



Brexit Alert for Legal Counsel Implications for Competition Law

Introduction

Brexit is becoming an increasingly complicated and difficult process to follow, with multiple possible scenarios to prepare for. Will there be a deal or will it all conclude with a hard Brexit? When is any form of Brexit likely to occur?

In the area of competition law, companies with ongoing transactions or investigations, and companies with transactions planned in the near future may be experiencing a great deal of unease amidst the current legal uncertainty. This Brexit alert aims to provide guidance with regard to the implications of a soft and hard Brexit for competition law.

Key Issues

There is a deal: Soft Brexit

Under the Withdrawal Agreement, a transition period will be instated until December 2020. During this transition period, EU competition law will largely remain in force. Additionally, the Commission and the European Courts will retain their jurisdictions. In other words, if the Withdrawal Agreement is ratified, everything will remain largely unchanged for approximately two additional years.

There is no deal: Hard Brexit

With a hard Brexit, the EU Withdrawal Act (not to be confused with the Withdrawal Agreement) provides that most EU competition law will be retained in UK legislation. Earlier in

March 2019, the Competition and Markets Authority ('CMA') published its final [Guidance on the functions of the CMA after a 'no-deal' exit from the EU](#). It is clear that the Commission and the Court of Justice of the European Union (CJEU) will lose their jurisdiction after Exit Day (11 pm on the date specified in Section 20 of the European Union (Withdrawal) Act 2018), which will lead to more complicated situations for ongoing transactions:

Mergers

- J Decisions reached by the Commission before Exit Day will be binding in the UK and remain excluded from the CMA's jurisdiction. If on appeal such decisions are annulled, a new filing of the transaction must occur before the CMA and the European Commission (or other competent national competition authorities), depending on which jurisdictional requirements are met.
- J If the Commission did not make a decision before Exit Day, the CMA will also have jurisdiction to review the merger (provided that the UK merger filing requirements are met). Two parallel merger investigations will be possible.
- J If the triggering event occurs before Exit Day, the merger will have to be notified to the Commission.
 - o The turn-over in the UK will be taken into account for thresholds even if the decision will not be taken before Exit Day.
 - o Logically, after Exit Day, the Commission will only consider harm within the EU.
 - o The decision by the Commission reached after Exit Day will no longer be binding or enforceable in the UK.
- J Transactions that take place after Exit Day will have to be notified to both the Commission and the CMA, provided that both thresholds are met. The one-stop-shop regime that follows the EU Merger Regulation no longer applies to the UK after Exit Day.

Antitrust

- J If the Commission reaches a decision regarding a certain practice before Exit Day, the decision is binding in the UK, and the CMA does not have any jurisdiction to conclude a finding on the same practice.
- J If the investigation began before Exit Day, but the Commission did not make a decision beforehand, the CMA can initiate an investigation on the same practice. The CMA does regain competence to review a cartel even if the Commission initiated formal proceedings. As per Regulation 1/2003, such a decision by the Commission removes any EU Member State competition authority's competence to investigate the cartel.
- J If no leniency application was made with the CMA, in parallel with leniency applications with the European Commission and other national competition authorities,

before Exit Day, the parties should file for leniency with the CMA as soon as possible.

The EU Withdrawal Act is supplemented by Regulations, which would amend the UK Competition Act of 1998 in order to make the Competition Act consistent. For example, all references made to EU institutions and laws will be erased from UK legislation.

The Block Exemption Regulations will be retained. However, the Secretary of State will be able to vary or revoke the exemptions. Lastly, the Regulations provide that UK regulators and courts must avoid inconsistent use of case law pre-Exit Day, unless the circumstances are different. Consequently, in a first stage, UK practice will remain consistent with EU practice.

Laga can help

Laga's Competition Law Department has extensive experience in European and domestic competition law. The team is also closely monitoring the latest Brexit developments.

Our team provides a full range of services in connection with state aid law, cartels, licensing agreements, merger reviews, abuse of dominance cases, and distribution agreements.

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