Merger review and anti-competitive activity if there's no Brexit deal

Summary
How merger review and investigations into anti-competitive activity would be affected if the UK leaves the EU with no deal

Detail
If the UK leaves the EU in March 2019 without a deal, find out how this would affect:

- the role of the Competition and Markets Authority
- merger review
- investigations into anti-competitive activity in the UK
- exemptions from competition law that businesses can benefit from
- claiming damages if you have been affected by anti-competitive behaviour

A scenario in which the UK leaves the EU without agreement (a ‘no deal’ scenario) remains unlikely given the mutual interests of the UK and the EU in securing a negotiated outcome.

Negotiations are progressing well and both we and the EU continue to work hard to seek a positive deal. However, it's our duty as a responsible government to prepare for all eventualities, including ‘no deal’, until we can be certain of the outcome of those negotiations.

For two years, the government has been implementing a significant programme of work to ensure the UK will be ready from day 1 in all scenarios, including a potential ‘no deal’ outcome in March 2019.

It has always been the case that as we get nearer to March 2019, preparations for a no deal scenario would have to be accelerated. Such an acceleration does not reflect an increased likelihood of a ‘no deal’ outcome. Rather it is about ensuring our plans are in place in the unlikely scenario that they need to be relied upon.

This series of technical notices sets out information to allow businesses and citizens to understand what they would need to do in a ‘no deal’ scenario, so they can make informed plans and preparations.

This guidance is part of that series.

Also included is an [overarching framing notice](https://www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/) explaining the government's overarching approach to

preparing the UK for this outcome in order to minimise disruption and ensure a smooth and orderly exit in all scenarios.

We are working with the devolved administrations on technical notices and we will continue to do so as plans develop.

In a 'no deal' scenario, the Competition and Markets Authority expects to issue guidance, where appropriate, to supplement or clarify existing guidance, with a view to helping businesses with their understanding of the transition to the post-exit UK merger control and antitrust enforcement regimes. Businesses should consult any guidance issued by the Competition and Markets Authority in addition to this notice.

Purpose

This notice sets out how merger review and investigations into anti-competitive activity would be affected if the UK leaves the EU with no deal.
If the UK leaves the EU in March 2019 without a deal, find out how this would affect:

- the role of the Competition and Markets Authority;
- merger review;
- investigations into anti-competitive activity in the UK;
- exemptions from competition law that businesses can benefit from;
- claiming damages if you have been affected by anti-competitive behaviour.

Before 29 March 2019

UK and EU competition law prohibit anti-competitive agreements and the abuse of a dominant market position. Merger control exists to prevent harmful effects to competition from mergers.

While the UK is part of the EU, mergers which meet EU turnover thresholds and many cases of anti-competitive conduct which affect the UK as part of the Single Market are investigated by the European Commission, with appeals to the Court of Justice of the European Union (CJEU). Where the European Commission does not take jurisdiction (legal authority over the case), the Competition and Markets Authority (CMA) is responsible for investigating the impact in the UK market. UK sector regulators (such as Ofcom) also have concurrent powers to investigate suspected infringements of competition law. Most appeals from Competition and Markets Authority decisions are heard by the specialist Competition Appeal Tribunal.

While the UK is part of the EU, it is possible to bring follow-on actions for private damages in UK courts for infringements of EU competition law based on decisions by the European Commission. European Commission decisions that are made

before exit will continue to have the same legal status in UK law that they have now, meaning that claimants may bring follow-on claims based on those decisions in UK courts. In addition, the CMA and UK courts are required to follow decisions of the CJEU on points of competition law and to take account of decisions of the European Commission in order to avoid inconsistent decisions.

After March 2019 if there's no deal

In the unlikely event of a 'no deal' scenario, the UK will cease to be part of the EU competition regime. The government is not proposing to make any changes to the UK competition regime beyond those necessary to manage the UK's exit from the EU.

The Competition and Markets Authority, which is a world-leading competition authority, will continue in its investigatory role for mergers and anti-competitive conduct with effects on UK markets.

The government will make necessary changes to UK law through Statutory Instruments made under the EU Withdrawal Act 2018. These will remove references to EU law and institutions, and duties on UK bodies which relate to current EU obligations. For example, powers relating to the European Commission's ability to undertake investigations of business premises in the UK will be removed; and the CMA and UK courts will no longer be bound to follow future CJEU case law.

The domestic UK competition regime will remain in place. All businesses operating in the UK will continue to have to comply with UK competition law. Anti-competitive agreements and abuses of a dominant market position that affect competition within the UK will continue to be prohibited. The Competition and Markets Authority and sectoral regulators will continue to investigate possible breaches of UK competition law.

The EU Withdrawal Act will preserve the EU block exemption regulations (which currently apply in the UK as parallel exemptions to the UK competition prohibitions). The block exemption regulations exempt certain types of agreements from competition rules where there are benefits for consumers. Any necessary modifications will be made to correct deficiencies in the exemptions, for example amounts denominated in euros will be converted and redenominated in pounds sterling. The intention is that existing agreements between companies that benefited from the parallel application of an EU exemption to the UK antitrust prohibitions prior to EU exit should continue to benefit from that exemption in the UK. Companies will also be able to benefit from the preserved block exemptions within the UK when they enter into new agreements that meet the relevant criteria after EU exit.

