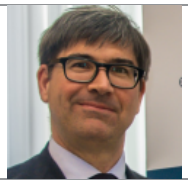
The Future of the Large Law Firm: Growth, Mergers, and Inequality

By John C. Coffee, Jr.



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By Bill Batchelor, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre, Alexander Kamp and Nick Wolfe February 18, 2020

Comment

The U.K. Competition and Markets Authority (CMA) has published "Guidance on the Functions of the CMA Under the Withdrawal Agreement" (Guidance), which sets out the regulator's approach to merger and competition cases during the Brexit transition period that will run until at least through December 31, 2020 (Transition Period):

- The Guidance confirms that during the Transition Period, the U.K. and the EU merger procedures will remain closely aligned. The EU competition and merger control rules will continue to apply as if the U.K. were still an EU member state.
- The European Commission (EC) will have exclusive jurisdiction over mergers notified to or investigations initiated by the EC during the Transition Period.
- Merging parties should consider the potential for parallel U.K. jurisdiction for deals notified after the Transition Period ends and take this possibility into account in their deal timing and prenotification contacts with the EC and the CMA. They should also legislate for this outcome with appropriate conditions precedent.
- Parties involved in ongoing investigations before the EC against whom the EC has not initiated formal proceedings should be alert to the risk of a parallel CMA investigation.

Transition Period

The Guidance confirms that, as provided in the Withdrawal Agreement, the U.K. will continue to be covered by the EU's "one-stop shop" for merger control during the Transition Period.[1]

Transactions with U.K. aspects and that meet the EU's turnover thresholds[2] will therefore continue to be notifiable to the EC and will not need to obtain clearance from the CMA. To determine whether a transaction meets the EU thresholds, merging parties will need to continue to count U.K. turnover as part of EU turnover.

The one-stop-shop arrangement will end when the Transition Period concludes. The U.K. government has announced its intention not to request any extension. Absent any new agreement between the U.K. and the EU otherwise, this means that the arrangement will end on December 31, 2020. Therefore, for transactions that will be notified to the EC from January 1, 2021, onward and which involve parties with European turnover including U.K. turnover or that will have effects in the U.K., both a potential EU filing and U.K. jurisdiction will need to be considered.

Similarly, the EC will retain exclusive jurisdiction to police cartels and abuses of dominance for investigations formally initiated prior to December 31, 2020, even if those cases conclude after that date. Thereafter the CMA will have jurisdiction to investigate, and in some cases this may occur in parallel to the EU proceeding where conduct impacts both jurisdictions.

Implications for Transactions That Straddle the Transition Period

The Guidance confirms that, after the end of the Transition Period, the EC will retain exclusive jurisdiction over transactions that:

- are formally notified to the EC before the end of the Transition Period or
- were notified to an EU member state and subsequently referred to and accepted by the EC for review before the end of the Transition Period.[3]

In practice, weeks or months of prenotification discussions with the EC precede formal notification, so for legal certainty, parties should formally notify the EC before December 31, 2020. Otherwise the CMA may claim parallel jurisdiction over the deal.

In anticipation of potentially conducting its own review after the Transition Period, the CMA will monitor cases that are in prenotification with the EC and may take "certain preparatory steps . . . to assess whether a formal investigation is likely to be necessary." Such preparatory steps could involve requesting information about a transaction from parties or third parties, issuing invitations to comment on a proposed transaction, conducting its own preliminary analysis of a transaction or communicating with foreign competition authorities. The CMA employed this practice during the past year in the context of the U.K.'s withdrawal negotiations with the EU 27, when it was unclear whether the U.K. would be able to ratify the Withdrawal Agreement. It became customary for the CMA to ask for information (or sight of the merger filing) in parallel to the EU review.

For cases that might not be formally notified to the EC before December 31, 2020, and which are likely to meet the CMA's jurisdictional thresholds,[4] the Guidance encourages parties to consider engaging with the CMA, noting that "early and constructive engagement on mergers that may fall under the jurisdiction of the CMA at the end of the Transition Period is likely to help with the expedient investigation of the case."

Implications for Conduct Cases That Straddle the Transition Period

EU and U.K. competition law apply in parallel to conduct affecting trade within the EU and the U.K. Even if companies are located solely in the U.K., their conduct can affect dealings with customers in the EU, so EU and U.K. law can apply concurrently to U.K. companies, even if without a physical EU nexus.

To complicate matters further, the EU takes long-arm jurisdiction over extra-territorial defendants provided that the conduct is implemented in or has reasonably foreseeable and substantial effects within the EU.[5] Companies situated outside the EU may therefore be subject to prosecution for a breach of EU competition law which has the requisite EU nexus.

Regarding ongoing conduct investigations, the EU will retain exclusive jurisdiction over antitrust cases after the end of the Transition Period where it has formally initiated proceedings (by issuing an initiation letter under Article 11(6) of Regulation 1/2003 or a statement of objections) before the end of the Transition Period.[6]

If the EC does not formally initiate proceedings in respect of an antitrust matter by December 31, 2020, then it will no longer have *exclusive* jurisdiction. However, it will have parallel jurisdiction with the CMA, even over U.K. entities, if the relevant conduct meets the low bar for EU jurisdiction (implementation or reasonably foreseeable effects in the EU).

In the majority of cases, conduct investigations tend to relate to past matters where the conduct (an illegal cartel, for example) has ceased. However, sometimes the allegation is that illegal conduct is ongoing. In that case a split jurisdiction and parallel proceedings may occur. The CMA "may investigate the facts postdating the Transition Period," while the EC continues to investigate the prior period conduct. The CMA states that it may "begin gathering information before the end of the Transition Period" in split jurisdiction cases, though *vires* challenges may arise in response to efforts to enforce investigatory powers before jurisdiction is ceded to the U.K.

