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Skadden Discusses Merger Reviews and Antitrust Inquiries in Case of "No-Deal" Brexit

By Bill Batchelor, Frederic Depoortere, Giorgio Motta and Ingrid Vandenborre November 1, 2018

Comment

As the U.K.'s March 29, 2019, exit date from the European Union approaches, companies involved in merger reviews or antitrust investigations should pre-emptively address the risk of a "no-deal" Brexit.

Both the U.K. and EU have antitrust laws that can apply simultaneously to the same merger or allegedly anti-competitive conduct. Currently, procedural rules determine how jurisdiction is divided between the European Commission (Commission), at the EU level, and the Competition and Markets Authority (CMA), at the U.K. level. But there are no transitional provisions dictating how jurisdiction for pending matters is to be handled in the event of a "no-deal" Brexit.

Merger Control. Companies in merger reviews filed with the Commission (whose pre-Brexit jurisdiction supersedes the U.K.'s review) should factor in the risk of a parallel review by the CMA post-Brexit. As the CMA has the power to investigate cases up to four months after closing, this could leave deals in significant legal uncertainty. A second risk is that EU jurisdiction falls away if, without the target's U.K. turnover, the deal no longer meets the EU merger control revenue thresholds. This would expose the deal to notification at a member state — rather than EU — level. These risks should be considered when drafting conditions precedent and, in appropriate cases, through consultation with the CMA and any relevant national authorities.

Antitrust Investigations. Companies subject to EU antitrust investigations (which, once formally initiated, would preclude the U.K. also investigating where EU competition law is engaged) may be subject to separate CMA proceedings post-Brexit. Again, this engenders substantial legal uncertainty. The U.K. has no statute of limitations in antitrust inquiries, and there is no obligation on the EU or CMA post-Brexit to respect each other's jurisdiction or to set off penalties imposed by the other authority for the same conduct. Particularly for ongoing cartel cases where the company has sought immunity, it will be important to have immunity markers in place with both authorities. Otherwise, the company risks other defendants jumping the queue for leniency.

Background

U.K. and EU antitrust laws currently apply simultaneously: While the U.K. remains part of the EU, procedural rules identify when matters fall under the jurisdiction of the Commission or CMA, and there are referral arrangements and soft law guidance in place to identify the authority best positioned to oversee each matter.

The draft withdrawal agreement[1] for the U.K.'s exit from the EU creates a transitional period of 18 months, ending on December 31, 2020, during which EU competition law will continue to apply to the U.K. Thereafter, ongoing matters before the EU will continue until completed. However, the EU and U.K. have both warned there is a risk of no agreement being reached on the U.K.'s withdrawal and the parties' future relationship. On September 13, 2018, the U.K. government published a technical notice explaining these potential risks.[2]

International law on termination of treaties provides scant guidance for companies on how transitional issues should be addressed, since it deals with the rights of states, not private parties.[3] Therefore, there is no reliable precedent on companies' rights in terms of the transition for ongoing merger control or investigation proceedings.

Planning for the Risks: Merger Control

Pre-Brexit, mergers notified to the Commission are not subject to CMA jurisdiction.[4] But the Commission review process can be lengthy, and companies sometimes spend months in prenotification discussions even before filing with the Commission. Investigations of complex cases can take a total of six to nine months. As a result, there is a risk that mergers currently in contemplation may not be filed, or will still be undergoing review, on March 29, 2019.

Risk of CMA Jurisdiction

In the event of a "no-deal" Brexit, the CMA may wish to also take jurisdiction over the deal if it meets the U.K. jurisdictional thresholds. The U.K.'s merger control regime provides for the CMA to call in transactions for review up to four months post-closing.[5] Therefore, parties closing a transaction from the end of November 2018 onward, subject to an EU filing and which also has a U.K. nexus,[6] will want to factor in the possibility of CMA review.

This jurisdictional risk should be assessed upfront and the CMA's potential interest in the deal evaluated. Parties typically address the need to gain merger clearance through inclusion of conditions precedent (CPs) in the merger agreement, making completion conditional on receipt of an all-clear from the competition authorities in the relevant jurisdiction(s). For example, completion might be conditional on receipt of clearance in the EU, Brazil, China and the US — the most frequent filing jurisdictions in the context of global transactions.

Whether such a risk is significant and should be addressed by inclusion of a U.K. CP in the merger agreement will need to be decided on the basis of the parties' presence in the U.K., transaction timing (including the extent of filings being made elsewhere and the expected clearance timelines) and the parties' risk appetite. This mixture of factors arises in part from the voluntary nature of the U.K.'s merger control regime, whereby the decision to file is at the discretion of the parties, but the CMA reserves the right to call in a merger for review.

Risk That the EU No Longer Has Jurisdiction

An additional risk to consider is the possibility that a transaction that currently triggers an EU filing only if U.K.[7] activities are included would not fall under the EU's jurisdiction after March 29, 2019, and may instead trigger filings in individual member states, and the U.K. Where this is a risk, appropriate risk allocation should be provided for in the conditions precedent, and consultation with the relevant (potential) reviewing authorities may be necessary.[8]

Planning for the Risks: Antitrust

Parties currently subject to an investigation by the Commission for potential infringements of EU competition law face the prospect of the CMA opening its own investigation after March 29, 2019, where the effects of the alleged anti-competitive conduct extend to the U.K.[9] As the U.K. has no statute of limitations on investigating anti-competitive conduct, this remains a risk even for conduct that ended many years prior to Brexit.

