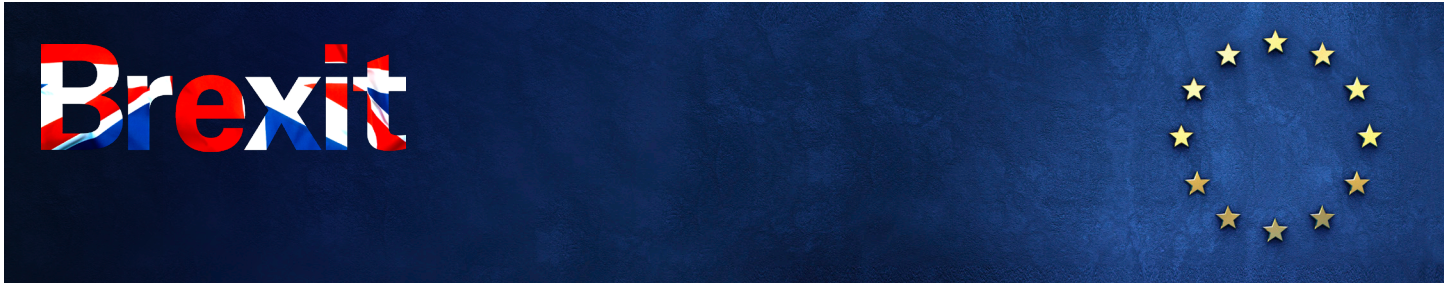


# EU-UK Antitrust Enforcement and Cooperation

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The Trade and Cooperation Agreement (TCA) governing post-Brexit trade relations between the UK and the EU includes provisions regulating EU-UK antitrust enforcement and cooperation effective 1 January 2021.

## Takeaways

- The post-Brexit regime changes little except for the likelihood of parallel antitrust inquiries.
- The TCA requires both the UK and the EU to control potentially trade-distorting subsidies.
- EU decisions are no longer binding on the UK.

**Anticompetitive Practices and Mergers.** The TCA provides for a mutual commitment to police restrictive agreements, market power abuses and anticompetitive mergers, and empowers EU and UK competition authorities to cooperate and share information. The post-Brexit regime therefore changes little except the likelihood of parallel inquiries in matters impacting both the UK and EU. The UK Competition and Markets Authority (CMA) has gained jurisdiction over mergers that had previously been exclusively reviewed by the EU and can investigate anticompetitive behaviour that impacts the UK. The CMA and the European Commission (EC) will likely continue to coordinate on most of these parallel investigations.

**Subsidy Control.** The TCA requires both the UK and the EU to control potentially trade-distorting subsidies such as state grants, guarantees, tax concessions or other preferential state measures that provide businesses with a selective competitive advantage.

- For the UK, this requires a new UK subsidy control (state aid) regime. The UK is consulting on the legal framework for this regime. It will entrust review of subsidies to a new independent authority. (One option is for this function to sit with the CMA.) The UK will involve *ex post* review only, rather than subject subsidies to prior notification. Complainants have a right to be informed of the subsidy and a one-month time limit to challenge the aid. A parallel EU-linked regime applies to Northern Ireland by virtue of the UK-EU Withdrawal Agreement.
- For the EU, rules regulating state aid at the member state level will remain unchanged. The principal difference under the TCA is that EU-level aid (commonly granted for EU-wide projects supporting, *inter alia*, regional growth, research and development, and environmental goals) may be subject to challenge by the UK. However, the practical impact of potential challenges is likely to be limited, as the TCA creates significant exceptions for EU-level aid.



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Companies should therefore be aware of potential complexity arising in the new UK and EU regimes:

- Competitors or other interested parties may be able to challenge before the CMA or UK courts subsidies granted in the UK that lead to competitive distortions between the EU and UK. Companies may potentially be subject to court-enforceable recovery orders.
- UK-granted subsidies affecting Northern Ireland may be subject to further control, potentially requiring notification and approval by the EC. As a result, there may be uncertainty as to the applicable legal regime for UK-focused subsidies with the potential to impact Northern Ireland.
- EU-granted support may also be subject to challenge, though, as noted, the TCA largely permits EU aid for the types of projects the EU most commonly supports. For EU aid granted via primary legislation, companies would not be at risk of individual recovery orders; instead, recovery will be a matter for TCA dispute resolution between the UK and EU.

**The TCA “Level Playing Field.”** The TCA enables one party to impose trade sanctions if the other’s legislative standards relating to certain policy areas, including subsidy control, develop in a manner that leads to a significant divergence affecting trade or investment.

