



BREXIT: A COMPETITION LAW PERSPECTIVE

The two areas of competition law most commonly relevant to businesses operating across European borders are antitrust – which covers the prohibitions on anti-competitive agreements and abuse of a dominant market position – and merger control. Brexit is also likely to have a significant impact on the way in which State aid law applies in the UK.

Antitrust

In the area of antitrust, UK law is largely aligned with that of the EU. Chapter I (prohibition of anti-competitive agreements) and Chapter II (prohibition of abuse of a dominant position) of the UK's Competition Act 1998 are modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union respectively.

No substantive changes to the Chapter I and II prohibitions are anticipated following Brexit: the prohibitions of anti-competitive agreements and abusing a dominant market position are generally drafted and interpreted in a similar manner globally.

However, a significant effect of Brexit will be that companies which may have previously been investigated by the European Commission only, in respect of activity that has an effect on both the UK market and the markets of other EU Member States, could face parallel investigations by both the European Commission and the UK's Competition and Markets Authority (CMA). This

could mean that businesses under investigation could have to devote more financial and human resources to responding to investigations, and may also be liable to pay separate fines. In addition, any appeal against an investigative outcome might have to be brought before both the Court of Justice of the European Union and the UK's Competition Appeal Tribunal.

Merger Control

Mergers may be affected in a similar manner. Currently, mergers which meet the jurisdictional thresholds set out at Article 1 of the EU Merger Regulation would generally only be reviewed by the European Commission, even if the UK's jurisdictional thresholds, set out at Section 23 of the Enterprise Act 2002, are also met. Following Brexit, the CMA will have jurisdiction to review such mergers in parallel with the EU.

Whilst multi-jurisdictional filings are increasingly common, the requirement to make a filing in both the UK and the EU will increase costs for businesses, and could lead to potentially inconsistent decisions. It could also lead to delays, especially if the CMA is required to adapt to a larger case load post-Brexit.

There may also be scope for the UK to make changes to its merger control regime: Prime Minister May has suggested that the Government should be able to block more mergers on public policy grounds, especially in strategic sectors¹. If implemented, this would represent a significant change from the current depoliticised and competition-focussed system.

¹ <http://www.telegraph.co.uk/business/2017/05/27/fortress-britain-foreign-deals-face-government-crackdown>

State Aid

Following Brexit the EU State aid regime may cease to apply in the UK. However, it is likely that under any continuing free trade agreement between the UK and the EU, control of State aid by the UK Government would continue to apply in some form. In addition certain forms of subsidy of businesses by the UK Government would be prohibited by WTO rules.

Conclusion

The exit process, including any implementation or transition period, may take a significant amount of time. Businesses should familiarise themselves with the potential legal consequences of Brexit in advance to ensure that they are able to make the smoothest possible transition.

For more information, please contact:



ANTHONY WOOLICH

Partner, London

T +44 (0)20 7264 8033

E anthony.woolich@hfw.com



FELICITY BURLING

Associate, London

T +44 (0)20 7264 8057

E felicity.burling@hfw.com



JEREMY KELLY

Associate, London

T +44 (0)20 7264 8798

E jeremy.kelly@hfw.com

[hfw.com/brexit](https://www.hfw.com/brexit)

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