at:

- whether the state aid regime has protected UK businesses; and
- the new role of the CMA in monitoring financial assistance from government.

Has the state aid regime helped UK businesses?

The state aid regime has protected UK businesses against subsidies provided to competitors in other member states

The UK has performed well compared with other member states when it comes to compliance with the state aid rules.

The compliance of the UK with the EU rules is reflected in the relatively low number of EU investigations into state aid provided to UK businesses. According to a recent study, “state aid given by the UK is responsible only for around 25” out of a total of about 500 cases that the Commission investigates, on average, each year.

The authors of the study see this as a demonstration of the observance of the state aid rules by public bodies in the UK. They also highlight it as evidence of the fact that UK markets have been protected from the distorting effects of aid granted by other member states [20] .

State aid rules have been argued to act as a disincentive to government investment

Other commentators, however, point out that the low rates of state aid granted by UK agencies could be seen as a lack of commitment to tackling economic issues through investment. Such issues could include lagging productivity and the decline of heavy industry.

It has been argued that the regional social and economic imbalances caused by the decline in industrial production were not helped by the observance of state aid rules. It could even have contributed to the extent of the leave vote in June 2016 [31] .

Whatever the view one forms of these issues, it is clear that the role of state aid policy - and the position of the state in the UK economy - remains controversial.

Government favouritism in providing support is likely to damage domestic competition as well as the UK's international reputation

The UK's exit from the EU, however, will end its obligation to conform with the EU state aid regime in the longer term [20] .

Aid that distorts competition by gaining an undue advantage to one recipient only is likely to damage foreign and internal competitors. Against this background, it is vital for the competitiveness of the UK business environment to ensure that financial assistance from public authorities does not lead to a restriction of competition, even after the exit from the EU [20] .

Thus, any proposal that the UK Government may be more ready to intervene directly in the economy after Brexit should be treated with caution. It could hamper the UK's reputation as a market-friendly jurisdiction. In addition, it could potentially create the risk of subsidy wars with other countries [32] .

The new role of the CMA in monitoring financial assistance from government

It appears that the creation of a state aid regime is going to be an essential component of any settlement with the EU. More generally, it is likely to be seen as a necessary safeguard to the competitiveness of the UK economy.

Given the concerns of the impact on competition, the UK Government's commitment to give the CMA the power to scrutinise financial assistance from public authorities after Brexit is to be welcomed [32] . The CMA has created a new state aid unit, and guidance has been issued on how the new powers will be exercised.

The CMA may provide much needed scrutiny of the compliance of UK subsidies with the competition rules. There are, however, several unanswered questions surrounding this role.

Monitoring state aid will put further strain on the CMA's capacity

The first concerns capacity. It is clear that state aid control will place an additional demand on the CMA's resources (although there have been recent budgetary increases to take account of Brexit).

In this context, it is going to be indispensable to manage these powers in a way that ensures the timely and efficient review of new aid. It is therefore expected that this function will have to be carefully managed so as to make the most of the available resources.

It is unclear whether the CMA is sufficiently independent from government

Secondly, there is a question over how effective the CMA is going to be, as an arm of government, in scrutinising decisions to grant state aid by other arms of government. It was argued before the House of Lords Committee on the EU [21] that the CMA would be well placed to carry out this function, due to its expertise. However, it was also recognised that its relationship with government might become strained as a result of its power to hold public bodies to account.

The CMA's standing and expertise is not in any doubt. However, it is suggested that safeguards regarding its independence and impartiality will be crucial to its success as a state aid regulator.

Bibliography

1 International Competition Network. (2002). Advocacy and Competition Policy. Retrieved from https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf [accessed 5 March 2019]

2 European Commission decision of 10 July 1986, case IV/31371/Roofing Felt. (1986). *Official Journal L232/15*.

3 European Commission decision no. 98/531/EC. (1998). *Official Journal L246/1*.

4 Case t-65/98 (Van den Bergh Foods Ltd v Commission of the European Communities). (2003). *European Court Reports II-4653*.

5 OFT, case CE 7691/06.. (2006). *Summary of the decision available at: https://webarchive.nationalarchives.gov.uk/20140402185545/http://www.oft.gov.uk/news-and-updates/press/2012/33-12*.

6 CMA, case reference CE/9742-13. (2017). *More information is available at https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs*.

