SLAUGHTER AND MAY

Competition & Regulatory Newsletter

31 January - 13 February 2018 / Issue 4

Quick Links

House of Lords Committee publishes report on competition law and State aid control in post-Brexit UK

On 2 February 2018 the Internal Markets Sub-Committee of the House of Lords European Union Committee **published** its report "Brexit: competition and State aid". The report explores the short-term implications of Brexit for competition law and its enforcement in the UK,[1] the need for transitional arrangements for competition matters,[2] and the impact on future UK competition and State aid policies.[3] It also briefly considers the related future UK institutional framework.[4]

The report concludes that maintaining consistency with the EU's approach to competition policy - at least in the short term – could help to provide stability and predictability for UK businesses. It also recognises, however, that Brexit provides an opportunity for the UK to take "*a more innovative and responsive approach to tackling global competition enforcement challenges*". On State aid, the report considers that it is highly likely that any UK—EU Free Trade Agreement (FTA) will include "*some form of State aid controls*". It also concludes that, outside of the EU, a UK-wide State aid framework will be required to avoid the risk of subsidy races between parts of the UK.

The short-term implications of Brexit

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The report notes that the EU antitrust provisions are "mirrored" in the corresponding UK antitrust rules and that domestic competition law currently includes a "consistency principle". This principle requires that: (i) UK law not diverge in its substantive application from EU law; and (ii) national judges ensure consistency of interpretation between the domestic rules, EU rules and case law.[5] Most witnesses agree that Brexit does not require a fundamental revision of

[1] Chapter 3.

[2] Chapter 4.

[3] Chapters 5 and 6.

[4] Chapter 7. Chapter 1 consists of an introduction while chapter 2 provides an overview of the current competition landscape.

[5] Section 60, Competition Act 1998.

the UK's well-established competition framework. It does, however, leave open the question of the relationship between the UK and EU competition rules post Brexit. The Committee considers that the consistency principle would no longer be appropriate in its current form (as EU law will lose its primacy). It recommends that it is replaced with a "softer duty", whereby UK authorities might "have regard to" EU law and precedent. At the same time, the Committee acknowledges that such an approach may not be appropriate in the longer term. It therefore calls on the Government to clarify this point during the negotiations with the EU.

Given their value to businesses in providing legal certainty, the Committee also concludes that similar arrangements to the current EU block exemptions for certain types of agreements should be preserved after Brexit. Under the current rules, these block exemptions automatically apply in the UK.[6]

On merger control, the report notes that currently larger mergers fall under the exclusive jurisdiction of the European Commission under the 'one stop shop' arrangement. Following Brexit, this arrangement will fall away, resulting in the potential for parallel reviews by the Commission and the Competition and Markets Authority (CMA) and a likely increase in the number of merger reviews by the CMA. The Committee welcomes the CMA's commitment "*to continue to work on procedural efficiencies*" to minimise the administrative burden of such parallel reviews.

On private actions and the role of UK legal services, the Committee acknowledges the position of the UK, and London in particular, as "*Europe's foremost jurisdiction for private damages actions*". It warns, however, that uncertainty about the future status of EU antitrust prohibitions and European Commission decisions could endanger this leading status. The Government should consider this risk when deciding whether to repeal or amend related domestic legislation.[7]

Transitional arrangements

The Committee notes that transitional arrangements will be necessary in relation to: (i) court cases and administrative procedures that are live at the point of Brexit; and (ii) future cases relating to pre-Brexit activities. It therefore welcomes the Government's recognition of the necessity of transitional (or 'implementation') arrangements. The Committee urges the Government to come to an early agreement with the EU on jurisdiction over competition cases during any transition period. This is necessary to provide certainty for businesses and to prevent cases falling through the cracks. The Committee also believes that an agreement on any transition period with the EU should ensure continuity with current arrangements to avoid businesses having to adapt to the implications of Brexit twice.