The risk of CMA investigation will depend on whether, and the extent to which, the potential infringement is likely to affect U.K. consumers. This is a matter for the CMA's prosecutorial discretion. In many cases, the same conduct will be subject to both EU and CMA jurisdiction (for example, a cartel that implicated consumers in both the U.K. and the remaining EU member states). There is no obligation on either authority to leave the other to investigate or to set off fines by the other authority in the event that the same conduct is penalized. A particular risk is cartel proceedings where the company has first-in status under the EU leniency program and therefore has achieved immunity from penalties but has not put in a marker at the national level. In that case, the company may want to consider a pre-emptive marker before the CMA to prevent other defendants jumping the queue for leniency.[10]

Risk of Divergent Substantive Rules

When it comes to substantive antitrust rules, little will change. The U.K. government has made clear in its "no-deal" guidance that it does not intend to make any changes to the U.K. competition regime beyond those necessary to manage exit from the EU. These changes include, for example, removing the Commis-sion's power to undertake dawn raids in the U.K. and removing the binding nature of Court of Justice of the European Union precedent on the CMA and U.K. courts. It therefore appears unlikely that the U.K. government will introduce any changes to the U.K. competition regime in the short term, meaning that existing competition compliance programs can remain in place. The U.K. government also intends to maintain the block exemption regulation while redenominating the euro amounts in the block exemption regulations in pounds sterling. Therefore, agreements currently covered by the existing EU block exemptions, which exempt certain types of agreements (for example, research-and-development agreements) from the application of certain antitrust rules, should remain exempted post-Brexit.

Private Damages Actions

Currently, those wishing to bring private damages actions in the U.K. courts can rely on Commission antitrust decisions as binding findings of infringement of the law. In the event of a "no-deal" Brexit, any such decision made after March 29, 2019, will no longer be legally binding before U.K. courts. Claimants will, however, still be able to bring foreign tort claims (a legal claim in the U.K. relating to a violation of foreign law) in the U.K. based on alleged breaches of EU competition law.

Claimants may also continue to bring claims in the U.K. based on decisions of the Commission or member state competition authorities that are made before March 29, 2019. However, claimants wishing to do so will face uncertainty regarding the continued applicability and enforceability of damages claims in EU member states. In the event of a "no-deal" Brexit, there would be no framework for continuing civil judicial cooperation between the U.K. and EU countries. Additionally, the U.K. government has made clear in its "no-deal" guidance on civil legal cases that it would repeal the existing EU framework for the recognition and enforcement of judgments. Damages awards rendered by U.K. courts would therefore no longer be automatically enforceable across the European Union.

For damages claims based on infringement decisions issued by both the Commission and the CMA after exit, it will be necessary to make parallel claims before U.K. and EU member state courts.

Conclusion

A "no-deal" Brexit remains an unlikely scenario given the mutual interest of the U.K. and the EU in securing a negotiated outcome. However, the technical guidance published by the U.K. government is a useful reminder that an agreement between the U.K. and the EU on the terms of exit and any possible transitional arrangements is not a foregone conclusion, particularly in light of the tight timeline for the conclusion and ratification of any such agreement. Businesses and their advisers should therefore consider the potential risks outlined above.

ENDNOTES

1 Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community, March 19, 2018.

2 Guidance – Merger Review and Anti-Competitive Activity if There's No Brexit Deal.

3 Article 70 of the Vienna Convention provides that "[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." Note that in the Vienna Convention "parties" refers to states. This provision is potentially helpful for state aid decisions that are addressed to states. It could also be argued that the EU 27 has a "right" to exclusive jurisdiction over a deal, but this is an area of uncertainty, as the precedents in this field tend to deal only with transfers of territory or trade concessions rather than jurisdictional issues.

4 Under Article 21 of Council Regulation (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004) (the EU Merger Regulation), the Commission reviews transactions with a "Community dimension."

5 Section 24 of the Enterprise Act 2002. See also Guidance on the CMA's Jurisdiction and Procedure, January 2014.

6 The CMA may claim jurisdiction if the target has 70 million pounds or greater in turnover in the U.K., or together the parties supply or acquire at least 25 percent of particular goods or services in the U.K. or in a substantial part of the U.K., with the merger creating an increase to this share.

7 This risk arises because the EU filing threshold is turnover-based: See Article 1 of the EU Merger Regulation. Once U.K. turnover is excluded, parties may fall under the turnover threshold for an EU filing or meet the "two-thirds" rule whereby each of the parties achieves more than two-thirds of its aggregate communitywide turnover within one and the same member state.

8 EU jurisdiction may still be obtained indirectly through a referral, but this would create significant delays to the review and closing timetable.

9 The CMA and the Commission currently have concurrent jurisdiction to enforce EU law under the Council Regulation (EC) 1/2003 (OJ 2003 L1/1, 4.1.2003), though the Commission can take control of cases when it considers itself to be best positioned to do so. After Brexit, the CMA will enforce U.K. law only, and the Commission will have no oversight authority when it comes to the U.K.

10 CMA guidance on leniency applications.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Planning for Merger Reviews and Antitrust Inquiries in Case of a 'No-Deal' Brexit," dated October 17, 2018, and available here.

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