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COMPETITION / ANTITRUST

BREXIT AND COMPETITION LAW – SAYING GOODBYE TO THE "ONE-STOP SHOP" AND THE EUROPEAN COMPETITION NETWORK

The transition period for the United Kingdom comes to an end on 31 December 2020 and companies will already have been asking themselves what the consequences are likely to be for them. One aspect of many is the possible impact on competition and state aid legislation. Some matters are already specifically addressed in the Agreement of 17 October 2019 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the "Withdrawal Agreement"), while with others questions remain (especially around state aid control). It will be interesting to see whether the EU and the UK manage to come to an agreement on further points in the remaining time and, if so, on which ones.

Overview

The negotiations over a free trade agreement between the UK and the EU continue. Whether a free trade agreement is likely to result in major changes to and consequences for competition law, however, would seem doubtful at this point. Fortunately, the legal roadmap for the transition from the current status quo, such as the "one-stop shop" principle in merger control and the European Competition Network in the field of antitrust, has largely been set out. Although bidding farewell to these basic principles will be painful for all cross-border companies, there is still the (small) comfort that the Withdrawal Agreement appears to have at least shed light on some issues around transition that are of major relevance in practice.

Substantively, the Withdrawal Agreement does not set out any requirements for the time after the transition period comes to an end. By all accounts, however, the signatories wish to stick with the current 'pillars' (antitrust prohibition, abuse control and merger control) in the context of the future free trade agreement and lay down certain minimum standards in this respect. Any fundamental divergence between the UK and the EU in terms of substantive rules in the future seems rather unlikely, also because both sides are closely involved in the International Competition Network (ICN), one aspect of which is a certain level of harmonisation. The free trade agreement seems to be far more important, on the other hand, for the substantive issue of what will happen with state aid control once the transition period ends.

The Withdrawal Agreement provides for nuanced transitional arrangements that are of interest in the competition context and which we will therefore outline below.

Antitrust: antitrust prohibition and abuse control

Generally speaking, both member states and the European Commission can act in parallel when it comes to dealing with antitrust violations. It is only when the European Commission decides to open formal proceedings that the national competition authority is relieved of its competence (Article 11(6) Regulation (EC) No 1/2003). If the UK is no longer regarded as an EU member state once the transition period ends, however, this rule would no longer apply. Hence, in new cases parallel proceedings before the European Commission and the UK's national competition authority (Competition and Markets Authority – CMA) would be possible.

For ongoing antitrust proceedings before the European Commission, the rule is that the European Commission will remain competent if it has already taken the decision to initiate proceedings (Article 92(3)(b) Withdrawal Agreement). Whether and to what extent the CMA may remain competent to deal with certain aspects of

proceedings of this kind once the transition period ends, seems unclear. The CMA's relevant guidelines appear to leave a chink open for it to take on the case, at least as far as "facts postdating the Transition Period" are concerned, though the CMA appears to be interpreting this rather broadly (CMA, "UK Exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement", 28 January 2020, para. 4.19). Companies that have reason to fear additional proceedings before the CMA therefore face some uncertainties. These risks could possibly be minimised by taking the precaution of applying to the CMA for leniency.

The European Commission will generally continue to monitor and enforce commitments given by or remedies imposed on companies in (or in relation to) the UK in connection with antitrust proceedings before the European Commission. If so agreed with the CMA, the European Commission can transfer the monitoring and enforcement of such commitments or remedies to the CMA (Article 95(2) Withdrawal Agreement).

Merger control

The main question in the context of merger control is that of jurisdiction, i.e. the extent to which the European Commission remains competent for already ongoing merger control proceedings and the situation as regards mergers that have not yet been notified.

To date, where a merger falls within the jurisdiction of the European Commission, the latter has sole competence to review (subject to a few exceptions, such as referrals) (known as the "one-stop shop" principle). Therefore, parallel merger control proceedings by the European Commission and individual member states were not foreseen – a rule that met the needs of economic players very well.

Once the transition period ends on 31 December 2020, the UK will no longer be treated as an EU member state, however. This will mean that, for all new mergers, one will have to assess whether it would make sense to notify to the CMA as well as to the European Commission (where the respective thresholds are met).

