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BEYOND BREXIT

COMPETITION LAW AND SUBSIDY CONTROL IN EU-UK AGREEMENT

Beyond Borders – Part of the Horizon Scanning series

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After many months of challenging negotiations set against the backdrop of a global pandemic, the EU and UK negotiators announced on 24 December that they had reached "agreement in principle" on the EU-UK's future relationship (the Agreement). Alongside fisheries, commitments to ensure a level playing field for open and fair competition, including in the area of subsidy control (or State aid), turned out to be one of the most contentious issues in the negotiations.

This briefing provides an overview of the implications of the 1,246-page Agreement for merger control, antitrust enforcement and subsidy control in the UK and EU. First, we recap each party's opening position on these topics. The briefing then discusses the general competition rules and subsidy control commitments in the Agreement before summarising what it all means in practice. We conclude with an overview of the next steps towards ratification of the deal on both sides.

Speed-read

The Agreement contains level playing field commitments including rules to prevent distortions created by anti-competitive practices and subsidies

Businesses with cross-border activities will have to comply with both EU and UK competition rules. There will be greater scope for parallel investigations possibly resulting in inconsistent or conflicting decisions

The UK will no longer follow the EU's State aid rules but will develop its own domestic subsidy control regime

The Agreement relies on a number of enforcement tools to ensure the parties' compliance with the subsidy control commitments, including recourse through national courts

The parties' opening positions

In March and May 2020, respectively, the European Commission (EC) and the UK Government published their draft texts for the EU-UK future relationship agreement. Both texts contained provisions on competition law enforcement and State aid/subsidy control but the provisions differed significantly in scope and strength.

The UK proposed light-touch reciprocal commitments on transparency for subsidies and commitments to maintain effective competition laws while the EU required continued application of the EU State aid rules by the UK and control of mergers and a prohibition of anti-competitive practices (also modelled on the EU rules) as far as those affected EU-UK trade.

The EU also proposed to subject some of these commitments to the Agreement's dispute settlement mechanism while the UK wanted to avoid the use of any enforcement tools to ensure compliance. However, both parties proposed cooperation between their respective competition authorities.

The EU-UK Agreement

Part two of the Agreement contains a section on "*Level playing field for open and fair competition and sustainable development*" that includes chapters on Competition Policy, Subsidies, State-owned enterprises and enterprises granted special rights, and Taxation. These chapters are designed to prevent trade distortions created by anti-competitive practices, discriminatory and abusive conduct and subsidies. They include commitments for each party to maintain effective antitrust and merger control regimes. The granting of subsidies is governed by a set of common principles in

combination with a number of enforcement tools, including recourse through national courts by competitors and unilateral remedial measures for each party. A mechanism to deal with "significant differences" in standards that affect trade between the parties (which allows unilateral rebalancing measures) also applies to the area of subsidy control but not competition policy.

The Agreement further requires each party to maintain or establish independent authorities in these areas and provides a legal basis for cooperation between these authorities.

Further detail on these commitments is set out in **Table 1** below.

The treatment of "live cases" – cases that were initiated before the end of the transition period – had been dealt with under the EU-UK Withdrawal Agreement. **Table 2** below contains a reminder of these transitional arrangements.

// The Agreement commits both Parties to maintain their high standards of competition law //

UK Government Summary Document

What does this mean in practice?

Merger control

Under EU merger control rules, all transactions that meet the threshold for notification to the EC, must be notified to the EC. Where this is the case, the various EEA national competition authorities cannot apply their own merger control rules to the transaction, even if the national merger control thresholds are met.

As anticipated, the EU-UK deal does not provide for this EU "one-stop-shop" principle to continue in relation to the UK. As of 1 January 2021, this means that where a merger satisfies both the EU thresholds and the UK thresholds, there may well be parallel investigations of the same merger by the EC and the CMA.

The CMA has stated that "*where possible and appropriate, [it] will endeavour to coordinate merger reviews relating to the same or related cases with the EC (and other competition authorities)*". This suggests that the CMA will take a pragmatic approach to cases where it shares jurisdiction with the EC. Importantly, the Agreement provides a legal basis for such cooperation between the EC and the CMA.

But despite this clear rhetoric from the CMA, in practice its approach to merger control has been increasingly interventionist over the past couple of years, including in relation to jurisdiction and transactions with limited UK nexus.

So businesses may need to add the UK to their list of merger control filings for an M&A deal, and hope that future cooperation arrangements (which the EC and CMA will presumably want to adopt as soon as practical) will reduce the risk of inconsistent CMA and EC decisions.

