

## Submission

# Brexit: competition (House of Lords inquiry)

September 2017

## 1 Introduction

- 1.1 EU and UK competition rules contain crucial accommodations for some forms of economic co-operation between undertakings. Such co-operation is important in the functioning of efficient, equitable, stable and sustainable supply chains and markets in some parts of the UK economy. Thus these accommodations for economic co-operation must be retained through the Brexit process and afterwards.
- 1.2 This submission answers two of the questions posed by the House of Lords EU Internal Market Sub-Committee (see **parts 3** and **4**). But before doing so it draws the Sub-Committee's attention to one area of EU competition law that we believe will not translate into UK law after Brexit without specific treatment in the Brexit legislative programme: agricultural co-operation (see **part 2**).

## 2 Protecting agricultural co-operation through Brexit

### The EU acquis and agricultural co-operation

- 2.1 EU competition law, as established under TFEU 101 and 102, contains accommodations for agricultural co-operation in the form of other EU treaty, legislation and policy decisions.
- 2.2 TFEU 42 gives powers to the EU legislator to decide to what extent the competition rules set out in the TFEU apply to the sector, taking into account the five objectives of the Common Agricultural Policy (CAP). TFEU39 defines CAP objectives as follows: increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies and ensuring reasonable prices for the consumer.<sup>1</sup>
- 2.3 The EU legislator has determined that agricultural activities are subject to competition policy except where 'derogations' apply. These derogations are currently set out in Common Market Organisation (CMO) Regulation (No 1308/2013). There are some general derogations that allow things like collective purchasing and joint processing and also varied derogations allowing different kinds of co-operation for specific sectors like dairy, meat and fruit and vegetables. The CMO Regulation also defines the legal operation of 'Producer Organisations' (POs) in these sectors.<sup>2</sup>

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<sup>1</sup> [http://ec.europa.eu/competition/sectors/agriculture/overview\\_european\\_competition\\_rules\\_agricultural\\_sector.pdf](http://ec.europa.eu/competition/sectors/agriculture/overview_european_competition_rules_agricultural_sector.pdf)

<sup>2</sup> Ibid

2.4 The whole *acquis* of EU law must be taken into account here. A full accommodation of agricultural co-operation must include the domestication of CJEU rulings relating to the interpretation of EU treaty and legislation, as applied to agricultural co-operation and to economic co-operation more generally.

*Existing UK statute and agricultural co-operation*

2.5 In general EU competition legislation is already given effect in the UK through two pieces of domestic legislation, the Competition Act (1998) and Enterprise Act (2002). Schedule 3 part 9 of the Competition Act provides specific accommodations for agricultural co-operation on the UK statute book.<sup>3</sup> However, it does this with specific reference to EU treaty, legislation and policy decisions. **Thus we are concerned the accommodations for agricultural co-operation in the UK's Competition Act only function in the context of EU membership and the CAP.**

*What Brexit legislation needs to do for agricultural co-operation*

2.6 To ensure continuity for UK farmers in relation to co-operation Brexit legislation under the Great Repeal Bill will need to:

- **Amend Schedule 3 part 9 of the Competition Act so that it functions without EU treaty, legislation and policy being in force. It should perhaps instead reference as yet undetermined UK agricultural policy, which is a devolved matter for the constituent parts of the UK.**
- **Ensure the provisions of the CMO Regulation (allowing agricultural co-operation and defining the legal operation of POs) have force in UK competition law after Brexit.**
- **Ensure CJEU rulings interpreting competition and agricultural co-operation, and economic co-operation more generally, continue to have meaning and weight after Brexit. Note these rulings are likely to refer to treaties, legislation and policy decisions that will no longer directly apply to the UK.**

**3 Response to the Sub-Committee question: “*What should competition policy in the UK set out to achieve? What guiding principles should shape the UK's approach to competition policy after Brexit?*”**

3.1 A strong and balanced competition policy for the UK after Brexit could and should help to foster a more inclusive economy.

3.2 After Brexit UK competition policy should ensure the fair, effective and efficient operation of markets for all actors on the economy, including consumers, businesses, workers, communities and public authorities, by preventing activities that create, entrench and abuse positions of economic power.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1998/41/schedule/3>

3.3 Crucially, after Brexit UK competition policy must continue to allow smaller players in the economy the right to co-operate for mutual advantage, so long as this does not disadvantage consumers and is in the interests of economic efficiency or some other essential and clearly defined public good\*.

