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European Merger Control Post-Brexit: New Year's Resolutions

Jay Modrall (Norton Rose Fulbright, Belgium) · Monday, January 4th, 2021

The December 24 announcement that the European Union (EU) and the United Kingdom (UK) had reached an agreement in principle on a new Trade and Cooperation Agreement (the TCA) was greeted with sighs of relief on both sides of the Channel. For competition lawyers and parties engaged in M&A activities, however, the work of clarifying how the EU and UK merger control regimes will work together is just beginning.

The TCA includes a chapter on competition, but this is very general. The EU and UK agree to "maintain a competition law which effectively addresses" merger review, among other things, and applies to "all economic actors irrespective of their nationality or ownership status." The TCA envisages that EU and UK authorities "shall endeavour to cooperate and coordinate," including by sharing information, and authorizes them to enter into a separate agreement on cooperation and coordination. But it says nothing about the specifics of such cooperation.

Brexit's most obvious and immediate effect on merger control is the UK's exclusion from the "one-stop-shop" under the EU Regulation 139/2004 on the control of concentrations among undertakings (the EUMR), meaning that the same transaction may trigger filings both in the EU and the UK. Thus, Brexit will likely lead to more UK merger notifications, a significant increase in the UK Competition and Markets Authority's (CMA's) workload, and increased burdens for companies.

Global M&A transactions often trigger multiple merger filings, and the addition of one more may not seem too serious. Duplicate filings in Brussels and London will likely have a disproportionate impact, however, owing among other things to the fact that both authorities will often need to examine the same European markets in parallel, both authorities employ front-loaded, information-heavy regimes and any required remedies may overlap or even conflict.

This "Brexit tax" in merger control can't be avoided entirely, but with creativity and goodwill, the Commission and the CMA can significantly reduce its impact. This article explores the merger control implications of Brexit and suggests ways to mitigate the burden on competition authorities and business.

Brexit Consequences for Merger Control

Brexit is likely to impact merger control in five main ways: creating short-term challenges for transactions signed in 2020 but not yet closed as of January 2021; increasing the number of UK merger filings; possibly reducing the number of EU filings; eliminating the existing framework for cooperation between the Commission and the CMA, and imposing greater burdens and legal uncertainty on business.

Short-term challenges

As with any major transition, Brexit will create interpretive and logistical challenges for transaction parties caught in the middle, in particular where transactions were entered into in 2020 but had not closed as of year-end. These issues are likely to be short-lived, however, and many questions are addressed in December 2020 guidance from the Commission (Notice to Stakeholders) and the CMA (Guidance on the functions of the CMA after the end of the Transition Period).

More UK filings

Many transactions meeting the EUMR filing thresholds will also meet the UK thresholds post-Brexit, but not all. For instance, joint ventures that meet the EU turnover thresholds by virtue of the parents' turnover are not necessarily captured under the UK rules. In addition, some deals that meet the EU thresholds will not trigger the UK thresholds, because the target does not have more than £70m in UK turnover and the transaction does not involve the creation or increase of a twenty-five percent share of supply in the UK. Moreover, transactions raising no competition issues, like many private equity transactions, will probably not be notified under the UK's voluntary system even if the thresholds are met.

In short, not all transactions notifiable under the EUMR will also be notified in the UK, but many likely will be. This duplication will lead to a significant increase in the CMA's workload, as well as a more prominent role for the CMA, particularly in major global transactions formerly outside the CMA's jurisdiction.

Fewer EU filings

Conversely, Brexit may lead to a reduction in the number of EU filings. Many companies derive a significant portion of their EU turnover in the UK, and some transactions that would currently be notifiable under the EUMR likely won't meet the turnover thresholds for mandatory filing when the UK is excluded. The number of EU filings eligible for voluntary referral to the Commission could also be reduced. Under the EUMR, parties acquiring control in transactions that would otherwise be notifiable

in three or more Member States can request that the transaction be referred to the Commission for review. The UK's jurisdictional thresholds are broad, and it is not uncommon for the UK to count as one of the jurisdictions that can be used to trigger a referral request. Parties to transactions that would be subject to review in (only) three EU Member States, including the UK, would no longer be able to take advantage of the voluntary referral process. Overall, it seems likely that Brexit will result in a small but noticeable drop in the number of filings to Brussels.

