



Brexit

Key issues for Competition Law and Merger Control

1 February 2020

Background

On 31 January 2020 (at midnight CET, 11pm London UK time, **exit day**), the UK ceased to be a member state of the EU, and the European Communities Act 1972 – the statutory basis for giving effect to EU law in the UK – was repealed. This is a profound change, but its immediate impact on UK law and regulation is limited in two important ways.

- Under the UK-EU agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), virtually the whole of EU law remains "applicable to and in the UK" from exit day until at least 31 December 2020. The Withdrawal Agreement calls this the "transition period". Here, we call it the "**implementation period**", following terminology used in the European Union (Withdrawal Agreement) Act 2020 (the **Act 2020**). The 2020 Act implements the Withdrawal Agreement into UK domestic law.
- Under the European Union (Withdrawal) Act 2018 (the **2018 Act**), all the EU law that applies in and to the UK immediately before the end of the implementation period (a substantial proportion of all UK regulation) will continue in force as UK domestic law (with some modifications) unless and until it is replaced or amended by new UK legislation. Under powers contained in the 2018 Act, the UK government has already issued a large number of statutory instruments to amend that "on-shored" body of law, and make it fit for purpose as domestic UK legislation in a post-Brexit environment. These statutory instruments are due to come into force at the end of the implementation period.

The Withdrawal Agreement provides for the implementation period to end on 31 December 2020, unless the UK and EU agree, by 1 July 2020, that it should be extended for a further one or two years. The UK government has indicated that it does not wish to seek such an extension, and the 2020 Act states that the implementation period ends on 31 December 2020.

Deal or no deal?

The implementation period gives the UK and EU a time-limited opportunity to negotiate, against a stable background, the terms of their future relations in respect of trade and the other areas that are currently regulated by EU law. At the end of the implementation period, any given area of UK-EU relations either will or will not be regulated by a new UK-EU agreement (a **future relationship agreement**).

When the Withdrawal Agreement was being negotiated, "deal or no deal?" was used to refer to the fact that at the point when the UK ceased to be an EU member state, there would either be no agreement on the terms of the UK's withdrawal (and so effectively a legal vacuum in UK-EU relations), or the UK would enter a transition period in which, for the duration of that period, the status quo would be largely preserved. At the end of the implementation period, the UK and EU may have reached agreement on all the aspects of their future relations that will be governed by future relationship agreements, or none of them, but it is also quite likely that they will have reached agreement on some, but not on others, so that the question "deal or no deal?" can only be answered for each individual topic or sector. Indeed,

in some areas it may take time before it is clear whether the UK and EU will seek to reach a bilateral agreement at all, rather than, for example, simply relying on the provisions of existing multilateral instruments like the WTO rules.

It will therefore necessarily take time for clarity on any possible "deal" outcomes to emerge. The shape of "no deal" outcomes is more predictable, but here too there is some uncertainty, since an agreement reached in one area may have effects that spill over into areas that are not explicitly addressed by it.

Competition law and merger control

Competition law and merger control are particularly significant for businesses contemplating a deal that may need regulatory clearances, or which is subject to or enjoying the benefit of restrictive provisions in commercial agreements. Because the UK's competition regime is modelled closely on the EU's, most commercial arrangements are unlikely to need substantial revision solely due to competition law now that the UK has exited the EU. However, any business that has cause to engage with a competition authority in the UK or the EU should be alert to the potential implications of no deal being reached between the UK and EU on their future relationship by the end of the implementation period. That could produce a sudden shift to different, and often overlapping, regimes that will be complex to navigate. If there is a deal, there is likely to be greater cooperation, but ultimately there will still be parallel and possibly diverging regimes. Maintaining open and fair competition between the UK and the EU is likely to be central to negotiations on a future relationship agreement. However, what that means in practice for competition law, merger control and state aid rules in the UK remains unclear.

For M&A transactions, including joint ventures, uncertainty about whether there will be a deal and what it will look like needs to be factored into negotiations, transaction documents and timetabling. Businesses need to consider, in particular, which authorities may have powers to review their transactions. The outcome of negotiations will have the greatest impact on ongoing investigations or commercial agreements where the availability of exemptions may be in question.

The table below summarises the key issues for businesses in relation to competition law, merger control and state aid, comparing what will happen during implementation period with what will happen from 1 January 2021 if there is no future relationship agreement. Some of the "no deal" issues below may persist even if the UK and EU do come to an agreement on their future relationship, but that is, as yet, still unclear.

