

The Practical Antitrust Implications of Tomorrow: Brexit Day

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As you are aware, the UK will be leaving the EU this Friday 31 January (Exit Day). The CMA has published guidance on how Brexit affects the CMA's powers and processes for antitrust enforcement and merger control during the Transition Period, towards the end of that period, and after it ends. The guidance also explains the treatment of 'live' cases, which are those cases that are being reviewed by the European Commission or the CMA during and at the end of the transition period. The Transition Period will run from 11pm UK time 31 Jan until 11pm UK time 31 December 2020.

The CMA had previously published its "no deal" guidance and a number of statutory instruments. Since there is now a ratified Withdrawal Agreement, and a Transition Period, that earlier guidance and SIs do not apply (at least for now, though these may become relevant, depending on the outcome of the negotiations between the EU and UK during the Transition Period). During the Transition Period, the application of EU competition law in the UK will remain unchanged. Throughout the Transition Period, EU law applies in the UK. EU law must also be interpreted and applied in the UK in accordance with the same methods and general principles as those applicable within the EU. EU Block Exemptions will continue to apply in the UK.

The Guidance contains a useful overview of how the EU Withdrawal Act 2018 and EU Withdrawal Agreement Act 2020 work (UK legislation which give legal effect in UK law to Brexit and to the EU-UK Withdrawal Agreement).

Key points for mergers and antitrust enforcement:

MERGER CONTROL

During the Transition Period:

- During the Transition Period the UK will continue to be treated as if it were a Member State under the EU Merger Regulation (EUMR), such that the 'one-stop shop' principle under the EUMR continues to apply.
- UK turnover generated by merging parties will still need to be taken into account when establishing whether a merger satisfies the EUMR jurisdictional thresholds.
- Where a merger satisfies the EUMR jurisdictional thresholds, the European Commission will continue to retain exclusive competence for the investigation of that merger, including with respect to any effects on any UK market (or market that includes all or a part of the UK).
- During the Transition Period, the UK will continue to be treated as if it were a Member State for the purposes of referrals of merger control cases from the European Commission to the national competition authorities of the Member States (NCAs) and vice versa (for the purposes of Articles 4(4); 4(5); 9; and 22 EUMR).
- Where a request for a referral to the CMA (under Article 9 or Article 4(4), EUMR) is accepted by the European Commission prior to the end of the Transition Period, the CMA will retain jurisdiction to review the merger after Exit Day.

Towards the end of the Transition Period:

- At the end of the Transition Period there will be some merger cases which are under review by the European Commission where a final decision has not yet been taken ("live cases"). There are three scenarios where the European Commission will retain exclusive jurisdiction to review a merger (including in relation to any effects on any UK market) and the CMA will therefore not have jurisdiction over the case:
 - Where a merger has been formally notified to the European Commission before the end of the Transition Period.
 - Where the European Commission has, before the end of the Transition Period, accepted (or is deemed to have accepted) an Article 22 EUMR referral request in which the CMA participated.
 - Where the European Commission has, before the end of the Transition Period, accepted an Article 4(5) referral request (or the deadline for Member States to disagree to the request has expired).
- For mergers where the European Commission has accepted commitments from the merging parties, the European Commission will continue to be responsible for monitoring and enforcing all aspects of these commitments, including any UK elements, after the end of the Transition Period. The Withdrawal Agreement provides that the European Commission and the CMA may agree to transfer responsibility for monitoring and enforcing the UK elements of such commitments from the European Commission to the CMA.
- Cases where the European Commission does not retain jurisdiction at the end of the Transition Period:
 - The CMA may have jurisdiction to review a merger that has not been formally notified or subject to referral to the European Commission before the end of the Transition Period.
 - If there is a material likelihood that the merger will not have been formally notified or referred to the European Commission before the end of the Transition Period, merging parties may wish to consider the possibility that the CMA will ultimately have jurisdiction to review the merger (and consider engaging with the CMA significantly in advance of the end of the Transition Period).
- Consider approaching the CMA to discuss whether it might be useful to begin pre-notification discussions in particular where:
 - the merger might not be formally notified to the European Commission before the end of the Transition Period; and
 - the merger is likely to raise material substantive issues in the UK.

