

Antitrust after the end of the Brexit transition period – where do we stand?

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The end of the Brexit transition period at 11pm on 31 December 2020 brings with it significant changes to the application of antitrust and merger control rules in the UK. The UK already has a well-established domestic regime, enforced by the Competition and Markets Authority (**CMA**), together with certain sector regulators. It is also at the forefront of international debates on antitrust policy and has shown its willingness to lead the charge in key antitrust reforms, such as regulation of the digital sector. Now the UK is no longer an EU Member State, it gains new freedom to pursue its own enforcement and policy agenda. While the Christmas Eve agreement on the future relationship between the EU and the UK (**Future Relationship Agreement**) makes some provision for a level playing field for “open and fair competition”, it is for the most part framed broadly – that both parties will maintain an effective competition law, with an independent authority to enforce the rules. The UK therefore retains a wide discretion to chart its own course.

In this article we explore what Brexit means for merger control, antitrust investigations and enforcement and State aid/subsidies, and look at how this is likely to impact business. Notwithstanding the Future Relationship Agreement, the bottom line is that companies active in the UK and the EU are now subject to parallel regimes, with the CMA having the ability to review (potentially identical) transactions and behaviour alongside the European Commission (**EC**).

Merger control: increased burden and uncertainty?

When the UK was part of the EU, the ‘one-stop-shop’ principle applied. This meant that where a transaction met the jurisdictional thresholds of the EU Merger Regulation (**EUMR**), the default position was that the EC had exclusive jurisdiction to assess its impact on competition in the UK and elsewhere in the EU (although the CMA could review on limited public interest grounds and a transaction could be ‘referred down’ to the CMA in certain circumstances).

Now that the transition period has ended, the one-stop-shop principle has fallen away – the EUMR no longer applies in the UK. The upshot: merging parties whose deals meet both the UK and EUMR merger control thresholds are subject to both regimes. The same transaction could therefore be looked at by both the EC and the CMA.

More work for both the CMA and merging parties?

The CMA is geared up for the additional workload that separation from the EU regime will bring. It has predicted that it will review an extra 50 mergers each year – a significant increase (it reviewed 62 deals in the whole of FY19/20). The CMA has been on a recruitment drive in preparation and notes that it continues to work on deployment of resources and taking on new staff.

For merging parties, having to consider an additional merger filing will likely increase their administrative burden. It may also lead to greater uncertainty: there will be another review process to take into account, and this gives rise to the risk that the CMA and the EC may reach different outcomes in relation to the same deal. This risk may be low – the Future Relationship Agreement provides that the EC and UK antitrust authorities should cooperate and coordinate on enforcement activities, where possible and appropriate, and leaves the door open for a separate (presumably more detailed) agreement between the EC/Member State antitrust authorities and the UK antitrust authorities. The CMA has stated that it “will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission as with other competition authorities”. And in revised **procedural guidance** it sets out its approach to dealing with multi-jurisdictional mergers, including steps parties can take to align timetables and facilitate the coordination of remedies with other authorities. This all fits with a more general global trend for authorities to coordinate reviews in terms of both procedure and substance in cross-border cases. Having said this, the risk of differing outcomes cannot be ruled out, in particular where the relevant markets are national or regional/local.

Given that the UK merger control regime is voluntary, however, merging parties are under no obligation to notify their deal to the CMA, even if the jurisdictional thresholds are met. But not notifying carries its own risks – the CMA could subsequently investigate and either prohibit the deal or require remedies to resolve any competition concerns it identifies. The CMA also imposes hold separate orders while investigating completed and even anticipated mergers. While these do not tend to prevent completion, they put a pause on integration while the CMA carries out its assessment and can be extremely burdensome to comply with in practice.

Parties should also bear in mind that the CMA is adopting an increasingly tough stance. In the past two years in particular it has blocked seven deals and caused at least ten to be abandoned. It has also significantly increased the proportion of transactions sent for an in-depth (phase 2) review, and ramped up enforcement of procedural merger rules. This all means that parallel UK and EC merger reviews for a strategic deal raising material competition concerns is unlikely to be straightforward.

But fewer reviews for the EC?

