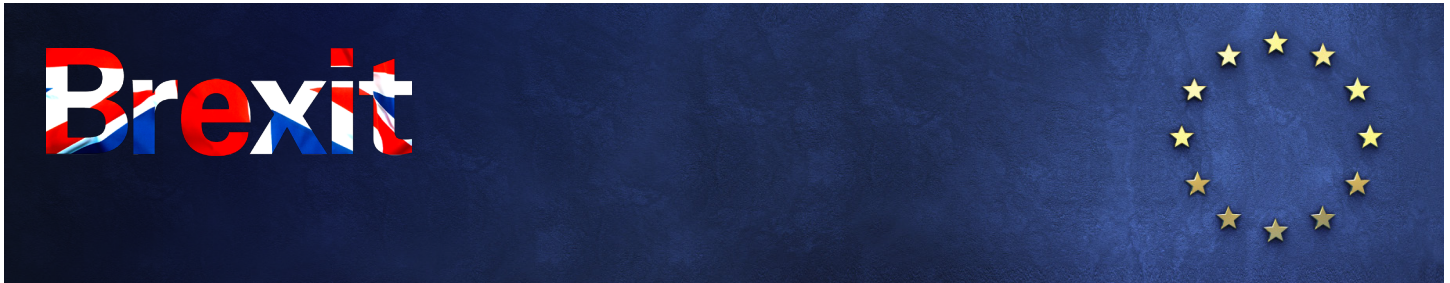


UK to Study Brexit's Impact on Competition Law

Skadden

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On 23 July 2017, the UK House of Lords' EU Internal Market Sub-Committee launched an inquiry into the future of the enforcement of the UK's competition rules once the UK leaves the European Union. Interested parties are invited to submit written evidence by 15 September 2017.

Background

Currently, responsibility to apply and enforce the EU rules on antitrust and merger control is shared by the European Commission and the national competition authorities of the EU member states (NCAs), facilitated by cooperation agreements and the European Competition Network, which brings together the European Commission and the NCAs.

The UK's domestic rules on antitrust and merger control are, to some extent, modelled on the EU rules and are to be interpreted consistently with EU law and judgments of the EU courts. State aid rules are exclusively governed by the Treaty on the Functioning of the European Union and controlled by the European Commission, and there is no domestic equivalent in the UK.

Upon the UK leaving the EU, this model — based on the supremacy of EU legislation over UK legislation and cooperation between the European Commission and the UK competition authorities — will cease unless some interim or other trade arrangement perpetuates it. Subject to that caveat, EU law will cease to apply to the UK, although the EU rules will continue to apply to UK businesses whose activities have an effect on trade between the EU member states. UK domestic law will apply, in parallel, where other member states are affected, to transactions, practices and conduct that have an effect in the UK.

The Inquiry

The inquiry aims to identify, explore and discuss the numerous challenges posed by Brexit on the application and enforcement of competition law in the UK so as to inform and influence the UK government's consideration of key issues.

In particular, the inquiry will explore whether the UK's approach to competition policy as a whole should be redefined; whether the UK Competition and Markets Authority (the CMA) will have the capacity and resources to cope with additional responsibilities and increased caseload; what role UK regulators with concurrent competition powers (*e.g.*, the Financial Conduct Authority (FCA) for the financial services sector) could play; the implications of conducting parallel EU/UK merger control reviews and antitrust investigations; whether the criteria of state interventions in merger reviews on



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national interest grounds would benefit from a review; the future cooperation between the UK and the EU competition authorities on investigations and enforcement actions; and the necessity of transitional arrangements after the UK leaves the EU.

The Sub-Committee will also explore potential state aid obligations in any EU-UK free trade agreement and whether the UK will need to adopt its own rules and system of state aid control.

Implications

Upon the UK leaving the EU, the UK competition authorities will need to assume aspects of enforcement previously undertaken by the European Commission, undoubtedly putting a strain on the already limited resources of the UK competition authorities and increasing administrative burden and cost for businesses.