**Legal Services and Legal Professional Privilege.** Though nominally meant to deregulate aspects of cross-border legal services, the freedoms provided by the TCA are limited and confined to the practice by UK-qualified lawyers of UK and international law to the exclusion of EU law. UK-qualified lawyers therefore lose their rights of audience before the EU courts, and their legal advice is no longer protected by privilege in respect of EU law matters. For antitrust matters that involve points of EU law, parties will therefore need to involve counsel qualified in an EU member state.

## Cartels, Abuses and Mergers

The TCA has made little change to the core antitrust framework. Overall, both the UK and the EU commit to maintain competition law regimes addressing anticompetitive agreements, abuse of dominance and mergers. Public policy objectives may provide for exemptions from competition law provided that they are transparent and proportionate to the objectives.

Cooperation between the CMA, the EC and individual EU member state competition authorities is expected to be governed by a potential future cooperation agreement, which may include the exchange of confidential information.

The principal changes under the new regimes are the UK’s independence as an antitrust regulator and that EU decisions are no longer binding on the UK. Regarding mergers, the CMA has gained parallel jurisdiction over transactions that had previously been reviewed exclusively by the EC. Regarding anticompetitive practices, EU action no longer forecloses separate CMA inquiries. Both the EU and the UK take extraterritorial jurisdiction over practices that are implemented locally or have a material local effect. Similarly, both regimes can take jurisdiction in parallel over mergers meeting the required revenue or (in the case of the UK) share of supply thresholds. (See our 5 October 2020 client alert, “[Antitrust Planning During the Countdown to Brexit](#).”)

One significant change to the UK and EU antitrust rules resulting from the intellectual property consequences of Brexit is that companies can more easily prevent parallel trade from the UK to the EU (though not from the EU to the UK). The TCA does not align EU and UK laws on IP exhaustion. This means that an EU IP rightsholder can prevent UK resellers of its trademarked products selling into the European Economic Area without its consent.

In relation to antitrust civil actions, the EU has not withdrawn its veto on the UK acceding to the Lugano Convention, which provides greater jurisdictional certainty to sue non-English domiciled defendants within the English courts and for which the UK filed accession papers in April 2019. The TCA should remove the political obstacles that stopped the EU from allowing the UK’s accession. (See “[Civil Disputes: New Gaps, Old Solutions](#).”)

## State Aid and Subsidy Controls

The TCA requires the parties to regulate potentially distortive state subsidies. For the UK, this will mean a new post-Brexit subsidy control system, something that has existed only at the EU level (state aid controls) until now. The UK will also set up a new independent authority to assess compliance with state aid controls. The UK issued a consultation on the new regime on 3 February 2021.

The TCA leaves open whether the control regime is one that requires prior notification or only a right for interested parties to challenge potentially illegal state subsidies post-grant. The UK is likely to take the latter course. The EU meets this obligation through its existing state aid regime (including *ex ante* review of state aid schemes). Additionally, the EU will need to create a new system to prevent trade-distorting EU-granted support. The EU offers many programmes to support strategic industries, environmental goals, research and development, and regional growth. How the subsidy control system will be built into these programmes remains to be seen.



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The TCA requires that the subsidy control system apply “with a view to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the Parties” (*i.e.*, the EU and the UK). Both the EU and the UK are required to maintain an effective system of subsidy control that ensures that subsidies comply with common principles (which in many respects draw on principles already applied under existing EU state aid rules). In particular, subsidies should pursue an identified public policy objective or remedy an identified market failure and be proportionate and limited to what is necessary; there also must be no other obvious alternative to a subsidy to achieve the desired policy goal. The system specifies certain types of subsidies that are not permitted, such as unlimited state guarantees or subsidies for ailing companies where no restructuring plan is in place.

Some notable exceptions weaken UK controls over EU-level subsidies; for example “supranational” programmes are not subject to cooperation or independent authority supervision, and “large cross-border or international cooperation projects” for transport, energy, the environment, research and development — those that by definition the EU will be most likely to undertake — are presumptively allowed. Further, aid granted to compensate for the damage caused by natural disasters or other exceptional noneconomic occurrences (presumably including a pandemic) and audiovisual aid are excluded. Both the UK and the EU subsidise film and TV production, so the latter exception will remove a potential source of friction.

Neither the EU nor the UK is obliged to order recovery of aid granted by primary legislation. The UK is only subject to EU-UK dispute settlement under the arbitration provisions of the TCA. The scope of the provisions exclude subsidies of a social character that are targeted at final consumers. Also excluded are subsidies where the total amount granted to a single economic actor is below approximately 325,000 Special Drawing Rights (as defined by the International Monetary Fund and calculated based on a basket of international currencies) over any period of three fiscal years, with a higher threshold where subsidies are granted for services of public economic interest.

