

Brexit and Competition Law

Kluwer Competition Law Blog

April 8, 2017

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Please refer to his post as: Jay Modrall, 'Brexit and Competition Law', Kluwer Competition Law Blog, April 8 2017, <http://kluwercompetitionlawblog.com/2017/04/08/brexit-and-competition-law-2/>

With her delivery of the UK's Article 50 notice on March 29, Theresa May has launched the two-year negotiating process leading to the first exit of a Member State from the European Union (EU). The negotiations will affect virtually every economic and policy area in Europe, including competition policy. These effects will be felt first and foremost in merger control, but the enforcement of cartels and other infringements, the evolution of private antitrust litigation and, more broadly, the direction of EU and UK antitrust policy, will also be impacted.

Merger control

The UK will cease to be covered by the EU Merger Regulation's one-stop-shop, meaning that many transactions notified in Brussels will also need to be notified in London. The UK's Competition and Markets Authority (CMA) projects a 40-50% increase in its workload. Global M&A transactions often trigger multiple merger filings, and the addition of one more may not seem too serious. Duplicate filings in Brussels and London will likely have a disproportionate impact, however, owing among other things to the fact that both authorities will often need to examine the same European markets in parallel, both authorities employ front-loaded, information-heavy regimes and any required remedies may overlap or even conflict. With creativity and good will, however, the Commission and the CMA could do much to mitigate these burdens by developing a framework for managing parallel merger reviews, for instance harmonizing notification forms and questionnaires and coordinating on any remedies that may be required. The Commission and the CMA could potentially make significant improvements through bilateral agreements, working in parallel with the broader negotiations. As March 29, 2019 approaches, many technical issues will arise for companies engaged in transactions that are in pre-notification or under investigation by the Commission but not yet approved.

Antitrust enforcement

Brexit will also impact the Commission's and CMA's antitrust enforcement, although the effects for business are less predictable. Most immediately, companies considering seeking leniency for a potential cartel-type violation in Brussels are more likely to need to consider a parallel application in London. More broadly, the Commission and the CMA currently have concurrent jurisdiction to enforce EU law under the Regulation 1/2003 framework, though the Commission can take control of cases where it feels best place to do so. Post-Brexit, the CMA will enforce UK rather than EU competition law, and the Commission will have no oversight authority. This change will likely not lead to significant changes in enforcement priorities in the near term, but coordination will become more difficult because the CMA will no longer be a member of the European Competition Network. Existing

international frameworks such as the International Competition Network do not provide for cooperation on a case-by-case basis. Again, the Commission and the CMA will need to develop new ways to cooperate to ensure that parallel investigations are handled as efficiently as possible and to reduce the risk of diverging outcomes.

Private litigation

In recent years, the UK has emerged as the preeminent jurisdiction in Europe for antitrust private damages action, thanks to advantages including an efficient and respected judicial system, a regime permitting collective actions and flexible procedures for collecting evidence. These advantages will remain, but a number of factors may reduce the UK's comparative advantage, including the implementation of the EU Damages Directive throughout the EU, uncertainty about UK courts' jurisdiction over actions relating to violations of EU law, the loss of the EU-law framework guaranteeing the enforceability of UK judgments in EU courts, and efforts made by jurisdictions such as Germany and the Netherlands to increase their attractiveness for antitrust damages actions.

UK and EU policy evolution

Over time, UK competition policy may evolve in different directions from EU competition policy. Many hope that future UK law will take greater account of economic arguments in areas where EU law is considered more rigid and formalistic than US law, such as loyalty rebates and vertical restraints. While such a change is certainly possible, Theresa May's call for UK authorities to take more account of industrial policy in future merger reviews casts doubt on the assumption that UK competition policy will inevitably move towards a more antitrust-economics-based approach post-Brexit.

Implications for business

Unlike in some other policy areas, Brexit's implications for competition policy do not call for urgent planning or action by business. However, business can and should join the competition Bar in encouraging the Commission and the CMA to plan for Brexit and to ensure that they have the necessary processes in place to operate in a new, parallel-jurisdiction environment.