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Kirkland Alert

Brexit and Beyond: Implications for EU and UK Antitrust Compliance

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Need to Know:

- **Transition period from February 1 to December 31, 2020 – merger control and antitrust investigations to continue as before during this period**
- **Mergers formally notified before the end of the transition period stay with the European Commission (“EC”) – start preparations early if you want to meet the deadline**
- **EC keeps antitrust investigations that it has formally commenced before the end of the transition period**
- **UK authority considering mandatory merger control regime for large transactions; UK antitrust rules unlikely to diverge in the near term**

With the UK leaving the EU on January 31, 2020, we answer some of the most common questions relating to the impact of Brexit on EU and UK mergers and antitrust investigations.

The headline is that there is a transition period, which means it will be business as usual until December 31, 2020, when the transition period is due to expire (that period could be extended, although, at present, the legal position in the UK is that no extension can be requested).

However, the UK Competition and Markets Authority (“CMA”) is already monitoring some of the more significant deals that may fall within its jurisdiction post-Brexit, and so businesses will need to factor in the potential impact of Brexit on transactions that are expected to straddle the end of the transition period and the “new world”.

Similarly, ongoing EU cartel investigations may be subject to a separate CMA investigation to the extent that the conduct occurred in, or impacted, the UK and the

EC has not formally initiated proceedings prior to December 31.

Merger control

We engage in regular international M&A. When do we need to start thinking about making both a UK and an EU filing?

The key consideration for determining whether to make a UK filing in addition to an EU filing is the date when the procedure is formally registered with the EC. In almost all cases, this will be the formal notification of the transaction to the EC.

This means that, if you formally submit your EU filing to the EC before December 31, 2020, the EC will be competent to review the merger and its decision will be binding on the UK, and therefore the CMA will not have jurisdiction to review the merger. If you formally notify after December 31, the EU will not consider the effects of the merger in the UK and a separate UK filing may be required. Bearing in mind that the EC closes for the Christmas period, the last day for formal filing will be Wednesday, December 23.

As all cases are subject to “pre-notification” before formal filing, companies are likely to want to start pre-notification early to avoid missing that deadline for the formal filing – which means before summer for the more complex cases.

From January 1, 2021, the CMA will be able to assert its jurisdiction over the UK aspects of all other transactions that would have previously qualified for exclusive review by the EC, provided they meet the UK jurisdictional thresholds.

UK merger control thresholds:

(a) The target’s UK turnover exceeds GBP 70 million, or

(b) As a result of the merger, a share of 25% or more in the supply or purchase of goods or services of a particular description in the UK (or a substantial part of the UK) is created or increased

Where there is uncertainty about the notification date for transactions that have a UK aspect and potentially meet the thresholds described above, it would be prudent to approach the CMA to engage in pre-notification discussions, if relevant.

Could Brexit affect my planned EU filing?

After December 31, 2020, turnover generated in the UK will no longer be included in the turnover calculation for EU thresholds. Therefore, if you miss the formal EC filing deadline of December 23, your transaction may no longer meet the EU thresholds.

What about UK cases that could be referred up to the EU? Or EU cases that could be referred back to the UK?

During the transition period, EU law will continue to apply in the UK, and therefore referral requests to and from the EC can continue to be made.

In particular, where a transaction will be notified to the EC before December 31, the parties may wish to request a referral to the CMA if the competition concerns mostly arise in the UK. In addition, where a transaction with significant effects in the UK has been notified to the EC, the CMA may request a referral itself from the EC.

During the transition period, the CMA may still refer cases to the EC if the effects of the case extend beyond the UK. However, from a practical and political perspective, the CMA is unlikely to do this.

After the transition period ends, there will be no system of referral between the EC and the UK.

How will remedies that have been agreed before December 31 be impacted? What about remedies for cases that are initiated before December 31?

The default position is that the EC will continue to be competent to monitor and enforce remedies in merger control proceedings that are initiated before the end of the transition period.

The EC and the CMA can agree that the default will not apply to a particular transaction. The EC and the CMA can also agree later down the line that the EC can transfer the monitoring and enforcement of remedies in the UK to the CMA.

What will the UK merger control regime look like after Brexit?

The UK regime is “voluntary”, in that notification is not mandatory and deals can be closed prior to CMA clearance. However, the CMA has started exploring whether transactions above a certain threshold (to capture the big transactions that currently are reviewed by the EC, not the CMA) should be subject to mandatory notification paired with a “standstill obligation”.

In general, the CMA’s workload is expected to increase dramatically (potentially doubling), but given that the CMA was gearing up to deal with a possible no-deal exit in October 2019, it is likely to be reasonably well-prepared for January 2021.

Cartels and abuse of dominance

What will happen to current EC investigations?

Until December 31, any EU antitrust investigation will continue as normal. If the EC formally initiates procedures before December 31, the CMA cannot investigate that same infringement and any decision issued by the EC will be binding on the UK. If the legality of such a decision is challenged, it can only be reviewed by the European Court of Justice. This means that the EU institutions will continue to have jurisdiction over cartel and abuse of dominance cases making their way through the courts long after Brexit has officially happened.

If the EC does not initiate proceedings before December 31, the CMA will have jurisdiction after that date to begin an investigation into any conduct that affects the UK whether that conduct occurred before or after December 31.

What will happen to commitments given before December 31? What about commitments given in cases initiated before December 31?

For any case initiated or decided before December 31, the EC will continue to be the competent authority to monitor and enforce commitments unless the EC and the CMA agree otherwise.

What about EU court decisions? Will they be effective in the UK?

During the transition period, EU law will apply in the UK, and the UK will be subject to the rulings of the European Court of Justice. The European Court of Justice will also continue to have competency to review decisions adopted after the end of the transition period in relation to proceedings that were initiated before December 31.

What about future investigations?

For any new activity that comes to light after December 31, the CMA could begin an antitrust investigation in relation to any conduct that affects competition in the UK. If the conduct also has an effect on competition within the EEA, the EC could begin an investigation in parallel.

What level of cooperation will exist between the CMA and the EC?

Unless a specific deal is reached, the CMA will no longer be part of the European Competition Network after January 31 (although it may receive information on ongoing cases that relate to the UK and may be invited to attend meetings). The CMA will also have limited cooperation with the EC in relation to antitrust investigations and merger control until a cooperation arrangement is negotiated.

The CMA has to date had good relations with DG Competition (the part of the EC responsible for the enforcement of EU competition law), and at the working level this is likely to continue. The CMA will also be looking to develop closer relations with other agencies – notably, the DOJ and the FTC are likely to be important in the CMA's inter-agency outreach going forward.

Will UK antitrust rules be similar to the EU rules in the future?

UK and EU antitrust rules are currently highly aligned. There are no plans for the UK laws to be amended and it is envisaged that UK competition laws will continue to be interpreted in a similar manner to EU provisions. However, after December 31, it will be possible for the UK authorities and courts to depart from interpretations and applications of the laws given by the European Court of Justice in certain circumstances. Over time, therefore, we could see some divergence (but with officials and UK courts steeped in EU antitrust law, this development may not be swift).

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