

The background of the slide is a dark blue field filled with a dense, overlapping network of colorful fiber optic cables. The cables are primarily in shades of red, grey, blue, yellow, and green, and they are arranged in a way that creates a sense of depth and movement, as if they are converging or diverging from various points. The overall effect is a complex, almost abstract pattern of light and color.

# **UK/ EU Competition and Consumer Protection Enforcement**

Wednesday 3 February, 11.00 am – 12.00 noon GMT

# Speakers



**Helen Brown**  
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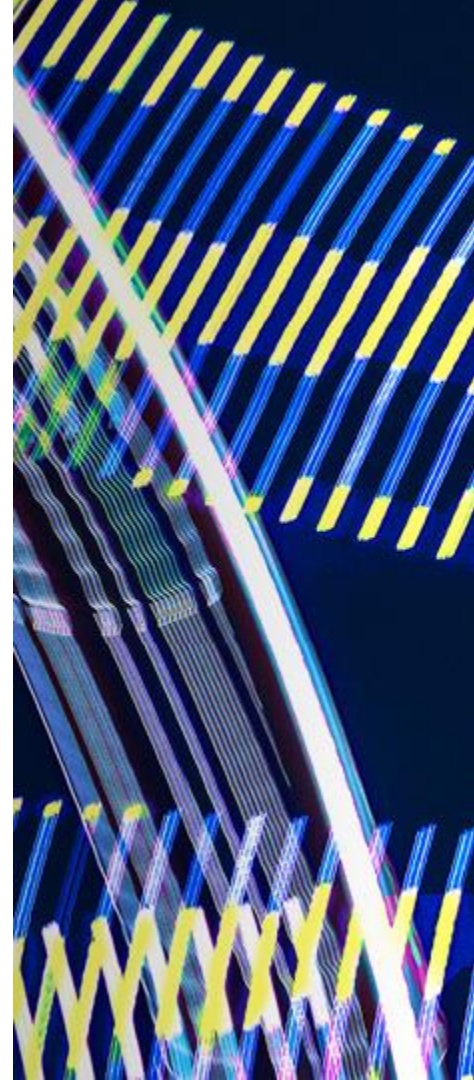


**James Robinson**  
Partner, London

# UK competition and consumer laws

As of 1 January 2021

- Standalone UK competition law regime, but with an obligation to interpret UK competition law consistently with EU law (see amendments to UK Competition Act 1998)
- ...unless there is an appropriate reason to depart from that position (listed in section 60A CA98) or the Court of Appeal/Supreme Court decide to
- But UK competition law to retain the same foundations – e.g., restrictions of competition "*by object or effect*" (see EU-UK Free Trade Agreement)
- For the most part the UK consumer law regime remains unchanged by Brexit

