Antitrust and merger control

On 31 January 2020, at 11pm GMT, the UK ceased to be a Member State of the EU and the transition period provided for in Article 126 of the Withdrawal Agreement started to run. Although the UK is now no longer a Member State, the provisions in the Withdrawal Agreement relating to the transition period provide that (unless expressly provided otherwise in the Withdrawal Agreement) EU law is to be applicable to and in the UK so as to produce the same legal effect as it did prior to the UK’s exit from the EU. Any references to Member States in EU law, including EU law as implemented by Member States, is to be understood as including the UK during the transition period.

The Withdrawal Agreement also includes transitional provisions for cases (antitrust and merger control) that are live at the end of the transition period (UK legislation calls this the “implementation period” and the last day is “IP completion day”). Such transitional provisions were previously set out in the Competition (Amendment etc) (EU Exit) Regulations 2019 (the “Competition Brexit Regulations”), but as these were designed to address a no-deal situation, those provisions are no longer relevant. Other provisions in the Competition Brexit Regulations may also be subject to change, but on the whole they can be expected to still provide a good indication as to what the position will be for UK competition law after the transition period.

After the transition period, a key impact of the UK’s exit from the EU will be that there will be many more cases, antitrust as well as mergers, where both the EU and the UK could in parallel open investigations, impose fines or other remedies, which could potentially add to risk, burden and cost for businesses.

Antitrust

During the transition period

Articles 101 and 102 TFEU, Regulation 1/2003, the EU Block Exemption Regulations and EU Guidance continue to apply in the UK in the same way they did before 31 January 2020. Regulation 1/2003 continues to govern the...
At the end of the transition period, if for antitrust and merger control, a lot of the secondary legislation to the end of the transition period. Anything done before that date, for the purpose of or in connection with the EU elements of the investigation, will continue to cooperate with the Commission. The CMA and concurrent regulators may also have jurisdiction over those aspects of such investigations as the market integration decision. For cases under investigation by the CMA or concurrent regulators at the end of the transition period that may affect trade between Member States, the CMA will no longer apply Articles 101 and 102 TFEU after the end of the transition period. Anything done before that date, for the purpose of or in connection with the EU elements of the investigation, is to be treated after the transition period as done for the purpose of or in connection with the domestic elements of the investigation.

**After the transition period**

After the transition period, the CMA and concurrent regulators will only have jurisdiction to investigate suspected infringements under the Chapter I and Chapter II prohibitions of the Competition Act 1998, not under Articles 101 and 102 TFEU. Instead, the Commission and UK authorities could in parallel open investigations and impose fines and other remedies for anti-competitive conduct affecting both the continuing EU and the UK.

All Commission decisions adopted under Articles 101 and 102 TFEU before the end of the transition period will remain valid in the UK. The Commission will also continue to be responsible for monitoring and enforcing any UK elements of commitments or remedies relating to these cases. Article 95(2) of the Withdrawal Agreement provides that the Commission and the CMA can agree for the monitoring and enforcement of the UK elements of these commitments or remedies to be transferred to the CMA. The UK will have to adopt legislation in order to ensure that the relevant decisions with commitments and remedies are preserved under UK legislation.

EU Block Exemption Regulations will be preserved as retained exemptions under the Competition (Amendment etc.) (EU Exit) Regulations 2019 (which deals with ongoing administrative procedures) may be required by the terms agreed relating to these cases. Article 95(2) of the Withdrawal Agreement provides that the Commission and the CMA can agree for the enforcement of the UK elements of these commitments or remedies to be transferred to the CMA. The UK will have to adopt legislation in order to ensure that the relevant decisions with commitments and remedies are preserved under UK legislation.

The Competition Brexit Regulations provide for the application of Article 101 and 102 TFEU conducted by the Commission shall be considered as having been initiated where the Commission has issued a statement of objections, a request for parties to express their interest in settlement discussions, or has published summary of the case and main content of the commitments. For these cases, the Commission will keep jurisdiction after the end of the transition period. The CMA and concurrent regulators will continue to cooperate with the Commission and (where invited) attend relevant Advisory Committee meetings. The Commission and concurrent regulators may also have jurisdiction over those aspects of such investigations as the extent that they may affect trade within the UK and are ongoing at the end of the transition period (no Commission decision yet), but further legislation may be necessary to set out the exact scope of the UK’s jurisdiction.

For cases under investigation by the CMA or concurrent regulators at the end of the transition period that may affect trade between Member States, the CMA will no longer apply Articles 101 and 102 TFEU after the end of the transition period. Anything done before that date, for the purpose of or in connection with the EU elements of the investigation, is to be treated after the transition period as done for the purpose of or in connection with the domestic elements of the investigation.

**At the end of transition – will there be elements of no deal?**

- At the end of the transition period, if the new trading relationship is not in place, there could be a no-deal at that point. It is more likely that this will be modified by an agreement on agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. Both sides have set out their respective negotiating positions. However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains relevant. See the accompanying section: Leaving the EU: The process and preparations.

