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The Impact of Brexit on the Competition and Markets Authority (CMA)

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Abstract: This paper explores the implications of Brexit for the Competition and Markets Authority (CMA). It argues that the most pressing issue is not the future design or evolution of UK competition policy, but the particular challenges faced by the CMA in scaling up their enforcement activities to replicate the work previously undertaken by the European Commission on the UK's behalf. The possibility of the CMA also being responsible for the UK's new subsidy control regime further heightens these pressures and risks a post-Brexit weakening of competition enforcement in the UK.

Keywords: Competition Law; Brexit; State aid; Trade.

Introduction

The present paper focuses on the particular impact of Brexit on the UK's Competition and Markets Authority (CMA). It draws on research undertaken for a new book that explores the impact of Brexit on all aspects of UK competition law, including state aid or subsidy control.[2] The key change that has arisen from Brexit is that the UK is no longer part of the EU's one-stop-shop system for antitrust enforcement and merger control. With very few exceptions, EU competition law cases are *either* dealt with by the European Commission, or by a national competition authority, but not by both. Brexit means that the UK's competition laws must now apply to all anti-competitive conduct and merger situations that affect UK markets – including those previously undertaken by the European Commission on the UK's behalf. However, the immediate challenge is not the design of the rules themselves, but the practical difficulties faced by the CMA in significantly scaling up its enforcement and merger review work, while also potentially becoming the appropriate authority for the UK's new state aid regime.

This paper first explains why enforcement is a more pressing challenge than the issues relating to the present and future direction of UK competition law. It then identifies the key issues facing the CMA, which include resources, the historically low number of cases investigated by the authority and the scope for cooperation in its enforcement tasks. Finally, the paper considers the implications of the UK's obligations under the subsidy control provisions of the EU-UK Trade and Cooperation Agreement (TCA). There are compelling reasons why the CMA should be the appropriate authority responsible for overseeing the UK's new subsidy control regime, but this role is likely to compound the above-mentioned challenges.

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[2] B Rodger and A Stephan, *Brexit and Competition Law* (Taylor & Francis 2021).

Why is the impact of Brexit on the CMA of such importance?

Following the UK's decision to leave the European Union in June 2016, much of the attention of competition law scholars focused on the issue of future divergence between UK and EU rules. It is notable that, apart from certain exceptions and caveats relating to specific industries, the TCA contains very little detail on how competition laws should be designed, or any minimum requirements.[3] Neither is the relevant chapter of the agreement subject to dispute settlement, which suggests there is little to prevent the two competition law regimes from diverging over time. It is unclear to what extent post-Brexit EU case law will be instructive or persuasive in the UK. Indeed, under the new s.60A of the Competition Act 1998, the CMA and courts can depart even from pre-Brexit jurisprudence where there is good reason for doing so. The upshot of this is that the UK may forge its own paths in competition law sooner than some had imagined and there is also a strong possibility that the direction of EU competition law could change without the influence of the UK.[4]

While the future direction of UK competition law design and practice is undoubtedly important, it is not the most immediate challenge faced by the UK. Although the Competition Act 1998 and Enterprise Act 2002 reflect a competition regime that was designed to operate alongside that of the EU, the UK rules are readily adaptable to apply to all anti-competitive behaviour and merger situations that affect UK markets and consumers, following fairly minimal amendments to their wording.[5] As we are aware, despite the new s60A of the 1998 Act, the Chapter I and Chapter II prohibitions of that Act are directly modelled on Articles 101 and 102 TFEU. Moreover, the economics-based competition assessment of mergers, broadly similar to the EU regime in Regulation 139/2004,, reflects decades of international convergence in the area, helped by organisations such as the International Competition Network (ICN). It is also notable that the CMA and Office of Fair Trading (OFT) before it, had always undertaken some international enforcement work, in relation to multijurisdictional agreements and merger situations that did not have an EU dimension. The UK also had a strong set of institutions already in place, including an internationally respected competition authority in the CMA and a specialist competition court to review its decisions, in the Competition Appeals Tribunal (CAT). Indeed, before Brexit there were a number of instances of the CAT interpreting novel questions of law, albeit sometimes in a manner that was later contradicted by EU case law.[6]

Accordingly, it is clear that the UK already has a strong set of competition laws and institutions. The immediate issue is not their design or whether they will diverge from the EU over time. Rather, it is whether the CMA is up to the challenge of significantly expanding and upscaling its activities, to ensure UK markets and consumers continue to enjoy at least the levels of protection from which they benefited before Brexit. The precise design of the UK's enforcement regime is relatively insignificant

[3] EU-UK Trade and Cooperation Agreement (TCA), Chapter 2 of Title XI.