The European Commission remains competent for already notified mergers based on Article 92(3)(c) Withdrawal Agreement. This mechanism – of using the date of notification – is familiar from other contexts and has generally proven successful. A certain level of uncertainty may result however if, as often happens, the European Commission holds extended pre-notification contacts. These can frequently continue for months and result in lengthy discussions over the question of whether the notification is complete and hence valid. The working level at the European Commission's DG Competition has already signalled that it is going to take a generous and pragmatic approach on this.

The European Commission also has jurisdiction if the period of 15 working days has elapsed and no member state competent to examine the concentration under its national competition law has expressed its disagreement as regards the request to refer the case (Article 4(5) Merger Control Regulation) or the European Commission decides to examine the concentration or is deemed to have adopted a decision to examine it (Article 22(3) Merger Control Regulation).

Regarding commitments given by or remedies imposed on companies in (or in relation to) the UK in connection with a merger control proceeding, the same applies as in the case of antitrust proceedings. Consequently, the general rule is still that they will continue to be monitored and enforced by the European Commission save where the monitoring and enforcement was transferred to the CMA by agreement with the latter (Article 95(2) Withdrawal Agreement).

The loss of the "one-stop shop" is bitter for the companies concerned. The assumption on the part of many observers is that the CMA will certainly take a self-assured approach and open extensive examinations – this is also what is to be expected based on the experience over recent months. Whether this will be a longer-term trend is questionable, however, because the UK government has basically given to understand that it wants to lower the regulatory hurdles. And – taking the pragmatic view – it can hardly afford to put up any major barriers to investment, given the current economic climate. But there is no doubt that companies will in future have to shoulder significant costs for legal advice in the UK.

State aid

The European Commission has sole competence for state aid control in the EU. Under Article 92(3)(a) Withdrawal Agreement, the European Commission remains competent for ongoing state aid proceedings if it has already allocated a case number.

Article 93(1) Withdrawal Agreement extends the competence of the European Commission to state aid granted before the end of the transition period, in respect of which, for a period of 4 years after the end of the transition

period, the European Commission is competent to initiate new administrative procedures on state aid governed by Regulation (EU) 2015/1589 concerning the UK. And beyond that, the European Commission will also still be competent to handle procedures initiated before the end of the four years.

It is no secret that there is much controversy around the issue of what will happen as regards the control of new state aid after the end of the transition period. While the Political Declaration in the annex to the Withdrawal Agreement (para. 77) provided that the Parties should "in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition", various statements made by the UK government in September and October have unfortunately shown that it no longer feels bound by this promise.

While the UK government has softened its intransigent position somewhat over recent weeks and it appears that a compromise could be reached, there is no telling at this stage what position the UK will take post Brexit in terms of state aid control. Discussions are currently centering around the idea of the UK having a control regime of its own, monitored by the CMA, and that of writing some 'high-level' substantive principles into the future free trade agreement. The question also arises of how to deal with differences of opinion, i.e. dispute resolution mechanisms. It therefore remains to be seen what route the EU and the UK will go down as regards reaching an agreement on state aid control, if at all.

Jurisdiction of the European Court of Justice

The ECJ will also continue to play a role after the end of the transition period. Under Article 95(1) Withdrawal Agreement, decisions adopted before the end of – or in the procedures referred to in Articles 92 and 93 Withdrawal Agreement, after the end of – the transition period and addressed to the United Kingdom or to natural and legal persons residing or established in the UK, are binding on and in the UK. If the UK does not comply with a decision of this kind or fails to give it legal effect in its legal order although it was addressed to a natural or legal person residing or established in the UK, the European Commission may, within 4 years from the date of the decision concerned, bring the matter before the European Court of Justice (Article 87(2) Withdrawal Agreement).

Conclusions

At this current point in time, it is still unclear what form the relationship between the EU and the UK will take after 31 December 2020. Whether a free trade agreement will be signed and, if so, what specific form it will take, is hard to say. Until such time as things are clearer, those affected have no alternative but to prepare for the various possible scenarios.

The good news is that, as far as competition law is concerned, some of the consequences at least are already mapped out on the basis of the provisions of the Withdrawal Agreement. Companies need to factor these risks and implications into their preparations before the transition period comes to an end. Whether the free trade agreement will result in additional, positive impacts in relation to competition law would appear doubtful, however.

So also in the competition context one could say that the 'Brexit has mainly losers'. The disintegration of the single territory within which competition law is applied uniformly results in a higher level of legal uncertainty and more effort for companies – on both sides of the English Channel.

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