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Coordination Across the Channel: The EU and UK Conclude Technical Negotiations on a Competition Cooperation Agreement

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The UK's withdrawal from the European Union put European competition policy in a somewhat awkward state. The schism left EU and UK competition law as geographical neighbours and almost identical twins in both legal form and substance, yet worlds apart in terms of their ability to coordinate. Prior to Brexit, and as the competition authority of an EU Member State, the UK's Competition and Markets Authority (CMA) was a member of the European Competition Network (ECN). As such, it was institutionally and legally embedded within the competition law enforcement efforts across the whole continent. That included being kept abreast of investigations launched by other National Competition Authorities (NCAs), coordinating and information sharing on investigations, as well as participating in discussions on issues of common interest.

Today, that is no-longer the case. As the NCA of a third country, the CMA is no-longer a member of the ECN, and has limited abilities to cooperate with either the Commission or NCAs on competition investigations. As a result, we have already started to see missteps in the previously harmonious dance of competition policy among European member states, perhaps most notably when the CMA and the Commission reached different conclusions when it came to deciding whether to let Microsoft buy Activision. Thankfully, it is common practice for the EU to sign competition cooperation agreements with third countries as to avoid situations where peer authorities end up treading on each other's toes in investigations with a supranational scope; the EU already has agreements with the US, Canada, Japan, South Korea and Switzerland. In fact, data from the OECD shows an increase in bilateral cooperation agreements between competition agencies. Collusion might be illegal for firms, but it's certainly not for competition authorities (at least, with a cooperation agreement)!

In that context, in October 2024, the EU and the UK concluded technical negotiations on their own bilateral Cooperation Agreement (EU press release, UK press release), which should enter into force in 2025, after ratification by EU and UK institutions. Such an Agreement would put cooperation between the CMA and EU Authorities on a footing more like it was pre-Brexit. Given that, it's tempting to dismiss the current Agreement as relatively inconsequential; the end to a momentary lack of coordination in competition policy.

We disagree for two reasons. First, the Agreement is of utmost importance because of the importance of coordination between competition authorities, especially since the CMA, no-longer

subordinate to the Commission in the hierarchy of EU competition law, has had to become a qualitatively different organisation with an expanded scope post-Brexit. Second, the competition policy landscape of 2024 is vastly different from that of the pre-Brexit world. Among other changes, the geopolitical context in which competition policy occurs has also changed massively, especially in light of the recent re-election of US President Donald Trump. Coordination between competition authorities, especially in Europe, is as important as ever.

Cooperation where it Counts

Brexit has meant that the CMA has expanded its competence to include tasks previously undertaken by the EU Commission when the UK was an EU member state. This includes reviewing mergers which would previously be reviewed by the Commission under the EUMR's "one stop shop" approach, as well as a responsibility for investigating breaches of competition law which would previously have been handled by the Commission. In short, Brexit meant that some investigations must happen in both jurisdictions at once, whereas before, they would have been only undertaken by either the Commission or the CMA.

The possibility of multiple competition authorities investigating the same subject matter is not new. Multinational corporations often come under scrutiny in several jurisdictions at once. Yet, if these investigations reach different conclusions, it can cause major headaches for both the competition authorities and the firms involved. It is legitimate for different competition authorities to reach different conclusions, for instance, if their competition laws dictate different outcomes for the same set of facts or given the inherent openness of competition law. However, cooperation agreements are nevertheless vital to minimise *accidental* disharmony, as well as to ensure that if there is reasonable disagreement, then it can be managed appropriately.

The recent Microsoft/Activision merger serves as a prime example of the difficulties which can arise from the lack of coordination between competition authorities. In April of 2023, CMA blocked the merger after its phase 2 investigation concluded, only for the Commission to approve the same deal around a month later, subject to conditions. That particular conundrum was resolved by a restructured merger deal put forward by Microsoft (essentially the same as the original but with the rights to stream Activision's games on the cloud outside of the EEA being sold to Activision's competitor Ubisoft). In September of 2023, the restructured deal was subsequently approved at the phase 1 stage in a separate review by the CMA, bringing the UK authority back in line with its EU counterpart. Despite the relatively minor changes to the merger, the CMA did not give much reasoning for why the restructured deal was permitted, yet the original one was blocked. While we will not comment on the merits of the case here, we do note that the CMA's about-face was perhaps not as graceful as it could have been.

While the Microsoft/Activision saga is now over, and it remains to be seen what the longer-term effect of the merger on competition will be, it could likely have been avoided entirely if a cooperation agreement existed between the UK and EU competition authorities. The episode therefore highlights the importance of cooperation between competition authorities. The proposed Cooperation Agreement reportedly does not allow EU and UK authorities to share sensitive commercial information with each other without consent from the parties involved, but it does allow them to coordinate on essentially everything else about competition investigations. This includes which cases are being run and the strategy that the authority is pursuing for the case. We

think that in terms of harmonising their approach to enforcing competition law, these aspects are most important since commercially sensitive information used to justify decisions can always be acquired by the Authorities when they know what to look for (as laid out in Articles 18 to 21 of Regulation 1/2003 and Chapter III of the Competition Act 1998 respectively), even if it cannot be shared explicitly as we will discuss below.

