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Deal or No Deal? The Impact of Brexit on UK Competition Law Becomes Clearer

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The UK is due to leave the EU at 11pm, London time, on 29 March 2019, at which point the EU Treaties will cease to apply to the country. Amongst the myriad issues flowing from this are significant challenges to the operation of the UK competition law regime, which is closely entwined with EU competition law.

At the moment, the European Commission and UK Competition and Markets Authority (CMA) share responsibility for antitrust enforcement and merger control affecting UK market (with large, cross-border transactions tending to be reviewed by the Commission and more domestic transactions falling to be reviewed by the CMA). Commission antitrust investigations typically last several years, even before appeals are taken into account, meaning that investigations concerning conduct affecting UK markets will have been started well before Brexit takes effect and some will be continuing at the point of exit. Although merger control reviews take less time, there will inevitably be reviews underway at the time that the UK falls outside the Commission's jurisdiction on 29 March.

There is therefore a pressing need for clarity on what happens to live cases at that point. It is also important for businesses to understand what competition laws will apply to their conduct within the UK from 30 March. Unfortunately, at the time of writing, this is far from clear.

On 14 November, nearly 30 months after the Brexit referendum, the Commission published the text of the 585 page draft Withdrawal Agreement. This document, which is the product of months of negotiation between UK and EU teams, sets out the terms for the UK's orderly departure from the EU. The Commission published an Outline Political Declaration on the Future Relationship on the same date, setting out the broad parameters for a potential future trading relationship between the EU and the UK.

Publication of the draft Withdrawal Agreement followed its approval by the UK Cabinet earlier the same day. The final Withdrawal Agreement is due to be formally adopted by the remaining 27 Member States of the EU at a special meeting of the European Council on 25 November, after which it will be subject to approval by the European Parliament. Once formally adopted by both the UK and EU, the Withdrawal Agreement will govern the UK's relationship with the EU until such a time as a new treaty can be put in place to govern that relationship on a lasting basis (or its earlier expiry). To serve its purpose, the Withdrawal Agreement must enter into force before Brexit takes effect on 29 March.

Before the Withdrawal Agreement can enter force, however, it also needs to be approved by the UK Parliament. The extent of political objections to its terms makes this approval (and hence UK ratification) highly uncertain. In the absence of ratification, and assuming that the UK does not withdraw or suspend its notice of its intention to leave the EU, Brexit will still take effect on 29 March, albeit without any agreement with the EU on the terms of departure. In such circumstances, the UK would suddenly drop out of the legal and regulatory structure provided for by the Treaties and be treated in the same way as any another third country.

While the consequences for a disorderly or "no deal" Brexit would be profound across the UK economy, at least we now have a clearer picture of how the UK Government proposes to deal with the impact on the domestic competition law regime, by virtue of the Government's publication of the Competition (Amendment etc.) (EU Exit) Regulations 2019 (Draft Regulations). These set out the detailed changes that would be made to UK competition law in the event of a no deal Brexit. On the same date, the CMA published two technical notices setting out its role in antitrust and mergers in a "no deal" scenario.

As an agreed withdrawal deal remains the baseline scenario, this will be considered first.

The deal

Basic purpose

To understand how the Withdrawal Agreement impacts on UK competition law, it is important to understand its basic purpose. As provided by Article 50 TEU, which governs the process for a Member State's withdrawal from the EU, the agreement's primary purpose is to deal with the immediate consequences of departure, including clarifying the process for administrative proceedings that straddle exit day confirming the rights of citizens of the UK and the other EU Member States who are resident in each other's territory at the point of Brexit and confirming the terms on which the UK will settle its outstanding financial liabilities to the EU.

The Withdrawal Agreement is not intended to deal with the long-term trading relationship between the UK and EU, which is instead due to be addressed through a separate treaty. Reflecting this, the outline Political Declaration, which sets out the general framework for that future relationship, is non-binding and reads more like a vague "heads of terms" than a formal agreement.

Since the full agreement on the future trading relationship will take time to negotiate, the Withdrawal Agreement provides for a "transition period", during which EU law will continue to apply to the UK as if it were still a Member State. The main exception to this principle is that the UK would not be represented in any of the EU's institutions. Although there is provision for UK experts to be invited to attend committees to discuss new EU competition legislation and draft Commission antitrust decisions before their adoption, UK representatives will have no voting rights and materially less influence.