Lost cooperation framework

Under the EUMR's one-stop-shop, the Commission and the CMA do not currently have to coordinate parallel merger reviews. Nonetheless, the European Competition Network (ECN) currently provides a strong institutional framework for cooperation among the Commission and national competition authorities (NCAs) including the CMA. The CMA will be excluded from this framework at precisely the time when greater coordination in merger review would be beneficial.

The Commission could and likely will enter into a bilateral Memorandum of Understanding with the CMA providing for cooperation in antitrust matters, as it has done with many other competition authorities. Because many merger cases involve pan-European markets and difficult cases will often require pan-European remedies, however, efficient handling of parallel EU and UK merger investigations will require a far greater level of coordination than currently occurs under existing Commission agreements.

Burdens and uncertainty for businesses

The need for duplicate filings in the EU and the UK will directly and immediately increase the burden of merger control for business. As mentioned, many transactions already trigger multiple merger control filings, so one more may not be seen as a material change. Unfortunately, however, the extra burden for business may be greater than the addition of one more filing would otherwise suggest, for several reasons.

First, the high level of market integration in the EEA suggests that parallel review by the Commission and the CMA will involve more duplication than parallel reviews by other jurisdictions. In many cases, the relevant geographic markets on which a transaction's impact is to be analysed will be EEA-wide, or at least regional. As a result, the Commission's and CMA's investigations, including for example extensive questionnaires, meetings with customers and competitors, and potentially site visits, will often involve the same entities and locations.

Second, within merging parties' organizations, the same limited group of people responsible for the European region will often be called upon to provide information for both the EU and UK investigations. While in many cases the same data will be usable in both reviews, any differences in the information required will increase the

burden for European market research or other business teams. To the extent that the Commission's and CMA's lines of questioning diverge in the course of the investigations, this burden will further increase.

Third, to the extent the Commission and the CMA have different concerns about a transaction and require remedies to address those concerns, divergent or conflicting remedies will be more likely to create operational problems than remedies in different regions of the world. Although the Commission and the CMA currently take similar approaches when analysing mergers, their approaches may diverge over time.

Mitigating the Brexit Tax in Merger Control

For all these reasons, Brexit will likely increase the burden of merger review for business and increase legal uncertainty over time. The Commission and CMA could, however, take a number of concrete steps to mitigate these negative consequences.

First and most broadly, the Commission and the CMA should create an ad hoc framework for cooperation in merger cases. This cooperation should be much broader than existing forms of cooperation between agencies, such as between the Commission and the U.S. antitrust agencies. The new cooperative framework could encompass all stages of the merger review process, from the notification to investigation to remedies.

With respect to the notification process, the Commission and the CMA could undertake a review of their existing notification forms to identify differences that might lead to unnecessary burdens for companies notifying in both jurisdictions and consider changes. Another approach to achieve similar benefits could be for the CMA to accept EU notifications (with some supplemental UK-specific information) for UK purposes, as the Swiss authority does with EU notifications.

It would also be helpful to align the Commission's and the CMA's pre-notification and Phase 1 timelines. The current UK process is 40 working days in Phase 1 in comparison to 25 working days in Brussels, but the EU notification process begins with an often lengthy pre-notification period. If a UK filing must be delayed until the EU pre-notification process is completed (so that the same market information can be used in both notifications), the longer UK Phase 1 period would be unnecessary.

With respect to the investigation process, the Commission and the CMA could greatly reduce the burden for business by cooperating in the collection of evidence. For instance, they could prepare common questionnaires, cooperate in interviews with customers and competitors, and conduct site visits and state-of-play meetings jointly. Rights of defence would, of course, need to be protected, but merging parties would generally benefit from such cooperation. Similarly, if parties receiving an EU statement of objections wished to exercise their right to an oral hearing, the hearing could be coordinated with the CMA – or, perhaps more realistically, the CMA could consult closely with the Commission and adjust its review timelines to allow the EU and UK processes to move forward in parallel and align key decision points.