Geopolitical Concerns

The Agreement, and cooperation between European competition authorities, is all the more important given current geopolitical events. Not only are multinational firms becoming ever more powerful, and ever harder to keep in check with the competition laws, but the recent re-election of US President Donald Trump also leaves us with uncertainty regarding the future direction of the US antitrust policy and enforcement. The EU has already shown some concern regarding the dominance of US firms on the continent; cooperation between the CMA and the EU Commission may serve as a means to help address these issues. Working on their own, NCAs, including the CMA, may lack the geopolitical clout to aggressively enforce the competition laws vis-à-vis big businesses headquartered on other continents. Coordinating in terms of approach, assessment, and perhaps decisions, may render enforcement against such undertakings more successful, as it could reduce the chance of conflicting decisions, and create stronger, unified policy statements.

Posing a united front should not be difficult for the EU and UK competition agencies, since their competition regimes are much alike. The polycentric policy goals and normative assumptions of the EU and UK competition regimes overlap in many aspects, largely due to their intertwined origins. The current approaches to competition law in the two jurisdictions are also largely similar. Both authorities have also shown an increased integration of environmental considerations in their decisions, as a matter of policy. The Draghi report highlights this, as does the CMA's Areas of focus for 2024 to 2025. Both have shown an increased focus on digital markets, with the EU enacting the Digital Markets Act and the UK recently passing the Digital Markets, Competition, and Consumers Act (although it remains to be seen if the Agreement will also cover sector-specific competition regulation). The two agencies have recently carried out investigations in the sector. As mentioned above, investigations have often concerned the same market player, such as Amazon (the initial UK press release mentioned that the CMA would 'seek to liaise' with the EU Commission, but this was not mentioned in the UK or EU's decisions to impose commitments), Meta (in which case the UK imposed commitments and the EU a fine), and Apple (the UK closed the case for reasons relating to prioritisation, and the EU applied commitments on the undertaking).

In terms of industrial policy – an ever more important concern – both jurisdictions have an ambition to grow their digital sectors and make them more competitive globally: the 2024 Draghi report on the future of EU competitiveness mentions this point on several occasions, as does the UK's recent "Invest 2035: The UK's Modern Industrial Strategy" report. In fact, the Draghi report and a speech by CMA CEO Sarah Cardell responding to the Invest 2035 report make it clear that both agencies may in the future play a more active role in supporting wider industrial policy goals, specifically by increasing the use of behavioural remedies in mergers. Cooperation in the area of merger control may be especially beneficial; the EU and the UK have carried out parallel investigations of 11 mergers since Brexit, five ending with divergent outcomes. While a cooperation agreement does not entail a complete harmonisation of competition policy across the Channel – nor is such result necessarily a positive outcome – it would increase the number of

stronger, unified decisions, which could support the goals pursued by both jurisdictions.

Aside from avoiding conflicting approaches, coordination can also help agencies optimise their approach to enforcement, as outlined in the OECD 2014 Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings. Even without the power to share confidential information, sharing theories of harm would save on agency resources in terms of time and staff members allocated to a single case. Of course, the agencies could still potentially share confidential information if parties to an investigation sign waivers allowing the agencies to do so. Previous examples of agency cooperation have indeed resulted in faster, more coordinated decisions. For example, cooperation between the Australian ACCC and Pakistan's CCP (regarding the acquisition of Pfizer Nutrition by Nestle in 2012) did not entail the sharing of confidential information, as no waivers were used. The authorities nevertheless reported that the high-level cooperation between them in reviewing the economic concentration facilitated the exercise of understanding market structures and identifying theories of harm. Similarly, cooperation between the EU Commission and the US DoJ in the Cisco/Tandberg case (2010) allowed both agencies to save on investigation efforts; as the US DoJ had already begun its investigation by the time the EU started its own investigation, the latter was able to benefit from the conclusions of the former, and both agencies issued similar decisions at the same time. Exchanging opinions on theories of harm could thus potentially save resources for the EU and UK authorities, given the overlaps between the two jurisdictions' approaches.

Inter-agency cooperation can also be beneficial in terms of mutual learning. For instance, while the EU has shown interest in introducing new market investigation powers, namely through the New Competition Tool, the UK has had similar powers for a decade, since the 2013 amendments of the Enterprise Act 2002. While the EU Commission also has expertise in carrying out sector inquiries and devising remedies, the CMA's specific experience may be beneficial to the former.

Conclusion

Agency cooperation presents a number of advantages – all of which are augmented by current geopolitical concerns and the never-ceasing effort to ensure a level playing field, both nationally and globally. We have argued that the proposed Agreement is an important development in light of the new role of the CMA post-Brexit, and the increasingly challenging geopolitical environment. The impact of the agreement, however, can only be assessed after it comes into force, which is planned to take place in 2025. Its success will largely depend on the willingness of both agencies to generally share knowledge and expertise, as well as their proactive choice to cooperate on cases of shared interest. Ultimately, it hinges on their willingness to enact a positive vision for European competition law post-Brexit, which acknowledges the similarities between their two competition regimes in terms of goals and policy.

**The author Todd Davies discloses that he was employed at Google as a software engineer between 2016 and 2022. All relations with the firm ended in March 2022.*

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