

# UK Competition Policy Post-Brexit: Taking back control while resisting siren calls<sup>†</sup>

Bruce Lyons, David Reader and Andreas Stephan

**KEYWORDS:** Brexit, antitrust, merger control, state aid, public interest, industrial policy.

## BACKGROUND

- The UK Government has triggered the formal process of withdrawing the UK from the European Union. This is likely to result in the UK leaving the Single Market, ending both free movement (of goods, capital, services and labour) and the supremacy of EU law - a 'hard Brexit' outcome.
- Post-Brexit, the UK competition regime will no longer be bound by EU Law, creating new freedoms for the UK to shape its competition policy independent of the EU.
- In particular, the UK will have greater freedom to: (i) employ public interest interventions in merger review, (ii) protect and promote UK industries with state aid interventions, and (iii) decide its own path for antitrust enforcement (e.g. by fully criminalising the cartel enforcement regime).
- While the UK may derive short-term benefits from exercising these new freedoms, they may well give rise to adverse effects in the long-term, including damage to competition.

## METHODOLOGY

- The paper focuses on three dimensions of UK competition policy (merger control, state aid and antitrust enforcement) that appear particularly prone to a 'change of approach' in the aftermath of Brexit.
- The authors draw on historical sources and recent developments to analyse the evolution of these three dimensions from both law and economics perspectives. The analysis provides a basis to consider the potential effects that exercising the new freedoms could have and whether any new legislation is desirable.

## KEY FINDINGS

- Making substantial changes to UK competition policy in the aftermath of Brexit risks undermining the high degree of predictability and transparency that the existing regime offers to businesses and potential investors.
- In merger control, an increase in public interest interventions could prompt a return to the uncertainties of the UK's former regime. A particular risk is that beneficial foreign investment will be deterred as well as 'unwanted' foreign investment.
- In state aid, attempts to promote or protect UK industry will probably constrain, and be constrained by, future trade agreements, particularly with the EU. By adopting an interventionist/protectionist stance, the UK would leave itself exposed to reciprocal behaviour by other countries, thereby disadvantaging UK businesses.
- Of the three dimensions we examine, UK antitrust enforcement has the greatest scope for divergence from the EU, but immediate changes would create regulatory uncertainty for businesses and instability for the CMA.

<sup>†</sup> This policy briefing is based on CCP Working Paper 16-12, 'UK Competition Policy Post-Brexit: In the Public Interest?' (2016), available at: <http://competitionpolicy.ac.uk/publications/working-papers>. It has been revised and is published as: Bruce Lyons, David Reader and Andreas Stephan, 'UK Competition Policy Post-Brexit: Taking back control while resisting siren calls', Journal of Antitrust Enforcement (forthcoming).

**W:** [www.competitionpolicy.ac.uk](http://www.competitionpolicy.ac.uk)

**T:** +44 (0)1603 593715

**A:** UEA, Norwich, NR4 7TJ

- New legislative safeguards may be necessary to limit undesirable side-effects of taking back control of competition and industrial policy.
- There will also be substantial resource implications. First, the UK will lose its share of EU cartel fines. Second, it is estimated that Brexit will at least double the CMA's workload with ensuing ramifications for the CAT. Without a very substantial increase in CMA resourcing, there will be a reduction in the quality of analysis in individual cases and/or in the number of cases considered.

## POLICY ISSUES

- As a priority, the CMA should be allocated sufficient funds to manage the significantly increased workload that will accompany the UK's withdrawal from the EU.
- A continued commitment to the current competition regime would: (i) mitigate some of the uncertainties surrounding the UK's future relationship with the EU, and (ii) improve the likelihood of more open trade agreements.
- There is a rational basis for repealing the ministerial power to propose new public interest grounds in lieu of primary legislation (s.58(3) Enterprise Act 2002), in order to avoid the risk of a post-Brexit influx of new public interest grounds in UK merger control.
- 'Self-restraining' legislation, which restricts the circumstances where state aid can be granted (e.g. to where it is clearly justifiable), may be required to ensure good trade relations and political discipline.
- While it may be beneficial for the UK to move towards a fully criminalised cartel enforcement regime in the long-term, the short-term requires UK antitrust enforcement to remain broadly aligned to EU rules and case law (thereby delivering much-needed continuity and certainty for businesses).

## SUGGESTED CITATION

Lyons B, Reader D and Stephan A, 'UK Competition Policy Post-Brexit: Taking back control while resisting siren calls', *Journal of Antitrust Enforcement* (forthcoming).

## THE CCP

The Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

## FOR MORE INFORMATION

More information about CCP and its research is available from our website:  
[www.competitionpolicy.ac.uk](http://www.competitionpolicy.ac.uk)

## ABOUT THE AUTHORS

- Bruce Lyons is a Professor of Economics at the UEA School of Economics and a member of the Centre for Competition Policy.
- David Reader is a Senior Research Associate (specialising in Law) at the Centre for Competition Policy.
- Andreas Stephan is a Professor of Competition Law at the UEA Law School and a member of the Centre for Competition Policy.

W: [www.competitionpolicy.ac.uk](http://www.competitionpolicy.ac.uk)

T: +44 (0)1603 593715

A: UEA, Norwich, NR4 7TJ