



BREXIT
SPECIAL 4

Competition Law and Policy after Brexit

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Competition law and policy is an area where the EU legal framework has had a particularly significant impact on the evolution of UK law. The EU rules have functioned as both catalyst and model for the equivalent UK provisions, while the broader influence of EU competition law extends considerably beyond the confines of the field itself. This contribution reviews the likely impact of Brexit, following which UK competition law faces the prospect of being cut adrift from its foundational influences.

At present, both EU and domestic competition law apply to anticompetitive behaviour taking place within the UK. The influence of the EU law prohibitions on the development of the distinct domestic rules has been significant: from the ground-breaking Competition Act 1980, which introduced effects-based competition law in the UK; to the revitalised Competition Act 1998 (CA98), which replicates the EU rules within domestic law; to the ambitious Consumer Rights Act 2015, which sought to position the UK as a global centre for private enforcement in line with evolving EU trends. The wider impact within the UK legal landscape has been more unpredictable but no less notable: from the infamous ‘euro-defence,’ which arose in the context of private law; to broader economic changes such as liberalisation of the Scottish water industry to coincide with adoption of CA98.

Post-Brexit much depends, in this field as in others, on the Article 50 negotiation process and the nature of any deal ultimately agreed. In the now **unlikely** event that the UK retains access to the internal market through participation in the European Economic Area (EEA), there would be comparatively little change, as the substance of the EU competition rules is replicated within the EEA Agreement. Enforcement of these provisions lies with the European Commission and EFTA Surveillance Authority, while

there would be little need to amend the corresponding domestic rules. Alternatively, the mythic ‘bespoke deal’ sought by the UK Government might contain obligations to apply EU competition law or equivalent provisions, a commitment that would arguably be less contentious than, for instance, ceding ground on immigration controls. But let’s assume instead that EU or EEA competition law will have no place post-Brexit: what will this mean for competition law and policy?

The likely effects have two principal dimensions: first, in terms of the non-applicability of the EU competition rules within the UK jurisdiction; and second, in terms of potential knock-on effects for existing—and persisting—domestic law. We will examine these dimensions with respect to four key areas of competition law and policy: antitrust, merger control, State aid, and public procurement.

Antitrust law

Antitrust—the rules governing anticompetitive coordination under Article 101 TFEU and Chapter I of the CA98, and abuse of dominance under Article 102 TFEU and Chapter II of the CA98—is an area where we could potentially see significant changes. Most obviously, Articles 101 and 102 would cease to have application in respect of anticompetitive behaviour taking place in the UK. The Commission would similarly lose its enforcement jurisdiction, including its power of pre-emption over the UK’s Competition

and Markets Authority (CMA) under ‘Modernisation’ Regulation 1/2003. On the other hand, UK companies will remain within the jurisdiction of EU competition law to the extent that anticompetitive behaviour is implemented or (more controversially) takes effect within the EU. The CMA, for its part, would no longer have any obligation to apply Articles 101 or 102 in domestic cases with a potential effect on trade between Member States, as currently required by Regulation 1/2003. It would also lose its membership of the **European Competition Network**, which functions as a—largely successful—coordination mechanism to facilitate more effective enforcement amongst the 28 national competition authorities and the Commission.

The potential effects extend beyond the EU realm. Currently, UK competition law is interpreted and applied in a manner intended to ensure, in the wording of section 60 CA98, that there is ‘no inconsistency’ between the domestic rules and EU law, encompassing both the case-law of the Court of Justice and the Commission’s decisional practice. Post-Brexit, this provision would appear to have little purpose, and thus presents a likely candidate for repeal under the supplementary powers envisaged within ‘**Great Repeal Bill**’. Ending the direct legal connection between EU and UK competition law is unlikely, however, to be the end of the story. First, the Chapters I and II prohibitions are clearly modelled on their EU law equivalents, so that EU precedents will continue to have marked relevance in this context, even if no longer legally binding. Moreover, in the past couple of decades EU law has emerged as one of the leading intellectual forces within the increasingly global field of competition law, and thus might be viewed as an example of ‘best practice’ here. Accordingly, it is unlikely that UK competition law will depart radically from its path over the past decade or so, or from the general tenor of the equivalent EU rules.

Yet is certainly possible that, on discrete issues, UK law may develop in a manner either more or less expansive than EU law. An example of the former might include extending the scope of UK competition law to behaviour outside the purview of the EU rules. A possibility is the application of competition law to activities of the NHS, something precluded to a large extent within EU competition law, yet embraced by the Competition Appeal Tribunal (CAT) in the early case of [BetterCare](#), and implicit within the ([highly contentious](#)) [Health and Social Care Act 2012](#). The desirability of doing so, of course, is less obvious. Alternatively, UK courts or the CMA may decline to follow certain EU antitrust precedents, arguably a distinct possibility in areas where EU law has received criticism for undue formalism or 'uneconomic' approaches. A High Court case from earlier this year in [Asda v MasterCard](#) presents an intriguing teaser of this possibility. Here, Mr Justice Popplewell declined to follow the approach of the Commission in its earlier [MasterCard](#) decision, holding instead that the same behaviour on slightly different facts did not breach either Article 101 or the Chapter I prohibition.

