



Competition time

What does Brexit mean for the Competition & Markets Authority, asks [Diana Johnson](#)

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IN BRIEF

► The Competition and Markets Authority has issued guidance about how its role as the main UK competition law regulator will change following Brexit.

► This article looks at how the Competition and Markets Authority will cope with the increased quantity and significance of cartels, mergers and competition investigations previously undertaken by the European Commission.

Following the departure of the UK from the EU at 11pm on Friday 31 January 2020, the UK has entered into a transition period until the end of December 2020 (transition period). During this transition period the UK and EU will attempt to negotiate an agreement to regulate their future trading relationship.

As part of the exit from the EU, the UK will move to become a standalone competition regime with effect from the end of the transition period. This change will have a significant effect on the Competition and Markets Authority (CMA), the UK's principal competition regulator, and this article examines the guidance that has been issued by the CMA about how it will deal with this change.

Since its creation in 2013, the CMA has worked closely with the European Commission and the competition regulators in each of the EU member states, via the European Competition Network. This network enables information about competition infringements and enforcement to be shared among the competition regulators across the EU. It also provides a mechanism for competition enforcement work to be shared out between the European Commission, which typically takes the larger cases which affect more than one member state, and national competition regulators such as the CMA.

Following the end of the transition period it is anticipated that the UK competition regulators, led by the CMA, will no longer share any cases with the European Commission. This is expected to lead to a significant increase in cases for the CMA and other sector regulators in the UK. It will

also lead to larger and more complex cases having to be dealt with by the UK competition regulators, which have previously been dealt with by the European Commission. Given this expected increase in both case load and the level of complexity of competition cases, the CMA has issued guidance on how the key areas that will change in competition enforcement following the end of the transition period.

Departing from European case law following Brexit

One of the key changes will be the removal of the requirement for UK courts and regulators to make decisions which are consistent with the principles of the EU treaties and the decisions and principles laid down by the Court of Justice of the EU (CJEU) in relation to Arts 101 and 102 of the Treaty on the Functioning of the EU. This requirement is currently set out in s 60 of the Competition Act.

A new statutory instrument, the Competition (Amendment etc) (EU Exit) Regulations 2019 (SI 2020/93) (the Competition SI) repeals s 60 of the Competition Act and introduces a new s 60A, which allows the UK to depart from CJEU case law in certain defined circumstances. This is not, however, a carte blanche for UK courts and regulators to make decisions inconsistent with previous EU case law. There are a set of prescribed factors that the CMA, sector regulators and the UK courts must consider before they depart from any previous case law. These factors include consideration of the differences between markets in the UK and markets in the EU or developments in forms of economic activity since the time the case law was made.

The CMA guidance points out that, following the end of the transition period, competition cases which involve one/more member states as well as the UK, may involve concurrent investigation and enforcement by the European Commission and the UK competition regulator. This may prove more burdensome to the businesses being investigated and may also increase the amount of work for the CMA.

Brexit: possible impact

The CMA's Annual Plan 2019/20 stated that, following the end of the transition period, the CMA will be a very different body because it will undertake investigations into larger and more complex global cases, while remaining committed to enforcing competition in markets which are purely UK based. The CMA has had time to prepare for its new role and in its annual plan it states that it has made great strides to ensure that it has the people, skills and infrastructure needed to take on major international cartel or antitrust or merger cases. The CMA does note, however, that, if the UK were to leave the EU without a deal at the end of the transition period, this may constrain its ability to continue its market investigation work, as it will have to prioritise the larger and mandatory cases.

What this means for practitioners

The CMA has a significant challenge approaching at the end of the transition period. It may struggle to cope with its existing, relatively high, caseload when competition enforcement cases, normally dealt with by the European Commission, are transferred. The CMA will choose to prioritise the larger, more complex cases, perhaps at the expense of the purely UK cases it has exclusively dealt with since its inception. This may lead to competition infringements not being investigated by the UK competition regulators, although the CMA may be able to rely more heavily than it has in the past on the sector regulators for the UK competition enforcement work. In recent years the Financial Conduct Authority has started using its relatively new competition enforcement powers by commencing market investigations and opening enforcement cases in the financial sector. If this increase in the work done by the sector regulators continues, it may free up the CMA to focus on the more complex, international competition cases with no significant reduction in competition enforcement in the UK.

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