Cooley

So This Is Brexit? UK Competition Law Post 31 January 2020

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Since the UK's referendum on EU membership in June 2016, there has been significant uncertainty over when the UK would leave the EU (commonly referred to as Brexit), whether the terms for departure could be agreed in time to avoid a "no deal" exit and even whether Brexit would happen at all. While these uncertainties have now been resolved sufficiently to enable Brexit to take place on 31 January and the medium term legal framework is clear, longer term uncertainty remains.

Following Prime Minister Theresa May's formal notification of the UK's intention to leave the EU on 29 March 2017, the country was originally due to cease to be a member state on 29 March 2019. Under Article 50 of the EU Treaty, the default position was that the EU treaties would cease to apply to the UK on that date. As a result of the UK government's inability to win parliamentary approval of the terms of departure that it provisionally agreed with the EU in November 2018, this deadline was subsequently extended three times, to 12 April and 31 October 2019 and, most recently, to 31 January 2020. A new Withdrawal Agreement was subsequently negotiated and published on 17 October 2019. The new Conservative government's large parliamentary majority since the general election on 12 December 2019 ensured that this new agreement (which was largely the same as the old one, except with respect to Northern Ireland) could be passed through the UK Parliament.

The new Withdrawal Agreement between the EU and the UK government, which sets out the terms for the UK's "orderly departure" from the EU, was signed by both parties on 24 January. It will take effect as an international treaty, albeit some provisions will take direct effect and thus create directly enforceable rights. The European Union (Withdrawal Agreement) Act 2020 (WAA), which implements the agreement in UK law, received royal assent on 23 January 2020. While the European Parliament still needs to vote on the Withdrawal Agreement before it takes effect, this is likely to prove a formality. This means that there will be no further extensions, and the UK will definitely leave the EU at 11:00 pm GMT (midnight, Brussels time) on 31 January 2020.

As an area that has seen close alignment and integration during the UK's membership of the EU, the application of competition law in the UK was set to be heavily impacted by Brexit. It is now clear that, as a result of the Withdrawal Agreement, the immediate impact will be limited and that EU competition law will continue to have a significant influence on the UK regime for years to come.

The transition period

To provide time for the EU and UK to negotiate a new trading arrangement, Article 126 of the Withdrawal Agreement provides for a "transition or implementation period", during which EU law will continue to apply in the UK as if it were still a member state. This period is stated to last until 31 December 2020. Although it can be extended once before 1 July 2020, until either 31 December 2021 or 31 December 2022, the UK government has said it will not request this and has even legislated to prevent UK ministers requesting such an extension. As a result, it is assumed for present purposes that the transition period will end at the end of this year, even though it is questionable whether a new trading relationship can be negotiated by then.

Reflecting the objective of providing for legal continuity during the transition period, Article 127 of the Withdrawal Agreement states that, unless otherwise provided in the agreement, "Union law shall be applicable to and in the United Kingdom during the transition period". This is implemented in UK domestic law by section 2 WAA, which amends the European Union (Withdrawal Act) 2018 (WA18) to provide that the European Communities Act 1972 (which acted as the conduit of EU law into domestic UK law for the duration of the UK's membership and confirmed the former's primacy over the latter) shall continue to have effect in domestic law, despite its formal repeal on 31 January. The WAA also states that the UK "is to be treated as it were a member of the EU during the implementation period".

This means that the enforcement in the UK of EU and UK competition law, as well as UK consumer protection

law, will continue largely unaltered on 1 February 2020. The European Commission will still have the power to investigate infringements of EU competition law affecting the UK and the exclusive power to consider the impact of mergers with an EU dimension on competition in the UK. UK revenues will continue to count towards EU revenues when assessing whether the EU Merger Regulation (EUMR) applies to a transaction and the "one stop shop" principle will continue to apply, meaning that transactions falling under the EUMR will be subject to a single merger review across the EU and UK.

The UK Competition and Markets Authority (CMA) will still be obliged to apply EU competition law when investigating anticompetitive conduct that affects trade between EU member states and to seek sign-off from the Commission before issuing decisions in such cases. The CMA and UK courts will still be obliged to apply UK competition law consistently with EU law principles, and parties will still be able to rely on Commission infringement decisions as the basis for private damages actions before UK courts. Domestic courts will also be able to make preliminary references to the Court of Justice of the EU in Luxembourg to clarify points of EU law during the transition period, and the CJEU will be able to give its ruling after 31 December 2020. The UK government will still be obliged to implement EU legislation and to obey EU state aid rules limiting public subsidies.