[4] See Rodger and Stephan (n 2) in particular Chapter 2, the other contributions to this special edition and also: B Lyons, D Reader and A Stephan, 'UK competition policy post-Brexit: taking back control while resisting siren calls' (2017) Journal of Antitrust Enforcement, 5(3), pp. 347-374.

[5] See Statutory Instrument, Exiting the European Union: Competition, The Competition (Amendment etc.) (EU Exit) Regulations 2019.

[6] Ian McDonald *et* al., 'Potential EU-UK competition law divergence post-Brexit highlighted by conflicting approaches of UK Competition Appeal Tribunal in recent pharma cases' (14 August 2018) Mayer Brown LLP, discussing Pfizer Inc. and Pfizer Limited v Competition and Markets Authority [2018] CAT 11; Also contrast, for example, *BetterCare Group Ltd v DGFT* [2002] CAT 7 (Case No 1006/2/1/01) with Case C-205/03 *FENIN*. Judgement of the Court (Grand Chamber) of 11 July 2006

if the CMA fails to effectively replicate the volume of UK-relevant enforcement work previously completed by the European Commission. Failure to do so could lead to a period of reduced competition in UK markets, for example because the volume of merger clearance work puts pressure on the number and completion rate of antitrust enforcement cases.

The Challenges Faced by the CMA

The principal challenges facing the CMA include resources, the speed and efficiency of case-work, and the level of international cooperation in the absence of membership of the European Competition Network (ECN).

Resources

The greatest increase in the CMA's workload is likely to be in relation to merger control. The authority estimated that accommodating merger work previously undertaken by the European Commission on the UK's behalf, would likely result in between 30-50 additional phase 1 mergers per year and around 6 additional phase 2 cases. This will represent around a 60-87% increase in its workload.[7] It also suggested that the new workload would involve mergers that were 'typically of a greater size and… greater complexity and/or involve greater international cooperation' than many of the mergers reviewed by the CMA as an EU Member State.[8] Apart from the demands this places on resources and CMA staff, it is notable that the UK and EU regimes operate under different timelines and procedures. This means that the CMA will not necessarily be able to deal with these cases as quickly as the European Commission might otherwise have done.

Although in most competition law systems the number of mergers falling for review is considerably greater than antitrust enforcement cases, the latter are far less predictable and can be significantly more resource intensive, given their punitive nature and the fact cooperation is not always forthcoming from the businesses under investigation. The last decade has seen a drop in EU cartel enforcement, following waves of related cases in industries such as chemicals, banking and car parts that were helped along by the European Commission's leniency notice and latterly its settlement notice. Meanwhile, dominance cases have always been relatively infrequent, but have recently taken a new focus in relation to the competition practices of big tech.[9] It is notable that one of the first cases to be opened by the CMA following the end of the Brexit transition period concerned Google's proposed removal of third-party cookies from its Chrome browser.[10] Furthermore, in March 2019 HM Treasury published an independent report on digital competition – 'The Furman Report'.[11] In

[7] Written evidence from the Competition and Markets Authority (CMP0002), reported in House of Lords European Union Committee, *Brexit: competition and State aid.* 12th Report of Session 2017-19 (2 February 2018) HL Paper 67, Para 31.

[8] Ibid.

[9] See for example: V.H.S.E Robertson, 'Excessive data collection: Privacy considerations and abuse of dominance in the era of big tech' (2020) Common Market Law Review 57(1), pp. 161-190; T Wu, *The Curse of BignessL How Corporate Giants Came to Rule the World* (Atlantic Books 2020); N Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (OUP 2020);

[10] CMA Press Release, 'CMA to investigate Google's 'Privacy Sandbox' browser changes' (8 January 2021).