Within six months of the granting of a relevant subsidy, officials must make publicly available basic information, including the amount and the recipient, on an official website or a public database. To assist private third parties in challenging a noncompliant subsidy, the TCA provides that relevant information must be made available to enable third parties to assess compliance with the principles. The EU will provide the relevant information through a public website (as is currently the case through the state aid register). The UK will provide such information on request, where an interested party communicates to subsidy-granting authorities that it may

seek review by a court or tribunal of a granted subsidy (or of any relevant decision by the granting authorities). Interested parties will need to seek review within one month of the public release of the relevant information (in the EU), and in the UK, within one month of receiving the relevant information, having requested it within one month of the basic information being made available.

The TCA also requires the EU and the UK to operate an effective mechanism for recovery in respect of subsidies that have been successfully challenged before a relevant court or a tribunal. The UK will need to make available a new remedy of recovery at the end of a successful judicial review.

In addition, the TCA includes provisions for the UK and EU to challenge each other on the award of subsidies that, in either the UK’s or the EU’s opinion, do not comply with the TCA’s subsidy-control principles. A new committee, the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development, will adjudicate complaints raised by one side or the other. Where either the EU or the UK considers that a subsidy causes, or there is a serious risk that a subsidy will cause, a significant negative effect on trade or investment between the parties, then upon notice, either side may take remedial action, provided such action is strictly necessary and proportionate. An arbitration tribunal may be established to adjudicate the appropriateness of any remedial measure.

### Northern Ireland-Related State Aid

A parallel EU-linked regime will apply to Northern Ireland by virtue of the UK-EU Withdrawal Agreement and, in particular, the Protocol on Ireland and Northern Ireland, which will remain in place alongside the TCA and was implemented on 1 January 2021.

Article 10 of the protocol sets out that EU state aid rules will continue to apply after the end of the Brexit transition period in which UK measures (1) affect trade between Northern Ireland and the EU and (2) fall within areas covered by the protocol, *i.e.*, the movement of goods and wholesale electricity markets.

The concept of affecting trade in the context of EU state aid rules is defined broadly and not subject to any quantitative thresholds. Article 10 could therefore potentially capture a large number of UK measures and may even extend to aid granted to UK entities not established in Northern Ireland if such measures are relevant to trade between Northern Ireland and the EU in areas covered by the protocol. For example, a subsidy granted to an industry that does business across the UK, including Northern Ireland, is likely still to be subject to EU state aid rules, even though not targeted at Northern Ireland.



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The arrangements concerning Northern Ireland may therefore provide an incentive for the UK to maintain an alignment with EU state aid at least in these policy areas, both because the Northern Ireland arrangement may in fact apply to a number of UK measures granted to companies outside Northern Ireland and because there may otherwise be a risk of regulatory nonalignment between Northern Ireland and the rest of the UK.

## Potential for Future Alignment on Stricter Anti-Subsidy Controls

The TCA also contains a detailed “rebalancing” provision recognizing that each party has a right to determine its “future policies and priorities” with respect to labour; social, environmental or climate protection; and subsidy control. If this leads to a significant divergence in these areas that materially impacts trade between the UK and the EU, the TCA allows either party to “take appropriate rebalancing measures” limited to what is strictly necessary and proportionate in terms of scope and duration, requiring the other to meet future higher legislative standards or face trade sanctions. (See “[Level Playing Field Obligations: Insurance Policy or Tinderbox for Future Trade Disputes?](#)”)

The rebalancing measures are primarily a trade remedy, but as the provision also covers subsidy control, it could also apply to any significant change of direction in the subsidy control policies in the TCA, potentially resulting in arbitration over state aid “rebalancing” measures. For example, the EC considers that a unilateral measure to rebalance a competitive advantage may be appropriate in “a situation where one Party would have a system of subsidy control that would systemically fail to prevent the adoption of trade distorting subsidies, which would provide a competitive advantage for that Party.”

On paper, the rebalancing provision is an aggressive one. Sanctions can be applied quickly for divergence, if necessary on a provisional basis, after 14 days of consultations or, in the event that one side requests arbitration, after 30 days if the arbitral tribunal has not ruled within that time period. These timelines are short relative to the months or years it customarily takes to resolve trade disputes. Additionally, the parties agree not to seek World Trade Organisation protection against these trade measures. How commonly they will be used in practice remains to be seen. Frequent use may be tantamount to requiring the EU and the UK to move in regulatory lockstep, which would likely be politically unacceptable to the UK.

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