Future UK competition policy

The Committee notes that "*ongoing consistency with the EU's approach to competition policy – at least in the short-term – could help to provide stability and predictability for UK businesses in the face of the*

---

[6] Agreements which comply with special regulations issued by the European Commission – commonly referred to as 'block exemptions' – are automatically valid and enforceable under EU law. Section 10 of the Competition Act 1998 creates a system of parallel exemptions.

[7] We discuss these questions in more detail in our client briefing **Brexit Essentials: The Future of competition litigation in the UK.**

significant changes Brexit will bring". The report also recognises, however, that the UK could, over time, depart from EU competition case law (e.g. where it relates to the Single Market objective, which will no longer be relevant to the UK).

Based on the evidence submitted, it further considers that Brexit provides an opportunity for the UK to develop "*a more effective competition enforcement regime*". It could adopt a more innovative and responsive approach to tackling global challenges, including in relation to "*fast-moving digital markets and dominant online platforms*". On balance, the Committee does not, however, believe that Brexit represents an opportunity significantly to change the existing public interest criteria in merger control.

The Committee also recommends that the UK and the EU continue to cooperate on competition matters post Brexit, ideally on the basis of a formal cooperation agreement covering both antitrust and merger case investigations and enforcement actions. Such an agreement should allow reciprocal evidence sharing. The UK will also have to enter into cooperation arrangements with other countries that are currently covered by existing EU bilateral agreements.

Future UK State aid policy

The report highlights that the future of State aid policy is an area that requires more active decision making on behalf of the Government. The EU is likely to insist on some form of State aid controls in the FTA with the UK, and there is "*likely to be a link between the level of access to the Single Market the UK hopes to secure and the degree of coherence with the EU State aid regime the UK is required to maintain*". But the Committee also considers that, outside the EU, a UK-wide State aid framework will be necessary to "*prevent the risk of domestic subsidy races and distortions of competition between various parts of the UK*".

On the enforcement of any State aid regime, witnesses to the inquiry gave mixed views as to whether this should be the responsibility of a separate State aid agency or whether the CMA could take up this role. The Committee notes that it would be important that any extension of the CMA's remit does not detract from its existing and expanding responsibilities.

Future UK institutional framework

In the Committee's view, it is clear that Brexit will have major implications for existing institutions with a statutory competition remit, as well as require the creation of new institutions. It recommends that:

(i) the CMA is "appropriately resourced" to deal with the additional caseload in the areas of antitrust, merger control and possibly State aid;
(ii) all newly created organisations are also "sufficiently resourced" and have clearly-defined remits; and
(iii) the UK should seize the opportunity to develop a system that "*more closely reflects domestic needs and priorities*".

Conclusion

The Committee's report provides a useful overview of the many ways in which Brexit will affect the UK competition landscape. Many of its recommendations and conclusions appear largely to embrace continuity. It is clear, however, that the Committee also believes that the UK's competition regime can use this juncture to innovate in some areas.

Other developments

Merger control

MOFCOM publishes three penalty decisions for failure to notify

On 6 February 2018 the Ministry of Commerce of the People's Republic of China (MOFCOM) published two penalty decisions for failure to notify, which followed another such decision on 31 January. To date, MOFCOM has published a total of 20 such penalty decisions, eight of which were made within the last 12 months, reflecting MOFCOM's increasingly strict approach to parties that fail to notify their transactions.

In the first **decision**, MOFCOM found that Grand Baoxin Auto Group Limited and Beijing Yan Bao Auto Service Co., Ltd. did not notify their joint acquisition of a Chinese auto components wholesaler and proceeded to register the change of shareholding in the target and revise the target's board composition. The second **decision** involved the failure of Yihai Kerry Investments Co., Ltd. and Korean company CJ CheilJedang Corporation to notify the formation of a joint venture. In the third **decision**, Shandong Sun Holding Group Co., Ltd. failed to notify its acquisition of sole control of three joint ventures in which it previously held 45 per cent stakes respectively.