[11] Digital Competition Expert Panel, 'Unlocking digital competition' (Independent report, HM Treasury 2019).

implementing one of the report's key recommendations, in November 2020, the UK government announced the creation of a new Digital Markets Unit (DMU) within the CMA.[12]

The increase in the number of antitrust cases is hard to predict given year on year variances and the fact any competition authority has a significant amount of discretion as to which cases it investigates. ECN data suggests that for the period 2004-2019, the CMA/OFT opened 115 investigations and delivered 41 decisions, compared to figures of 399 investigations and 118 decisions by the European Commission.[13] If we assume that two thirds of EU cases affect UK markets in some way, that suggests a potential threefold increase in the CMA's antitrust workload just to maintain the level of enforcement which UK markets enjoyed while the UK was still an EU Member State. There is a concern that the CMA will feel compelled to prioritise larger international infringements over local ones – as these are the more damaging and the more obvious indicator of how the CMA is fairing as compared to the European Commission – with any consequent weakening in enforcement likely to be in relation to smaller scale infringements within particular localities of the UK.

This challenge is compounded by how the immediate pressure on CMA resources is likely to lie in the operation of the UK merger control regime, despite the voluntary notification system currently at its core. The danger is that in order to stay on top of its mandatory tasks in merger clearance work which cannot be avoided, the CMA will be forced to divert resources from its antitrust enforcement activities. This would be very damaging from a deterrence perspective but would also result in a significant loss of income for HM Treasury in the form of antitrust fines. In cartel cases alone, the European Commission has collected nearly €30 billion in fines since 1990.[14] These have been paid into the EU budget and so benefit public money across the Member States. A significant portion of these fines are attributable to anti-competitive behaviour affecting the UK. As well as benefiting the public purse, they are the principal tool for achieving deterrence and encouraging compliance with competition rules. It is therefore important that an equivalent level of enforcement be maintained, and that enforcement resources are not simply diverted to the CMA's non-discretionary mergers workload.

In order to be ready for this increase in workload and ensure there is no weakening in enforcement, the UK government increased the CMA's budget by £20m, to around £90m per annum and increased its staff from 640 in March of 2018 to around 844 in 2020.[15] In that same year, an additional £16m was spent on their new London headquarters in Canary Wharf[16] and it was announced that it would receive additional funding for the new DMU unit.[17] It remains to be seen whether this increase will be sufficient.

Throughput of cases

[12] HM Government Press Release, 'New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated' (27 November 2020)

[13] European Competition Network Statistics (1 May 2004 – 31 December 2019). Available: https://ec.europa.eu/competition/ecn/statistics.html#2 [accessed 9 March 2020].

[14] Source: European Commission, 'Cartel Statistics' <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 24 August 2020.

[15] CMA, *Annual Report and Accounts 2019 to 2020* (14 July 2020); See also: B Lyons, 'Unfinished Reform of the Institutions Enforcing UK competition Law' in B Rodger, P.Whelan and A MacCulloch (eds), *The UK Competition Law Regime: A Twenty Year Retrospective* (OUP 2021).

[16] CMA, *Annual Report and Accounts 2019 to 2020* (14 July 2020).

[17] HM Treasury Policy Paper, *Spending Review 2020* (15 December 2020) at 7.43.

While the UK is generally lauded for having an effective merger regulation regime, its performance when it comes antitrust has been subject to some criticism – especially in terms of the number of cases it has completed, as reflected in the potential increase in antitrust workload discussed earlier in this paper.[18] A 2010 National Audit Office (NAO) Report noted that the OFT had delivered 20 decisions relating to anti-competitive agreements and only 4 relating to abuse of dominance.[19] A second NAO report in 2016 noted:-

> The low case-flow we identified in 2010 has continued, with the Office of Fair Trading and CMA making 24 decisions and the regulators just eight since 2010. The UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014, compared to almost £1.4 billion of fines imposed by their German counterparts.[20]

It proceeded to compare the UK's performance further with that of Germany and France and noted that the level of fines imposed in the UK were also lower than in Italy, Spain and the Netherlands, despite having a larger economy than those three Member States.

