Cooley

Brexit Readiness: Spotlight on Antitrust

During the transition period, it has been very much business as usual with EU competition law continuing to apply in the UK as if the UK was still a Member State. However, at the end of the transition period, EU competition law will cease to apply in the UK and the UK Competition and Markets Authority (CMA) will have jurisdiction over matters which were previously exclusively reserved to the European Commission (EC). This will bring significant changes to the UK competition law regime.

Below we summarise the key changes and the practical implications for businesses going forward.

Merger control

1. What is the impact on UK merger control?

Under the current rules, if a transaction falls within the scope of the EU merger rules, the EC has jurisdiction to review it and the transaction does not need to be separately notified in other EU member states. This is known as the 'one-stop-shop' principle. As of 11:00 pm GMT on 31 December 2020, the UK will fall outside this 'one-stop-shop' principle, meaning that the EC's review of a merger will no longer cover the UK. As a consequence, parties may find that their transaction is subject to review by the CMA and the EC, creating additional burdens and uncertainties for businesses, which will need to be reflected in deal documentation.

The CMA has been preparing for the end of the transition period for some time and anticipates that its merger caseload will increase by 40% to 50%. While the UK will continue to operate a voluntary regime at the end of the transition period, merging parties should bear in mind that the CMA has a very proactive merger intelligence committee, which scans the press and industry sources for potentially relevant deals. For deals which are likely to meet the UK jurisdictional thresholds but the parties decide to complete their transactions without notifying the CMA, there is a risk that the CMA could subsequently 'call in' the transaction, impose 'hold-separate' orders and, in the worst-case scenario, prohibit and unwind the merger.

2. What about mergers currently under review by the EC at the end of the transition period?

Under Article 92 of the Withdrawal Agreement, the EC remains responsible for merger proceedings that have been "initiated" before the end of the transition period. This covers transactions which, before the end of the transition period, were either: (i) formally notified to the EC; or (ii) referred to the EC for review, without any Member States objecting (including the UK) and with the EC's acceptance. Only in those specified circumstances will the EC retain exclusive jurisdiction to review the merger. For all other cases, the CMA is no longer prohibited from taking jurisdiction. Merging parties involved in a transaction that could be subject to review by the UK around the end of the transition period are therefore encouraged to engage with the

CMA at an early stage, particularly where the transaction may raise competition concerns in the UK.

Foreign investment control

3. Should we expect more government intervention on national security grounds in 2021?

On 11 November 2020, the UK government published its long-awaited National Security and Investment (NSI) Bill. The NSI Bill introduces a standalone regime for screening investments in the UK on national security grounds and grants the UK government extensive powers to 'call in' transactions across all sectors of the economy, with no turnover or market share thresholds required. This comes at a time when many countries across the world are strengthening their foreign investment controls during the COVID-19 pandemic. While the UK government is keen to emphasise that the new regime will remain targeted and proportionate so that most transactions will be cleared without any intervention, hostile actors should be in no doubt – there will be no back door into the UK.

4. What are the key takeaways of the proposed new NSI regime?

At the time of writing, the NSI Bill is currently making its way through Parliament and may be subject to further amendment before it comes into force (anticipated in Q1 2021). The key takeaways from the NSI Bill introduced on 11 November 2021, are as follows:

- **Mandatory notification**: Companies investing in sectors considered "sensitive" to national security will be required to notify their investments in advance of closing. The UK government is consulting until 6 January 2021 on the precise scope of the sectors and which activities in each sector should be included in the mandatory regime, but it is anticipated to cover transactions in 17 sectors, including artificial intelligence, data infrastructure, communications and engineering biology. Failure to notify will carry heavy sanctions and if parties complete without clearance, the transaction will be legally void;

- **Voluntary notification**: For deals not covered by the mandatory regime, parties are required to voluntarily notify transactions that may be of interest from a national security perspective;

