



EU, COMPETITION AND REGULATED MARKETS

The UK Publishes Second Regulation on the Implications of a No-Deal Brexit on Competition Law

by **Marco Hickey**

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On 10 September 2019, the UK published the Competition (Amendment etc.) (EU Exit) (No 2) Regulations 2019 (2019 Regulations No.2), together with an explanatory memorandum to the 2019 Regulations No.2. The 2019 Regulations No.2 were drafted for a scenario where no agreement is reached between the UK and the EU regarding the UK's exit of the EU by 31 October 2019 (Exit Day).

Background

Currently, the UK merger control and competition law enforcement regimes are integrated into an EU-wide system. The European Commission has exclusive jurisdiction to review mergers which meet the applicable EU jurisdictional thresholds under the so-called "one-stop shop" principle. It also has the jurisdiction to investigate potential competition law infringements (i.e. anti-competitive agreements – including cartels – and abuses of dominance) that impact on competition in the EU, including in the UK.

The Competition and Markets Authority (CMA) and sectoral regulators are required to apply the EU competition rules alongside the equivalent UK rules and cannot take action where the Commission has already opened a formal investigation. They are also required to apply the equivalent UK rules, so far as possible, consistently with EU case law.

As a result of leaving the EU, the UK will no longer be a part of the EU competition system. The key impacts of this on antitrust and merger control are that:

The CMA and sector regulators will no longer be empowered to investigate and enforce infringements of EU law as well as UK competition law and to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in parallel with UK law; and

The one-stop shop provided by the EU Merger Regulation (EUMR) will no longer apply such that the CMA will no longer be prohibited from investigating mergers with an EU dimension under the EUMR.

Previously, in January 2019, the UK government had adopted the Competition (Amendment etc.) (EU Exit) Regulations 2019 (2019 Regulations No.1), in exercise of the powers in the European Union (Withdrawal) Act 2018 (EUWA). The 2019 Regulations No.1 addressed failures of retained EU law (which is preserved in UK law by the EUWA) to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU in the event of a no-deal exit from the EU.

The 2019 Regulations No.1:

- Revoked from the EUWA Articles 101 and 102 of the TFEU and the EUMR (and related EU regulations and European Commission decisions);
- Proposed amendments to the Competition Act 1998 and Enterprise Act 2002 (and other primary and secondary legislation) to reflect this revocation, separate the EU and UK antitrust and merger

systems and made provision for a smooth transition to a standalone UK competition regime after exiting the EU. This included:

- Amending the Competition Act 1998 to remove provisions empowering the CMA and sector regulators to investigate and enforce EU competition law and removing provisions for reciprocal investigation cooperation;
- Introducing a new section 60A of the Competition Act 1998 to provide that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law, unless appropriate in specific circumstances; and
- Copying existing EU block exemption regulations into UK law.

The 2019 Regulations No.2 are designed to address a number of gaps in the 2019 Regulations No.1.

2019 Regulations No.2 / Competition (Amendment etc.) (EU Exit) (No.2) Regulations 2019

The 2019 Regulations No.2 will come into force in the event no agreement is reached between the UK and the EU. The 2019 Regulations No.2 focus on the issue of competition commitments, and amend the Competition Act 1998, Enterprise Act 2002 and related legislation and the savings and transitional provisions of the original 2019 Regulations No.1.

The 2019 Regulations No.2 were not subject to public consultation, but were made with informal consultation with the CMA and other sector regulators. If the 2019 Regulations No.2 are approved by the UK parliament, the CMA is expected to publish guidance on its enforcement by Exit Day.

No-deal Brexit: UK-based EU commitments

In its explanatory memorandum to the 2019 Regulations No.2, the UK government noted that it previously thought that the EU Commission would continue to monitor and enforce commitments made to it and which related to the UK if the commitments were accepted prior to the UK leaving the EU.

However, in March 2019, the Commission published guidance in relation to a no-deal Brexit scenario and the enforcement of competition law. In this guidance, the Commission indicated that after the UK's exit, the EU parties with commitments may in certain circumstances consider requesting the Commission to "waive, modify or substitute" these commitments insofar as they addressed, or only concerned, UK markets.

Accordingly, the 2019 Regulations No.2 amend the 2019 Regulations No.1 to preserve commitments that "relate to the supply or acquisition of goods or services in the UK" as retained EU law, and give the power to monitor and enforce these commitments to UK competition authorities.

The 2019 Regulations No.2 include a list of all EU merger and competition infringement commitments that include UK elements up to August 2019 (12 competition commitments and 31 merger commitments). The 2019 Regulations No.2 also include provisions for the retention of any other commitments made after 15 August 2019 and before Exit Day.

The amendments also grant powers to UK competition authorities to monitor and enforce these commitments. These powers will broadly mirror those which are available for commitments under the UK competition regime, but also focus on ensuring that the UK authorities can enforce the commitments as if it would be enforced by the Commission.

No-deal Brexit: private damages

The 2019 Regulations No.1 made changes to the provisions which apply in relation to private law damages claims for infringements of competition law after Exit Day. They provide that after Exit Day, while UK consumers and businesses will continue to be able to pursue private law follow-on damages claims based on CMA decisions, decisions made by the European Commission on or after Exit Day will no longer be binding on UK courts, nor will decisions made after exit by national competition authorities in other member States be treated as prima facie evidence of an infringement.

The 2019 Regulations No. 1 made transitional provisions for private law claims relating to domestic infringements and EU infringements, but did not expressly address the position in relation to claims which involve 'combined elements', that is, those which involve breaches of the domestic and EU prohibitions after exit day, or claims which involve behaviour which spans Exit Day.

The 2019 Regulations No.2 include minor drafting changes to the transitional provisions in the 2019 Regulations No.1. These changes clarify the applicable law and procedure to be applied in private law damages claims, which deal with breaches of both the domestic and EU prohibitions after Exit Day, or claims which involve behaviour which spans Exit Day.

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