Comparisons between the UK and EU Member States should be interpreted with some caution. There are differences in how decisions are delivered (for example in whether there is a separate decision for each undertaking). Moreover, the number of cases completed and fines imposed actually gives us limited information about the level of compliance with the law in a given jurisdiction. For example, it could be that the CMA and OFT's efforts to engage in advocacy and promote compliance has led to businesses avoiding anti-competitive behaviour in the first place. It is also worth noting that a lower proportion of UK cartel decisions have relied on leniency applicants, as compared to the European Commission and some other Member States.[21]

Nevertheless, the significantly enhanced international dimension to the CMA's work could prove very challenging at first in terms of experience and expertise. The previously low throughput of cases will undoubtedly make the anticipated increase in enforcement case numbers more challenging. Indeed, like international merger reviews, larger global antitrust cases will be of greater complexity and may rely heavily on cooperation with other jurisdictions. Lyons raises a further issue, which is that the CMA will find it harder to deflect pressure from government departments and from businesses.[22] The European Commission provided some helpful distance, in this respect between the CMA and the most contentious cases. The CMA's task may be facilitated by the fact it has developed a more structured settlement procedure for antitrust cases in recent years, which has shown significant uptake and some evidence of more efficient case management.[23]

<u>Cooperation</u>

[18] See B Rodger, 'Application of the EU and domestic antitrust prohibitions: an analysis of the UK competition authority's enforcement practice' (2020) 8(1) JAE 86- 131.
[19] National Audit Office, *Review of the UK's Competition Landscape* (22 March 2010)
[20] National Audit Office, *The UK competition regime* (3 February 2016) at 15
[21] See A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing).
[22] Lyons (n 15), p29.
[23] See A Stephan, 'UK Country Report' in Tihamér Tóth (ed.), *The Cambridge Handbook of Competition Law Sanctions* (Cambridge University Press, forthcoming, 2021). Although cf Rodger, (2020) JAE supra showing evidence of a fall-off in settlements in the more recent period of enforcement in relation to the Chapter I prohibition.

While the CMA is already a well-respected competition agency internationally, Brexit requires the authority to reconsider its approach to cooperation with the European Commission and National Competition Authorities (NCAs), as a third country agency. It must also strengthen co-operation agreements to assist it in dealing with its future international case-work. Regulation 1/2003 makes legal provision for co-ordination and sharing of information between the Commission and respective Member State NCAs. The CMA suggested it would be "very inefficient" if in future the UK and EU could not share confidential information when investigating the same anti-competitive conduct.[24] This is a reference to the type of information that was previously freely available to the CMA, and indeed all EU NCAs, through the European Competition Network (ECN).[25] Yet the TCA details cooperation in relation to competition enforcement between the European Commission and the CMA in general terms only, and there is no special associate membership of the ECN for the CMA.[26] The language is very similar to other trade agreements, in that each party shall "endeavour to cooperate and coordinate" in relation to enforcement.[27] Unfortunately, despite the range of different types of competition authority co-operation agreements worldwide, there is no precedent for emulating the level of information exchange facilitated by the ECN, between the competition authorities of two independent jurisdictions. [28] Even the bilateral cooperation agreement between the European Commission and the Swiss Authority for example, which one would expect to be very far-reaching due to the special status of Switzerland's relationship with the EU as a member of EFTA, has considerable limitations as to both the type of information that can be exchanged and how it can be used.[29]

The exchange of confidential information is curtailed by the protections that exist in domestic law, but more importantly by the impact that exchange might have on enforcement. In the context of merger control, information exchange is more straightforward because it is a consensual process in which all those involved want to achieve a resolution – ideally a merger clearance. It is also an ex-ante process whose function, crucially, is not to determine whether there has been an ex-post infringement of the law that could result in corporate fines and follow-on actions for damages. By contrast, the stakes in antitrust enforcement are very high and competition authorities are particularly guarded about sharing confidential information that may have been gathered through a leniency programme or settlement procedure. Providing wider access to leniency documentation submitted by businesses would potentially undermine these tools, by discouraging firms from coming forward to report cartels or making it less likely that firms will opt for a streamlined procedure that reduces the scope for costly appeals. The exchange of leniency information can occur within the EU's ECN because the

[24] Written evidence from the Competition and Markets Authority (CMP0002) reported in House of Lords European Union Committee, *Brexit: competition and State aid.* 12th Report of Session 2017-19 (2 February 2018) HL Paper 67, Para 151.

[25] A Andreangeli, 'EU Competition Law Put to the Brexit Test: What Impact Might the Exit of the UK from the Union Have on the Enforcement of the Competition Rules' (2018) Yearbook of Antitrust and Regulatory Studies, 17, 7-28., part 3

[26] TCA (n **Error! Bookmark not defined.**) Article 2.4 of Title XI; See also European Commission, *Draft text of the Agreement on the New Partnership with the United Kingdom* (18 March 2020), UKTF (2020) 14, Chapter 2 at 2.16.