- **"Call-in" power**: The Secretary of State will have a broad power to "call-in" non-notified transactions up to five years post-transaction in cases where the Secretary of State reasonably suspects that there is, or could be, a risk to national security; this period is reduced to six months if the Secretary of State becomes aware of the transaction (e.g., through media coverage); and

- **Retrospective application**: Due to concerns that transactions may be brought forward or accelerated in order to take place prior to the commencement of the NSI Bill, under the current terms of the NSI Bill, any transaction raising national security concerns that closes on or after 12

November 2020 but before the official entry into force of the NSI Bill, could be "called in" for review after the NSI Bill becomes law.[1]

Antitrust enforcement

5. What is the impact on cartel enforcement?

In the past, the focus of the CMA has been largely on the enforcement of local cartel investigations. However, the CMA is keen to take on larger international cartels that affect the UK and has already shown early signs of these ambitions. Companies should anticipate parallel cartel investigations in the future and should organise their leniency applications accordingly. Businesses should also be aware that the CMA has made active use of director disqualifications and criminal prosecution, and this is likely to continue in the future.

6. What happens to ongoing investigations before the EC?

The EC continues to be the competent authority for antitrust cases in the UK which it initiated before 31 December 2020. This specifically covers cases formally registered by the EC before the end of the transition period (i.e., where the EC has issued a Statement of Objections, a request for parties to express their interest in engaging in settlement discussions, or a summary of the case for the purpose of a commitment decision). In those specific cases, the CMA will not be able to investigate the same conduct or agreement until the EC has concluded its investigation. The only exception to this rule is where the anticompetitive conduct is still ongoing at the end of the transition period and may have an effect on trade in the UK; in those circumstances, the CMA may investigate facts from that date onwards (i.e., 1 January 2021).

For all other cases that have not been formally initiated by the EC at the end of the transition period, the EC will cease to have jurisdiction over the UK aspects of the investigation, which will pass to the CMA. There is therefore a risk that anticompetitive behaviour may be subject to parallel investigations by both the CMA and the EC, where it may affect trade within the UK and the EU. Businesses which have obtained leniency from the EC, but haven't had their case formally initiated by the EC, should carefully consider making a separate application for leniency to the CMA before the end of the transition period if there is a risk of a parallel UK investigation in the future.

7. What about ongoing CMA investigations?

Where the CMA is investigating conduct that may affect trade between the UK and one or more EU Member States and the CMA has not issued a decision before 31 December 2020 and the case proceeds, the CMA will no longer apply the EU prohibitions after 31 December 2020.

All actions taken before 31 December 2020 in connection with the EU elements of the investigation – such as information gathering through notices, interviews or

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1 For more details, please see our Cooley alert.

inspections – will be treated, after that date, as having been done for the purposes of the domestic elements of the investigation. Such actions therefore remain valid for such purposes.

8. Who will monitor and enforce EU antitrust commitments?

The Withdrawal Agreement provides that, after 31 December 2020, the EC will continue to be the competent authority to monitor and enforce commitments given or remedies imposed in or in relation to the UK in connection with EU antitrust cases. This includes commitments given or remedies imposed after 31 December 2020 in respect of those cases, which the EC initiated before the end of the transition period. However, the EC may transfer responsibility for monitoring and enforcing such commitments or remedies in the UK to the CMA and the concurrent regulators by mutual agreement between the EC and the CMA.

EU Block Exemption Regulations

9. Are they still available?

There are seven EU Block Exemption Regulations, which will be retained when the transition period ends. These relate to vertical agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport. However, amendments to the Block Exemption Regulations have been made to correct deficiencies resulting from the UK ceasing to be a Member State of the EU. For example, references to EU treaties and institutions will change to references to domestic legislation, and references to euros will be changed to pounds sterling. References to the internal market will also be changed to references to the UK, which will impact the geographic scope of the Block Exemption Regulations. The power to vary (including to extend) or revoke the application of the retained exemptions to the UK will lie with the Secretary of State, acting in consultation with the CMA.