THE EU MERGER CONTROL SYSTEM APPLIES REGARDLESS OF THE NATIONALITY OR COUNTRY OF INCORPORATION OR WHERE THE HEADQUARTERS OF AN UNDERTAKING ARE LOCATED. THE FACT THAT THE UK HAS BECOME A THIRD COUNTRY HAS NO IMPACT ON THE APPLICABILITY OF THE EU MERGER RULES TO UK UNDERTAKINGS WHEN THE EU JURISDICTIONAL CRITERIA ARE FULFILLED. AFTER THE END OF THE BREXIT TRANSITION PERIOD, IT IS POSSIBLE THAT BOTH THE EC AND THE UK'S CMA WILL BE COMPETENT TO REVIEW IN PARALLEL A PLANNED CONCENTRATION BUT UNDER THEIR RESPECTIVE SUBSTANTIVE AND JURISDICTIONAL RULES (EC GUIDANCE TO STAKEHOLDERS)

Public antitrust enforcement

Having left the EU, the UK is a third country for the purposes of EU competition law. This means that the UK no longer forms part of the European Competition Network (ECN), which includes the EC and EU Member State competition agencies.

However, the UK's exit does not, as such, have an impact on the applicability of the EU antitrust rules to UK undertakings. As the EC notes in its recent guidance, these EU rules will continue to apply to UK companies if anti-competitive conduct "*is implemented or produces effects within the EU internal market*". Similarly, if that same anti-competitive conduct also produces effects within the UK, it could be subject to a parallel investigation by the CMA. From 1 January 2021, there is therefore an increased likelihood of parallel investigations with respect to both alleged anti-

competitive agreements and abuses by dominant companies.

Currently, the UK antitrust rules mirror the EU rules and, at the moment, there are no plans to change the UK antitrust rules significantly other than to manage the UK's exit and ensure the UK regime works independently of the EU framework post 1 January 2021. The existing EU block exemptions, which exempt certain types of agreements (e.g. vertical, technology transfer and R&D agreements) from the application of antitrust rules, have also been transposed into UK law, with only minor modifications to reflect the fact of Brexit. As a result, existing agreements between businesses that currently benefit from those provisions should remain exempted from both EU and UK antitrust rules.

But the Agreement does not require the UK to maintain the status quo, obliging the UK only to have an effective antitrust regime. Post 1 January 2021, the obligation on UK competition law enforcers to ensure consistency between the interpretation of the UK regime and the EU regime (under s. 60 of the UK Competition Act) has been replaced by a softer obligation. This allows scope for divergence possibly resulting in inconsistent or even conflicting decisions in the medium to long term.

Private antitrust enforcement

The UK is currently a key jurisdiction for competition damages claims - popular with claimants for a number of reasons, including favourable disclosure rules, the depth of market expertise and judicial experience, and the presence of litigation funders.

As of 1 January 2021, other than those resulting from cases initiated by the EC before that date, EC infringement decisions cease to be legally binding before UK courts. Claimants who wish to pursue follow-on damages claims in UK courts are therefore no longer able to rely on those decisions as a binding finding of infringement. It remains to be seen, however, what impact this will have on the popularity of the UK as a jurisdiction for damages claims.

State aid

As of 1 January 2021, the UK no longer applies EU State aid rules (except as provided for in the NI Protocol to the EU-UK Withdrawal Agreement) and the UK Government published legislation to effect this change (the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020). However, to implement the subsidy control commitments in the Agreement, the UK is required to set up its own subsidy control regime with "an appropriate role" for an independent authority and recourse through UK courts by interested parties such as competitors.

At the time of writing, no further details are available on how the UK intends to meet these obligations. One option would be to dust off the plans of the previous UK Government for a domestic regime that remained in step with the EU State aid regime (based on *ex ante* control of aid) with an independent authority (the CMA) to administer and enforce the rules. Or will the Government use the flexibility of the Agreement to introduce a more light-touch, *ex post* regime? Or see the role as better suited to an organisation other than the CMA?

It also remains to be seen what the impact on the UK will be of the rules that the EU ultimately adopts to address the impact of subsidies from non-EU countries on trade within the EU ("foreign subsidies"). The EC's proposals in this area, announced in June 2020, are discussed in an earlier briefing and blog post, available here and here. As currently described, these measures appear broad and potentially complex in their operation albeit that the draft proposal implies that free trade deals (such as the Agreement) will take precedence over any actions taken under the proposed new rules.

> // **It was worth fighting for this deal because we now have a fair and balanced agreement with the UK, which will …, ensure fair competition, …** //
>
> Ursula Von der Leyden, President of the European Commission

Next steps

The UK Parliament approved the Agreement on 30 December. Because of the last-minute timing of the Agreement, the European Union (Future Relationship) Act provides that UK law will take effect with such modifications as are required for

the purposes of implementing the deal, until such time as proper amendments can be made.

