



Brussels, 2 December 2020
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March 2019

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF COMPETITION

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.¹ The Withdrawal Agreement² provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom.³

However, after the end of the transition period the United Kingdom will no longer apply EU law.

Therefore, all interested parties, and especially economic operators, are reminded of the legal situation applicable after the end of the transition period. This notice notably explains the relevant legal situation in the fields of antitrust (Part A below) and merger control (Part B below).

Please note:

This notice does not address:

- EU rules on cross-border mergers set in Directive (EU) 2017/1132,⁴
- EU rules on conflict of laws and jurisdictions.

For these aspects, other notices have been published.⁵

¹ A third country is a country not member of the EU.

² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

³ Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

⁴ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46.

⁵ https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/preparing-end-transition-period_en.

A. EU ANTITRUST ENFORCEMENT

1. GENERAL FRAMEWORK

EU antitrust enforcement is governed by Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), Regulation (EC) No 1/2003,⁶ and Regulation (EC) No 773/2004.⁷ This legal framework is complemented by other Regulations dealing with particular types of conduct or with specific sectors, as well as the guidance provided in various decisions,⁸ notices and guidelines adopted by the European Commission (“Commission”) and in the case law of the Union Courts.⁹

The territorial application of EU antitrust rules is defined in Articles 101 and 102 TFEU, as interpreted by the Court of Justice of the European Union (“Court of Justice”). They apply regardless of the nationality of the undertaking or its country of incorporation or where its headquarters are located, and may also cover conduct occurring outside of the EU. The Court of Justice has held that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of the TFEU, if that agreement is operative on the territory of the internal market.¹⁰ For conduct occurring outside the EU, the Commission's jurisdiction can be justified under public international law either on the basis of the implementation of conduct in the EU¹¹ or on the basis of the qualified effects doctrine in the EU.¹²

Hence, the fact that the United Kingdom has become a third country following its withdrawal, will not have as such an impact on the applicability of the EU antitrust rules to UK undertakings, even after the end of the transition period. As any other

⁶ Council Regulation (EC) No 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L1, 4.1.2003, p. 1.

⁷ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102] of the Treaty, OJ L123, 27.4.2004, p. 18.

⁸ E.g. Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29.

⁹ For an overview of the legislation and the various notices and guidelines, see <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

¹⁰ See for example judgment of the Court of Justice of 25 November 1971, Béguelin Import, 22/71, ECLI:EU:C:1971:113, paragraph 11.

¹¹ Judgment of the Court of Justice of 27 September 1988, Ahlström Osakeyhtiö and Others v Commission, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, ECLI:EU:C:1988:447, paragraph 16.

¹² Judgment of the Court of Justice of 6 September 2017, Intel Corp. v Commission, C-413/14 P, ECLI:EU:C:2017:632, paragraphs 43-47.

undertaking registered or headquartered in a third country, a UK undertaking will be subject to EU antitrust rules if its anticompetitive conduct is implemented or produces effects in the EU. This also applies to public undertakings and undertakings enjoying special or exclusive rights located or established in the United Kingdom.

The Commission will thus continue to exercise its jurisdiction on agreements or conduct affecting competition within the internal market, including with regard to UK undertakings. The jurisdiction of the United Kingdom over such practices pursuant to its own national antitrust rules may also be applicable in parallel, subject to the limitations stemming from the provisions of the Withdrawal Agreement concerning the proceedings initiated by the Commission before the end of the transition period (see section 2 below).

In carrying out its investigations, the Commission will still be able to obtain information under Article 18 of Regulation (EC) No 1/2003 from UK undertakings. Conversely, after the end of the transition period, the Commission will no longer be able to carry out inspections in the United Kingdom on the basis of Articles 20 or 21 of Regulation (EC) No 1/2003 (with the exception of the inspections carried out in the context of proceedings initiated before the end of the transition period; see section 2 below).

