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Competition - Antitrust
Competition and Markets Authority Draft Guidance on a "No-deal" Brexit

The recently published draft guidance by the Competition and Markets Authority (CMA) provides a high-level insight into how the UK will deal with competition law and its development post-Brexit in the event of a "no-deal" Brexit scenario. However, the extent of the types of changes that might be made and the impact on businesses are uncertain.

Background

On 28 January 2019, the CMA published its draft guidance (Draft Guidance) and opened its consultation on how the CMA should exercise its powers and processes in the event of a no-deal Brexit in relation to the legal framework, merger control and enforcement of competition law prohibitions (antitrust, including cartels).

Legal Framework

On the 24 January 2019, the Competition (Amendment etc.) (EU Exit) Regulations 2019 (Regulations) (accompanied by the explanatory memorandum) were published, having been made on 22 January 2019. The Regulations were prepared by the government with the view to update UK competition law from 11 p.m. on 29 March 2019 (Exit Day).

Competition Law Prohibitions

The Regulations would change the position currently outlined in the Competition Act 1998 (Competition Act) that recognises the primacy of EU law.

At present, when interpreting the equivalent prohibitions set out in Chapters I and II of the Competition Act, the CMA, sectoral regulators and UK courts must as far as possible follow the principles of:

- The Treaty on the Functioning of the European Union (TFEU)
- Court of Justice of the European Union (CJEU) case law on:
  - Article 101 prohibitions on anti-competitive agreements
  - Article 102 prohibitions on the abuse of dominance

Furthermore, the CMA, sectoral regulators and UK courts should have regard to any relevant decisions or statements of the European Commission.

The provisions contained in the new Regulations will allow the CMA, sectoral regulators and the UK courts freedom to depart from the principles of the TFEU and CJEU case law when it is considered "appropriate" to do so and where at least one of a number of prescribed factors applies:

- Differences between UK competition law and corresponding provisions of EU law that had effect immediately before Brexit
- Differences between markets in the UK and markets in the EU
- Developments in forms of economic activity since the time the principle or decision was laid down or made
- Generally accepted principles of competition analysis or a generally accepted application of such principles
- A principle laid down or a decision made by the CJEU on or after Exit Day
- The particular circumstances under consideration

The Draft Guidance provides that the CMA, sectoral regulators or the UK courts will not be "required to act with a view to securing consistency with the TFEU or CJEU principles or decisions where they are bound by a principle or decision of a court or tribunal in England and Wales, Scotland or Northern Ireland that requires them to act otherwise".

There is scope for further clarity in this aspect. For example, it is essential for businesses to understand how the CMA, sectoral regulators and UK courts would exercise discretion where particular business practices conducted in the UK are permitted while such business practices are prohibited in its EU business. This position will apply to **all** cases from the point of Exit Day, so further guidance will be necessary to provide businesses with greater certainty.

Merger Control

The Draft Guidance has outlined practical implication for merger control and placed an emphasis on merger notifications.

Currently, where a merger has a European Community dimension, the European Commission has exclusive competence to review that merger within the EU, including with respect to its effects on any UK market where the UK market would be predominantly affected. Any remaining cases that fall below the EU thresholds would be handled by the CMA or sectoral regulators in the UK.

With a "no-deal" Brexit, the European Commission's review of mergers will no longer cover the UK and, as such, mergers may be subject to scrutiny by **both** the CMA and the European Commission. Therefore, "if the European Commission has not reached a decision before Exit Day, the CMA can assert jurisdiction over the merger and review its effects within the UK after Exit Day if the UK jurisdictional requirements are met". Although the CMA has provided that the notification of proposed mergers would still remain voluntary, if businesses failed to seek clearance with the CMA, however, these businesses would run the risk of an investigation at a later date and potentially be required to unwind transactions.

Undoubtedly, there are greater merger risks for businesses and this reinforces the need for businesses to potentially undertake parallel clearance in both the UK and the EU. Further guidance is required to provide greater certainty to businesses to ensure that proper planning can be implemented in terms of the structuring of transactions and whether notifications are necessary to minimise the risks following a no-deal Brexit.

Consultation

The Consultation invites businesses and stakeholders to comment on whether the Draft Guidance provides sufficient information and clarity in terms of the jurisdiction of on-going merger control cases and competition law prohibition cases, which will apply from Exit Day (i.e. "live" cases that are being reviewed by the European Commission or the CMA on Exit Day). Additionally, the CMA invites responses on whether the Draft Guidance provides sufficient information and clarity in respect of the treatment of new cases investigated by the CMA after Exit Day.

The CMA invites comments on the Draft Guidance and the consultation closes at 11:45 p.m. on 25 February 2019.

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