Reflecting the UK's immediate loss of all rights to representation in the European institutions (including the Council, Commission, Court of Justice and Parliament), the main practical change is that the CMA will no longer have the right to participate in advisory committee meetings on Commission cases and legislation or to participate in the European Competition Network, comprising the Commission and national competition authorities. While the CMA will be invited to attend such meetings where discussions concern the UK, it will no longer have a vote and will inevitably lose influence over case outcomes and wider policy.

The main immediate impact on 31 January 2020 will thus be political. In simple terms, the "event" stage of departure will have happened and the referendum mandate will have been discharged. The process of departure, however, will continue.

After transition

Since little will change during the transition period, the key question now becomes what happens after that. Fortunately, the Withdrawal Agreement provides some answers, at least as far as the status of matters that are live at that point is concerned. On 28 January, the CMA published "Guidance on the functions of the CMA under the Withdrawal Agreement" (CMA guidance), which summarises the relevant provisions and provides some helpful pointers on how it will manage the transfer of cases at the end of the transition period. Measures previously implemented by the UK government to deal with a "no deal" exit also provide some guidance as to what will happen next.

Article 92 of the Withdrawal Agreement provides that the European Commission will continue to have competence after the end of the transition period to handle live administrative proceedings concerning the application of EU competition law to UK businesses or relating to competition in the UK that it started investigating before 31 December 2020. Article 95 provides that any resulting decisions shall be binding on and in the UK. The European courts will also retain jurisdiction to review appeals from any resulting decisions.

As a result, the Commission will continue to have exclusive jurisdiction to review mergers that were notified to it before the end of the transition period, with the CMA acquiring the ability to review the impact of transactions notified under the EU Merger Regulation on 1 January 2021. As the CMA's latest draft annual plan notes, however, the long lead time for notifications means that it is likely to get involved in pre-notification discussions with parties to transactions that will be subject to parallel EU and UK reviews by early autumn this year.

Reflecting this, the CMA guidance notes that "merging parties are encourage to approach the CMA to discuss whether it might be useful to begin pre-notification discussions" if a merger "might not be formally notified to the Commission before the end of the transition period" and the CMA is "likely" to have jurisdiction. The CMA guidance also notes that the CMA will monitor cases "which may be the subject of pre-notification discussions" with the Commission and that may fall under UK investigation at the end of transition. Significantly, it notes that the CMA may commence "preparatory steps" for a formal investigation, including requesting information from parties or third parties and issuing an invitation to comment, before it gains the ability to launch formal investigations of such mergers on 1 January 2021. Given the CMA's practice of undertaking a large part of its factual investigation during pre-notification, this suggests that a degree of parallel Commission and CMA review will be evident by the fourth quarter of 2020.

The Withdrawal Agreement provides for a longer transition for state aid, with Article 93 noting that the Commission will retain competence to review the award of aid by the British government for four years after the end of the transition period. Any resulting Commission reviews and appeals will be able to extend beyond the end of that four year period.

As part of a protocol providing for closer alignment between Northern Ireland and the EU to facilitate continued trade within the island of Ireland, the Withdrawal Agreement also provides for a potentially indefinite application of EU state aid law in Northern Ireland, to the extent that measures affect trade between Northern Ireland and the EU. Assuming that this concept will be interpreted with reference to the EU law concept of trade between member states, the requirement for such an effect is likely to be a low bar in practice.

The future

Things become less clear when looking beyond the "transition from the transition period". As the CMA guidance notes "the UK's relationship with the EU after the end of the Transition Period … remains subject to negotiations with the EU". It also notes that the CMA's previous "No Deal Guidance" document no longer applies, since there has been a withdrawal deal.

The UK government has, however, confirmed that the basic principle governing its plans for a "no deal" Brexit – namely that all EU laws that are directly effective in the UK at the point of departure will be imported into domestic law at that point – will still apply. The only material change will be that the definitive date for that import – and for determining what gets imported – becomes the end of the transition period (or "IP completion day", reflecting the UK government's preferred terminology of "implementation period"), rather than the original "Exit day". Section 39(1) WAA defines IP completion day as 31 December 2020 at 11:00 pm (again reflecting the primacy of Brussels time in determining the moment of decisive legal acts related to Brexit). The various statutory instruments passed under the WA18 to amend domestic laws to take account of the myriad legal changes arising from Brexit (including the Competition (Amendment etc.) (EU exit) Regulations 2019) will thus now take effect on IP completion day, rather than exit day.