In relation to merger control, the “one-stop-shop” and cross-referral features of the EU Merger Regulation will cease to apply to the UK. This means that some transactions could be the object of parallel reviews by both the European Commission and the CMA, impacting the timing of deals, increasing the risk of diverging outcomes and increasing legal costs.

There continues to be significant debate in the UK over the extent to which foreign takeovers should be subject to a national interest test. The Conservative Party election manifesto suggested that this should be considered in particular in the context of critical infrastructure and industries that are strategic to the future development of the British economy. However, the key architect of this strategy has been removed as a result of the recent UK general election, so it is unclear how much support this will receive, in particular given the large number of legislative programs required to effect Brexit and the fact that the CMA will have much to cope with post-Brexit without additional changes being made. The UK government is also likely to be mindful of the need to support the UK economy and investment into the UK in the period leading up to and immediately following Brexit.

In relation to antitrust, following the UK's exit from the EU, the UK competition authorities could conduct investigations into the same activities in parallel with the European Commission or NCAs, leading to multiple leniency applications, dawn raids and information requests, and increasing the total level of fines as a result of multiple investigations.

Some level of procedural reforms, cooperation agreements between the UK competition authorities and the European Commission (and NCAs) as well as transitional measures post-

Brexit will be crucial, not only to assist the authorities themselves in navigating the changeover but also to help minimize the burden on businesses.

For example, in relation to merger control, parties notifying their transaction to the European Commission in the run-up to Brexit will need to be guided on how the CMA intends to handle the UK aspects of their deal upon Brexit, especially if the transaction is under review. Guidance will also need to be provided as to how remedies imposed by the European Commission pre-Brexit will continue to apply in the UK post-Brexit.

The UK government may also want to revisit the basis on which the CMA has jurisdiction to review mergers, streamline the Phase I review process by introducing a short-form merger notice for deals that present no complex issues and/or alleviate potential resource constraints at the CMA to avoid extra burdens on businesses. Regulators with concurrent competition powers, such as the FCA, could also play a role, although this could bring drawbacks, for example a dilution of the CMA's competition expertise.

Furthermore, the UK competition authorities and the European Commission would be well advised to continue working together to minimize the risk of conflicting outcomes.

In relation to antitrust, whether the UK remains a jurisdiction of choice for antitrust private damages actions will largely depend on whether claimants can continue to bring follow-on claims that rely on European Commission infringement decisions.

Moreover, and assuming that the European Commission will have no involvement in investigating post-Brexit infringements of competition law in the UK, parallel EU/UK antitrust investigations are more likely than not to occur. Given the often cross-border nature of infringement behavior, continued cooperation between the UK competition authorities and the European Commission will be crucial in the facilitation of the enforcement of competition rules, such as in the case of conducting dawn raids.

Finally, if the EU courts cease to have jurisdiction over the UK after March 2019, there will inevitably be some divergence in jurisprudence over time. While the UK courts and regulatory bodies could still be required to have regard to EU court judgments and European Commission decisions, meaning that a dramatic divergence in jurisprudence (in the short to medium term at least) could be avoided, the UK might make greater use of the criminal cartel offence, as it will no longer need to consider to the same extent the impact of doing so on any civil enforcement by the European Commission.



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Next Steps

The EU Internal Market Sub-Committee's [call for evidence](#) is an important opportunity for businesses to engage in the debate and influence policy, procedural and legislative changes likely to arise post-Brexit.

The Sub-Committee will hold oral evidence sessions in September and October 2017. It aims to publish its report, with recommendations, early in 2018. The report will receive a response from the government and will be debated in the House.

The UK House of Lords' EU Committee and five other sub-committees are conducting a series of short, coordinated inquiries in relation to a number of other key issues likely to arise in the Brexit negotiations.

These calls for evidence follow the introduction on 13 July 2017 of the European Union (Withdrawal) Bill 2017-19 before the UK Parliament. The bill provides for the repeal of the current European Communities Act 1972 to end the supremacy of EU legislation over UK legislation on the day the UK leaves the EU and to convert EU legislation currently applicable in the UK into UK legislation.

Skadden welcomes input to support a submission to the Sub-Committee in advance of the 15 September 2017 deadline.

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