

## Antitrust Advisory

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### **EU and UK Strike Deal on Cooperation in Competition Investigations**

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On 29 October 2024, the European Commission (EC) and the UK government announced that technical discussions on a competition cooperation agreement (CCA) between the EU and UK had been finalised. The CCA will enable closer cooperation between the UK Competition and Markets Authority (CMA) and the EC, as well as the national competition authorities (NCAs) of EU Member States, in competition investigations.

#### **Background**

The CCA will supplement the UK-EU Trade and Cooperation Agreement (TCA), which entered into force on 1 May 2021 between the UK and EU following Brexit. The TCA allows for a limited exchange of information between the EC, NCAs, and CMA to the extent permitted by each country's law. In addition, the TCA provided for the possibility of a separate agreement on cooperation and coordination to be concluded between the EC, NCAs, and CMA, including on conditions for the exchange and use of confidential information.

The official negotiations for the CCA were launched in May 2024 to ensure a more effective enforcement of competition laws in parallel investigations into anticompetitive practices and merger control. The CCA will enter into force after the necessary ratification procedures have been concluded in the UK and EU.

#### **The Rationale of the CCA**

The CCA will be the first agreement to enable direct cooperation between NCAs and a non-EU competition authority. It is envisaged that the CCA will allow the EC and NCAs to inform the CMA (and vice versa) of opened investigations, as well as enable the agencies to coordinate on their parallel investigations. However, the extent of coordination that the CCA will involve is still unclear.

So far, the EC has indicated that the CCA will set out the principles of cooperation between the agencies so as to avoid any conflicts between jurisdictions. The CCA is also expected to set out rules on the exchange of information between the various agencies involved and is expected to go further than the cooperation envisaged between the EC and U.S. competition authorities in the 1991 EU-U.S. agreement. A similar mechanism already exists for the exchange of information pertaining to ongoing investigations between the EC and the Swiss Competition Commission (SCC) requiring the relevant undertakings' prior written consent. In line with that,

the EC clarified in its announcement that any exchange between the agencies will be subject to the relevant undertakings agreeing to 'waivers'.

As a result, the extent of the coordination provided for in the CCA may not go as far as originally anticipated, especially the exchange of confidential information and evidence pertaining to antitrust and merger investigations. Currently within the EU, the EC and NCAs can fully cooperate on their investigations as part of the European Competition Network (ECN). For instance, Regulation 1/2003 provides for extensive cooperation between the EC and NCAs on the enforcement of competition rules, which includes requesting the EC to provide copies of important documents collected (Article 11(2)); updating the EC and other NCAs on the initiation, progress, or conclusion of investigations (Articles 11(3) and (4)); and exchanging confidential information relating to ongoing investigations which could also be used as evidence by the receiving authority (Article 12). It remains to be seen whether the CMA will also be allowed to participate in some of the ECN exchanges or whether a separate mechanism will be set up for the exchange of information between the members of the ECN and the CMA.

Moreover, Regulation 1/2003 enables the cooperation between NCAs, the EC, and national courts in competition law proceedings to a limited extent, as well as prevents the issuance of conflicting decisions by national courts that may be contrary to EC decisions. However, it is still unclear whether the cooperation will extend to national courts, the timing of inspections conducted by the agencies, or the alignment of timelines for parallel merger investigations.

It also remains to be seen what position will be adopted by the CCA on the treatment of immunity and leniency statements pertaining to antitrust investigations by each agency. For example, the EU-Swiss agreement does not extend to the exchange of information obtained during leniency or settlement procedures, unless the relevant undertakings have provided a waiver to that effect.

Finally, we would also expect the CCA to include provisions on negative and positive comity, as is already the case with the EU-U.S. and EU-Swiss agreements, requiring the parties to (1) consider how their enforcement activities could negatively affect the interests of another party (negative comity); and (2) consider requests from other parties to open or expand enforcement activities in order to remedy the adverse impact of the anticompetitive conduct on the requesting party's interests (positive comity).

## Outlook

The CCA may create some efficiencies for businesses subject to cross-border antitrust or merger investigations by reducing unnecessary delays in timeline and preventing conflicting enforcement outcomes. On the other hand, depending on how the cooperation mechanism will be designed and implemented by the authorities, the CCA may conflict with defence rights of businesses under investigation.

In terms of future investigations, following the adoption of the CCA, there may be a surge in international enforcement activities. As a matter of fact, in March 2023, the EC coordinated dawn raids of fragrance manufacturers in cooperation with the CMA, SCC, and U.S. Department of Justice (DOJ); and in October 2023, the EC conducted dawn raids of construction chemical companies in cooperation with the CMA, DOJ, and Turkish Competition Authority.

There is currently no specific date for the adoption of the CCA; however, it is a welcome tool by both the CMA and EU enforcers. Sarah Cardell, CEO of the CMA, stated that the CCA will enable the CMA 'to work even more closely with EU competition authorities on shared cases and common competition issues – without unnecessary barriers.' Similarly, Margrethe Vestager, the EC's executive vice-president in charge of competition policy, stated that the CCA will implement 'a predictable and transparent framework, exploiting the full potential of the TCA ... to the ultimate benefit of European business and consumers.'



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