7 Competition and Markets Authority. (2009). Government in Markets: Why competition matters - a guide for policy makers. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284451/OFT1113.pdf [accessed 30 January 2019]

8 EU Council of Ministers. (2003). Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN [accessed 30 January 2019]

9 EU Commission. (2004). Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0043:0053:EN:PDF [accessed 30 January 2019]

10 EU Council of Ministers. (2004). Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN [accessed 30 January 2019]

11 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. (2018). Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf [accessed 6 June 2019]

12 Her Majesty's Government. (2018). Statement from HM Government. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL. [accessed 14 February 2019]

13 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. (2018). Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf [accessed 6 June 2019]

14 Allen and Overy LLP. (2016). English jurisdiction clauses - should commercial parties change their approach?. Retrieved from http://www.allenovery.com/SiteCollectionDocuments/Brexit_-_Specialist_Paper_No_2_-_English_jurisdiction_clauses_-_should_commercial_parties_change_their_approach.PDF [accessed 18 February 2019]

15 Ahmed, M. (2016). Brexit and English jurisdiction agreements: the post-referendum legal landscape. *European Business Law Review*, *27*(7).

16 Andreangeli, A. (2016). Competition litigation in the EU and the UK after the 2014 EU antitrust damages directive. *Civil Justice Quarterly*, *35*(4).

17 Roth, P. (2017). Competition law and Brexit: the challenges ahead. *Competition Law Journal*, *16*(1).

18 Andreangeli, A. (2017). The consequences of Brexit for competition litigation: an end to a success story?. *European Competition Law Journal*, *38*(5).

19 Competition and Markets Authority. (2014). Prioritisation principles for the CMA. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf [accessed 27 February 2019]

20 Lyons, Reader and Stephan, . (2017). UK competition policy post-Brexit: taking back control while resisting siren calls. *Journal of Antitrust Enforcement*, *5*(3).

21 UK Parliament House of Lords European Union Committee. (2018). Brexit: competition and state aid. 12th Report of Session 2017-19. HL Paper 67.. Retrieved from https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6706.htm#_idTextAnchor024 [accessed 08 May 2019]

22 National Audit Office. (2018). Exiting the EU: competition, consumer policy and state aid. Retrieved from https://www.nao.org.uk/wp-content/uploads/2018/07/Exiting-in-the-EU-consumer-protection-competition-and-state-aid-Summary.pdf [accessed 09 May 2019]

23 Competition and Markets Authority. (2019). Guidance on the functions of the CMA in the event of a "no deal" exit from the EU. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf [accessed 08 May 2019]

24 Competition and Markets Authority. (2018). Merger cases if there's no Brexit deal. Retrieved from https://www.gov.uk/government/publications/cmas-role-in-mergers-if-theres-no-brexit-deal/cmas-role-in-mergers-if-theres-no-brexit-deal [accessed 21 February 2019]

25 National Audit Office. (2018). Exiting the EU: competition, state aid and consumer protection. Retrieved from https://www.nao.org.uk/wp-content/uploads/2018/07/Exiting-in-the-EU-consumer-protection-competition-and-state-aid.pdf [accessed 6 June 2019]

26 Competition and Markets Authority. (2014). Mergers: Guidance on the CMA's jurisdiction and procedure. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf [accessed 21 February 2019]

27 Modrall, J., & Giles, I. (2016). Brexit: merger review implications and recommendations. Retrieved from https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct16_modrall_10_18f.authcheckdam.pdf [accessed 09 May 2019]

28 Competition and Markets Authority. (2018). A view from the CMA: Brexit and beyond - a keynote speech given by Michael Grenfell, CMA Executive Director. Retrieved from https://www.gov.uk/government/speeches/a-view-from-the-cma-brexit-and-beyond [accessed 21 January 2019]

29 Department for Business, Energy and Industrial Strategy. (2018). National security and investment: proposed legislative reforms. Retrieved from https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms [accessed 09 May 2019]

30 Competition Law Committee of the City of London Law Society. (2017). Written evidence submitted to the House of Lords EU Internal Market Sub-Committee. Retrieved from teeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-competition/wr [accessed 09 May 2019]

31 Tomlinson, J. (2017). Brexit, globalisation and de-industrialisation. Retrieved from https://voxeu.org/article/brexit-globalisation-and-de-industrialisation [accessed 09 May 2019]

32 Department for Business, Energy and Industrial Strategy. (2018). State aid if there's no Brexit deal. Retrieved from https://www.gov.uk/government/publications/state-aid-if-theres-no-brexit-deal/state-aid-if-theres-no-brexit-deal [accessed 26 February 2019]

SPICe The Information Centre
An t-Ionad Fiosrachaidh

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Abigail Bremner on telephone number 85361 or abigail.bremner@parliament.scot.
Members of the public or external organisations may comment on this briefing by emailing us at SPICe@parliament.scot. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@parliament.scot.
Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.