**4 Response to the Sub-Committee question: “Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?”**

Retaining accommodations for economic co-operation

- 4.1 Overall, consistency should be maintained. Crucially this includes accommodations for economic co-operation that currently exist in EU law and the UK Competition Act. In current UK practice these accommodations particularly relate to agriculture (see **part 2**). But EU and UK law also includes legal provisions to accommodate other economic co-operation, discussed below.
- 4.2 Article 101 TFEU (3) sets out conditions where the application of Article 101 TFEU (1) (prohibition of economic co-operation) could be inappropriate. It says that forms of economic co-operation that improve productivity, promote technological and economic progress and have clear benefits for consumers should be allowed.<sup>4</sup> This has broadly been characterised as allowing co-operation that increases ‘economic efficiency’ with consumer benefits.
- 4.3 Because of Article 101 TFEU (3), EU competition law also allows for individual and block exemptions for forms of both vertical and horizontal co-operation. These set out how co-operation in areas like research and development can be allowed in order to increase economic efficiency.<sup>5</sup> While the functionality of some older block exemptions has been criticised, newer block exemptions have been well received.<sup>6</sup>
- 4.4 These aspects of EU law have already been given form in the UK through the Competition Act 1998, Sections 4 to 9, with the ‘economic efficiency’ criteria for *potential* individual and block exemptions set out in Section 9.<sup>7</sup> It is important that UK competition law retains provision for such exemptions after Brexit.
- 4.5 While there has been some ambiguity as to how narrowly or widely Article 101 TFEU (3) should be interpreted, the most recent CJEU rulings suggest that in the *acquis* of EU law, a wide interpretation of ‘economic efficiency’ is allowed.<sup>8</sup>

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\* such public goods might include environmental protection, food security or inclusive economic development

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

<sup>5</sup> [http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_2\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2_en.pdf)

<sup>6</sup> Chalmers, Davies, Monti (2014) ‘European Union law’ Cambridge University Press

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/I/crossheading/exemptions>

<sup>8</sup> Chalmers, Davies, Monti (2014) ‘European Union law’ Cambridge University Press

4.6 Crucially the CJEU has also ruled that in practice EU competition objectives must at times be balanced with social objectives.<sup>9</sup> This recognition of the need to balance objectives, so as to ensure socially beneficial co-operation is permitted, will also need to have effect in UK law on the day of departure from the EU and should be retained in UK law afterwards.

4.7 **The scope to allow economic co-operation provided by Article 101 TFEU (3) and the UK Competition Act, alongside the wider legal interpretations of economic efficiency and balanced social benefit in the *acquis* of EU law, should be retained after Brexit.**

*Addressing perceived shortcomings in the competition settlement for agriculture*

4.8 After Brexit Government could address perceived shortcomings in the EU's competition settlement for agriculture.

4.9 While the accommodations discussed in **part 2** are crucial they are also considered to be suboptimal by expert stakeholders. In its November 2016 report to the European Commission by the Agricultural Markets Task Force stated:

*"The current agricultural derogations as laid down in the CMO regulation are the result of a historically grown patchwork of ad hoc approaches and solutions, sometimes the result of institutional compromise, which lack a common organising principle. This is a far cry from the coherent and integrated policy framework that is desirable."*<sup>10</sup>

4.10 The Task Force cited conflicting rules and uncertainty and confusion among farmers, the EC, the CJEU and national competition authorities as to what is allowed, especially in relation to joint selling by co-operatives.<sup>11</sup> The Task Force concludes:

*"Lack of clarity concerning the applicable rules is thus liable to have a disturbing effect on the self-organisation of farmers and risks ultimately undermining the efficiency of the whole supply chain."*<sup>12</sup>

4.11 In its 'Future of the CAP: Post 2020' paper, Copa-Cogeca, the EU-wide body representing agricultural co-operatives and farmers' associations, recommends:

*"Recognising the specificities of the agricultural sector and allowing farmers to work collectively are two fundamental pre-conditions to strengthen farmers' position in the food supply chain and consequently improve their bargaining power. Without legal certainty regarding joint action farmers' uptake and use of these measures will be minimal. In this context a modernisation of the competition law should be envisaged."*<sup>13</sup>

4.12 Of course, these are concerns about the effective operation of the competition settlement

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<sup>9</sup> Ibid

<sup>10</sup> [https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf)

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> <http://www.copa-cogeca.be/Download.ashx?ID=1655215>

at an EU level as applied across 28 member states. The lack of clarity may in fact be less strong or less damaging when looking at the UK in isolation. That said, the CMO is the result of many years of EU-wide compromise, so we believe the UK government should take these concerns seriously.

- 4.13 **We recommend reviewing the UK's post-Brexit version of the CMO Regulation, with a view to making it more cohesive and better tailored to the needs of UK farmers and the objectives of the emergent UK agricultural policy. This would not necessarily mean liberalising the competition settlement but rather giving it a more cohesive UK-centric focus.**

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