BREXIT: IMPLICATIONS FOR MERGER CONTROL

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This article considers what the key implications may be for merger control if the UK leaves the EU.

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As is the case for other areas of law, the implications of Brexit for merger control depend largely on the model that would form the basis of the UK's ongoing relationship with the EU. The most important distinction in this respect is between:

- A model whereby the UK continues to be bound by EU legislation, such as the EU Merger Regulation (EUMR). The most likely route to such a model would involve the UK rejoining the EEA, alongside the current EEA/EFTA states of Norway, Iceland and Liechtenstein (the EEA model) and becoming subject to Article 57 of the EEA Agreement, which implements the EUMR for the EEA/EFTA states.

- Various other models that involve the UK ceasing to be bound by the EUMR, whereby the UK's relationship with the EU is governed by a series of bilateral agreements (like Switzerland); a free trade agreement (like Canada); participation in the EU customs union (like Turkey); or reliance on the UK's membership of the World Trade Organisation (WTO).

THE EEA MODEL

The EEA Agreement replicates EU competition law. If the UK were to re-join the EEA under the same terms as Norway, the European Commission would continue to have exclusive "one stop shop" jurisdiction to review mergers between parties exceeding certain turnover thresholds within the EU, including the effects of those mergers on competition in the UK and other EEA/EFTA states that do not form part of the EU.

Jurisdictional issues

Under the EEA model, the UK would cease to be an EU member state, so the UK turnover of merging parties would no longer be taken into account when determining whether a transaction has an "EU dimension" and is therefore subject to mandatory notification to the European Commission under the EUMR. This would push some transactions below those thresholds, meaning that they would no longer qualify for a "one-stop-shop" review by the European Commission:

- For the sub-set of those mergers that do not need to be notified to national competition authorities of other EEA member states, and which do not give rise to competition concerns, the impact would be positive. These transactions would avoid having to make any mandatory filings and there would be little merit in making a voluntary UK filing given the absence of competition concerns.

- Another sub-set of those mergers would become subject to requirements to notify a number of national EEA competition authorities instead. This would increase regulatory burdens for these mergers, irrespective of whether they give rise to competition issues.

The EEA Agreement also provides for the EFTA Surveillance Authority (ESA) to have jurisdiction to review mergers that do not meet the turnover thresholds set out in Article 1 of the EUMR within the territories of the EU member states, but do meet those thresholds within the territories of the EEA/EFTA states, and therefore have an "EFTA dimension".

So, for example, a merger would be notifiable to the ESA if it involved two parties with:

- More than EUR5 billion of combined worldwide turnover;
- Individual turnover of more than EUR250 million in the territories of the EEA/EFTA states (comprising Norway, Iceland and Liechtenstein), with no more than two thirds of that turnover arising in one and the same EEA/EFTA state; and
- Individual turnover of less than EUR100 million in the EU region.

To date, no merger has ever satisfied the conditions for mandatory notification to the ESA, so there have been no such filings.

In the rare scenario in which merging parties have insufficient turnover in the EU to trigger a filing under the EUMR, but do have substantial turnover in the EEA/EFTA states, it has always been the case that more than two-thirds of that turnover is in Norway, which has a much larger economy than Iceland or Liechtenstein.

That could change if the UK were to join the list of EEA/EFTA states, adding another large economy alongside that of Norway. This would likely lead to the ESA reviewing some (but probably not many) mergers involving businesses with operations that are focused in the UK and Norway. Consequently, the ESA would need to build capacity and develop procedures for the review of such mergers.

Politically palatable?

The European Commission has no officials or Commissioners from the EEA/EFTA states, although secondments of such officials to the Commission do take place. While the post-Brexit status of the UK officials who currently serve within the Commission remains unclear, it seems likely that, over time, there would be fewer UK officials within the Commission deciding on EUMR notifications of important mergers involving UK companies, and possibly none at all.

