

Brexit Essentials: Deal or no deal - the competition regime

October 2018

On 13 September 2018 the UK Government published a technical notice on how merger control and antitrust rules would be affected if there is no Brexit deal - part of its series of papers that aim to help business and individuals prepare for such a scenario.

This briefing considers what that technical notice tells us about the future application of the EU and UK antitrust and merger control rules - deal or no deal.

The Government has recognised that any merger control or antitrust decisions made by the European Commission pre-Brexit will continue to have binding legal effect in the UK post-Brexit - this will be true whether there is a deal or not. However, once the UK is no longer a member of the EU, the EU's "one-stop shop" for merger control and cartel enforcement will no longer apply for future cases. Regardless of the deal reached between the UK and the EU, parallel investigations by the UK's Competition and Markets Authority (CMA) and the Commission are expected in both the mergers and antitrust sphere.

Merger control and antitrust if there is a deal

Withdrawal and transition period

Although the Withdrawal Agreement has not yet been agreed, the most recent published draft provides for a transition period until 31 December 2020. During this period the status quo would persist and the UK would continue to be subject to EU laws and regulations.

In the draft Withdrawal Agreement the Commission has proposed that it will retain jurisdiction over all "Brexit-straddling" merger

control and antitrust cases that are initiated before the end of the transition period. It will also have jurisdiction to open investigations post-Brexit, into conduct that took place in the UK pre-Brexit (although in practice, the Commission's appetite to pursue such cases seems likely to be limited unless the conduct affects the EU more widely).

What is less clear is how jurisdiction will be allocated between the CMA and the Commission in respect of conduct that falls both sides of the Brexit date; for example, cartel behaviour that spans the pre- and post-Brexit period and which has an effect on both EU-27 and UK markets. Further clarity on this may emerge in any future cooperation agreement between the UK / CMA and the EU / Commission.

Future relationship

In a deal scenario, what will the future relationship look like beyond the transition period? The Government's White Paper of July 2018 on its proposals for the UK's future relationship with the EU implicitly confirms the end of the EU "one-stop-shop" arrangements but proposes maintaining the current UK merger control system and antitrust rules (which are largely modelled on the EU rules), with "strong cooperation" between the CMA and the Commission. It also acknowledges the need for the regulators' parallel merger control and antitrust decisions to be compatible with each other. The Government has therefore stated that it wants to work with the EU to continue its cooperative arrangements, including provisions on sharing confidential information and coordinating on cases. Any such cooperation will need to include "robust guarantees which ensure a level playing field" by alignment of UK rules with EU

and international standards, as per the European Council's guidelines for the Brexit negotiations.

So while businesses should expect to add the UK to their list of possible merger control filings for an M&A deal, it is anticipated that any future cooperation agreement will include arrangements to reduce the risk of inconsistent CMA and Commission decisions.

Merger control and antitrust if there is no deal

If the UK exits the EU with no deal, the UK's merger control and antitrust regime would apply in parallel to the EU regimes from Brexit date. The Government's 'no deal' notice is silent, however, on whether and how the CMA and the Commission would cooperate on any resulting parallel cases. In the absence of any agreement, such cooperation would have no formal basis.

Without a deal, the proposal that the Commission would retain jurisdiction for ongoing merger and antitrust cases initiated pre-Brexit could also not be taken for granted.

For merger control cases, the Commission would point to its own Jurisdictional Notice which clearly prescribes EU jurisdiction be determined by the date a binding legal agreement was concluded, or the announcement of a public bid. In antitrust cases, the Commission's Regulation 1/2003 is equally clear that the national competition authorities of the EU Member States lose their jurisdiction to take action in a case when the Commission's initiates proceedings. The 'no deal' notice does not, however, confirm whether the UK Government would consider itself bound by these provisions post Brexit.

In practice, 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 that the ongoing Commission investigation would not otherwise address its concerns.

Impact on public and private antitrust enforcement

While in a no-deal Brexit scenario the EU competition rules would no longer directly apply in the UK, the UK's current antitrust rules are substantially the same as the EU rules. The 'no deal' notice expressly notes that the Government does not propose to make any changes to the existing antitrust rules, beyond those necessary to manage the UK's exit from the EU. So, in the short to medium term at least, there should be no need for businesses to deviate from their existing antitrust compliance programmes in the event of Brexit (deal or no deal).

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, would be transposed into UK law, with only minor modifications to reflect the fact of Brexit. As a result, existing agreements between businesses that currently benefit from those provisions should remain exempted from both EU and UK antitrust rules post-Brexit, unless/until the UK Parliament decides otherwise.

Without a deal (and most likely also if there is a deal, except for during any transition period), Commission decisions that are made post-Brexit would cease to be legally binding before UK courts. The biggest impact of that effect would be felt by victims of cartel behaviour wishing to pursue private damages actions in the UK courts, who would no longer be able to rely on Commission antitrust decisions as binding findings of infringement of the law. Claimants seeking to rely on such decisions may wish to bring those cases before 29 March 2019 in order to maximise their chances of being able to do so.

Impact on current deal plans

In the M&A sphere, the Government’s advice for businesses contemplating mergers in the run up to March 2019, or with merger cases that will be filed with the Commission but straddle the Brexit date, adds little detail. It suggests that businesses consult with their lawyers (and as needed also the CMA and the Commission) as to whether a parallel filing would be required in each case.

Given the cold comfort in the Government’s ‘no deal’ notice, businesses contemplating M&A activity with effects in both the UK and EU may be considering accelerated deal timetables, to push a Commission clearance decision through before 29 March 2019 and avoid the uncertainty. 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. Taking into account the time required for pre-notification discussions (several weeks at a minimum in the most straightforward of cases; months in more complex scenarios), the last quarter of 2018 may be a busy time for deal-doers.



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