

House of Lords Publishes Report on Brexit’s Impact on Competition and State Aid

Kluwer Competition Law Blog
February 16, 2018

Ros Kellaway, Totis Kotsonis, Annabel Borg (Eversheds Sutherland)

Please refer to this post as: *Ros Kellaway, Totis Kotsonis, Annabel Borg, ‘House of Lords Publishes Report on Brexit’s Impact on Competition and State Aid’, Kluwer Competition Law Blog, February 16 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/02/16/house-lords-publishes-report-brexit-imp-act-competition-state-aid/>*

On 2 February 2018, the EU Internal Market Sub-Committee of the House of Lords (“**EU Committee**”) published its report on the implications of Brexit on competition law and State aid (“**Report**”)[1]. On antitrust and merger control, the Report concludes that there should continue to be consistency between the UK’s and EU’s approach to competition matters, but post-Brexit, the UK would be free to adopt a more innovative and responsive approach to tackling global competition enforcements challenges. On cooperation, the Report proposes a formal agreement covering investigations and enforcement actions. On State aid, it recommends a UK-wide domestic State aid framework. Furthermore, the Report concludes that transitional arrangements will be necessary to clarify jurisdiction in cases which are ‘live’ at the point of Brexit, as well as future cases relating to conduct which occurred whilst the UK was in the EU.

Why was the competition inquiry conducted?

As an EU Member State, the UK can apply EU competition law rules against monopolies and cartels, as well as benefit from EU-wide enforcement undertaken by the Commission. Furthermore, the UK’s competition regime is underpinned by domestic statutes modelled on EU law. Post-Brexit, there will be a break in that model.

Domestic legislation relating to merger control and antitrust issues will remain in force, but the UK will be expected to carry out its own investigations into cartels or mergers that would previously have been conducted by the Commission. This increase in responsibilities is expected to need a commensurate increase in resources for UK regulators. State aid on the other hand presents entirely different challenges for the UK, as it is an area of competition law that is controlled exclusively by the Commission.

Evidence received

The Report followed the EU Committee’s competition inquiry, chaired by Lord Whitty, into the opportunities and challenges of leaving the EU for antitrust rules, merger control and State aid, as well as the future of UK competition policy post-Brexit. The inquiry was launched on 21 July 2017 and the EU Committee received evidence from over fifty witnesses including from academics, barristers, companies, government bodies, law firms (including from Eversheds Sutherland – please see our response [here](#)), regulators and trade associations. The Report refers to the evidence on which the EU Committee relied including from Eversheds Sutherland.[2]

Recommendations in the Report

A summary of the EU Committee’s recommendations is provided below.

Consistency with EU law: In order for UK competition law to remain aligned with EU competition law in the short-term, the Report proposes that, post-Brexit, UK authorities should “*have regard to*” EU law and precedent. It states, however, that such an approach may not be appropriate in the longer-term.

EU block exemption regulations: The current EU block exemptions, such as the vertical agreements block exemption, are valued by UK businesses in helping them to ensure that certain types of agreements do not fall foul of either EU or UK antitrust prohibitions. The Report recommends that similar arrangements should continue to apply under UK law post-Brexit. The EU Committee calls on the Government to clarify whether the EU (Withdrawal) Bill is intended to facilitate the ongoing application of the current exemptions, and for how long. Furthermore, the Government will need to decide the extent to which the UK will continue to take account of future EU block exemption regulations.

Private actions: The uncertainty surrounding the future status of EU antitrust prohibitions and Commission decisions could put the UK’s status as Europe’s foremost jurisdiction for private damages actions resulting from breaches of competition law in jeopardy. The Report recommends that the Government should take this into account when it decides whether to repeal or amend the legislative basis for ‘follow on’ claims in the Competition Act 1998, and whether to allow UK bodies to continue to accept final Commission decisions.

