Brexit
Key issues for Competition Law, State Aid and Merger Control

9 October 2020

Background

The UK left the EU on 31 January 2020 (**exit day**). However, this profound change has so far had limited impact on UK law and regulation. Under the agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), the UK continues in most respects to be treated as if it were still part of the EU from exit day until 31 December 2020. The Withdrawal Agreement provided a mechanism to extend this period but it has not been used. It therefore appears that the full legal consequences of Brexit will begin to be felt from 1 January 2021.

The Withdrawal Agreement does not regulate future trade between the UK and EU, or any other area of potential future EU-UK cooperation, except to a limited extent in relation to Northern Ireland. It remains unclear if a deal on future UK-EU relations will be agreed by 31 December 2020. In some areas there is an obvious legal fall-back framework in the absence of a deal (for example, if agreement is not reached on tariff-free trade, "WTO rules" will apply); in other areas there is not. Whatever happens, those trading between the UK and EU will face significant regulatory changes (for example in relation to customs). It also seems likely that, if the UK and EU reach a deal in the coming weeks, it may be a fairly "thin" agreement, meaning that negotiations on some aspects of the UK-EU post-Brexit relations may continue well beyond 2020.

For more detailed background, click **here**.

Competition law, state aid and merger control

Maintaining open and fair competition between the UK and the EU has been central to negotiations on a future relationship agreement. If there is a deal, there is likely to be greater cooperation than there would be in the absence of one, but ultimately there will still be parallel and possibly diverging regimes. This looks particularly likely in relation to state aid, with the UK preferring to rely on WTO rules rather than accept continuation of the EU state aid regime in any form.

Businesses may wonder what all of this means in practice. Competition law is particularly significant for businesses which are 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, though particular rules may change over time. Any business that has cause to engage with a competition authority in the UK or the EU should be alert to the forthcoming sudden shift to different, and often overlapping, regimes that will be complex to navigate. Businesses contemplating an M&A deal, including joint ventures, that may need regulatory clearances will now need to factor parallel UK and EU merger control regimes into negotiations, transaction documents and timetabling (in particular, identifying which authorities may have powers to review their transactions). Businesses in receipt of state aid will want to be sure they are not penalised (and that it will not be clawed back); something that requires certainty about the applicable regime and associated enforcement risks.

The table below summarises the key issues for businesses in relation to competition law, merger control and state aid, comparing the current position during the 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?	The EC continues to be a one-stop shop for transactions meeting the EU thresholds until the end of the implementation period. 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. Thereafter, a transaction may be required to be notified to both the CMA and the EC, unless other arrangements are agreed.	Parallel merger notifications may be required to both the Competition and Markets Authority (CMA) and the European Commission (EC). 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. 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. Market definitions and shares in those markets may change if trade barriers insulate the UK market.
What do you need to think about in M&A transaction documents if merger control thresholds are likely to be met?	So long as a transaction is notified before the end of the implementation period, the EC retains exclusive jurisdiction to investigate it, excluding the possibility of the CMA stepping in. The commencement of pre-notification discussions with the EC will not be enough. 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.	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 clearances in particular will need careful drafting. 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. 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. The UK CMA is willing to take an expansive view of its jurisdiction to intervene in completed mergers, as well as impose "freeze orders" to halt integration.
Which authority will have jurisdiction to investigate competition law infringements?	EU competition law continues to apply until the end of the implementation period. The EC continues to have jurisdiction over enforcement of EU competition law in the UK and the Court of Justice of the EU has exclusive jurisdiction to review EC decisions. The CMA is also able to enforce EU competition law. The EC continues to be able to carry out dawn raids in the UK to investigate suspected breaches of EU competition law,	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. 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. If you are involved in an ongoing competition

	either on its own or by the CMA acting on its behalf.	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. 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. EC infringement decisions will no longer be a valid basis for a follow-on damages action in UK courts.
Do your commercial agreements rely on block exemptions and will these continue to be available?	There is no practical change until the end of the implementation period, when they will be retained in the UK.	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. 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.
How will the Northern Ireland Protocol (Protocol) affect competition law?	Businesses in Northern Ireland are bound by EU competition law and merger control rules in the same way as businesses in other parts of the UK.	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). However, under the Protocol, EU state aid rules (see below), as well as certain other EU rules in relation to the trade in goods, are intended to continue to apply in Northern Ireland beyond the implementation period if there is no future relationship agreement. After four years of the Protocol being in force, the elected representatives of Northern Ireland would be able to decide, by simple majority, whether to continue applying relevant EU rules. However, the UK Internal Market Bill, which is currently being considered by Parliament, would allow the UK government to adopt regulations which set out how the state aid aspects of the Protocol are to be interpreted, including making provision to disapply or modify the effects of the provisions of the Protocol (despite these provisions having been agreed in an international treaty with the EU). This has proved controversial.

Are you (or a business you are acquiring) in receipt of state aid?	The UK continues to be part of the EU state aid regime until the end of the implementation period.	It was originally anticipated that the EU state aid rules would be enshrined into UK legislation by the European Union Withdrawal Act 2018, with enforcement being undertaken by the CMA. However, the UK government has announced that it will not adopt EU state aid rules and will rely, instead, on World Trade Organisation anti-subsidy rules. These would determine when a UK subsidy might justify countervailing measures in the form of tariffs being applied by EU member states (or vice versa). WTO rules do not provide a legal framework to address domestic effects of subsidies on competition which the UK government intends to legislate on in due course. Further, the Internal Market Bill reserves exclusive competence over state aid/subsidy control to the Westminster Parliament. It gives UK government ministers powers to provide "financial assistance" i.e. state aid, in areas which were arguably previously devolved, such as to support economic development (with further detail expected in future regulations). This has angered the devolved governments as it may limit their ability to provide such financial assistance according to their own priorities and policies. There will be a UK Shared Prosperity Fund to replace EU Structural Funds. Despite the provisions of the Internal Market Bill, under the Withdrawal Agreement (i.e. international law), the EC may still bring a state aid case against the UK for four years from the end of the implementation period if it involves aid granted before the end of that period.

Michael Dean
Partner, Competition
D +44 141 271 5730
M +44 778 557 7425
Michael.dean@dentons.com

Adrian Magnus
Partner, Competition
D +44 207 320 6547
M +44 776 852 3225
Adrian.magnus@dentons.com

Melanie Martin
Senior Associate, Competition
D +44 141 271 5736
M +44 750 083 5682
Melanie.martin@dentons.com

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