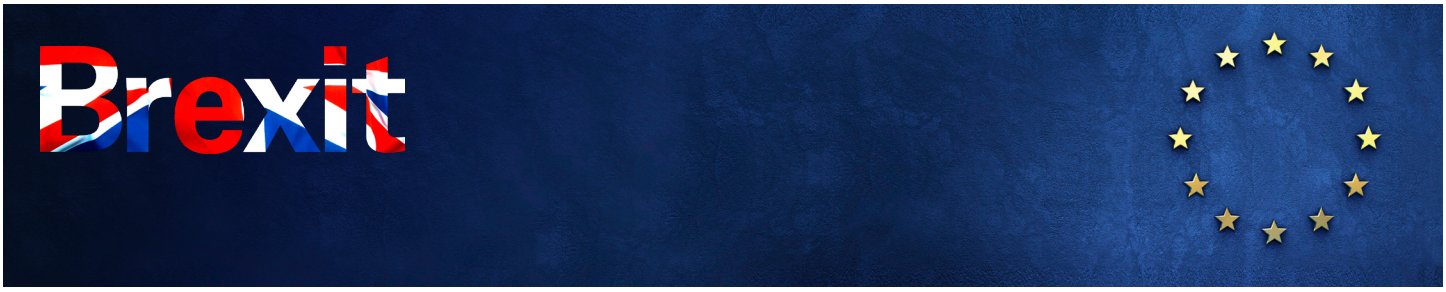
Antitrust Planning During the Countdown to Brexit

Skadden

10 / 05 / 20



If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

December 31, 2020, is the last day of the Brexit transition period under the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community (Withdrawal Agreement). After the end of the period:

- the U.K.'s Competition and Markets Authority (CMA) will gain jurisdiction over mergers that had previously been reviewed at the European Union (EU) level under the exclusive jurisdiction of the European Commission (EC);
- merging parties will therefore need to consider whether, based on the particular facts of their merger, it makes sense to volunteer a CMA filing;
- the CMA will have jurisdiction to investigate anticompetitive behaviour that impacts the U.K., whereas before it was precluded from investigating an infringement already under investigation at the EU level; and
- the substance of the antitrust rules will remain the same for companies doing business in the U.K., at least in the immediate term.

Merger Control

The conclusion of the transition period means the end of the one-stop (EU) shop for merger control in relation to mergers with a U.K. and EU dimension.[1] Merging parties in these instances will need to consider whether to voluntarily file with the CMA (in addition to filing with the EC). In theory, this consideration will apply to any merger not officially filed with the EC before December 31. In practice, given that the EC will close for the end of year holiday period on December 23, any merger will need to be formally filed by then to avoid potential parallel review by the EC and CMA.[2]

Whilst a CMA filing is voluntary, the CMA can decide to review a merger in the absence of a voluntary filing. This means that merging parties will need to carefully consider whether a voluntary filing or other outreach to the CMA is sensible in the

[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 U.K. if the relevant procedures were initiated before the end of the transition period.

[2] Given that prenotification contacts can be lengthy and in some cases span several months, deals currently in contemplation may not be in a position to formally notify by December 23. Also, in the case of smaller transactions that meet multiple national thresholds and are then eligible for referral to the EC one-stop shop under Article 4(5) of the EU Merger Regulation, the request for referral to the EC (by filing a reasoned submission (Form RS)) would need to take place by the beginning of December.

© Skadden, Arps, Slate, Meagher & Flom LLP. All rights reserved.

context of their transaction. Even mergers with apparently little connection to the U.K. are potentially of interest to the CMA. In recent years the CMA has reviewed a number of deals where the target had very low and even de minimis U.K. revenues. This has been the case even where the deal is subject to antitrust review and its natural centre of gravity has been in another jurisdiction. In such cases, the CMA asserts jurisdiction on the basis of a combined share exceeding 25% in any overlapping description of goods or services between the merging parties in the U.K. (the "share of supply" test). The CMA can be creative in identifying overlaps and does not need to base its assessment on economic markets or industry definitions of product or service markets. For example, in *Roche/Spark*, the CMA based the share of supply test on the number of U.K.-based full-time equivalent employees engaged in activities relating to the area of perceived overlap. In *Sabre/Farelogix*, the CMA asserted jurisdiction on the basis of Farelogix's supply to American Airlines and, consequently, to British Airways, through a partnership arrangement between the two carriers.

In recent years, the risk of the CMA taking such an approach has increased. This has been particularly true of deals in dynamic sectors, or those with a "tech" or startup dimension, which have in general been subject to increased scrutiny by competition regulators in various jurisdictions. Whilst turnover or asset thresholds have precluded review in many jurisdictions, the CMA has been aided by its ability to apply the share of supply test. The CMA has used this not only to undertake "Phase 1" investigations, but also in numerous cases to subject deals to the extensive scrutiny of a Phase 2 review. Whilst the historic average for Phase 2 reviews has been approximately 11% of CMA merger cases, in 2019 the proportion of cases sent to Phase 2 by the CMA was approximately 20%, and in the year-to-date 2020 it is approximately 40%.

