

BREXIT - IMPACT OF THE WITHDRAWAL AGREEMENT FOR MERGER CONTROL

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Legal Briefings - By **Kyriakos Fountoukakos, Stephen Wisking and Kristien Geurickx**

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. This briefing looks at the provisions in the Withdrawal Agreement that are relevant for merger control, both during the transition period and after, and highlights some key timing issues that will be relevant for deal planning during the course of this year.

In brief, during the transition period, which runs until 31 December 2020, the EUMR and UK merger control regimes will operate in the same way as they did prior to 31 January 2020 (Exit day), as if the UK were still an EU Member State.

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.#

DURING THE TRANSITION PERIOD

During the transition period, the 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 (i.e. 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 towards the end of 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 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 previously provided for under the transitional provisions of 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 notified to 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 (e.g. 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 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, provided 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, 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.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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