[27] Ibid, Article 2.4(3).

[28] Written evidence of the Centre for Law Economics and Society at UCL (CMP0032) reported in House of Lords European Union Committee, *Brexit: competition and State aid.* 12th Report of Session 2017-19 (2 February 2018) HL Paper 67, Para 156.

[29] Written evidence by Dr Andrea Coscelli, reported in House of Lords European Union Committee, *Brexit: competition and state aid.* 12th Report of Session 2017-19 (2 February 2018) HL Paper 67, Para 156

infringement can only be investigated by one EU authority, in a context where leniency applications may have been submitted to multiple authorities, including the Commission.[30] Moreover, sharing confidential information between independent jurisdictions increases the likelihood of multiple investigations and higher fines, as well as damages actions and the possible prospect of criminal prosecutions. For these reasons, the continued exchange of confidential information between the CMA and the European Commission may be rather limited. The CMA can expect a level of cooperation with its EU counterparts that is more typical of bilateral arrangements between competition authorities of independent jurisdictions, and therefore inferior to what existed before. Inevitably, this will make its international enforcement tasks more complicated, resource-intensive and time-consuming.

The role of the CMA in the UK's new subsidy control regime

State aid proved to be one of the most contentious issues in the future trading relationship negotiations. The EU wanted the UK to remain within the sphere of its state aid regime, establishing its own authority, but retaining the ability to request preliminary rulings from the Court of Justice of the European Union (CJEU) and continuing to follow its jurisprudence.[31] This broadly followed a model used in trade agreements with states to the East of the EU, who ultimately have ambitions for accession into the bloc.[32] The EU was particularly wary not to replicate the static subsidy control arrangements it had entered into with Switzerland.[33] The UK, on the other hand wanted minimal subsidy control provisions that were broadly in line with WTO rules and the EU's free trade agreement with Canada.[34] The TCA represented a significant compromise by both sides.[35] The UK is not bound by EU State aid rules and is not under the jurisdiction of the CJEU, except in relation to goods affecting trade between the EU and Northern Ireland.[36] Moreover, the trade term *subsidy control* was employed – not the more EU Law-related term, *state aid*. Neither is the UK obliged to replicate the EU's system of ex ante notification and clearance of subsidies. Instead, it must apply a set of principles that closely mirror EU State aid rule practice, establish an independent authority with an 'appropriate role' and publish outline details of subsidies on an official website, alongside a justification in terms of key principles. The UK and EU can request to intervene in each other's proceedings as a third party. A Specialised Committee on the Level Playing Field will be available to help resolve disputes informally. However, if either side still feels aggrieved, they may unilaterally and rapidly take remedial measures

[30] F Wagner-von Papp, 'Competition Law in EU Free Trade and Cooperation Agreements (And What the UK Can Expect After Brexit)' European Yearbook of International Economic Law 2017, pp. 301-359 at 352-3.
[31] European Commission, Draft text of the Agreement on the New Partnership with the United Kingdom. 18 March 2020. UKTF (2020) 14. Available: https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf (accessed 15 August 2020).
[32] See E Szyszczak, 'A Uk Brexit Transition: To the Ukraine Model?' (November 2017) UK Trade Policy Observatory, Briefing Paper 11.
[33] M Segura *et al.,* 'Brexit, the EEA and the EU State aid Rules' (2019) European State aid Law Quarterly 1, 3-14, p7; G Peretz, 'A Star Is Torn: Brexit and State aid' (2016) European State aid Law Quarterly 3, 334-337
[34] HM Government, DRAFT UK-EU Comprehensive Free Trade Agreement (CFTA). 27 Feb 2020. Available: https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu (accessed 15 August 2020); Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Inion and its Member States (30 October 2016), OJ [2017] L 11/23.
[35] TCA, Chapter 3 of Title XI
[36] Northern Ireland enjoys a special status in order to avoid the need for a hard border with the EU on the Island of Ireland. See Protocol on Ireland / Northern Ireland (2019), Article 10.

(e.g. impose tariffs) in advance of a binding arbitration tribunal responsible for the overall enforcement of the TCA.