Post-transition period, with an increased caseload resulting from parallel review of deals that were previously the exclusive domain of the EC, the CMA may choose to focus its resources differently. However, the more likely scenario based on recent practice is that the CMA will continue to actively survey the deal landscape, including in the case of smaller deals in prominent sectors.

Parties will therefore often need to consider both an EU Form CO and whether to volunteer a U.K. merger notice (or face a request from the CMA to notify). In some instances, however, the U.K.'s exit from the EU may mean EU merger thresholds are no longer satisfied. This is because U.K.-derived revenues will no longer count toward the EU merger filing threshold. In such circumstances, individual national level filings within the EU may be triggered, depending on whether country-level thresholds are met. A further possible scenario, where the parties still meet the EU-level threshold but have heavily concentrated revenues in one EU member state, is that the removal of the U.K. from the calculation could result in two-thirds of the remaining EU revenue falling in a single member state, such that it is only necessary to file in an individual member state (rather than submitting an EU Form CO).

The potential for a CMA filing also remains a relevant consideration in acquisitions of minority shareholdings that can be considered to give rise to "material influence." In several recent cases, such as *Amazon/Deliveroo* and *Hunter Douglas/247 Home Furnishings*, minority shareholdings and attached rights have been reviewed in depth at Phase 2.

Finally, in all cases where it is necessary to consider volunteering a CMA filing, an alternative to immediately submitting a merger notice is to brief the CMA on a transaction. This can help parties to decide whether a merger notice is a necessary endeavor — although it is not a guarantee against potential CMA interest in a full merger notice further down the line.

All of the above should be reflected in deal planning and documentation, meaning that conditions precedent should take into account the possibility that formal EU notification has not taken place by December 23 and the CMA takes jurisdiction after December 31, 2020; and equally the possibility of individual member state filings should EU jurisdiction fall away once U.K. revenues are excluded from the EU-wide turnover thresholds.

Antitrust Investigations

The end of the transition period means that the rules allocating jurisdiction over investigations between U.K. and EU antitrust regulators will no longer apply. Companies will potentially become subject to parallel EU antitrust and CMA proceedings in respect of allegedly anticompetitive behaviour (cartels or abuses of dominance) that impact both the U.K. and EU.

Where the EU 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, the CMA cannot investigate the same infringement. Decisions issued by the EC in such cases will be binding on the U.K. and any appeals will be reviewed only by the European Court of Justice and not by U.K. courts.

Antitrust Planning During the Countdown to Brexit

Conversely, if no EU proceedings are initiated before the transition period ends, the CMA will have jurisdiction to investigate any conduct that affects the U.K. whether the conduct occurred before or after December 31, 2020.

That said, whilst the majority of conduct investigations relate to past matters where the conduct (an illegal cartel, for example) has ceased, sometimes the allegation is that illegal conduct is ongoing. In that case a split jurisdiction and parallel proceedings may occur even where the EU formally initiated proceedings before the end of the transition period. The CMA would have jurisdiction to investigate facts post-dating the transition period, whilst the EC alone would continue to investigate the prior period conduct.

Defendants should be particularly alert to the risk of parallel proceedings where they have obtained immunity or leniency through early cooperation with one 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 therefore consider preemptively approaching the CMA in the remaining time before the end of the transition period to ensure that they gain cooperation credit if risk of a future U.K. parallel case exists.

Companies located solely in the U.K. should be aware that the EU will continue to have jurisdiction over U.K. entities if the relevant conduct meets the low bar for EU jurisdiction (implementation or reasonably foreseeable effects in the EU). If conduct can affect dealings with customers in the EU, EU law can apply concurrently to domestic law in the U.K., even without a physical EU nexus.

Antitrust Litigation

With the EU currently blocking the U.K.'s application to join the Lugano Convention, post-transition period the clear cut rules on jurisdiction under the Brussels I Regulation will no longer apply. Wide discretion under English common law will mean uncertainty for parties seeking to bring a cartel claim in English courts, as they will need to satisfy a jurisdictional gateway (*e.g.*, show that harm was suffered in England or rely on an anchor defendant) and establish *forum conveniens* in order to serve proceedings on a defendant out of the jurisdiction.

In order to establish jurisdiction under the Brussels I Regulation, claimants must commence proceedings by December 31.[3] From January 1, 2021, jurisdiction over new proceedings will be determined by the English common law rules (or, where applicable, the Hague Convention), unless the EU changes its position on U.K. accession to the Lugano Convention.

The Substantive Antitrust Rules

The current substantive antitrust rules will not immediately change post-transition period. The U.K. will adapt EU competition regulations into a set of domestic competition regulations. In the particular case of the Block Exemption Regulations, they will be adopted into U.K. law, redenominated in pounds sterling and with the same expiry dates. Agreements that currently fall under a block exemption safe harbour will continue to do so after the end of the transition period.

As Court of Justice of the European Union precedents will no longer bind the CMA or U.K. courts post-transition period, even absent any reworking of the substantive rules by Parliament in the future, divergence between the substance of EU and U.K. antitrust rules is likely to (slowly) develop over time. Similarly, without U.K. influence, EU antitrust rules may develop in a different direction, particularly in light of industrial policy and foreign investment concerns.