This means that all current EU block exemption regulations will be imported into UK law as "retained exemptions" and will remain in force until their expiry. This is important because each block exemption effectively codifies the application of EU competition law – and by extension UK competition law – to agreements falling within their scope. As a result, agreements that fall within the safe harbour defined by an EU block exemption will be immune from challenge under the UK Competition Act 1998 and restrictions that are defined as "hard core" under an EU block exemption will be presumed to infringe UK competition law.

The current Vertical Agreements Block Exemption, which governs a wide range of supply agreements, remains in force until 31 May 2022, while the Technology Transfer Block Exemption, which governs many common forms of IP licensing, remains in force until 30 April 2026. As a result, EU law will continue to describe the limits of UK competition law well into the 2020s. The effect is likely to continue after that date, either because UK exemptions continue to match EU exemptions or, less directly, through the CMA and UK courts taking account of EU case law. Indeed, section 6 WA18 provides that all UK courts below the Supreme Court must apply retained EU law consistently with judgments of the CJEU pre-dating Brexit. Although the government has now indicated that it may loosen this requirement by empowering any UK court to depart from EU case law, the similarities between the regimes means that in practice UK courts are likely to be guided by the extensive body of existing EU case law, as well as new Commission decisions and case law.

In addition to publishing the Withdrawal Agreement in October 2019, the UK and EU published a non-binding "political declaration" on the framework for the future relationship between the EU and the UK alongside. The introduction to that document states that the declaration "establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core". Although the declaration is couched in vague and aspirational terms, it is clear that the arrangement will be "underpinned by provisions ensuring a level playing field for open and fair competition". This is a central objective of the EU, to address concerns that the UK will diverge from strict EU controls on matters such as food safety, environmental protection, state subsidies and employment rules in order to enable British companies to gain a competitive advantage over European firms. Notably, paragraph 77 specifies that the UK and EU "should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition".

While there is little risk that the UK will entirely abandon its current competition law framework, the future UK

regime for the control of government subsidies remains unclear. While the previous UK government had indicated that it would import EU state aid law wholesale into UK law and had passed legislation to empower the CMA to enforce it, the extent of the current government's commitment to independent and robust state aid control remains to be seen.

Any watering down the previous government's commitment to preserve a degree of alignment with EU law in the critical area of competition and state aid control will make it harder for the UK to negotiate a close trading relationship with the EU, a point recently underlined by the new president of the Commission, Ursula von der Leyen. Quite how this tradeoff plays out in 2020 remains to be seen.

Practical steps

Whilst the transition period provides for some legal certainty over the next 11 months, businesses that are involved in ongoing competition law matters before the Commission or are contemplating acquisitions in the EEA during this period should consider what action needs to be taken well before the end of the year.

Below we set out some practical steps that businesses can implement during this transition period:

- **Merger agreements** – Parties to a merger that will be subject to the EUMR but which may not be formally notified to the Commission by 31 December 2020 should consider whether to contact the CMA in advance to facilitate a parallel review, if the transaction has a potential impact on UK markets. Businesses should carefully consider their strategy and approach to timings (particularly given Commission holidays over the Christmas period) as early as possible in 2020.
- **Commercial agreements** – If you distribute or source products or services under commercial agreements that apply to the UK because it falls within a contractually defined territory comprising the EU or EEA by virtue of the UK's current membership, you should consider amending the agreement to clarify the UK's status after 31 January 2020, for example by stating that the UK continues to be part of the defined territory covered by the agreement, even when it ceases to be part of the EU/EEA.
- **Leniency applications** – Where the Commission has granted a marker or accepted a leniency application with respect to a suspected cartel, check whether the reported conduct also affected the UK market. If it did, but the Commission has not yet initiated formal proceedings, you should assess whether a separate application for leniency should also be made to the CMA.
- **Commitments** – Although the Withdrawal Agreement provides that the EC will continue to be competent to enforce commitments or other remedies relating to the UK, it also provides that this responsibility may be transferred to the CMA. If you are subject to UK-specific remedies as a result of a previous Commission antitrust or merger investigation, an assessment is advisable to determine whether a transfer to the CMA would be preferable to ongoing Commission monitoring.

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