This decision also points to an area where the UK is likely to lose out significantly post-Brexit: namely, private damages actions for antitrust infringements. The Commission has, for over a decade, sought to develop a '[competition culture](#)' in the EU bolstered by robust private enforcement, culminating in the passage of a Directive on Antitrust Damages Actions in 2014 to strengthen national enforcement procedures. Prior to Brexit, the UK had been positioning itself to develop as the preeminent centre for such activity in the EU. The Consumer Rights Act 2015, in particular, expanded the jurisdiction of the CAT, and introduced various procedural [innovations](#) such as opt-out class action suits. While Brexit does not entirely rule out the possibility that such actions may continue to come before UK courts, it is likely to diminish significantly the gains that might otherwise have been available to the UK's legal community.

Merger control

In terms of merger control, the wide definition of transactions having a

'Union dimension' under the EU Merger Control Regulation (EUMR) means that mergers involving large UK firms will, in many instances, continue to require notification to the Commission. Loss of the 'one-stop-shop' facility, however, will mean that such transactions must also be notified to and reviewed by the CMA, thus increasing costs and risks for businesses. Any implications for the substantive merger control rules in the UK are unlikely to be substantial, however. As things currently stand, UK law already differs, at least formally, in terms of the standard of review deployed—a 'substantial lessening of competition' test, in contrast to the EUMR's 'substantial impediment to effective competition' criterion—yet both regimes are sophisticated and well-regarded in terms of the substance of analysis. The only pressing question post-Brexit is, perhaps, whether UK merger control might be refashioned to pursue a more robust industrial policy to shape the UK economy in its brave new world outside the internal market. This, however, seems both unlikely and, many would argue, highly undesirable should it materialise.

State aid

This nonetheless brings us to the question of the broader competition policy framework for the UK post-Brexit, and specifically, the issue of State support to foster industrial development or avert economic decline. At present, the UK's ability to provide financial support to individual firms is limited by the State aid rules, which prohibit such funding unless justified by reference to a relatively narrow range of economic or social concerns. The State aid rules have been criticised, in particular, by commentators and [politicians](#) on the left who advocate for a more proactive role for government within industry. Yet as the claimed '[sweetheart deal](#)' granted to Nissan in the wake of the Brexit vote illustrates, granting financial or other support to strategically important private-sector players is not an exclusively left-wing concern.

Leaving the EU is thus likely to allow the UK Government greater flexibility in this regard—although, in a 'chicken-and-egg' situation, the potential negative economic impact of Brexit is likely to be a key motivation for any more interventionist economic policy facilitated by removal of the

constraint of the State aid rules. In the longer term, however, significant State intervention to prop up otherwise failing industries is unlikely to prove either sustainable or effective. Nor does it seem compatible with conventional Tory wisdom which has, for many decades, focused on 'rolling back the frontier of the State'. Finally, as the UK attempts to build its regrettably titled [Empire 2.0](#) going forward, it must bear in mind the limitations imposed by WTO law, which, although less exacting than the State aid rules, nonetheless impose certain constraints on subsidies. On a slightly facetious note, abandoning the State aid rules would, however, at least remove one [potential obstacle](#) to the rather graceless suggestion that the UK might become a '[tax haven](#)' should the Article 50 negotiations fail to deliver a sufficiently advantageous outcome.

Public procurement

Public procurement, too, is an area where EU law currently provides the bedrock of the decidedly complex [UK legal framework](#). It is unlikely that Brexit will result in significant changes to the underlying procedures for procurement in the short term, and it is practically unthinkable that it might lead to the wholesale abandonment of procurement regulation even in the longer term. Where we are more likely see change is in terms of the equality of access currently guaranteed to traders from other Member States, reflecting the fact that the public procurement rules are an application of the principles of free movement and non-discrimination from EU law. A more selective approach might thus allow the task of procurement to be used more strategically as a tool of industrial policy, again shaping industrial development in the post-Brexit landscape. On the other hand, it may be doubted whether the apparently inexorable commitment to '[value for money](#)' in public procurement would actually be sacrificed to satisfy [more nationalistic urges](#). It is worth noting, moreover, that the WTO framework also contains relevant restrictions in the shape of the Agreement on Government Procurement, to which the UK is currently a party as EU Member State.

Perhaps the most interesting challenges posed by Brexit, however, arise not

for the Member State that intends to leave but rather for the 27 that remain. Although somewhat late to the party in terms of substantive competition law, the UK has had significant **influence** over the tenor of economic development within the internal market. Indeed, many of the so-called 'neoliberal' phenomena associated with the EU—including market-opening, deregulation, corporatisation and even privatisation of public enterprises—were first conceived of and implemented domestically within the UK. The dissatisfaction in certain Member States with the undue emphasis placed on the 'economic' in preference to the 'social' in Europe is well-known, culminating in a side-lining of any reference to 'undistorted competition' in the Lisbon Treaty at the insistence of France's **Nicolas Sarkozy**. The UK's departure thus removes a significant liberalising force from the EU structure. As the UK embraces a future of free trade tempered by more local industrial policy concerns, within the reconstituted EU the question is whether we might see a rather different, perhaps more interventionist kind of competition policy emerging in future.

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