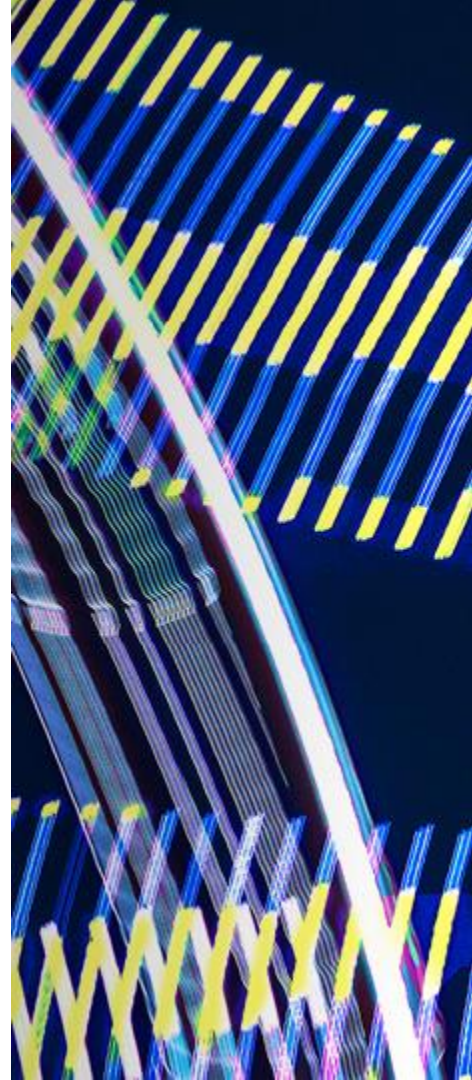




# UK competition law

## Legal Framework

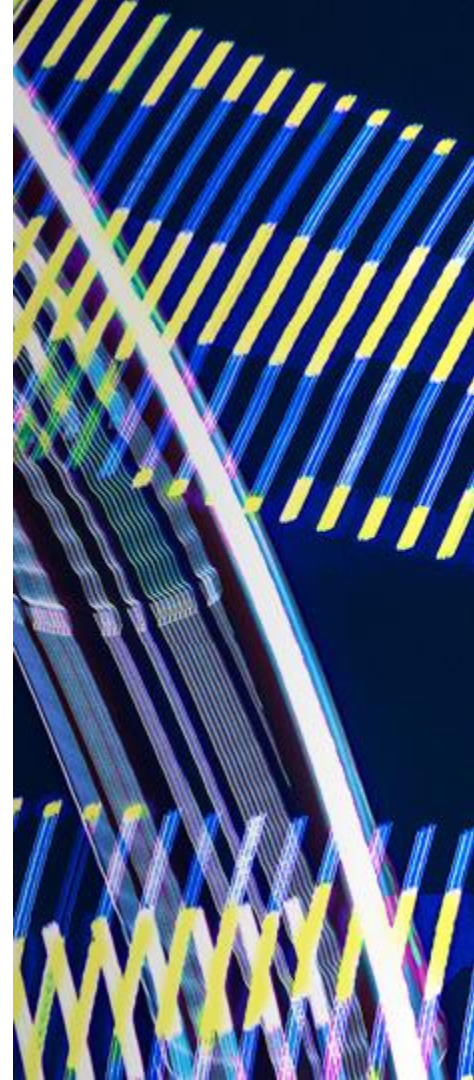
- Competition Act 1998 and the Enterprise Act 2002 (as amended)
- Series of guidelines published by the OFT and CMA
  - Some are amended in light of Brexit, others remain unchanged
  - Incl. guidance on the functions of the CMA after the end of the Transition Period (CMA125)
- New Retained Block Exemption Regulations, covering:
  - Supply chain (distribution, licensing etc.)
  - Horizontal cooperation
- Other recent UK developments: digital, AI, sustainability, UK internal market
- Consistency with EU law?



# UK consumer laws

## Legal Framework

- Laws derived from EU law e.g. Consumer Protection from Unfair Trading Regulations, Part 2 of the Consumer Rights Act (unfair terms) and Consumer Contracts Regulations (distance sales rules) remain unchanged
- Exceptions:
  - Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018
  - Online Dispute Resolution Regulation has been revoked
  - CPC Regulation revoked – and references in the Enterprise Act updated







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**EU and UK antitrust and  
consumer law developments**

# EU and UK developments: horizontals

## Policy initiatives

- **EU review of Horizontal Block Exemptions Regulations (EXP: 31/12/22)**
  - Expected to address to major trends and developments as well as areas where clarification is needed: climate change, sustainability, joint bidding, price signalling, digitalisation, AI, buying alliances, labour markets, hub & spoke, etc.
  - See also EU call for contributions aimed at identifying whether there are remaining barriers to desirable agreements supporting the EU Green Deal objectives and if so, how such barriers can best be addressed
- **CMA approach:** yet to consider an update to the corresponding Retained Block Exemption Regulations. See also:
  - Guidance published on 27/01/21 on environmental sustainability agreements and competition law
  - Research paper published by the CMA on 19/01/21 on how algorithms can reduce competition and harm consumers
  - Launch of project to review consumer law and false or misleading environmental claims – part of Annual Plan commitment to support low carbon economy

# EU and UK developments: horizontals

## Enforcement

- “Classic” cartels still a priority
  - Price fixing, information exchange, market allocation. Very large fines and increased investment in cartel detection (e.g., CMA digital bid-rigging screening tool). Director disqualification in the UK.
  - Examples: EC cases in Forex (2019), car safety equipment (2019), canned vegetables (2019), car parts (2020). CMA cases in precast concrete drainage products (2019), roofing materials (2020), ophthalmology services (2020), pharmaceuticals (some ongoing), financial services (ongoing), construction (some ongoing)
- “New” cartels emerging
  - Enforcement against buyer cartels. Examples: EC cases against purchasers of scrap lead-acid automotive batteries (2017), and purchasers of ethylene (2020). FCA case regarding the sharing of strategic information during a placing and an initial public offering (2019)
  - R&D: ongoing investigation against BMW, Daimler and VW regarding possible collusion to restrict competition on the development of technology to clean the emissions of petrol and diesel passenger cars
  - Human resources: no cases in the public domain but EC and CMA showing significant interest



# EU and UK developments: distribution

## Policy initiatives

- **EU review of the Vertical Block Exemptions Regulation (EXP: 31/05/22):**
  - To address growth of e-commerce, new market players (e.g., online platforms, to incorporate latest CJEU case law (e.g., Coty) and to clarify and simplify existing rules)
  - EC exploring change of policy on dual distribution, online sales and parity obligations
  - EC also undertaking a review of the Motor Vehicle lock Exemption Regulation (EXP: 31/05/23)
- **UK approach:** yet to consider an update to the corresponding Retained Block Exemption Regulations.
  - EU internal market imperative no longer relevant, but substantive rules have been retained in any event
  - Note CMA (OIM) responsible for the UK internal market
  - Key questions on territorial resale restrictions to/ from UK/ EEA remain open
  - Geo-blocking post-Brexit - EU businesses do not have to follow the EU Geo-Blocking Regulation when selling to UK customers but UK businesses selling into EU will need to continue to comply