The question of whether the UK should adopt a domestic system of subsidy control, and who should administer it, was entirely unresolved when the TCA was agreed. Some within the Johnson government called for there to be no independent regulator and for subsidy control to instead be subject to a light-touch regime.[37] This may have been motivated by a misunderstanding of the State aid rules, or part of a negotiating strategy, or may have represented a genuine intention to move industrial policy into a new era of significant state assistance. There may also have been a desire to adopt an aggressive business taxation strategy, in order to undercut the EU and attract foreign investment.[38]

In light of the TCA, the UK government launched a public consultation in February 2021 on what shape the UK's new subsidy control regime should take.[39] This clarified that there would be no going back to 'picking winners' or other failed industrial strategies of the past. Instead, the focus would be on creating a flexible regime that allowed UK subsidies to be focused on important strategic goals, such as levelling up between regions, encouraging innovation and the transition to a net zero economy. The system would not replicate the EU's ex ante notification system and would instead focus on reporting, monitoring, review by the courts and possible enforcement by the relevant authority. The TCA requires the UK to establish an 'operationally independent authority' that has an 'appropriate role' in its subsidy control regime.[40] The consultation left open the question of what form this authority should take and what powers of enforcement it should be given. It identified the CMA as an existing authority that could fulfil this role, but also hinted that 'it may be the case that different elements of the regime are ultimately overseen by a combination of bodies…'.[41] It is interesting to note that before the TCA was reached, there was considerable confusion over whether the CMA would be responsible for any post-Brexit subsidy control regime and whether there would be an authority at all, much to the confusion of the House of Lords EU Internal Market Sub-Committee, who could not get the government to clarify its position in April 2020.[42] Nonetheless, it was clear that an independent authority would be an essential element of any compromise on state aid. [43]

[37] 'Cummings leads push for light-touch UK state-aid regime after Brexit' Financial Times, 28 July 2020; See also Department for Business, Energy & Industrial Strategy, *UK Internal Market* (July 2020) CP278, paras 55-6. ; See also comments by a former Cabinet Member under the May Government: D Gauke, 'Without a proper State aid regime, the UK is unlikely to reach a deal with Brussels' Conservative Home. 1 August 2020. For a discussion of some of the potential benefits of no State aid restrictions within the UK, see generally: A Weinberger, 'State aid Regulations after Brexit: A good deal for the UK?' in J Hillman and G Horlick (eds.), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* (Institute of International Economic Law: Washington DC, 2017),pp. 88-100.

[38] S Hirsbrunner, 'How to Please Your Sweethearts When You Are Divorcing: The UK Government's Ability to Offer Incentives to Foreign Investors After Brexit' (2016) European State aid Quarterly, 4, 504-507.

[39] Department for Business, Energy & Industrial Strategy, *Subsidy control: designing a new approach for the UK* (3 February 2021).

[40] TCA, Article 3.9(1)

[41] BEIS Subsidy Control Consultation (n 39) at 118.

[42] See letter of 3 April 2020 from Baroness Donaghy, Chair of the EU Internal Market Sub-Committee, to Paul Scully MP, Minister for Small Business, Consumers and Labour Markets.

[43] European Commission, *Draft text of the Agreement on the New Partnership with the United Kingdom* (18 March 2020), UKTF (2020) 14, at 2.4.

There are compelling reasons for having a strong independent authority overseeing the UK's new subsidy control regime. It will allow for swift interventions to prevent damaging subsidies that would otherwise depend solely on costly legal challenges in the courts. It will also provide an effective way for public authorities to seek advice when it comes to high-risk subsidies, thereby helping to limit the danger of a chilling effect on spending decisions that are genuinely beneficial to the economy. It is worth noting that the UK has historically under-utilised subsidies and was a net beneficiary of EU state aid rules, as a Member State.[44]

There are also compelling reasons for the independent authority to be the CMA. High risk subsidies must be assessed through a balancing exercise that requires detailed expertise and knowledge of the impact on competition and trade. This clearly has overlaps with the CMA's existing skills set and sits well alongside their competition policy and consumer law portfolios. The CMA is also already very well versed in undertaking advocacy exercises among government departments and regional public bodies and they now have regional offices in Edinburgh, Cardiff and Belfast.[45] The other significant benefit of appointing the CMA as the relevant authority, is that they already have a great working relationship with the European Commission through their former role as a national competition authority within the EU. This will be crucial in ensuring a good level of ongoing cooperation to avoid possible trade disputes arising out of subsidy decisions by either the UK or the EU. It will also be important to the Northern Ireland Protocol, under which goods (and electricity) traded between Northern Ireland and the EU are still subject to EU state aid rules.[46] It is still unclear how this will be restricted just to subsidy decisions affecting Northern Ireland. It could be that public spending aimed at Great Britain is said to have some effect on trade between NI and the EU. It could also be that spending decisions that affect services have some effect on trade of goods in Northern Ireland (for example, in relation to banking or transport).[47] Close cooperation will limit the danger of the European Commission taking action in a manner that is seen as applying EU state aid rules to all of the UK, using the protocol as a backdoor.