2. SPECIFIC PROVISIONS OF THE WITHDRAWAL AGREEMENT CONCERNING PROCEEDINGS INITIATED BY THE COMMISSION BEFORE THE END OF THE TRANSITION PERIOD

Article 92 of the Withdrawal Agreement provides that the Commission remains competent for administrative procedures concerning compliance with Union law relating to competition in the United Kingdom that have been ‘initiated’ before the end of the transition period. In particular, the same provision clarifies that proceedings for the application of Article 101 or 102 TFEU conducted by the Commission under Regulation (EC) No 1/2003 shall be considered as having been initiated at the moment at which the Commission has decided to initiate proceedings in accordance with Article 2(1) of Regulation (EC) No 773/2004. In such instances, the Commission remains competent to investigate the facts occurring until the end of the transition period, whereas the relevant authorities of the United Kingdom can investigate the same conduct pursuant to UK antitrust rules only for the facts occurring after the end of the transition period.

Pursuant to Article 94 of the Withdrawal Agreement, Regulation (EC) No 1/2003 and Regulation (EC) No 773/2004 shall apply to the proceedings initiated by the Commission before the end of the transition period, including in the United Kingdom. As regards investigative powers, this means that, in the context of such proceedings, the Commission will not only be able to obtain information under Article 18 of Regulation (EC) No 1/2003 from UK undertakings, but it also retains the power to carry out inspections in the United Kingdom.

Like all decisions adopted by the Commission, decisions adopted by the Commission in the procedures referred to in Articles 92 of the Withdrawal Agreement, even if adopted after the end of the transition period, shall be binding, including on and in the United Kingdom, and their legality shall be reviewed exclusively by the Court of Justice in accordance with Article 263 TFEU.

The Commission remains competent to monitor and enforce commitments given or remedies imposed in, or in relation to, the United Kingdom in connection with any proceedings for the application of Articles 101 or 102 TFEU conducted by the Commission under Regulation (EC) No 1/2003.¹³ If so agreed between the Commission and the designated national competition authority of the United Kingdom, the Commission can transfer the monitoring and enforcement of such commitments or remedies in the United Kingdom to the designated national competition authority of the United Kingdom. The possibility of any such transfer will be subject to a case-by-case assessment, where appropriate, and agreed with the designated national competition authority of the United Kingdom on an *ad hoc* basis.

B. EU MERGER CONTROL

1. GENERAL FRAMEWORK

EU merger control is governed by the EU Merger Regulation (EC) No 139/2004 (“EUMR”)¹⁴ and its Implementing Regulation.¹⁵ This legal framework is complemented by guidance provided in various Commission notices and guidelines and in the Union Courts’ case law.¹⁶

The EUMR establishes an *ex ante* control system, in which certain types of transactions with specific turnover thresholds have to obtain the Commission's approval before the parties involved are allowed to implement them. If the Commission has jurisdiction over a transaction under the EUMR, Member States are no longer allowed to apply their national competition laws to the transaction. They may, however, take appropriate measures to protect legitimate interests other than those taken into consideration by the EUMR, under the conditions provided for in Article 21 thereof. The exclusive jurisdiction of the Commission in the EU under the EUMR is also referred to as the "one-stop-shop principle".

As for antitrust rules, the EU merger control system applies regardless of the nationality or country of incorporation or where the headquarters of an undertaking are located. Hence, the fact that the United Kingdom has become a third country following its withdrawal from the EU, has no impact on the applicability of the EUMR to UK undertakings when the jurisdictional criteria of the EUMR are fulfilled.

¹³ Article 95(2) of the Withdrawal Agreement.

¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

¹⁵ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and its annexes (Form CO, Short Form CO, Form RS and Form RM) (OJ L 133, 30.4.2004, p. 1), as amended by Commission Regulation (EC) No 1033/2008 (OJ L 279, 22.10.2008, p. 3), and by Commission Implementing Regulation (EU) No 1269/2013 (OJ L 336, 14.12.2013, p. 1).

¹⁶ For an overview of the various notices and guidelines, see <http://ec.europa.eu/competition/mergers/legislation/legislation.html>.

