Brexit and Global Antitrust Reviews: Practical Issues and Guidance

Kluwer Competition Law Blog
September 21, 2018

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Please refer to this post as: Jonathan Parker, Joshua N. Holian, Calum M. Warren, 'Brexit and Global Antitrust Reviews: Practical Issues and Guidance', Kluwer Competition Law Blog, September 21 2018, http://competitionlawblog.kluwercompetitionlaw.com/2018/09/21/brexit-global-antitrust-reviews-practical-issues-guidance/

The UK's expected separation from the European Union (EU) on 29 March 2019 (Brexit Date) will re-cast the process by which parties pursuing global mergers secure their antitrust approvals. It will also reshape the potential exposure that parties face when subjected to global investigations of anticompetitive conduct. As Brexit rapidly approaches, businesses increasingly seek guidance concerning the practical implications that these changes hold for their operations.
On 13 September 2018, the UK government published a technical paper (the Notice) addressing the impact that a "no deal" Brexit will have on merger control and competition law enforcement in the UK and the EU. At its core, the Notice reflects the principle that, absent an agreement to the contrary, the UK's merger control and competition law regime will stand jurisdictionally and procedurally separate from the EU as of Brexit Date. Functionally, this means that the current UK regime for merger control and competition law enforcement will remain in place, and that the UK government will make only the minimum required changes to manage the UK's exit from the EU. Those changes will include removing references to EU institutions and duties on UK bodies that relate to current EU obligations, ending the primacy of EU law, and the binding nature of future case law of the EU's Court of Justice (CJEU).

The Notice provides a useful jumping-off point for addressing questions around, "what does Brexit mean for me?" Without attempting to exhaust every possibility, this Client Alert analyses four important practical questions addressing what a no deal Brexit scenario means for parties subject to merger control or competition law investigations in the UK and the EU. Specifically:

1. Will the European Commission (Commission) and the UK's Competition and Markets Authority (CMA) be able to initiate parallel merger investigations in relation to the same transaction post-Brexit?
2. Can the CMA initiate a parallel merger investigation in relation to a "live" Commission investigation post-Brexit?
3. What will happen to EU-level merger investigations if the Commission's jurisdiction depends on the UK aspect of the transaction?
4. Can the CMA initiate a parallel competition law investigation into a potential infringement that the Commission was investigating pre-Brexit?

Will the Commission and the CMA be able to initiate parallel merger investigations in relation to the same transaction post-Brexit?

Yes. Post-Brexit, the Commission will no longer be able to investigate the UK aspects of mergers and the CMA will be the only competition authority that is competent to assess mergers affecting the UK as of Brexit Date. Accordingly, post-Brexit, if a transaction falls within the jurisdiction of the UK and the EU merger regimes, the Commission's jurisdiction will no longer supersede that of the CMA, and both authorities will investigate these mergers in parallel. Just as, today, mergers are investigated in parallel by, for example, the Commission and the US, Canadian, or Australian competition authorities. In the event of a no-deal Brexit, parallel merger investigations of this kind may begin immediately after Brexit Date.

Today, the Commission's jurisdiction to review mergers supersedes that of its Member States. If a transaction triggers an EU-level filing due to the fact that the merging parties exceed certain revenue thresholds, then the Commission has exclusive jurisdiction to review the transaction. (The Commission might refer a transaction with particular national issues back down to the Member State(s), but in the first instance jurisdiction rests with the Commission.)

This will change post-Brexit. As the Notice reflects, absent a deal that preserves the status quo, the UK will maintain its jurisdiction to review the UK aspects of any M&A transactions that exceed the UK's merger control thresholds. Correspondingly, the Commission will no longer have jurisdiction to investigate the UK aspects of a transaction, which will be solely reserved for the CMA. As a result, while notification to the CMA will (at least for the foreseeable future) remain voluntary post-Brexit, if separate UK jurisdiction arises based on either the target's UK turnover or the parties' combined share of supply of products or services in the UK and the transaction gives rise to potential issues in the UK, parties will need to consider whether to notify the transaction to the CMA before closing. Otherwise, parties will leave open the possibility that the CMA may open an own initiative investigation up to four months post-closing. Overall, this change will likely result in a significant increase in the number of transactions that merging parties decide to notify to the UK — the CMA believes that Brexit could result in up to a further 50 notifications per year, nearly doubling its current workload.

Adding a UK merger notification in relation to a transaction that is already subject to Commission-level review is likely to be burdensome for merger parties. Amongst others, the CMA (like the Commission) has shifted its review process for complex mergers to depend much more heavily on its analysis of the merging parties' pre-merger internal documents. As a result, post-Brexit, complex strategic deals face the likelihood of undergoing extensive, parallel, separate demands for internal documents in the UK and EU (as well as the US) as part of their merger reviews. Such investigations often take a substantial amount of time to resolve, and they directly affect both the timing and the outcome of the mergers under review. In order to manage this process and synchronise merger clearances as much as possible, merging parties will need to carefully consider and develop a robust merger clearance strategy that takes the potential document discovery procedures for the UK, the EU, and other jurisdictions into account.

Can the CMA initiate a parallel merger investigation in relation to a live Commission investigation post-Brexit?

Without a deal that preserves the Commission's and the UK's current approach to these merger investigations today, the agencies will have separate jurisdiction going forward, and nothing would prevent the CMA from launching its own investigation in relation to a transaction that has already undergone extensive antitrust analysis by the Commission. However, in practice, unless the UK government takes the view that the Commission no longer has jurisdiction in this situation (as discussed below), it might be more practical for the CMA to leave the Commission to complete investigations that are live on Brexit Date.