However, there are also reasons why there might be reluctance within the CMA and the Department for Business, to give the authority a significant role in subsidy control. The first is that the challenges presently facing the CMA in relation to scaling up antitrust enforcement and merger control are already extremely challenging, as discussed earlier in this paper. Successfully meeting that challenge whilst also taking on a significant new portfolio may be unrealistic. It may also be that further expansion in resources and staffing are not forthcoming in light of the enormous economic cost of the Covid-19 crisis. Indeed, the CMA's 2020 Annual Report appears to suggest that preparations for any potential new subsidy control role were drawn from existing resources.[48] The second is that responsibility for state aid may be viewed as somewhat of a poisoned chalice, given the present UK government's hostility towards judicial and other independent challenges to its decision making. A strong independent authority is actually beneficial to government, as it makes it easier for them to rebuff lobbying efforts and political pressures that can result in 'irrational' subsidies being conceded.

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[44] House of Lords European Union Committee, *Brexit: competition and state aid.* 12th Report of Session 2017-19 (2 February 2018) HL Paper 67, Chapter 6, Figure 1.

[45] CMA Press Release, *CMA announces new appointments in Scotland, Wales and Northern Ireland* (7 May 2014)

[46] Revised Protocol to the Withdrawal Agreement (New Protocol on Ireland / Northern Ireland) (17 October 2019), Article 10

[47] See written evidence submitted by George Peretz QC to the Committee on the Future Relationship with the European Union (June 2020); European Commission, *Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of State aid,* (18 January 2021).

[48] CMA, *Annual Report and Accounts 2019 to 2020* (14 July 2020).

It is also helpful in ensuring companies do not spark costly subsidy wars between cities and devolved regions, or create other significant distortions of trade between different parts of the UK. This does not mean that subsidies aimed at levelling up or encouraging innovation are not possible. Yet it also easy to imagine a collision course between the independent authority and government – for example where assistance is granted to particular companies to mitigate the costs of Brexit.[49]

Conclusion

Brexit marks a pivotal moment in the CMA's history. The political decision to leave the EU has catapulted it from an EU national competition authority largely focused on domestic enforcement, to potentially one of the most important competition authorities internationally. Its ability to meet this challenge is far more important and pressing than questions of whether UK and EU competition law will diverge over time, or the institutional and substantive design of the UK regime, which is already well-suited to international enforcement. The CMA has already begun to forge its own way in regulating and taking enforcement action against big tech companies and is likely to receive significant volumes of leniency applications in connection with cartel enforcement, given the size and nature of UK markets. This paper has identified the considerable challenges the CMA faces in successfully undertaking this new enhanced role. There are particular concerns about whether it will be able to upscale its enforcement activities, given its comparatively low throughput of cases in the past. There is also a danger that competition enforcement could be weakened as resources are focused on the significantly higher volume of merger clearance cases – especially given the loss in cooperation with EU authorities and the more general challenges of investigating conduct that has occurred largely outside the UK. The responsibility on the CMA to ensure there is no weakening in competition policy that could harm UK markets and consumers is significant. There remains continued uncertainty over whether the CMA should also act as the independent authority for the UK's new subsidy control regime and what enforcement powers it might enjoy. There are compelling reasons why this role naturally sits alongside the CMA's tasks in competition policy and consumer law. Nonetheless, undertaking this significant additional portfolio on top of the challenge of upscaling its existing activities, may prove to be the straw that breaks the camel's back. The additional pressure of regulating a subsidy control regime could spread the CMA resources too thinly and ultimately result in a damaging weakening of competition enforcement overall in the UK post-Brexit.

[49] See for example, 'Nissan was offered secret state aid to cope with Brexit, minister concedes' *The Guardian* (4 Feb 2019)