One substantive change will arise in relation to parallel trade and the exhaustion of intellectual property rights. EU and U.K. competition law strictly prohibits suppliers from preventing distributors from selling to customers in other European Economic Area (EEA) states. This includes any agreement with the supplier to restrict the distributor from making sales online within the EEA.[4] However, suppliers can lawfully prevent non-EEA-based distributors from selling trademarked products into the EEA.[5] The supplier's IP rights are not "exhausted" by a first sale outside the EEA. Its IP rights still entitle it to prevent resale in the EEA, and this is permitted by EU competition law.

That position changes after the end of the transition period:

- Under EU law, the U.K. becomes a non-EEA country for IP exhaustion purposes. So rights holders will be able to use their IP rights to prevent U.K. distributors from reselling trademarked products in EEA countries. There will no longer be EEA exhaustion from a first sale in the U.K.
- Under U.K. law, as amended post-Brexit, first sale in the EEA or U.K. results in exhaustion.[6] Rights holders cannot object to resale by EEA-based distributors into the U.K. There would

[3] Article 67 of the Withdrawal Agreement.

[4] See, in relation to the U.K., *Ping v. CMA* [2020] EWCA Civ. 13 and the EU Case C-439/09, Pierre Fabre Dermo-Cosmétique SAS ECLI:EU:C:2011:649.

[5] Case C-306/96 *Javico v. Yves St. Laurent* [1998] ECR I-1983; Case T-198/98 *Micro Leader v. Commission* ECLI:EU:T:1999:341.

[6] Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019.

Antitrust Planning During the Countdown to Brexit

therefore be no defence under U.K. competition law that non-IP-exhaustion permitted the supplier to restrict parallel trade into the U.K.

The IP position may change depending on whether exhaustion of rights is addressed by any free trade agreement between the U.K. and EU.

State Aid

State aid is proving to be a sticking point in the current negotiations on a potential future free trade agreement between the EU and U.K. The U.K.'s latest position is to complete a consultation on a new U.K. regime in 2021, and follow World Trade Organisation rules on subsidies until such new regime is in place, given that the existing EU regime will cease to apply to the U.K. after December 31 (subject to any agreement otherwise in the current negotiations on a potential future free trade agreement).

To the extent a new U.K. state aid regime is developed, it is expected that the CMA would take over the role of state aid enforcement and supervision for the U.K. In this case, state aid by a U.K. public authority post-transition period would need to be notified to the CMA.

In parallel, companies in receipt of subsidies by the U.K. government will potentially be caught by any new rules introduced by the European Commission seeking to address foreign subsidies that distort the market in the EU.[7]

CMA Consultation on Draft Guidance on Post-Brexit Powers

The CMA is currently seeking views on its Draft Guidance on the Functions of the CMA After the End of the Transition Period.[8] The draft guidance explains the anticipated legal changes following the end of the transition period in relation to merger cases, antitrust cases (including cartels and abuse of dominance), enforcement of consumer protection legislation and cases over which the European Commission will continue to exercise competence under the Withdrawal Agreement. The consultation closes at midday on October 30, 2020. The CMA will publish a final version of the guidance following the consultation.

Key Takeaways

- If you expect to sign a transaction before the end of the year, consider whether the likely timetable points toward an EU filing by December 23, 2020, or a later filing date. Depending on the wider transaction considerations, it may make sense to try to accelerate the transaction timetable (or otherwise) to reduce the number of necessary filings.
- If the timetable (and therefore the extent of the likely filing requirements) is uncertain, it may make sense to initiate contact with both the EC and the CMA early on, to avoid a delay post-transition period.
- Conditions precedent should account for the possibility that formal EU notification has not taken place by December 23 and the CMA takes jurisdiction after December 31, 2020. Equally, parties should consider the possibility of individual member state filings should EU jurisdiction fall away once U.K. revenues are excluded from the EU-wide turnover thresholds.
- Parties involved in live antitrust matters against which 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. This 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 early cooperation credit is sought.
- Claimants wishing to bring cartel proceedings in English courts should consider initiating proceedings before December 31, 2020, to benefit from the clear cut rules on jurisdiction under the Brussels I Regulation.
- Companies should consider what consequential amendments should be made to their U.K.-to-EEA distribution arrangements in consequence of the change to the IP regime, and exhaustion of rights, post-transition period.

[7] "Commission Adopts White Paper on Foreign Subsidies in the Single Market," June 17, 2020.

[8] "Draft Guidance on the Functions of the CMA After the End of the Transition Period," October 2, 2020.

Antitrust Planning During the Countdown to Brexit

Contacts

Bill Batchelor
Partner / Brussels
322.639.0312
bill.batchelor@skadden.com

Frederic Depoortere
Partner / Brussels
322.639.0334
frederic.depoortere@skadden.com

Giorgio Motta
Partner / Brussels
322.639.0314
giorgio.motta@skadden.com

Ingrid Vandenborre
Partner / Brussels
322.639.0336
ingrid.vandenborre@skadden.com

Aurora Luoma
Counsel / London
44.02.7519.7255
aurora.luoma@skadden.com