The transition period is currently proposed to last until 31 December 2020. As that is unlikely to be sufficient for negotiation of a new trading relationship, the Withdrawal Agreement provides that it can be extended once, until a later date that must be specified in the Withdrawal Agreement. Although this aspect is hotly disputed, the possibility of an extension of the transition period to the end 2022 is currently under discussion.

The backstop

If the UK and EU fail to agree terms on the future trading arrangement before the end of the transition period, or if the agreed future relationship is not close enough to allow continued frictionless trade between Northern Ireland and Ireland, then the Withdrawal Agreement provides for the implementation of a so-called "backstop" arrangement. This would create a "single customs territory" between the EU and the UK, which would remove the need for customs checks on goods moving between the EU and UK, as well as providing for closer regulatory alignment between the EU and Northern Ireland than will be maintained by the rest of the UK. To address the EU's desire for a "level playing field" within that customs territory, the protocol includes provisions to ensure that the UK will maintain a degree of continued alignment on fundamental aspects of its legal and regulatory system relevant to competitiveness, including ensuring effective State aid and competition law regimes.

The competition provisions of the backstop require the UK to ensure the maintenance of a domestic competition law regime to ensure that anticompetitive conduct is prohibited, using wording that closely mirrors the EU's antitrust prohibitions, as set out in Articles 101 and 102 TFEU, and the wording of the EU Merger Regulation. The UK would be required to have an independent competition authority (the CMA), which will apply domestic competition law, as far as it reflects concepts of EU law, using EU law "as sources of interpretation". (Since the UK Competition Act 1998 (CA98) closely tracks the wording of Articles 101 and 102, this principle would presumably apply to all antitrust enforcement.) As regards State aid, the CMA would be required to consult the Commission on all draft decisions before adoption and must take "utmost account" of the Commission's views in any decision. There is provision for close cooperation between the Commission and CMA to be maintained, to ensure smooth operation of these arrangements.

It is notable that the outline Political Declaration envisages that the UK will maintain a State aid and competition law regime to ensure open and fair competition, "building on the level playing field arrangements provided for in the Withdrawal Agreement". While the detailed implementation of this aspiration remains to be agreed, presumably this would require a similar level of alignment to that anticipated in the backstop. Indeed, the UK Government's own White Paper on its preferred future trading relationship proposes to maintain the key elements of the UK competition regime as part of a close cooperative arrangement to "ensure that competition decisions are compatible".

Transitional arrangements

The transitional arrangements with respect to competition law cases are relatively straightforward. Specifically,

Article 92 of the Withdrawal Agreement provides that the Commission will continue to be competent for all administrative procedures commenced during the transition period, including live antitrust investigations and merger control reviews. The Commission will also retain the jurisdiction to monitor compliance with commitments entered into before the end of the transition period, although it will be able to transfer this role to the CMA. In the case of State aid, the Commission will be able to open new investigations into suspected breaches of relevant rules by the UK with respect to aid granted before the end of the transitional period for up to four years after the end of that period. This would potentially give the Commission continuing jurisdiction over matters affecting the UK until 2026, even without taking into account additional time for appeals to the Court of Justice of the European Union.

No deal

In the absence of agreement, none of the above would apply. To avoid a legal vacuum in the event of a no deal exit,the general approach of the UK Government is to import the entire body of current EU law into domestic law at the point of departure. Amendments to specific statutes will be required, to remove inappropriate references and "deficiencies" that would lead to laws not functioning after exit (for example, references to Commission functions that will no longer apply to the UK). The European Union (Withdrawal) Act 2018 gives the Government power to implement such amendments by secondary legislation. The Draft Regulations set out the detailed changes to meet this objective with respect to UK competition law.

Section 60 of the CA98 currently requires UK competition authorities and courts to apply UK competition law in a manner that is consistent with EU competition law. Under the Draft Regulations, section 60 will be repealed and replaced with a new section 60A that will ensure there is no inconsistency with *pre-exit* EU case law, unless it is considered *"appropriate to act otherwise"* in specified circumstances. The new provision thus ensures a degree of continued alignment between the EU and UK regimes, albeit with more leeway than exists at present.