- The body of EU law in force at the end of 2020 will be retained, with suitable amendments – this will be called “retained EU law”.

- A lot of the secondary legislation to make such amendments has already been made, but further adjustments may be required by the terms agreed for the future relationship. See the accompanying section: The UK’s new legal order post-Brexit: A new class of UK law.

- For antitrust and merger control, the Competition (Amendment etc.) (EU Exit) Regulations 2019 amend current UK competition legislation where necessary, in order to make the legislation suitable in a no-deal scenario. The provisions in the Competition Brexit Regulations may be subject to change, but on the whole they can be expected to provide a good indication as to what the position will be for UK competition law after the transition period.
Private enforcement

Follow-on damages actions for breach of competition law, in which the claimant relies on an existing infringement decision, are increasingly common in the UK. After the transition period, new Commission infringement decisions may not have a binding effect on the UK courts and claimants may look to other jurisdictions when choosing the forum to bring such claims. This decision will also be affected by UK rules of private international law which may continue to recognise a competition law offence under a foreign law as actionable in the UK.

This change should not affect claims relating to conduct for which the Commission had jurisdiction before 31 December 2020, whether the decision is adopted before or after that date. Such Commission decisions will remain binding in the UK (Article 95 Withdrawal Agreement) and there is therefore likely to be a significant number of existing and future decisions which will continue to affect the UK and provide a basis for follow-on damages claims. In addition, the English courts are likely to be ingenious in finding a basis for jurisdiction in relation to claims against parties subject to the jurisdiction of the English courts for breach of EU competition law and, because of wide English law disclosure rules, the English courts should remain an attractive forum.

After the transition period, UK courts will no longer be bound to treat decisions by the national competition authorities as prima facie evidence of a breach of Articles 101 or 102 TFEU for the purpose of a follow-on claim for damages. Decisions reached before the end of the transition period, even if only final after that date, will however retain their status of prima facie evidence.

The Withdrawal Agreement is silent on the subject of private enforcement, but changes affecting jurisdiction and recognition of judgments may be relevant (see separate Disputes section of this guide).

Merger control

During the transition period

During the transition period, the EU Merger Regulation (“EUMR”) and UK merger control regimes will operate in substantially the same way as prior to 31 January 2020.

- Mergers within the EUMR jurisdiction will be dealt with by the EU Commission, including with respect to effects on any UK market.
- UK turnover will be included in the normal way for EUMR purposes as if the UK were still an EU Member State.
- The CMA will not open an investigation into the same transaction (ie the EUMR will continue to be a one-stop-shop system for the EU/EEA plus the UK), unless jurisdiction is transferred to the CMA under Article 9 or Article 4(4) EUMR.

One important change is that the CMA no longer has the right to participate in meetings of the Advisory Committee. Article 128(5) of the Withdrawal Agreement provides that UK experts may, if invited, exceptionally attend meetings where the discussions concern the UK, but they will have no right to vote and their presence will be limited to the specific agenda items relating to the UK.

Live cases during the transition period

For cases in progress at the end of the transition period, Article 92 of the Withdrawal Agreement (which deals with ongoing administrative procedures) provides that the Commission continues to be competent for administrative procedures initiated before the end of the transition.

Article 92(3)(c) specifies that, for the purpose of the EUMR, proceedings shall be considered as having been initiated:

- at the moment the transaction has been notified to the Commission (in accordance with Articles 1,3 and 4 EUMR (“formal notification”);
- the time limit of 15 working days referred to in Article 4(5) EUMR (request by the merging parties for a merger to be reviewed by the Commission) has expired, without any Member State with national jurisdiction (including the UK) having expressed disagreement over the request to refer the case to the Commission; or
- the Commission has accepted (or is deemed to have accepted) a referral request under Article 22 EUMR in which the CMA participated.

Where a request for referral to the CMA (under Article 9 or Article 4(4) EUMR) is accepted by the Commission before the end of the transition period, the CMA will have jurisdiction to review the transaction after the transition period.

For all cases initiated under these provisions before the end of the transition period, the Commission will keep jurisdiction after the end of the transition period until it reaches a final decision and only the European courts will have jurisdiction to review such a decision on appeal. The CMA will not be able to review the UK aspects of these cases (unlike the position under the transitional provisions in the UK.
no-deal Brexit legislation, which are now no longer relevant).

The CMA will continue to cooperate with the Commission, sharing and receiving case-related information, and attending Advisory Committee meetings (but only where invited), for all such transactions, even after the end of the transition period.

**Commitments**

For all cases where the Commission has accepted commitments from the parties, either before the end of the transition period or after, if the Commission has jurisdiction over the case under the transitional provisions set out above, the Commission will continue to be responsible for monitoring and enforcing all aspects (including any UK elements) of these commitments after the end of the transition period.

Article 95(2) of the Withdrawal Agreement provides that the Commission and the CMA can agree for the monitoring and enforcement of the UK elements of these commitments to be transferred to the CMA. The UK will have to adopt legislation in order to ensure that the relevant decisions with commitments are preserved under UK legislation.