# EU and UK developments: distribution

## Enforcement

### Competition cases

- Focus on resale price maintenance, online sales restrictions, territorial restrictions
- Very large fines and increased investment in detection - e.g., dawn raids, CMA digital RPM screening tool
- EC cases: consumer electronics (2018), Guess (2018), Nike (2019), Sanrio (2019), NBC (2020), Melia (2020), Video games (2021), Mondelez (ongoing)
- CMA cases: musical instruments (2019/2020), home insurance (2020), Rangers FC-branded kit (ongoing), domestic lighting (ongoing)

### Consumer Cases

- Focus on pricing transparency and unfair terms – particularly online, misleading online reviews and endorsements
- Undertakings obtained to change practices, legal proceedings issued against Viagogo in UK
- CPC cases: Airbnb (2019), Booking.com and Expedia (2019), Facebook (2019)
- CMA cases: social media endorsements (undertakings from influencers and Facebook), secondary ticketing (Viagogo, Stubhub, GETMEIN, Seatwave)

# EU and UK developments: digital markets

## Policy initiatives

- **EC sector inquiry** targeting consumer products and services connected to a network and that can be controlled at a distance (e.g., via a voice assistant, mobile devices)
  - Focus on consolidation of data; de facto and contractual restrictions, including on interoperability
  - RFIs sent to companies. EC expects to publish a Preliminary Report on the replies for public consultation in the spring of 2021. The final report is expected in the summer of 2022
- **EU's Digital Services Act package:**
  - EC proposed two legislative initiatives: the Digital Services Act (DSA) and the Digital Markets Act (DMA).
  - EU proposal for a New Competition Tool: aimed at addressing gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets
- Ongoing enforcement and very high fines at EU and UK level against large tech/platforms
- **CMA:** is also leading on issues around digital markets – delivered its Digital Taskforce advice to UK Government in December 2020



# EU and UK developments: consumer law

## New legislation

- **EU Digital Content and Services Directive and Goods Directive**
  - Grants specific remedies for digital content and digital services– tiered remedies harmonised across EU – applicable from January 2022
- **UK position:** many of the provisions in these two Directives are already in force in the UK – in the Consumer Rights Act 2015
  
- **EU Omnibus Directive**
  - Introduces updates to 4 core consumer Directives
  - Key change: introduction of meaningful fines for breaches of consumer law – 4% of turnover in member state or member states where breach occurred
- **UK Position:** 2018 Green Paper (Modernising Consumer Markets) proposed penalties of up to 10% of turnover – but no substantive developments since – but CMA still pressing for fining powers



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**How to respond to new  
antitrust and consumer  
enforcement cases?**

# Post-Brexit enforcement cases

## Prepare to handle parallel EC and CMA investigations

- CMA to only investigate suspected infringements of UK competition law and not EU competition law
- CMA may obtain jurisdiction over elements of proceedings which have already been formally initiated by the EC, e.g. if the conduct under investigation may affect trade within the UK and is ongoing as of 1 January 2021
- EC no longer has the power to carry out dawn raids in the UK
- Risk of parallel investigation arises where anticompetitive conduct impacts on trade between EU Member States and on trade within the UK (includes direct/ indirect sales, includes market sharing agreements, and possibly certain territorial restrictions from the EU to the UK)
- Leniency application to the EC will not provide any protection from fines (or other penalties) with respect to any UK investigation under UK competition law



# What does this mean in practice?

## Prepare to handle parallel EC and CMA investigations

- Need to conduct a single investigation which satisfies both EC and CMA requirements
- Additional risks to mitigate in the UK: cartel offence and director disqualification
- Timing is of the essence both in the EU and the UK – availability of immunity and leniency is generally dependent upon similar factors, with some notable differences:
  - Availability of immunity for RPM in the UK (but only if no pre-existing investigation)
  - Clear admission of guilt expected at the outset (incl. from cooperating employees)
  - Very strict rules on collection of data to maintain chain of custody
  - Conduct of interviews to avoid contamination of evidence and witness accounts
  - Tip off risks, confidentiality and cooperation (incl. as applicable for individuals leaving company)
  - Constant scrutiny of investigatory steps

# CMA consumer enforcement

- From 1 January 2021 CPC system no longer applies in the UK
- CMA ceases to be a competent authority for the purposes of the CPC
- There is “*scope for cooperation arrangements between EU and UK as a third country*” under the CPC Regulation.
- No detail as yet as to what this could look like
- CMA yet to update its Consumer Protection Enforcement Guidance (CMA58)
- Expect the CMA to continue “as is” with its domestic enforcement action

# EC – CMA future relationship

- EC and CMA to cooperate on competition law matters (see EU-UK Free Trade Agreement)
  - Cooperation, sharing of information and alignment?
  - Expectation is that enforcement of cases will run in parallel
- International role of the CMA as it seeks to lead initiatives in digital markets, climate change and competition policy
- Immediate CMA priorities remain: Brexit transition, sustainability, digital markets, and consumer enforcement...





# Questions



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