Retained EU block exemption regulations

EU block exemptions exempt certain categories of agreements from the prohibition of anticompetitive agreements set out in Article 101 TFEU. Currently, there are seven block exemption regulations in force, relating to vertical agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport. Currently, agreements that fall within the protective scope of an EU block exemption are also protected from domestic challenge under the CA98.

Under the Draft Regulations, the current EU block exemptions will continue to define the scope of domestic exemptions until they expire (between 2022 and 2026). At that point, the Government will decide whether to continue this arrangement for any new EU block exemptions or introduce divergent domestic block exemptions or, indeed, have no block exemptions under the domestic regime. This is important since, by defining the scope of protective safe harbours, the EU block exemption regulations effectively codify an area of law, including by listing clauses that are presumptively unlawful. As a result, there will be limited scope for CMA practice to diverge from EU law in areas covered by block exemptions until their expiry.

Follow on damages claims

Under the current regime, claimants can bring actions for damages based on an EU competition law infringement decision of the Commission. In a "no deal" scenario, claimants bringing a damages action will not be able to rely upon a Commission decision adopted after exit day as binding proof of a cause of action. Instead, such claimants will need to bring a standalone claim or pursue a damages claim based on a matching CMA infringement decision (if there is one). Commission infringement decisions adopted before exit day, however, will continue to be binding on UK courts.

Merger control

After a "no deal" exit, the UK will no longer be part of the EU merger control regime. Consequently, the Draft Regulations remove references to the EUMR and its interaction with the UK merger control regime from domestic law.

For the first time (outside the public interest regime), parties will have to consider the parallel application of both the UK and EU merger control rules to a proposed transaction. Although notification to the CMA looks set to remain voluntary, at least in the medium term, parties to transactions that raise substantive competition issues, or

that are subject to public takeover rules, could still find themselves having to notify in both the EU and in the UK.

In its guidance on mergers in a "no deal" scenario, the CMA encourages businesses who envisage such a possibility to engage early with it, particularly where the transaction raises potential substantive UK competition law issues. Going forward, the CMA will continue to monitor non-notified mergers, including those falling under the EUMR, for transactions that may raise competition concerns.

Antitrust investigations

The CMA's new guidance on antitrust enforcement in a "no deal" scenario clarifies that the CMA will have jurisdiction to conduct investigations into breaches of the CA98 domestic prohibitions occurring before or after exit day, including in cases where the Commission has taken jurisdiction but has not yet reached a decision. Therefore, parties that are subject to ongoing EU investigations may face the additional burden of facing a separate investigation by the CMA, with the possibility of additional fines. Notably, the CMA has already announced that it has started an investigation into commitments concerning an airline alliance that were previously agreed with the Commission and which are due to expire after exit day.

Comment

At the time of writing, the UK political situation remains highly fluid, with the result that either of the above scenarios remains possible, as does a third scenario of Brexit not happening at all. Notwithstanding this uncertainty, the short to medium term impact in the competition law area looks set to be relatively limited, whatever happens.

To recap, if the Withdrawal Agreement is agreed, EU competition law will continue to apply to the UK in its entirety exactly as it does now until the end of 2021 and potentially well beyond. In the event that the "backstop" is triggered, core principles of EU competition law will continue to influence the application of UK competition law beyond that point for the foreseeable future. The UK State aid regime will remain particularly closely aligned with EU law, due to the close continuing oversight that will exercised by the Commission. As noted above, any future agreement on future trading arrangements looks set to take a similar approach to that taken in the backstop to ensure that the UK regime remains closely aligned with EU competition law on an ongoing basis.

If there is a no deal exit, the CMA will continue to apply domestic competition law within a framework set by EU competition law, including EU case law, for years to come. Scope for divergence will be limited by section 60A of the CA98, as well as by the value of following 40 years of EU legal precedent and the desire to minimise legal uncertainty and duplication.

While there may be disruption to live cases, the Commission and CMA will hopefully take steps to find practical solutions once the political fog has cleared. In the area of merger control, there will inevitably be duplication and the UK domestic regime is bound to come under strain, as the CMA struggles with an increased caseload and the need to avoid divergence between EU and UK reviews, in terms of both process and outcome. Fortunately, it will have an increased budget for this and has already commenced a substantial recruitment round. Whether the additional resources are needed sooner, rather than later, remains to be seen.

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