**Engagement with the CMA and pre-notification discussions**

The CMA will have jurisdiction over transactions that have not been formally initiated before the Commission before the end of the transition period. The CMA encourages merging parties to engage with the CMA before the end of the transition period, if it is possible that a transaction will not have been formally notified or referred to the Commission before the end of the transition period and the transaction is likely to meet the jurisdictional thresholds under UK merger control and may raise competition concerns.

The CMA itself will also monitor such cases and may approach the merging parties, as well as third parties, to request information (and issue an invitation to comment inviting third parties to comment on the transaction). Sharing relevant information with the CMA will assist the CMA with its assessment of whether a formal investigation may be necessary and will ultimately speed up any investigation.

The CMA has published guidance on the functions of the CMA under the Withdrawal Agreement which sets out in more detail its approach and powers for merger control, antitrust and consumer protection enforcement during the transition period.

**After the transition period**

Once the transition period ends, the EUMR and its one-stop-shop regime will no longer apply in the UK. Turnover of the parties in the UK will no longer be relevant in order to assess whether the EUMR thresholds are met and the Commission will have no jurisdiction to take into account the impact of a transaction it reviews on any UK market.

The EUMR and the UK merger regime will instead run in parallel and a transaction that qualifies under the EUMR may also be subject to UK merger control (provided the jurisdictional thresholds of the UK regime are met). This may add a burden and cost for businesses, in particular in view of the level of the UK merger fees (ranging from £40,000 to £160,000 depending on the UK turnover of the enterprises acquired) and the longer time frames for UK merger control clearance. The CMA has estimated that this will lead to an increase in UK merger investigations by up to 40% and the Government has committed to increase the CMA budget with an extra £2.8 million a year.

The extent to which the Commission and the CMA will cooperate with each other in the event of parallel investigations after the transition period remains to be seen. The CMA has indicated that it is keen to maintain a good working relationship with the Commission. In the context of merger control, where it is often in the interest of the parties to agree confidentiality waivers for information to be shared with other reviewing agencies, cooperation between both authorities is expected to continue. There are also a number of precedents of administrative cooperation agreements between the Commission and competition authorities of third countries (eg with the United States Department of Justice and Federal Trade Commission), adopted outside the scope of a formal trade agreement, which provide a precedent for a similar arrangement with the CMA.

**Practical considerations**

Parties to M&A deals taking place during the course of 2020 will need to be alert to the relevant transitional provisions under the Withdrawal Agreement, which may have an impact on the regulatory outcome for their transaction. They may, to some extent, be able to manipulate these rules in order to achieve their preferred outcome. The following points in particular should be noted:

- It is possible that we will see more referral requests by the CMA for jurisdiction to be transferred to it from the Commission, in particular during the second half of 2020, as the CMA may want to have jurisdiction.
"After the transition period a key impact of the UK’s exit from the EU will be that there will be many more cases, antitrust as well as mergers, where both the EU and the UK could in parallel open an investigation, impose fines or other remedies, which could potentially add to risk, burden and cost for businesses."

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over cases which have an impact on the UK market. As long as the referral is granted by the Commission before the end of the transition period, the CMA will have jurisdiction to review the transaction. Similarly, we may see the CMA vetoing more requests for referrals to the Commission, if the CMA does not want to lose jurisdiction over a case that has an impact on the UK market.

- A transaction that meets both EUMR and UK merger control thresholds will be reviewed solely by the Commission where the deal was formally notified before 31 December 2020. Even after the transition period, the CMA cannot open an investigation into the same transaction and appeals against a Commission decision in such cases will only be possible before the European courts.

- In the case of a referral request under Article 4(5) EUMR (for jurisdiction to move up to the Commission) the 15 working days will need to have expired by 31 December 2020, without any disagreement by a Member State with national jurisdiction (including the UK), for the Commission to have jurisdiction over the case. The parties to the merger will therefore need to make sure they put such a request in by early December 2020 at the latest.

- Where parties are in pre-notification discussions with the Commission before the end of the transition period, they will need to consider whether the merger is likely to be formally notified or referred to the Commission before 31 December 2020. If there is a possibility that this won’t be the case, they should consider engaging with the CMA where appropriate, in order to speed up the UK review process, if the CMA is likely to have jurisdiction after the transition period.

- For transactions notified to the Commission after the transition period, UK turnover will not be included for the purpose of calculating the EUMR thresholds. This may be a relevant consideration for not notifying before 31 December 2020, but in that case the possibility of jurisdiction for the CMA will need to be considered.

- Competition provisions in the SPA will need to consider all possible outcomes in respect of jurisdiction.

- The increasing difficulty in using the UK’s completed merger process and the UK’s rules on foreign inward investment (which are likely to be extended after the end of the transition period) may provide further obstacles in large international mergers with a UK element, once the UK obtains a parallel jurisdiction.