Where remedies are needed, the Commission and the CMA could agree to accept remedy proposals in the same format, if and to the extent, the issues are the same, and to cooperate in the market testing of proposed remedies. Similarly, in remedy implementation, the Commission and the CMA could agree to accept the same forms and otherwise avoid duplication. For example, in many cases, only one monitoring or divestiture trustee should be required for both the EU and UK processes. A useful model might be the existing but informal arrangements between the U.S. agencies and the Canadian Competition Bureau, under which the Bureau sometimes relies on remedies negotiated by the U.S. agencies based on a side letter, without the need for a complete separate remedy process in Canada.

Procedural cooperation and convergence between the Commission and the CMA are clearly desirable post-Brexit, but it remains to be seen how far the CMA will be prepared to accept the Commission as the "lead authority" on European competition matters. The CMA may be less willing to allow another agency to take a leading role than the Swiss and Canadian authorities have been (even though pre-Brexit it would not have had jurisdiction over cases caught by the EUMR). If that turns out to be the case, a looser structure in which the Commission and the CMA could agree on a case-by-case basis which authority is best placed to take the leading role may be preferable.

In summary, Brexit will likely lead to duplicate EU and UK notifications in many transactions that meet the EUMR thresholds. The additional notification requirements will lead to increased costs and complexity for business. With creativity and goodwill, however, the Commission and the CMA could do much to mitigate these burdens. In many cases, the Commission and the CMA could potentially make significant improvements through bilateral agreements without the need for new legislation.

Conclusion

There is great cause for optimism as we leave the challenges of 2020 behind us. In relation to merger control, however, the conclusion of the TCA signals the start, not the end, of work for the Commission and the CMA. While the larger framework of the EU's and UK's future relationship was being negotiated, the scope for in-depth discussions between the two agencies on specific aspects of their conduct of parallel merger reviews was limited. With the TCA in place, both agencies are free to make ambitious New Year's resolutions to craft innovative ways of working together to reduce the Brexit tax on business and – not incidentally – themselves.

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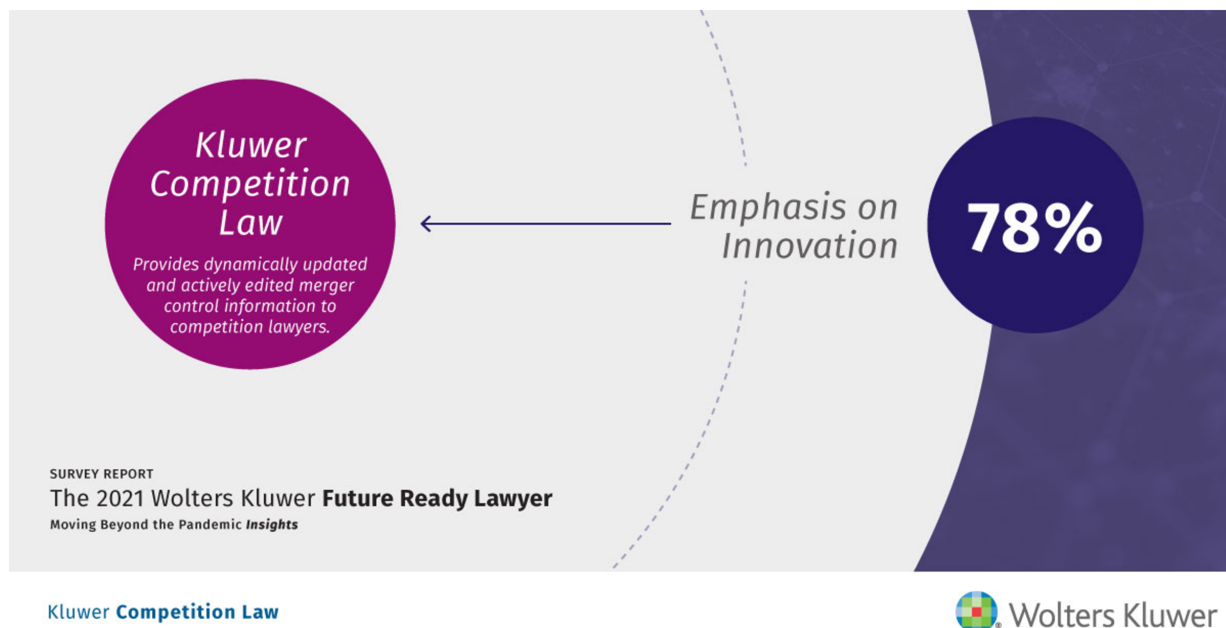

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