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Brexit, UK merger control and competition law: what happens now?

Brexit will have an impact on UK merger control and competition law – but it's not as big as you might think, at least in the short term. Here's what you need to know, as well as an update on likely timings.

Timing

At the time of writing, the dates for the UK leaving the EU had been changed from the original exit date of 29 March to 31 October 2019 at the latest – or 1 June 2019 if, having failed to ratify the Withdrawal Agreement by 22 May, the UK does not comply with its obligation to hold elections to the European Parliament.

For the time being, therefore, the UK remains subject to the EU Merger Regulation and EU competition law – but there continues to be uncertainty over both the timing of its exit and the form that its exit will take. We set out below what the position would be if the UK leaves the EU subject to the draft Withdrawal Agreement ("deal") or without any formal agreement having been reached with the EU ("no deal").

Merger control

- **Deal:** If the UK leaves the EU subject to the draft Withdrawal Agreement, nothing will change immediately because of the transition period (which is scheduled to last until 31 December 2020). In particular, during that period, it will still be possible to take advantage of the "one stop shop" offered by the EU Merger Regulation (and any mergers caught by the thresholds in that Regulation will still need to be notified to the European Commission, as at present).
- **No deal:** if the UK leaves the EU without a deal, the EU Merger Regulation will immediately cease to apply in relation to the UK. In some cases, merging parties may need to seek clearance from both the UK and the EU authorities in parallel – but this will depend on whether the merger triggers the jurisdictional thresholds for both the EU Merger Regulation and the UK national merger control regime.

Competition law

- **Deal:** If the UK leaves the EU subject to the Withdrawal Agreement, then - as is the case with merger control - nothing will change immediately because of the transition period. During that period, the UK will continue to be subject to Articles 101 and 102 of the Treaty on the Functioning of the European Union

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(TFEU) and both the European Commission and the UK Competition and Markets Authority (CMA) will continue to have power to enforce those prohibitions in the UK.

- **No deal:** If the UK leaves the EU without a deal, Articles 101 and 102 of the TFEU will cease to apply in the UK. However, UK businesses could continue to be investigated and potentially fined by the European Commission for infringements which relate to the remainder of the EU in the same way as many companies based in third countries have been to date. UK national competition law – in the form of the Chapter 1 and Chapter 2 prohibitions of the Competition Act 1998 - will also continue to apply. When interpreting the Competition Act, UK courts will still be able to have regard to EU case law on Articles 101 and 102 (on which the Chapter 1 and 2 prohibitions are based) and will probably continue to follow it in the majority of cases. However, there will be somewhat greater scope to diverge from the EU approach than exists under the current regime - which could have a more significant impact over the longer term.

What happens to investigations which have not reached a conclusion?

- **Deal:** The Withdrawal Agreement provides that, where an investigation has started before the end of the transition period, the European Commission can complete the process and its decision will be binding as regards the UK (even if it is not issued until after the end of the transition). This principle applies in relation to investigations under both EU merger control and Articles 101 and 102.
- **No deal:**
 - **Merger control:** The European Commission has recently confirmed that, where it is satisfied that a merger met the relevant jurisdictional thresholds before the UK's departure from the EU, it will complete its investigation. However, in its substantive assessment of the deal, it will take account of the UK's departure and acknowledges that its eventual decision will not be binding on the UK. As a result, merging parties may be faced with a situation where they have no clearance applicable in the UK and may need to notify the CMA under the UK merger control regime (to ensure that they are not at risk of a subsequent challenge by the CMA based on substantive concerns relating to the UK). The UK's no deal guidance advises parties which are concerned about this risk to discuss it with the CMA, with a view to ensuring that if necessary/appropriate, any UK notification can be dealt with as swiftly as possible.
 - **Articles 101 and 102:** As noted above, even after the UK has left the EU, the European Commission will still be able to take decisions in relation to any infringements by UK firms which affect the rest of the EU. The main impact of no deal is likely to be procedural: for example, after Brexit, the Commission will not be able to carry out "dawn raids" in the UK in order to gather information on possible infringements. However, UK firms may find that the CMA will decide to open its own investigations in parallel to those of the Commission (and the CMA will obviously continue to have the power to conduct "dawn raids" in the UK).

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