The ESA, which is also located in Brussels, does employ officials from EEA/EFTA member states, and Protocol 24 of the EEA Agreement lays down procedures for "close and constant liaison" between the Commission and the ESA when the Commission is reviewing certain transactions notified under the EUMR, for example, where the parties have EFTA-wide turnover that meets certain criteria, or where the transaction is liable to give rise to a significant impediment to effective competition within the EFTA region. However, this procedure only affords the ESA the right to receive information about the transaction and to make its views known, and does not confer any legal right to determine or participate in the Commission's ultimate decision. This limited involvement of UK nationals in the determination of mergers affecting the UK may make the current EEA arrangements politically unpalatable to those who would decide on the model for Brexit.

OTHER MODELS

In any of the other models (for example, based on bilateral agreements, a customs union, free trade agreement or WTO rules), the UK would cease to fall within the jurisdiction of the EU merger control regime. This would create potential disadvantages for some transactions and potential advantages for others.

First, large mergers involving UK businesses that do raise competition concerns would face the disadvantage of having two, parallel reviews by each of the EU and UK authorities, instead of a "one-stop-shop" review by the European Commission as at present. Obtaining merger control clearances for such deals would become significantly more expensive and complicated, and subject to risks of divergent procedural and substantive approaches by the European Commission and the UK Competition and Markets Authority.

Second, the exclusion of UK turnover when calculating whether the thresholds for an EUMR filing are met would push some transactions below those thresholds, with the same consequences as outlined for the EEA model (see *the first two bullet points under Jurisdictional issues*, above).

Third, there would probably be a broadly positive impact for joint ventures with activities in the UK, but not the EEA region. Provided the Commission makes good on its current plan to exclude extra-EEA joint ventures from the scope of EUMR mandatory filing requirements, such JVs would escape an EUMR filing obligation. Purely "green field" JVs (in which the parents do not contribute existing assets that amount to an "enterprise") are not notifiable under the UK's voluntary merger control regime, irrespective of whether they raise competition concerns (although they can be assessed under the prohibition on anti-competitive agreements contained in Chapter I of the Competition Act 1998).

For other JVs, a voluntary UK filing may be advisable for some, but many more would benefit from a lower regulatory burden. For example, acquisitions of joint control over UK real estate assets are, at present, often subject to filing requirements under the EUMR that are largely pointless due to the typical absence of any conceivable competition concerns, and which would be avoided post-Brexit. That said, Commissioner Vestager recently indicated that the Commission is considering the introduction of block-exemptions from the EUMR filing requirements for certain categories of transaction which, if introduced, would neutralise any merger control advantages of Brexit for those exempted transactions (see *Legal update, Speech by Commissioner Vestager on refining the EU merger control system (http://uk.practicallaw.com/8-624-6186)*).

Scope for greater protectionism

Finally, there would be implications for mergers that give rise to public interest concerns. At present, governments of EEA member states are prevented by Article 21 of the EUMR (and equivalent provisions of the EEA Agreement) from applying national legislation to prohibit or impose remedies on mergers that are notifiable under the EUMR, unless they do so to protect legitimate public interests such as public security, media plurality, prudential rules or any other public interest consideration that is cleared in advance by the European Commission. Any illegitimate exercise of national legislation can be challenged by the Commission and, ultimately, ruled unlawful by the EU Courts.

Depending on the terms of the UK's post-Brexit trading arrangements with the EU and elsewhere, the UK could obtain greater freedom to block or impose conditions on mergers on grounds that are unrelated to competition, such as the impact on employment, or a desire to limit foreign ownership of UK businesses. For example, when Pfizer launched its proposed (and ultimately abandoned) takeover of AstraZeneca in 2014, some politicians advocated government intervention to protect jobs and R&D capacity in the UK, but any attempt to do so would almost certainly have met stiff opposition from the European Commission. Post-Brexit, protectionism of this nature could become both possible and, depending on the political leanings of future governments, pronounced.

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