The deal must also go through a ratification process with the European Parliament and the Council. However, the late Agreement left insufficient time for the European Parliament to give its consent by the end of the transition period. The EC therefore proposed to apply the Agreement on a provisional basis, for a limited period until 28 February 2021. The Council, acting by the unanimity of the 27 EU Member States, authorised the signature of the Agreement and its provisional application as of 1 January 2021. Next year, the Council will adopt the decision on the conclusion of the Agreement, once the European Parliament has given its consent.

Table 1

EU – UK Agreement **Key provisions relating to merger control, antitrust and subsidies**	
General	The parties (i) recognise the importance of free and undistorted competition in their trade and investment relations and (ii) acknowledge that anti-competitive business practices may distort the proper functioning of markets and undermine the benefits of trade liberalisation.
Merger control & Antitrust	Each party must maintain: (i) a competition law, which addresses anti-competitive agreements and concerted practices, abuse of dominance, and mergers/acquisitions that may have significant anti-competitive effects; and (ii) an independent authority or authorities competent for the enforcement of the competition rules. The Agreement's "horizontal dispute settlement mechanism" does not apply to these commitments.
Subsidy control (*)	**General principles** – commitment for each party to maintain "an effective system of subsidy control" ensuring that the granting of subsidies respects a defined set of binding principles, including a contribution to a well-defined objective of public interest (e.g. the green transition). **Specific principles** – applicable to key sectors (e.g. air transport and energy) or types of aid (e.g. rescue and restructuring of ailing companies, unlimited guarantees and export subsidies), i.e. prohibited subsidies and subsidies subject to conditions. But the Agreement also sets out exceptions, e.g. a *de minimis* exception. **Transparency commitments** – requirement for each of the parties to publish on an official website or a public database certain information within 6 months of granting subsidies (or within 1 year for subsidies in form of tax measures). **Consultations on subsidy control** – option for each party to request consultations on (potentially) distortive subsidies within the Trade Specialised Committee on the LPF for Open and Fair Competition and Sustainable Development. **Specific commitments on taxation** to ensure this is not used as a means to distort competition. **Enforcement tools** (i) Guarantees of domestic enforcement ensuring that respect of general principles can be challenged before and verified by courts, in either the EU or the UK, in accordance with each party's domestic law, and "an effective mechanism of recovery". (ii) Unilateral remedial measures for each party (e.g. reintroduction of tariffs or quotas on certain products) to react where a subsidy of the other party creates "a significant negative effect" on trade or investment.

	(iii) Unilateral rebalancing measures in the case of "significant divergence", in particular, situation where one party would have a subsidy control system that would systemically fail to prevent the adoption of trade distorting subsidies, which would provide a competitive advantage to that party. (iv) Agreement's "horizontal dispute settlement mechanism" applies to some commitments. Non-compliance by one party with the arbitral ruling may lead to sanctions authorised by the arbitration tribunal, such as the suspension of commitments (e.g. resulting in the introduction of tariffs or quotas). Each party must also maintain or establish an independent authority or body with "an appropriate role in its subsidy control regime".
Cooperation	The Agreement provides a basis for cooperation between the competition authorities of the parties in the areas of merger control, antitrust enforcement and subsidy control, including the option to enter into separate agreements on cooperation and coordination
(*) However, the EU State aid rules will continue to apply to the UK in respect of any measure that affects "trade between Northern Ireland and the Union" which is subject to the NI Protocol to the EU-UK Withdrawal Agreement (under Article 10 Protocol).	

Table 2

REMINDER **TREATMENT OF LIVE CASES ON 1 JAN 2021**	
The EU-UK Withdrawal Agreement provides that the EC remains competent to deal with all on-going merger, antitrust and State aid cases that are initiated before 31 Dec 2020 (which the EC should specify in a list for the UK within 3 months after this date). This means that parallel enforcement is possible in all cases that were *not* initiated by the EC before this date.	
A case is deemed to have been initiated:	
Merger control	➢ The merger has been notified to the EC in accordance with Art 1, 3 and 4 EUMR (including if subsequently referred to MS under Art 9 EUMR). ➢ The notifying parties have asked for the EC to examine a transaction under Art 4(5) EUMR and the 15 working day limit has expired without any of the MSs objecting. ➢ The EC has accepted a reference from a MS to examine the merger under Art 22 EUMR.
Antitrust	The moment when the EC decided to initiate proceedings in accordance with Art 2(1) of EC Regulation 773/2004 (Note: the EC is required to inform the parties concerned of this decision).
State aid	The moment when the procedure was allocated a case number.
Monitoring and enforcing of commitments given under EU cases pre-Brexit including UK elements: EC retains jurisdiction unless otherwise agreed with CMA.	

Contacts

Anna Lyle-Smythe

Partner

T +32 495 22 46 03

E anna.lyle-smythe@slaughterandmay.com

Nele Dhondt

Professional Support Lawyer

T +44 (0)20 7090 4023

E nele.dhondt@slaughterandmay.com

This briefing is part of the Slaughter and May Horizon Scanning series

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