Brexit Essentials: No deal - the competition regime

November 2018

On 30 October 2018 the Competition and Markets Authority (CMA) published a series of statements setting out how it intends to proceed in respect of ongoing European merger and antitrust cases in the event there is no Brexit deal. These statements build on the general principles set out in the UK Government's technical notice published on 13 September and discussed in our October 2018 briefing. They are intended to assist businesses in their forward-planning for a no deal scenario.

The UK Government has also laid before Parliament secondary legislation making provision, in the absence of a deal, for the transition to a standalone UK competition regime on Brexit date. The Government has emphasised that this legislation does not represent a change in policy regarding the operation of competition law in the UK, but simply addresses technical deficiencies in UK competition legislation that will arise as a result of Brexit.

This briefing considers what we now know about the future application of the EU and UK antitrust rules in a no deal scenario.

CMA's role in mergers if there's no deal

Where the European Commission has reviewed a merger and issued a decision on or before 29 March 2019 (Brexit date), the CMA will have no jurisdiction over that merger (unless the Commission decision is later annulled, in which case provision will be made to ensure the CMA is not 'timed-out' from investigating the merger).

For mergers subject to review by the Commission but in respect of which the Commission has not issued a decision on or before the Brexit date, the CMA will have jurisdiction to review the merger, subject to the UK merger control thresholds being met. If the CMA takes jurisdiction this would give rise to parallel reviews by the CMA and the Commission, which could result in inconsistent or conflicting decisions. There would be no formal basis for cooperation between the authorities in a no deal scenario, so the risk of inconsistency appears substantial.

Impact on current deal plans

The CMA's advice to parties contemplating mergers in the run up to Brexit date, or with merger cases that will be filed with the Commission but straddle Brexit date, is to engage with the CMA at an early stage (for example, around announcement), particularly if the merger may raise potential competition concerns in the UK. The CMA may suggest that the merging parties begin parallel pre-notification discussions.

The CMA has also made clear that it will continue its current practice of monitoring mergers that are not voluntarily notified to it, including those that currently fall under the Commission's jurisdiction but over which the CMA may have jurisdiction post-Brexit date.

In light of this, businesses contemplating M&A activity with potential effects in both the UK and EU may be considering accelerated deal timetables, to push a Commission clearance decision through before 29 March 2019. As explained in our October 2018 briefing, a straightforward deal expected to receive Phase 1 unconditional clearance would need to be notified to the Commission by mid-February 2019 to beat the Brexit date deadline. Any recommended pre-notification period would need to start (well) ahead of that date.

CMA's role in antitrust if there's no deal

In a no deal scenario, the CMA will no longer have jurisdiction to apply the EU antitrust rules; nevertheless, the UK's current antitrust rules – which are substantially the same as the EU rules – will remain unchanged.

While the CMA (as well as UK sector regulators and UK courts) is currently required to interpret the UK antitrust rules consistently with the decisions and principles of the Court of Justice of the European Union, in a no deal scenario such bodies will be free to depart from pre-Brexit European case law where appropriate in the particular circumstances.

Where the Commission has reached an infringement decision in respect of anticompetitive conduct on or before Brexit date, the CMA will be prevented from opening an investigation in respect of that conduct post-Brexit (unless that Commission decision is subsequently annulled). Post-Brexit, the CMA will be free to investigate (alleged) breaches of the UK antitrust rules occurring before or after Brexit date, including those which the Commission is still investigating in parallel.

The CMA has confirmed that the existing EU block exemptions, which exempt certain types of agreements (e.g. certain vertical, technology transfer and R&D agreements) from the application of antitrust rules, will be transposed into UK law, subject to minor modifications to reflect the fact of Brexit. As a result, existing agreements that benefit from those provisions will remain exempt from the UK antitrust prohibitions, as will new agreements which meet the relevant criteria.

Impact on public and private antitrust enforcement

The latest statements from the CMA make clear that it could launch parallel investigations post-Brexit. Nevertheless, the CMA will continue to have regard to its prioritisation principles in deciding which matters to investigate. As noted in our October 2018 briefing, launching parallel investigations seems unlikely to be an enforcement priority for the CMA in all but the most egregious of cases, where the CMA believes the ongoing Commission investigation would not otherwise address its concerns.

Infringement decisions by the Commission post-Brexit will cease to be legally binding before UK courts – claimants who wish to pursue follow-on damages claims in UK courts will therefore no longer be able to rely on that decision as a binding finding of infringement. Similarly, UK courts will no longer be required to treat infringement decisions of an EU Member State's national competition authority as prima facie evidence of an infringement.

State aid

In a speech on 30 October 2018, Juliette Enser – who has been appointed as the CMA's Director for State aid – acknowledged that the new UK State aid regime needs to be ready for March 2019 in case no deal is reached. As noted in our August 2018 briefing, at this point any full notifications not yet approved by the Commission would have to be submitted to the CMA. Such treatment of transitional cases appears unduly burdensome on aid providers and recipients, especially where it would require resubmission of notifications that have already gone through a lengthy Commission process and/or are close to receiving approval.

As for the substance of the new State aid regime, the UK Government intends to pass legislation transposing the EU State aid rules into UK law in autumn 2018. This includes bringing across the existing block exemptions and giving effect to existing Commission approvals. The CMA expects the domestic regime to be substantively and procedurally very similar to the existing EU regime. This is helpful for aid grantors and beneficiaries, for whom it should be more or less 'business as usual' in terms of the rules they are used to applying. The CMA will be publishing guidance early next year to facilitate users of the State aid system in understanding how the new regime will operate.

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