The level of fines is still, by global standards, very low. In these three recent decisions, they ranged from RMB150,000 (approximately £17,000) to RMB300,000 (approximately £34,000). MOFCOM imposed a higher fine on each of Baoxin, Yan Bao and Shandong Sun because it was evident they were aware of their obligation to notify their transaction but nevertheless intentionally chose to implement without doing so: Baoxin had previously submitted merger filings to MOFCOM several times and Shandong Sun did submit a notification but this was rejected by MOFCOM for failing to comply with legal requirements. Shandong Sun subsequently re-filed but only after completion had already taken place.

This is clearly an area of active enforcement by MOFCOM. Last April, the MOFCOM Antimonopoly Bureau's deputy director-general reportedly forewarned the possibility of increasing the level of fines and introducing new sanctions for failure to notify. However, any changes to the Anti-Monopoly Law will require extensive consultation and ultimately approval by the Standing Committee of the National People's Congress.

Antitrust

European Commission publishes progress report on implementation of collective redress measures

In parallel with issuing the proposal that would ultimately lead to the **Damages Directive**, in June 2013 the European Commission also published a **recommendation** on collective redress measures. The recommendation stressed that all Member States should have mechanisms available at national level both for injunctive and compensatory relief in "mass harm situations" involving breaches of EU law (including but not limited to competition law).

The Commission has now published a **report** on the progress made by Member States in implementing the recommendation. It shows that the availability of collective redress mechanisms, and safeguards against the abuse of such mechanisms, is still not consistent across the EU. Indeed, the report admits that legislative progress in this area has been "rather limited". Belgium, Lithuania, Slovenia and, to a lesser extent, France and the UK have each promoted collective redress since 2013. In the UK, this has been through the introduction of an 'opt out' for representative claims in the Competition Appeal Tribunal, which came into effect on 1 October 2015 (for more information, see our previous **briefing** on the subject). Nevertheless, there are still nine Member States that do not provide for any possibility of collective redress for damages arising from breaches of EU law, and even in those Member States where such action is permitted, there are practical obstacles for would-be litigants to overcome. These failings are exemplified by the challenges faced in recent cases such as the **car emissions scandal**, where car manufacturers such as Volkswagen were found to have manipulated tests for air pollution at the expense of consumers.

The report indicates that the Commission will continue to promote and analyse the recommendations. Furthermore, the findings of the report will feed into preparations for the "New Deal for Consumers", which the Commission aims to propose in spring 2018 as part of its endeavours to further strengthen methods of enforcement and redress for consumers.

State aid

European Commission approves six electricity capacity mechanisms to ensure security of supply in Belgium, France, Germany, Greece, Italy and Poland

On 7 February 2018 the European Commission **announced** the approval under State aid rules of electricity capacity mechanisms in Belgium, France, Germany, Greece, Italy and Poland, which are aimed to ensure that electricity supply can match demand in the medium to long term. The Commission assessed the six mechanisms to ensure they meet strict criteria under EU rules, in particular the **Guidelines on State aid for environmental protection and energy**. The Commission also took into account the conclusions of its 2016 **sector inquiry** into capacity mechanisms. This confirmed that capacity mechanisms must target a genuine security of supply need, must be designed in such a way as to avoid competition distortions and

must deliver security of supply at the lowest possible cost for consumers, as well be open to providers in other Member States.

The six approved capacity mechanisms adopt three different structures. In the case of Belgium and Germany, the Commission authorised strategic reserves, whereby certain generation capacities are kept outside the electricity market for operation only in emergencies. As regards Italy and Poland, the Commission authorised market-wide capacity mechanisms, whereby companies are offered payments to generate electricity or reduce their electricity consumption. In the case of France and Greece, the Commission authorised demand response schemes, whereby customers are incentivised to reduce their electricity consumption in hours where electricity is scarce.

In its press release, the Commission highlighted certain characteristics of the measures which are in line with the conclusions of its sector inquiry. For example, each Member State had clearly identified and qualified the security of supply risks, and each had agreed to grant support through regular, competitive auctions or tenders. Further information about each of the mechanisms is available in the Commission's **factsheet**.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600