

Deal Planning After Brexit — Merger Control Aspects

What does the UK's exit from the EU on 31 January mean for parties' deal planning?

Key Points:

- On 23 January 2020, the UK passed legislation to leave the EU on 31 January 2020 under the terms of the Withdrawal Agreement negotiated with the EU, which provides for a transition period between 31 January 2020 and 31 December 2020.
- For transactions formally notified to the European Commission (EC) before the end of the transition period, the EC will continue to have jurisdiction to assess the UK effects of the transaction.
- Transactions notified after the end of the transition period, that meet both the UK and EU filing thresholds, could face parallel scrutiny by both the EC and the UK Competition and Markets Authority (CMA).

Now that the Withdrawal Agreement has been approved by the UK Parliament, the UK will almost certainly leave the EU on 31 January 2020. The Withdrawal Agreement must also be approved by the European Parliament, but this approval is viewed as highly likely. On exiting the EU, the UK will enter a transition period from 31 January to 31 December 2020 (at this time, the UK government has ruled out any extension to the transition period, though it remains a possibility in the context of previous UK-EU negotiations).

According to the Withdrawal Agreement, there will be no changes to merger control jurisdiction for the EU or the UK during the transition period. For transactions formally notified to the EC before the end of the transition period, the EC will continue to have jurisdiction to assess UK effects of the transaction (*i.e.*, the “one-stop shop” principle will apply).

Only transactions notified after 31 December 2020 or after the end of the transition period, that meet both UK and EU filing thresholds, could face *de facto* parallel scrutiny by both the EC and the CMA.

During the Transition Period

- The usual EU and UK jurisdictional tests will continue to apply. If the EU jurisdictional test is met, the transaction will fall within the exclusive competence of the EC. Parallel notifications to the CMA and the EC will not be required.

- The usual referral mechanisms between the CMA and EC will continue to apply. In practice, there may be a greater risk of the CMA requesting the referral of cases that involve UK local competition issues.
- The EC's information and search powers will remain unchanged.
- The Withdrawal Agreement does not introduce changes to the EC's approach to substantive assessment and remedies.
- The EC can still require remedies for UK businesses in decisions adopted after the end of the transition period, for proceedings initiated during the transition period. However, the Withdrawal Agreement states that the EC and the CMA may agree to transfer monitoring and enforcement of remedies to the CMA.

The EU will have jurisdiction for merger proceedings initiated before the end of the transition period

- The EC will have jurisdiction to review a transaction (*i.e.*, the one-stop shop principle will apply) if the EU Merger Regulation (EUMR) thresholds are met and if EC proceedings were initiated before the end of the transition period.
- The UK will still count as an EU Member State for the purposes of EUMR turnover calculation.
- Merger control proceedings will be considered as initiated at the moment at which one of the following occurs:
 - A transaction meeting the EUMR's jurisdictional thresholds has been notified to the EC
 - If merging parties have requested to refer a transaction without an EU dimension to the EC, and 15 working days have expired without any Member State having expressed its disagreement
 - Following a referral request by a Member State(s) that the EC examine a transaction without an EU dimension, the EC has decided, or is deemed to have decided, to review the transaction

When should parties prepare for a separate UK filing?

- When the transition period expires on 31 December 2020, transactions — relating to UK or non-UK businesses — that meet both UK and EU filing thresholds could face parallel scrutiny by both the CMA and EC.
- Pre-notification discussions with the EC, prior to formal filing, can take several months. If discussions with the EC are ongoing, but formal filing is unlikely to occur before 1 January 2021, parties should prepare for a possible CMA filing if the UK jurisdictional tests are met.
- Although parties can formally file without pre-notification or EC approval, this is not usually advisable and risks the EC rejecting the filing as incomplete.
- If a significant transaction is undergoing EC pre-notification in late 2020, the CMA may run a “shadow case team” that engages with parties to mitigate the risk of the UK review lagging the EC review

significantly. The CMA's draft annual plan for 2021 states that it will engage in pre-notification discussions for certain mergers from early autumn 2020, similar to arrangements in the lead-up to the no-deal Brexit deadlines.

UK Jurisdiction

What does the UK's voluntary filing regime mean for parties?

- A transaction is subject to UK jurisdiction if either of the following applies:
 - The target's UK turnover exceeds £70 million (£1 million if the target is active in the production of military or dual-use goods, computing hardware, or quantum technology)
 - The transaction results in the creation of, or increase in, a 25% (or higher) share of sales/purchases of goods or services in the UK (or if the target alone has a 25% share, and the target is active in the production of military or dual-use goods, computing hardware, or quantum technology)
- The UK is a voluntary filing regime, so the fact that a transaction meets the UK filing thresholds does not mean parties are required to file a notification. If parties do not file, however, the CMA may initiate its own investigation up to four months after it becomes aware of the material facts of the transaction (which is typically the date of closing).
- To address the uncertainty the voluntary regime creates, parties may consult with the CMA on whether a filing is appropriate.

Please contact the Latham lawyer with whom you normally consult to discuss potential risks to your transaction.

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