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K&L Gates Brexit Task Force

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BREXIT: Stay Calm – Effects on Antitrust Expected to be Limited

Should the UK leave the EU, the way how antitrust rules apply to companies based in and doing business in the EU and in the UK is unlikely to change significantly in the short or medium term.

Notably, UK domestic competition laws on anticompetitive agreements and abuses of dominance closely mirror those of EU law and so immediately post-Brexit there would be little change. However, over time, the practice and procedure rules could start to diverge.

Antitrust

As with other non-EU countries, UK companies will remain subject to EU antitrust law in relation to agreements (whether horizontal or vertical) or unilateral conduct that has an effect within the EU.

Currently, either the European Commission (“Commission”) or the Competition and Markets Authority (“CMA”) will investigate companies in connection with suspected infringements of EU law. However, post-Brexit, both authorities could start parallel cartel investigations over the same conduct affecting the EU and the UK.

Whilst the Commission will no longer be able to investigate UK companies on-site (dawn raids) or ask the CMA to carry out investigations on its behalf, it will be able to send written requests for information to UK companies. This is the current procedure for businesses based outside of the EU.

As regards distribution models affecting the UK and the EU, it is important for companies to ensure that their agreements will comply with both regimes. However, this is something that already now companies should carefully consider, particularly in connection with the scope of online sales restrictions. A number of national competition authorities (e.g., in Germany, France) have been adopting a stricter approach than the one of the Commission when reviewing agreements or practices allegedly overly restrictive of online sales.

Except for the fact that both the Commission and the CMA could start parallel proceedings over the same conduct affecting the EU and the UK, in the medium term, we do not expect the CMA to interpret and apply antitrust law in a substantially different way from the Commission and European Courts. However, in the longer term, the CMA could build its own (diverging) caselaw.

Merger control

Once the UK leaves the EU, the cooperation between the Commission and UK will be over, as the "one-stop shop" system based on the EU Merger Control Regulation will no longer apply to the UK.

This means that transactions triggering the relevant merger filing thresholds will have to be reviewed by both competition authorities (the CMA and the Commission). Since merger control is voluntary in the UK, Brexit will not change this. Nonetheless, given the loss of the "one-stop shop", it is likely that the CMA will have to review a higher number of cases. By contrast, unless the EU merger filing thresholds will be updated, there will be a reduction in the number of merger filings with the Commission due to the fact that the UK turnover will not be counted for the purposes of determining whether a transaction meets the EU thresholds.

State aid

EU rules on state aid, and the mechanisms for its enforcement, will cease to apply in the UK, which will only be subject to the state subsidies limits established by the World Trade Organization. In other words, the UK will be able legally to fund businesses on its territory with public resources without any possibility of reprisals from the EU.

This would not be the case if the UK will apply the EU antitrust rules or if some new tailor-made agreement is reached, including UK's access to the EU internal market. In that case, an essential condition would certainly be to implement state aid rules almost identical to those in force for the other participants in the single market. However, UK companies, like any other company from non-EU countries, will be able to submit complaints to the Commission for illegal state aid measures.

An increasing tension between the UK and EU Member States on these issues is not unlikely. This could in turn lead to a rethinking of the Commission's current state aid policy.

Risk of a higher formalism in the application of EU antitrust rules?

UK authorities have traditionally been promoting a more modern approach to antitrust law, based on the effects of the conduct. This has contributed to the modernization of certain areas of EU antitrust law (e.g. merger control). As a consequence of Brexit, this positive influence might reduce. We expect that this might result in a higher degree of formalism in the application of antitrust law in the EU as the UK would no longer directly participate in the EU decision-making process and jurisprudence.

In particular, we can conclude that companies dealing with the EU and the UK will need to take account of both antitrust law regimes – as it is the case with any other non-EU country – since:

- a) companies may be targeted by parallel investigations launched by the Commission and the CMA in connection with cartels affecting the EU and the UK;
- b) companies' distribution and antitrust compliance models will have to comply with both regimes;
- c) EU state aid rules may no longer apply to UK; and
- d) companies may have to file the same transaction to the CMA and the Commission if the requisite merger filing thresholds are met.

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