In a ‘no deal’ scenario, businesses should be aware that it is possible that there will be no agreement on jurisdiction over live EU merger and antitrust cases to the extent that they address effects on UK markets. Businesses subject to an ongoing antitrust investigation should take independent legal advice on how to comply with any ongoing investigation of the European Commission and/or the Competition and Markets Authority (or the relevant UK regulator).

Once the UK has left the EU, although the European Commission may investigate mergers or anti-competitive conduct within the EU Single Market, it will no longer begin investigations into the UK aspects of mergers or cases involving anti-competitive conduct in the UK. Instead, the Competition and Markets Authority and regulators with competition enforcement powers (for example, Ofcom and Ofwat) will only investigate anti-competitive conduct that affects UK markets under UK competition law. The Competition and Markets Authority will be the only authority with jurisdiction to review mergers for their effects in the UK.

In a ‘no deal’ scenario the UK will not be part of the EU Civil Judicial Cooperation regime, which governs certain aspects of claims for damages for infringements of EU competition law. The government’s technical notice on [Civil Judicial Cooperation](link to CJC notice - TBC) explains the general implications of this change.

If a decision is made by the European Commission after exit, claimants who wish to pursue private damages claims in UK courts for infringements of EU competition law will no longer be able to rely on that decision as a binding finding of an infringement in follow-on claims. Consumers and businesses will continue to be able to pursue private damages claims before UK courts based on Competition and Markets Authority decisions (or decisions by a competent sectoral regulator) under UK competition law.

Implications

The main change for businesses will be that, in some cases, mergers that currently meet the relevant EU thresholds will be reviewed by both the Competition and Markets Authority and the European Commission. The [UK’s voluntary notification regime](https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger) will remain. Similarly, after the UK exits the EU, companies may be investigated by both authorities in parallel for breaches of UK and EU antitrust rules where there are effects in both markets.

UK businesses that conduct business in the EU (or that otherwise act in a way that affects competition in the EU) will continue to be subject to EU competition law.

EU firms that conduct business in the UK will continue to be subject to UK competition law.

Competition infringement decisions of the European Commission that are made before the UK exits the EU will continue to have the same legal status as they have now, meaning that claimants may bring follow-on claims based on those decisions in UK courts.

Actions for businesses and other stakeholders

Most businesses (those not subject to an ongoing investigation or considering a merger transaction) will not need to take any action except to continue to comply as normal with the prohibitions on anti-competitive agreements and the abuse of a dominant market position that will continue to apply in the EU and the UK.

The EU merger regime continues to apply as normal until the point of exit. If businesses are considering a merger transaction in the run up to March 2019 and are in doubt as to whether parallel notification in the UK and the EU is advisable, they may want to consider early engagement with both the Competition and Markets Authority and the European Commission. Businesses that have made a merger notification but have not received clearance prior to March 2019 should approach the European Commission and the Competition and Markets Authority, who will be able to advise whether any further action is necessary to comply with the EU or UK merger control regime in the specific case.

Businesses operating in the EU that meet EU turnover thresholds for merger review will still be required to notify the European Commission for clearance as they do now, subject to the fact that the UK will no longer be part of the EU for the purposes of the application of the relevant EU thresholds.

After exit, because the EU's "one-stop shop" for mergers will no longer be in effect in the UK, businesses considering a merger that has an impact in EU and UK markets after exit will need to comply with both EU and UK merger rules.

Businesses benefiting from EU Block Exemption Regulations will wish to familiarise themselves with the modifications to the preserved block exemptions but should not be significantly affected by the changes.

The European Commission will continue to have the power under EU law to investigate UK firms if they engage in conduct that distorts competition within the EU.

EU businesses operating in the UK must comply with UK competition law as they do now.

Businesses subject to an ongoing antitrust investigation should take independent legal advice on how to comply with any ongoing investigation of the European Commission and/or the Competition and Markets Authority (or the relevant UK regulator).

Claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after exit will be able to do so on a standalone basis, as a foreign tort claim (a legal claim in the UK relating to a violation of foreign law).

In a 'no deal' scenario, if companies or consumers wish to claim damages based on infringement decisions issued by both the European Commission and the UK authorities after exit, it may be necessary to make parallel claims before the UK courts and the courts of an EU member state.

Claimants pursuing claims for damages in UK courts, based on decisions of the European Commission or member state competition authorities that are made before exit, may bring those claims in UK courts. Claimants should consider the applicability of damages claims in EU member states in the light of the government's Technical Notice on Civil Judicial Cooperation.

More information

The government's response to the House of Lords EU Internal Market sub-committee report [Brexit: Competition and State Aid](https://www.parliament.uk/brexit-competition-inquiry) provides more detail on some of the points outlined above and the broader impact of EU exit on the UK competition regime.

Additional information on the UK competition regime is available on the following websites:

The [Competition and Markets Authority](https://www.gov.uk/government/organisations/competition-and-markets-authority), which investigates possible breaches of UK competition law.

The [Competition Appeal Tribunal](http://www.catribunal.org.uk/), which hears appeals on decisions made under UK competition law.

This notice is meant for guidance only. You should consider whether you need separate professional advice before making specific preparations.

It is part of the government's ongoing programme of planning for all possible outcomes. We expect to negotiate a successful deal with the EU.