# What does Brexit mean for customers for competition legal advice?

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**Competition analysis: Following the UK vote to leave the EU, Matt Evans, partner in the antitrust and competition team at Jones Day in London, assesses the implications of Brexit for customers for legal services in the UK.**

## Introduction

Brexit could take many forms. For the purposes of assessing how Brexit might impact substantively upon companies seeking competition law advice, there are two principal scenarios. First, where the UK remains part of the internal market (sometimes known as the single market). Under that scenario there is unlikely to be a substantive change in competition law in the UK, as regards either substance or procedure, because the EU competition rules are likely to remain fully applicable, including, for the most part, the Commission's jurisdiction. Second is the situation in which the UK is no longer part of the internal market. This latter consequence can be expected to entail material changes for companies seeking antitrust advice in the UK. This article highlights the likely impact of such a scenario on buyers of competition law advice in the UK.

## Increased red tape and increased legal costs?

Companies doing business in the UK currently benefit from what is by and large an efficient allocation of resources and division of labour between the national competition authorities (NCAs) of EU Member States—such as the Competition and Markets Authority (CMA) in the UK—and the European Commission (the Commission). This applies both to merger control, through the EU Merger Regulation (Regulation (EC) 139/2004, the EUMR), and antitrust investigations, through Regulation (EC) 1/2003.

## Merger Control

The EUMR provides for an EEA-wide one-stop-shop review procedure for deals meeting its jurisdictional thresholds or, at the request of the notifying parties, for deals that fall short of the jurisdictional thresholds but which otherwise meet national merger control thresholds in three or more EU Member States. If the UK left the internal market, companies buying businesses with revenues in the UK may find themselves having to make two merger filings—one to the Commission, the other to the CMA—where previously they would have made only one.

It may also be the case that post-Brexit, a deal which would have qualified for review by the Commission pre-Brexit no longer meets the jurisdictional test because UK revenues no longer count towards the EU-wide turnover thresholds. This could result in fewer EUMR filings and more, parallel, national ones instead.

Companies engaged in international commerce are well used to making numerous merger control filings in different jurisdictions and devising strategies with their advisers to minimise disruption, coordinate filings and seek common resolutions to concerns raised. Nevertheless, businesses will no doubt not welcome having to think about making an additional filing in the UK where pre-Brexit a single filing to the Commission would have sufficed. UK filings are voluntary, insofar as companies may close deals without notifying them for UK merger clearance. Failure to notify, however, creates uncertainty since the CMA can call a deal in for review up to four months after it becomes aware of the deal closing (or, if earlier, after closing is made public). For this reason, many companies choose to notify qualifying deals in the UK on a failsafe basis.

The likely increase in UK merger control in the event that the UK leaves the internal market may be unwelcome to companies for several reasons, including:

- UK merger control often takes longer than EU merger control—pre-notification discussions with the CMA last typically two to three months even for straightforward cases—often longer than the typical pre-notification discussions with the Commission
- Phase I lasts longer—40 working days in the UK, 25 working days in Brussels
- the CMA charges a filing fee of up to £160,000—there is no filing fee at the Commission

The risk of the CMA reaching a different conclusion in its review of a deal from that reached by the Commission in the same case is likely to be low. The CMA has a good working relationship with the Commission and, in practice, one would expect the two authorities to coordinate their reviews and reach aligned conclusions on the impact of a global or European deal on competition in the EU and UK respectively. Nevertheless, a divergence in analysis cannot be excluded. In particular, if Brexit leads to the erection of trade barriers between the UK and the EU, an assessment of competition on either side of the English Channel may differ post-Brexit compared with today. This is because companies on one side of the Channel may find themselves less constrained by rivals on the other, potentially leading to more concentrated markets, more UK national markets (as opposed to an EU- or EEA-wide market incorporating the UK) and accordingly an increased risk of Phase II merger investigations and the accompanying need to give divestments or behavioural undertakings in order to obtain clearance.

Even before Brexit, companies buying businesses trading in the UK may want to rethink their usual UK merger filing strategy as Brexit approaches. In certain cases, it may be advisable to notify a deal for merger clearance in the UK where previously no filing would have been made. This is not so much to generate goodwill with the CMA but rather, if a company has its eyes on a bigger deal in a particular sector post-Brexit, which the CMA inevitably will want to review once the UK is no longer part of the internal market, there may be strategic reasons to notify the straightforward deal first, so as to educate the CMA about the company and competition in its sector in advance of the bigger deal. This may help smooth the path for the more difficult deal ahead.