Nevertheless, the government reserves its position in the Notice and leaves open the possibility for the CMA to intervene in these types of transactions should it wish to do so. There are three principal scenarios in which the CMA may encourage the parties to notify the transaction allowing it to open its own merger investigation in parallel to a live Commission investigation:

- *If the Commission would not have jurisdiction to impose divestiture remedies to alleviate UK issues*. In a no deal Brexit scenario, the Commission may lose its jurisdiction to impose divestiture remedies in relation to assets located in the UK. If a strategic transaction gives rise to potential concerns in the UK, the CMA may wish to carry out its own investigation in parallel to the Commission's ongoing investigation. This would preserve the CMA's ability to impose remedies in relation to UK assets in the event it concludes that the transaction gives rise to concerns in the UK.
- *If the CMA would like to reserve its ability to diverge from the Commission's view.* Based on its initial review of the UK aspects of a transaction and the Commission's previous decisional practice, the CMA may wish to carry out its own investigation in order to reserve its ability to reach a divergent view on the UK aspects of the transaction, as compared with the Commission's assessment in relation to the remaining EU elements of the transaction.
- *If it would be politically more acceptable for the CMA to open its own parallel investigation.* In certain circumstances, it may be politically more acceptable for the CMA to open its own parallel investigation. This will primarily depend on the nature of the sector in which the parties are active.

In cases in which a parallel CMA investigation seems possible, buyers should consider engaging with the CMA pre-Brexit, and potentially also submitting a request to have the UK portion of the transaction referred back to the CMA ahead of time. Buyers may also want to contemplate negotiating a condition in their transaction documents to take into consideration a UK merger control process.

What will happen to EU-level merger investigations if the Commission's jurisdiction depends on the UK aspect of the transaction?

There are two potential scenarios in this regard:

- Live merger investigations that have already started on Brexit Date, but in which the Commission's jurisdiction depends on the merging parties' revenues in the UK.
- Merger investigations that are pending on Brexit Date but have not yet started. The Notice provides limited guidance on this topic and recommends that merging parties take legal advice in relation to these situations.

To put this issue into context: at present, the Commission's jurisdiction to review an M&A deal normally arises as a result of the merging parties' global and EU-wide revenues. In accordance with long-standing principles established by the CJEU, the relevant date for determining the Commission's jurisdiction is typically the date of signing of the transaction (or equivalent), or the date of first notification to the Commission (whichever is earlier). Where the Commission's jurisdiction depends on the UK aspect of the transaction, questions will arise as to the legal basis for any ongoing investigation by the Commission and whether it could accept undertakings from merging parties if their transactions give rise to competition concerns.

In relation to the first scenario, potentially, without an agreement between the EU and the UK, the EU may therefore no longer have legal competence to continue its investigation. Practically speaking, if the Commission commences a merger investigation pre-Brexit, regardless of whether its jurisdiction to do so depended in part on the parties' revenues in the UK, the Commission possibly may take the position that it has the jurisdiction to complete its investigation post-Brexit if the relevant date for establishing its jurisdiction was pre-Brexit (as outlined above). This is likely to be a preferable outcome for the CMA to prevent a cascade of new merger cases falling into its jurisdiction on Brexit Date — an eventuality that the CMA is not currently well-positioned to deal with. That said, parties pursuing transactions with clearance timelines that extend beyond March 2019 should carefully consider what role the UK filing thresholds play in the parties' global filing analysis, as merging parties may find their transactions are no longer reviewable by the Commission and that a merger filing to the CMA might be needed.

In the second scenario, if the EU has jurisdiction pre-Brexit, but merger investigations have not commenced and are therefore not live on Brexit Date, jurisdiction will more likely transfer to the CMA. This is the case even in situations in which, for example, merging parties have already engaged with the Commission in relation to pre-notification discussions.

In both scenarios, merging parties should be alive to the fact the analysis may impact the conditions to closing and other provisions of the transaction documents.

Can the CMA initiate a parallel competition law investigation into a potential infringement that the Commission was investigating pre-Brexit?

Conceptually, the answer to this question is yes. Moreover, in practice, parties subject to live Commission-

level investigations likely will be exposed to future UK-level investigations if the conduct in question would meaningfully impact competition in the UK.

At present, the Commission has jurisdiction to investigate potential competition law infringements that impact competition in the EEA, including in the UK.

If an EU competition law investigation is pending on Brexit Date, as with merger proceedings, the Notice states that there may be no agreement on jurisdiction in respect of live cases which leaves open the possibility that the CMA could open its own investigation in relation to a potential competition law infringement that affects the UK market. This will be immediately relevant for parties that submitted a leniency application in respect of the Commission's pending investigation. Such parties will need to consider whether to approach the CMA in these circumstances, if they have not already filed a precautionary leniency application with the CMA. For its part, the CMA may want to open its own investigation if the Commission would not have jurisdiction to impose a penalty (for example, in relation to a company that is only present in the UK) or if the CMA may wish to reserve its ability to reach a divergent outcome to the Commission's assessment.

The Notice considers the implications for other aspects of UK and EU competition law enforcement post-Brexit, including the continued application of the EU's current block exemption regulations, the possibility of follow-on private damages claims, and the removal of the binding nature of future case law of the CJEU.

Conclusion

Brexit creates some inherent uncertainty around what happens to merger reviews and antitrust investigations after March 2019. Certain withdrawal deals could essentially freeze the status quo in place, at least for some period of time. In a no deal Brexit scenario, however, the CMA will stand next to the Commission as a sister agency, and the CMA will presumably review the merger control filings and substantive issues that may arise during this review period. While every situation is different — and clients should seek advice on specific scenarios — parties pursing strategic transactions, in particular, will want to give careful thought to what impact Brexit holds for their merger control filing obligations. Furthermore, whether and how to allocate the risk of a new and separate CMA investigation post-Brexit in their deal documents.