Defendants should be particularly alert to the risk of parallel proceedings where they have obtained immunity or leniency through early cooperation with the regulator. The CMA will not recognize cooperation credit granted by the EU if the CMA decides to initiate parallel proceedings (indeed, it may not be available if another defendant has cooperated first in the U.K.). Defendants in ongoing EU matters should consider preemptively approaching the CMA to ensure that they gain cooperation credit if risk of a future U.K. parallel case exists.

Key Takeaways

Staying in the one-stop shop: The Guidance clarifies that the jurisdictional hook to ensure continued application of the one-stop shop and to avoid a parallel investigation by the CMA is the date of formal notification.

- Parties who want to continue to benefit from the one-stop-shop arrangement may want to consider expediting their prenotification discussions with the EC where possible in order to formally notify before the end of the Transition Period.
- Due to the EC's holiday schedule, December 23, 2020, is effectively the last date to formally notify the EC prior to the end of the Transition Period. The EC is likely to experience a rush to formally notify toward the end of the Transition Period, which may leave it with limited capacity to engage with merging parties in the final few months of the year.
- Conversely, where the parties' U.K. turnover makes the difference between filing or not with the EC (because the EU turnover jurisdictional thresholds will not be met if U.K. turnover is omitted), the parties should consider whether waiting to notify until after the Transition Period results in procedural advantages. At that point U.K. turnover will no longer be counted toward the EU jurisdictional thresholds, which may obviate the need for an EU filing.

Preparing for parallel proceedings: Where timing uncertainty exists as to whether formal EC notification is achievable by the Transition Period cutoff, the parties should consider briefing the EC and the CMA in parallel. This will reduce the duration of prenotification discussions with the CMA in the event parallel filings are required.

Conditions precedent: Parties should anticipate the possibility of parallel merger review by including appropriate conditions precedent for transactions with a U.K. nexus, even if the transaction would meet the EU thresholds. The conditions precedent may require, for example, that the parties have made an EU notification prior to the transitional period cutoff date (so as to retain exclusive jurisdiction). Where that is not practicable, the merger conditions should account for possible parallel proceedings.

- The conditions precedent should account for the possibility that the CMA could take jurisdiction after December 31, 2020, and should therefore make closing conditional on CMA clearance in the event that the CMA does so.
- Whether such a U.K. condition precedent should be included will depend on a risk assessment. The voluntary nature of the UK's merger control rules means that the decision to file is at the discretion of the parties unless the CMA calls in a merger for review. The likelihood that the CMA would investigate a merger depends on a number of factors including the extent of the parties' presence in the U.K. and whether they are active in an industry in which the CMA has shown a particular interest, such as the digital and technology industries.
- The condition precedent may also need to address the possibility that a transaction that currently triggers an EU filing only if U.K. activities are included would not fall under the EC's jurisdiction if notified after December 31 2020; the transaction may instead trigger filings in individual member states and the U.K.

Conduct cases: Parties involved in live antitrust matters against whom the EC has not initiated formal proceedings by the end of the Transition Period should consider the risk of a parallel investigation by the CMA, which will depend on whether, and the extent to which, the potential infringement is likely to affect U.K. consumers. Where CMA involvement is likely, parties may wish to consider engaging with the CMA prior to the end of the Transition Period, particularly where a defendant seeks early cooperation credit.

Further guidance: Finally, the Guidance notes that the future relationship between the U.K. and the EU after the end of the Transition Period "remains subject to negotiation with the EU" and that the CMA may publish further guidance on any changes to the regime which will take effect at the end of the Transition Period. Parties should therefore keep an eye out for political developments as well as further guidance from the CMA.

ENDNOTES

[1] Articles 127 (1) and (3) of the Withdrawal Agreement. Article 95(1) of the Withdrawal Agreement provides that decisions adopted by EU institutions before the end of the Transition Period that are addressed to the U.K. or to U.K. companies will be fully binding on and in the U.K. Articles 95(1), 92 and 93 of the Withdrawal Agreement provide that decisions made by EU institutions after the end of the Transition Period that are addressed to the U.K. or to U.K. companies will be fully binding on and in the UK if the relevant procedures were initiated before the end of the Transition Period.

[2] Mergers must be notified to the European Commission if (i) the combined worldwide turnover of the parties exceeds EUR 5 billion and each of at least two parties has EU turnover exceeding EUR 250 million, or (ii) the combined worldwide turnover of the parties exceeds EUR 2.5 billion, each of at least two parties has EU turnover exceeding EUR 100 million, in each of at least three member states the parties' combined turnover exceeds EUR 100 million, and in each of the same three member states, each of at least two parties has individual turnover exceeding EUR 25 million. An EU filing is not required if each party realizes more than two-thirds of its EU turnover in one and the same member state.

[3] See Article 92 of the Withdrawal Agreement, which provides for how the EU and the U.K. will handle overlapping jurisdiction over live cases.

[4] The CMA may claim jurisdiction if the target has GBP 70 million 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 in this share.

[5] See Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and Others v. Commission of the European Communities* ("Woodpulp") (1988); T-102/96 *Gencor Ltd v. Commission* (1999); and C-413/14 P *Intel Corporation Inc v. Commission* (2017).

[6] See Article 92 of the Withdrawal Agreement.

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 Investigations Under the Brexit Withdrawal Agreement," dated February 13, 2020, and available here.

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