Perhaps. It will all depend on whether the removal of the UK turnover of the merging parties makes a difference when applying the EU turnover thresholds. For some deals this may well be the case. But note that the time a deal is signed is crucial to the analysis. **Guidance** published by the EC is clear that where signing took place before the end of the transition period then, even if the transaction was not notified to the EC by that point, the UK turnover of the parties should be taken into account when applying the EU thresholds.

The EC does, however, continue to have competence to review any transaction which was formally notified to it (or in relation to which it accepted a referral request) before the end of the transition period. This is set out in the Withdrawal Agreement. It retains this jurisdiction until it reaches a final decision – even if this is not until sometime in 2021. And, unless any such decision is annulled on appeal, the CMA has no jurisdiction to review the deal.

A note on foreign direct investment

The UK Government is looking to chart its own course when it comes to reviewing investments into the UK. The new EU Regulation providing for a framework for the screening of foreign direct investment into the EU (see our **alert**) will no longer apply in the UK (although, of course, any investment into the EU from UK-based businesses may well fall within its scope). The Government is instead focused on taking forward plans for a radical new national security regime – contained in the National Security and Investment Bill – which will require mandatory notification of transactions in certain broadly defined “sensitive” sectors, backed up by a “call in” power (and the

possibility of voluntary notification) applying to an extremely wide range of transactions across the whole of the UK economy. Non-compliance will risk criminal and civil sanctions, while failure to notify a deal falling under the mandatory regime will result in that transaction being deemed legally void. This is a big change to the UK merger control regime, and one that we expect to result in a large number of notifications. We should know more about the likely timing of the new regime during the course of 2021. In the meantime, see our **alert** for details.

Antitrust and cartels: appetite for more enforcement?

Like merger control, now that the transition period has ended, EU antitrust rules no longer apply in the UK. This means that the CMA is no longer prohibited from taking enforcement action against suspected anti-competitive agreements or abuse of dominance in the UK where the EC is investigating the same conduct. The exception is formal EC investigations that are ongoing as at 31 December 2020 – the Withdrawal Agreement provides, broadly, that the EC retains competence over these cases until their conclusion.

In practice, this means that a suspected infringement with effects in both the UK and the EU can be investigated by the CMA (or the UK sector regulators) in parallel with the EC. Clearly this could lead to the CMA bringing more enforcement action. It opens up the possibility for it to investigate large cross-border cartels with some UK nexus or, for example, the unilateral conduct of businesses suspected of being ‘dominant’ in their markets. The CMA notes that it is “ready to launch complex cartel and antitrust cases... with a global dimension that would have previously been reserved to the European Commission”. Indeed, CMA CEO Andrea Coscelli has indicated that the authority is “actively considering potential enforcement cases in the digital sector” (which fits more generally with the CMA’s push to increase scrutiny of conduct in digital markets – see our **alert** on the proposed new regulatory regime for digital firms). The Financial Conduct Authority has also hinted that it is also looking to pick up more antitrust cases. But it will all depend on resource. This type of enforcement action is ultimately discretionary, unlike the CMA’s review of mergers, which it has a statutory duty to undertake. And while the CMA states that it is “ready to take on new post-EU Exit responsibilities from January 2021”, it will be interesting to see whether there is an immediate shift in enforcement activity, or whether any uptick takes a little more time to materialise.

Benefit of block exemptions will remain

Under the EU antitrust rules, there are a set of regulations which exempt certain types of conduct, if criteria are satisfied, from the prohibition on anti-competitive agreements (the so-called **Block Exemption Regulations**). They cover, for example, vertical agreements, research and development and technology transfer. These Block Exemption Regulations have been adopted into UK law. This continuity provides vital predictability

for the businesses that rely on them. Existing agreements will continue to benefit from, and new arrangements can be structured to fall within the scope of, the relevant safe harbour. And, while there is a chance that the Government will seek to amend the scope or application of the Block Exemption Regulations in the future, as yet there have been no indications that this is high on the agenda.

Damages actions: little difference in practice?

EC decisions made before the end of the transition period continue to have binding effect for the purposes of private damages actions and can form the basis of a follow-on claim. The same is true for EC decisions reached after 31 December 2020 in cases formally initiated before that date. By contrast, claimants cannot rely on EC decisions relating to investigations initiated and concluded after the transition period as a binding finding of infringement. Claimants will therefore need to prove these infringements from scratch, using the infringement decision as evidence. Standalone actions in relation to infringements of EU antitrust rules can still be brought after 31 December 2020, but only where the infringement occurred before that date.