Key issue	Implementation Period up to 31 December 2020	No deal on future UK/EU relationship
To which competition authority should you notify your transaction?	<p>The EC will continue to be a one-stop-shop for transactions meeting the EU thresholds until the end of the implementation period.</p> <p>At the end of the implementation period, cases in mid-review will, if notified to the EC before the end of the implementation period, continue to be investigated by the EC.</p> <p>Thereafter, a transaction may be required to be notified to both the CMA and the EC, unless other arrangements are agreed.</p>	<p>Parallel merger notifications may be required to both the Competition and Markets Authority (CMA) and the European Commission (EC).</p> <p>The CMA will have exclusive competence to review transactions (including those mid-review by the EC) meeting the UK merger control thresholds. It will look at the effect of the transaction on competition in the UK.</p> <p>The EC will also have jurisdiction to review the same transaction if it meets the EU thresholds (calculated excluding UK turnover), looking at effects in the EU (excluding the UK). A deal which would have met EU thresholds pre-Brexit may be subject to filing requirements of individual member states post-Brexit, rather than to the EC.</p> <p>Market definitions and shares in those markets may change if trade barriers insulate the UK market.</p>
What do you need to think about in M&A transaction documents if merger control thresholds	<p>So long as a transaction is notified before the end of the implementation period, the EC will retain exclusive jurisdiction to investigate it, excluding the possibility of the CMA stepping in. The commencement of pre-notification</p>	<p>M&A deals and the transaction documents need to prepare for the possibility of the CMA stepping in to investigate UK aspects in parallel with the EC (if the respective thresholds are met). Conditions precedent in relation to merger</p>

are likely to be met?	<p>discussions with the EC will not be enough.</p> <p>Any future agreement between the UK and EU could make provision for greater cooperation between the CMA and EC in dealing with mergers than in the event of a no deal.</p>	<p>clearances in particular will need careful drafting.</p> <p>There will also be implications for deal timetables and longer pre-notification to both the CMA and EC (or national competition authorities) may need to be factored in. Early engagement with both the CMA and the EC is recommended in those circumstances.</p> <p>Although the UK merger regime is nominally voluntary, in practice deals are very unlikely to go "under the radar" if there is also an EC merger notification.</p>
Which authority will have jurisdiction to investigate competition law infringements?	<p>There will be no major changes during the implementation period and EU competition law will continue to apply until the end of that period.</p> <p>The EC will continue to have jurisdiction over enforcement of EU competition law in the UK and the Court of Justice of the EU will have exclusive jurisdiction to review EC decisions. The CMA will also be able to enforce EU competition law rules in the same way as it does now.</p> <p>The EC will continue to be able to carry out dawn raids in the UK to investigate suspected breaches of EU competition law, either on its own or by the CMA acting on its behalf.</p>	<p>If your business trades in both the UK and EU member states it will have to comply with both the EU and UK competition regimes.</p> <p>Complex questions are likely to arise in relation to determining whether conduct has "an effect" on competition within the UK or EU (or both). The CMA and EC may take different approaches. There will be no obligation on the CMA to be consistent with EU law.</p> <p>If you are involved in an ongoing competition investigation, parallel proceedings (which could be criminal in the UK and civil in the EU) are a possibility. Investigations with an EU element carried out by the CMA under EU law will continue under UK law only as the CMA can no longer enforce EU competition law.</p> <p>The EC will no longer be able to carry out dawn raids in the UK and will be limited to making written requests for information to UK-based companies.</p> <p>EC infringement decisions will no longer be a valid basis for a follow-on damages action in UK courts.</p>
Do your commercial agreements rely on block exemptions and will these continue to be available?	<p>There will be no practical change until the end of the implementation period, when they will be retained in the UK.</p>	<p>The current EU block exemptions (of which there are seven, including exemptions for vertical agreements and technology transfer agreements) will be retained in the UK as parallel exemptions to the UK competition prohibitions, but may be amended.</p> <p>It remains to be seen how these will be interpreted by the CMA, and there may be scope for greater territorial protections in the UK.</p>
How will the Northern Irish "backstop" affect competition law?	<p>Businesses in Northern Ireland will continue to be bound by EU competition law and merger control rules in the same way as businesses in other parts of the UK.</p>	<p>In relation to competition law, businesses in Northern Ireland will be in the same position as those operating in the rest of the UK. EU competition law will not apply unless their conduct has an effect in the EU (which of course includes Ireland).</p> <p>However, under the revised Northern Ireland Protocol (Protocol), EU state aid rules (see below), as well as certain other EU rules in relation to the trade in goods, would continue to apply in Northern Ireland beyond the</p>

		<p>implementation period if there is no future relationship agreement.</p> <p>After four years of the "backstop" being in force, the elected representatives of Northern Ireland will be able to decide, by simple majority, whether to continue applying relevant Union rules.</p>
<p>Are you (or a business you are acquiring) in receipt of state aid?</p>	<p>The UK will continue to be part of the EU state aid regime until the end of the implementation period.</p> <p>When the implementation period ends, the CMA will take on the role of the EC and investigate state aid issues in the UK.</p> <p>However, the EC may bring a state aid claim against the UK if it involves actions that occurred before the end of the implementation period.</p>	<p>The EU state aid rules would be enshrined into UK legislation by the European Union Withdrawal Act 2018.</p> <p>The CMA would take over enforcement and supervision of state aid rules from the EC (subject to comments on Northern Ireland below).</p> <p>The UK could depart from the EU state aid rules by introducing new legislation.</p> <p>If the Protocol comes into force, EU state aid rules will continue to apply in relation to measures that affect trade between Northern Ireland and the EU in areas covered by the Protocol. This may lead to conflicting state aid regimes in Northern Ireland and the rest of the UK.</p>

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