## Antitrust investigations

Similarly, if the UK leaves the internal market, businesses can expect to have to overcome more red tape and strategise to a greater extent than today with regard to antitrust investigations. It is worth noting of course that the types of conduct that may fall within EU competition law will likely still be caught by UK competition law. Currently, the Commission does not act as an automatic one-stop shop for investigations into potential restrictions of competition and abuses of a dominant position affecting EU trade. However, insofar as there is no automatic allocation between the NCAs and the Commission, in most cases, the NCAs and the Commission allocate cases between them so as to minimise duplication and ensure an efficient process. If the UK leaves the internal market, there is a risk that where the Commission investigates an EU-wide cartel or other restriction of competition, the CMA will launch its own parallel investigation. This has the potential materially to increase costs for businesses under investigation and to require companies to navigate different procedures, legal tests and information gathering powers. Companies under parallel investigations will need to ensure a coordinated approach in the different jurisdictions in which they are under investigation.

## Follow-on actions for damages

The English courts are currently an attractive forum for claimants bringing damages actions following the issue of Commission antitrust infringement decisions. It is uncertain whether they will remain an attractive or even appropriate forum for claimants in the future in respect of infringement decisions the Commission hands down. Potential claimants considering bringing an action for damages in respect of ongoing Commission antitrust investigations, where the decision may be issued after the UK has left the internal market, ought to explore with their advisers whether the English courts are likely to remain their forum of choice, or whether it would be more prudent to prepare to bring an action for damages in another EU Member State, such as Germany or the Netherlands. Depending on any transitional arrangements governing a UK exit from the internal market, it is conceivable that in future, parallel claims could be brought in the UK and—if the UK has left the Union—within an EU Member State, so as to cover effects of the anticompetitive conduct within the EU and the UK respectively.

## Leniency applications

Companies applying for leniency in respect of fines and other sanctions arising from cartel conduct within the EU often make parallel applications both before the Commission and relevant NCAs, such as the CMA. To the extent, however, that some companies only currently apply for leniency to the Commission in respect of an EU competition law infringement, they should consider making a parallel application before the CMA, even before the UK leaves the internal market, so as to ensure they do not fall within a loophole that may not leave them protected in the UK.

## Potential political interference in UK merger control

Soon after taking office, the new Prime Minister indicated a desire to introduce new laws in the UK enabling the government to intervene in a wide array of sectors to enable it to approve or block the acquisition of UK businesses by foreign undertakings. The UK will have much more freedom outside the internal market to intervene in this way than it does today. Currently, the UK government can intervene and ultimately block a merger for public interest reasons only in the defence, media and finance sectors. Should the Prime Minister get her apparent wish, the likely outcome of a move towards protecting so-called national champions in the UK will be a need for new legal advice—alongside public affairs/lobbying activities—for companies considering an acquisition in a sector that appears on the government's protected list.

## Securing legal privilege over advice relating to EU competition law

Brexit—if it involves leaving the internal market—will also have implications for the ability of companies to claim legal privilege over advice received from external lawyers in respect of EU competition law. The EU courts developed the criteria that must be met in order to keep legal advice and company communications drafted for the purpose of obtaining such advice out of the hands of the Commission during an antitrust investigation. Those criteria are narrower in scope than the rules governing legal advice privilege in the UK. In particular, not only must the advice/correspondence be between an independent external lawyer (rather than an in-house lawyer) and their client, but that lawyer must be entitled to practise in a Member State within the EEA. For the time being, pre-Brexit, companies may continue to seek advice on EU competition law from external lawyers qualified to practise in England and Wales, Scotland or Northern Ireland. From the date Brexit comes into force, however, future advice from such lawyers is unlikely to attract legal privilege before the Commission and EU courts unless the lawyer or lawyers in question are also entitled to practise in a country which remains an EEA state. For this reason, many UK solicitors and barristers are exploring the possibility of obtaining practising qualifications in other EU Member States, such as Ireland and Belgium.

The practical implication of this impending change is that companies that find themselves subject to Commission investigations between now and Brexit should think carefully about whether it is wise to instruct a team of lawyers comprising solely UK qualified lawyers. It may be more prudent to at least ensure a team that comprises a combination of UK and other EU qualified lawyers. The advantage of the latter approach will be to ensure that upon Brexit, the relevant case knowledge can remain with the original team of lawyers instructed and the working relationships with Commission officials similarly should be unaffected by the UK leaving the internal market.

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