This sounds like a major change. In practice, however, we may see little difference. On balance, our view is that the UK courts are likely to accept an EC infringement decision as discharging the evidential burden of proof to establish an infringement (even if that is no longer automatic). CMA infringement decisions will also continue to be binding on the courts. For these reasons, we expect that the UK courts will remain a forum of choice for potential claimants, especially with the option of class actions on the table.

State aid/subsidies: a whole new regime?

The position vis-à-vis State aid is still in a state of flux. The EU State aid rules no longer apply in the UK after 31 December 2020. This is except, of course, where necessary to give effect to the Withdrawal Agreement, under which: (1) the EC continues to have competence over State aid proceedings initiated before the end of the transition period; (2) for up to four years (ie to the end 2024), the EC has the ability to initiate new procedures for aid granted by the UK before the end of the transition period; and (3) pursuant to the Northern Ireland Protocol, EU State aid rules continue to apply to the UK in relation to Northern Ireland-EU trade in goods and wholesale electricity markets.

So where does that leave us? The UK Government is clear that it intends to establish a new UK subsidy regime. The Future Relationship Agreement enables this, ensuring that the EU and the UK will each have in place its own independent system of subsidy control (with neither being bound to follow the rules of the other). It sets out certain key principles that each system must follow, including that subsidies must pursue a specific policy objective and must be proportionate and limited to what is necessary. It also provides a list of prohibited subsidies, such as unlimited state guarantees and subsidies for rescue and restructuring where there is no credible restructuring plan in place. And the Future Relationship Agreement lays down certain provisions for the operation of the systems. These include the need for both parties to be transparent about the subsidies they grant, and for each to establish and maintain an independent body to oversee their respective regimes. There must also be a reciprocal mechanism for one party to seek information/action from the other where it considers that a subsidy is at serious risk of causing a significant negative effect on trade or investment between them.

These are all important elements that the Government must carefully incorporate into the new UK subsidy regime. But there are many details still to be ironed out. Will the Government, for example, choose to put in place an ex ante regime (like the EU's current system), requiring approval before a subsidy can be granted? Or will it instead take a different approach where no prior consent is needed? Which body will enforce the regime? The CMA seems the most natural choice, but this is by no means certain. All eyes will be on the Government's consultation on the new regime – planned for early 2021 – for answers.



Will UK antitrust policy diverge from that of the EU?

The short answer is: most likely, at least over time. We have already discussed State aid. In terms of merger control and antitrust, at the moment the UK's regimes very closely mirror the EU system (with the notable exception that the UK, unlike the EU, currently operates a voluntary and non-suspensory competition-based merger control regime). The extent to which this will remain the case going forward is unclear and by no means guaranteed.

On the one hand, when conducting antitrust investigations, the CMA (plus sector regulators and UK courts) must ensure that there is no inconsistency with EU law and case law of the EU courts as applicable before the end of the transition period. They must also have regard to EC decisions, statements and guidance as at that date. This all looks similar to the pre-Brexit position. But there is a key difference: built into the revised UK rules is a get out clause – the CMA, regulators and UK courts can depart from EU law/case law where “appropriate” to do so (eg due to differences between UK and EU provisions, or to accord with generally accepted principles of competition analysis). We envisage that the use of these provisions will result in a gradual divergence away from the EU position over time.

On the other hand, there are various policy initiatives and reforms underway in the UK that are likely to have a more immediate impact in distinguishing the UK regime from that of the EU. We mentioned above the plans for a new digital-specific rulebook, which looks set to apply to digital firms designated as having “strategic market status”. Such firms will potentially be bound by enforceable codes of conduct, subject to “pro-competitive interventions” and required to comply with a distinct (mandatory suspensory) merger control regime. While not completely out of line with the EC’s proposals for digital regulation (see our **alert**), they show that the UK Government is determined to plot its own route forward. And, as the CMA confirms its readiness to take its place as a global competition authority, the Government has indicated that wider amendments to the UK’s competition policy are on the cards. Expect more during 2021.

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