After the Transition Period:

- After the end of the Transition Period, mergers will no longer be subject to the EU one-stop shop principle in relation to the UK. UK turnover will no longer be relevant for determining whether a merger satisfies the EUMR jurisdictional thresholds.
- Where a merger satisfies the jurisdictional thresholds of the EUMR and the UK EAO2, the CMA and the European Commission may conduct parallel assessments of the same merger in their respective jurisdictions.
- Where possible and appropriate, the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission (and other competition authorities).

ANTITRUST ENFORCEMENT

During the Transition Period:

- The European Commission will continue to have the power to enforce Article 101 and Article 102 TFEU in relation to the UK. During the Transition Period, the UK and the CMA continue to be subject to the provisions of Regulation 1/2003.
- The European Commission will be able to carry out dawn raids in the UK and the CMA will also continue to be able to assist the European Commission and national competition authorities of the Member States with their investigations.
- The CMA and the UK concurrent regulators will also continue to have access to information shared amongst the European Competition Network as if the UK were still a Member State. However, pursuant to the Withdrawal Agreement, the participation and attendance of the CMA or UK concurrent regulators in ECN meetings, oral hearings and Advisory Committee meetings during the Transition Period will be by invitation only and in circumstances where cases involving the UK are under discussion or the presence of the UK is necessary and in the interest of the EU.
- All existing EU block exemption Regulations will continue to apply in the UK during the Transition Period.
- The UK regime for competition law redress (i.e. private action for breaches of competition law) remains the same during the Transition Period. Parties therefore will be able to bring private UK court action on the basis of suspected infringements of EU and UK competition law or follow-on damages claims on the basis of EU and UK competition law infringement decisions of the CMA, the UK concurrent regulators, the European Commission or Member State national competition law authorities.
- The leniency regime applicable in the UK remains the same during the Transition Period. The leniency regimes of the European Commission, the CMA and the national competition authorities of the Member States will remain separate and each jurisdiction should be considered individually.
- The fact that a party has made a leniency application to the European Commission whether before or after the end of the Transition Period will not provide it with any protection from fines with respect to any UK investigation under the CA98. Nor will such an application provide its employees or directors with any protection from prosecution for the criminal cartel offence in relation to that cartel activity in the UK or from director disqualification proceedings.

Towards the end of the Transition Period:

- Where the European Commission has formally initiated an investigation under Article 101 or Article 102 TFEU but is yet to reach a decision in respect of that prior to the end of the Transition Period (a 'live' case), the Withdrawal Agreement makes provisions for how the UK elements of these cases are to be dealt with in terms of jurisdiction between the UK and the EU:
 - Where the European Commission has formally initiated proceedings before the end of the Transition Period, the European Commission will continue to be competent for the proceedings after the end of the Transition Period.
 - After the Transition Period ends, the CMA and UK concurrent regulators may obtain jurisdiction over elements of proceedings which have already been formally initiated by the European Commission. For example, if the agreements or conduct under investigation may affect trade within the UK and are ongoing as at the end of the Transition Period, the CMA or concurrent regulators may investigate facts postdating the Transition Period.
 - When the CMA and the UK concurrent regulators are investigating conduct that may affect trade between EU Member States and have not issued a decision before the end of the Transition Period and the case proceeds, they will no longer apply the EU prohibitions after the end of the Transition Period.

After the end of the Transition Period:

- After the end of the Transition Period, the CMA and the UK concurrent regulators will only investigate suspected infringements of UK domestic competition law and not EU competition law.
- After the end of the Transition Period, the European Commission will continue to have responsibility for the monitoring and enforcement of any UK elements of commitments given or remedies imposed in connection with any European Commission proceedings for the application of Article 101 or 102 TFEU. However, the Withdrawal Agreement provides an option to transfer responsibility for enforcing the UK elements of the commitments or remedies to the CMA and the concurrent regulators by mutual agreement between the Commission and the CMA.