State aid

10. What happens to EU State aid rules after the end of the transition period?

According to Article 92 of the Withdrawal Agreement, the EC will continue to have jurisdiction over existing State aid cases and all State aid cases initiated before the end of the transition period (i.e., those that have been allocated a case number). Under Article 93 of the Withdrawal Agreement, the EC will remain competent to initiate new State aid investigations concerning the UK in respect of aid granted before the end of the transition period, but only during the four years after the end of the transition period. The Court of Justice of the EU (CJEU) will have exclusive competence to review decisions adopted in the context of such State aid proceedings.

Article 10 of the Protocol on Ireland and Northern Ireland in the Withdrawal Agreement foresees that EU State aid law will continue to apply in the UK for measures that impact trade between Northern Ireland and the EU, at least up to 31 December 2024. Based on a narrow textual reading, this is limited to trade in goods

and the wholesale market for electricity. The EC will remain the enforcement authority and the CJEU will have jurisdiction on such proceedings.

The UK State aid regime remains under negotiation and is one of the most contentious issues in the future of the EU/UK relationship.

11. Will the UK adopt a domestic State aid framework?

The UK State aid regime is still under negotiation and is one of the most contentious issues in the future of the EU-UK relationship.

Originally, it was intended that EU State aid rules would be transposed into UK law as retained EU law. This intention was subsequently abandoned and, on 9 September 2020, the UK government announced that it will follow, from 2021, WTO subsidy rules.[2] It has also committed to issue, before the end of 2020, guidance for UK public authorities on the WTO rules and to launch a consultation on whether a new domestic subsidy regime should go beyond the UK's international commitments. At present, there is no clear proposal on an internal UK State aid framework.

As noted above, EU State aid rules will continue to apply to UK measures affecting trade between Northern Ireland and the EU after the end of the transition period. Nonetheless, concerns have emerged within the UK government that the EC could extend the application of EU State aid law and claim jurisdiction also in relation to UK-wide subsidy initiatives (for instance, on a subsidy to a company based in Great Britain with a Northern Ireland subsidiary) by adopting a wide interpretation of the State aid regime contained in the protocol – the so called "reach-back effect". To avoid such a situation, the UK government introduced provisions in the proposed UK Internal Market Bill to unilaterally interpret and disapply State aid rules contained in the protocol.[3] The EC is currently bringing proceedings against the UK government for taking such an action, which it regards as a breach of the UK's obligations under the Withdrawal Agreement.[4]

Key takeaways

- The EC remains responsible for merger proceedings that have been "initiated" before the end of the transition period.
  Once the transition period ends, the 'One-Stop-Shop' regime for merger proceedings will cease to apply to the UK. Parties will therefore need to consider whether to voluntarily file with the CMA (in addition to filing with the EC).
- As the CMA is emerging as one of the most interventionist agencies in the world, the risk of the CMA reaching a divergent outcome from other competition authorities on the same transaction cannot be ignored.
- The EC continues to have jurisdiction for antitrust cases 'initiated' before 31 December 2020. For antitrust investigations not launched prior to the end of

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2 Department for Business, Energy & Industrial Strategy, Press Release "Government sets out plans for new approach to subsidy control", 9 September 2020.

3 United Kingdom Internal Market Bill. The bill was introduced before the UK Parliament on 9 September 2020. At the moment of writing, the UK Internal Market Bill is undergoing the legislative process.

4 Commission, Press Release, Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations, 1 October 2020.

the transition period, the CMA will be able to investigate suspected infringements of UK domestic competition law in relation to conduct from both before and after 31 December 2020.

- The UK State aid regime is still under negotiation and is one of the most contentious issues in the future of the EU-UK relationship.
- Under current proposals, the EC will continue to be the competent authority for existing State aid cases and for State aid cases ‘initiated’ before the end of the transition period. The EC will also have the power, up until 31 December 2024, to start new investigations into aid measures granted before the end of the transition period.