Merger control: The loss of the ‘one stop shop’ arrangement whereby larger mergers fall under the exclusive jurisdiction of the Commission is likely to increase the number of mergers subject to review by the Competition and Markets Authority (“**CMA**”) and the number of appeals heard before the Competition Appeal Tribunal. In the CMA’s written evidence[3], it suggested that businesses could streamline potential dual review requirements by “*agreeing to waivers allowing the European Commission and the CMA to share and discuss information*”, and confirmed that it would continue to “*work on procedural efficiencies that minimise the burden of notification*”. The EU Committee welcomed these proposals.

Transitional arrangements: The Report states that transitional arrangements will be necessary to manage EU competition court cases and administrative procedures which are ‘live’ at the point of this transition. It urges the Government to come to an early agreement with the EU on jurisdiction over competition cases during any transition period, to provide certainty for businesses and to ensure that no cases ‘fall through the cracks’ during this time, to the cost of UK consumers.

Cooperation with the EU: The UK is likely to leave the European Competition Network (“**ECN**”) when it leaves the EU. The ECN is composed of the Commission and the national competition authorities in all EU Member States, and is a forum through which they engage in cooperation and exchange best practices. The Report recommends that the Government negotiates the “*most comprehensive competition cooperation arrangement the EU has ever agreed with a third country*”. The UK will also need to re-establish competition cooperation arrangements with countries currently covered by existing EU bilateral agreements.

State aid: Regardless of the UK’s future trade agreement with the EU, the UK will still be bound by its obligations under the World Trade Organisation Agreement on Subsidies and Countervailing Measures (“**ASCM**”). The ASCM has no domestic application and, therefore, would not regulate State aid within the UK. The Report, therefore, states that outside the EU, a UK-wide State aid framework will be necessary to avoid the risk of domestic subsidy races and distortions of competition between various parts of the UK. In developing this, the Government should take into account calls from local authorities for a less complex and burdensome approval process than under the current EU regime. The Report also recommends that the Government involves and secures the support of the devolved administrations in this process, including in agreeing the terms of reference, remit and priorities of any new UK State aid authority. Finally, it calls for the Government to clarify what approval mechanism State aid would be subject to post-Brexit, and its position on the shape of the future UK State aid regime.

UK’s future institutional framework: Given that the CMA’s workload will increase post-Brexit, the Report states that it is imperative to ensure that the CMA is adequately resourced, with staff with the right skills and experience, in sufficient time. As well as existing bodies, the UK’s future institutional framework for competition matters will involve a number of other organisations, including the proposed Trade Remedies Authority, and possibly a new State aid authority. It will be important to ensure that all these organisations are sufficiently resourced, have clearly defined remits, and that they work together to deliver a cohesive and effective competition regime.

UK future competition regime: Following Brexit, the UK will have the opportunity to design a system that more closely reflects domestic needs and priorities, and is more inclusive of the devolved administrations and local authorities, as well as other stakeholders such as businesses and consumer groups. The EU Committee urges the Government to make full use of this opportunity and launch a consultative process, involving all relevant stakeholders, to inform its decisions and any related legislation.

International networks: Outside of the ECN, there are other international networks such as the International Competition Network and the Organisation for Economic Co-operation and Development. The EU Committee urges the CMA to maintain and increase its engagement in these fora to help enhance its influence in the global competition community post-Brexit.

Comment

Brexit presents an opportunity for the Government to adapt its competition and State aid policy. It should, however, be borne in mind that if the Government wants a “*deep and special partnership*” with the EU, the UK will have to continue to comply with EU competition policy. Indeed on 9 January 2018 Michel Barnier of the Commission stated “*there will be no ambitious partnership without common ground on fair competition, State aid, guarantees against tax dumping, and social and environmental standards.*” Therefore, in fact the Government may be limited on the extent to which it will be able to depart from EU competition policy post-Brexit; UK competition policy could be more stringent but not more lenient.

[1] Available from: <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/67/67.pdf>.

[2] See paragraphs 68, 93, 104, 139, 152, 157, 180, 188 and 196 of the Report.

[3] Available from: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-sub-committee/brexit-competition/written/69571.pdf>.