The Withdrawal Agreement provides that the EU merger control system continues to apply to and in the United Kingdom during the transition period. After the end of the transition period, it is possible that both the Commission and the UK national competition authority will be competent to review in parallel a planned concentration but under their respective substantive and jurisdictional rules on merger control.¹⁷ Therefore, undertakings will no longer benefit from the one-stop-shop principle in that regard.

2. SPECIFIC ISSUES CONCERNING THE ASSESSMENT OF THE COMMISSION'S JURISDICTION

2.1. Turnover calculations under EUMR

The relevant date for establishing EU jurisdiction over a concentration pursuant to Articles 1 and 3 EUMR is the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first merger notification, whichever date is earlier.¹⁸ These rules are not altered by the Withdrawal Agreement or otherwise by the United Kingdom's withdrawal from the EU. If any of the relevant events takes place prior to the end of the transition period, the Commission will assess whether the jurisdictional test of the EUMR is met on the date of that event and will take into account the turnover that the parties to the concentration realise in the United Kingdom to establish the turnover of the undertakings concerned at the EU and individual Member State level.

If the relevant date for establishing EU jurisdiction takes place after the end of the transition period, the Commission will no longer take into account the turnover that the parties to the concentration realise in the United Kingdom.¹⁹

2.2. Cases 'initiated' before the end of the transition period

Article 92 of the Withdrawal Agreement provides that the Commission remains competent for administrative procedures that have been 'initiated' before the end of the transition period. For those cases, the Commission has the sole competence to assess the effects of a concentration on the UK territory, including assessing and accepting commitments in the UK, even after the end of the transition period. Pursuant to Article 94 of the Withdrawal Agreement, the investigative and procedural framework of the EUMR and its Implementing Regulation shall apply to the proceedings

¹⁷ As is the case now for transactions which are reviewed by the Commission and third-country competition agencies.

¹⁸ See paragraph 156 of the Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95 of 16.4.2008, p. 1.

¹⁹ This may result in some transactions that would have met the EUMR thresholds, if the UK turnover of the undertakings concerned were to be included, not being notifiable; for example where the target undertaking does not realise a turnover of at least EUR 250 million in the EU without counting its turnover in the United Kingdom.

initiated before the end of the transition period, including in the United Kingdom.

For a concentration that meets the turnover thresholds laid down in Art 1 EUMR and that thus has Union dimension, a case is considered to have been initiated on the day of notification to the Commission of a Form CO (or short Form CO), or Form RS with a view of initiating a referral procedure under Article 4(4) EUMR.

As regards the Commission's jurisdiction following a referral of a concentration without Union dimension, a distinction needs to be drawn between pre-notification referrals pursuant to Article 4(5) EUMR and post-notification referrals pursuant to Article 22 EUMR.

2.2.1. Pre-notification referrals pursuant to Article 4(5) EUMR

Under Article 4(5) EUMR, the notifying party or parties may make a reasoned submission that a concentration without a Union dimension be reviewed by the Commission, provided that the concentration is capable of being reviewed under the national competition laws of at least three Member States. Any competent Member State may object within 15 working days.

In instances where an Article 4(5) submission has been made and where a concentration without Union dimension is capable of being reviewed in three Member States, amongst which the United Kingdom, the Commission will acquire jurisdiction under Article 4(5) EUMR if, prior to the end of the transition period, the period of 15 working days has elapsed without any competent Member State expressing its disagreement.

2.2.2. Post-notification referrals pursuant to Article 22 EUMR

After the end of the transition period, the United Kingdom will no longer be empowered to refer cases to the Commission or to join referral requests by other Member States under Article 22 EUMR.

If the United Kingdom has requested a referral or joined a referral request by another Member State, and the Commission has decided (or is deemed to have decided) to examine the concentration in accordance with Article 22(3) EUMR before the end of the transition period, the case will be considered to be referred also with respect to the United Kingdom. If the United Kingdom has not made or joined such a referral request, or if the Commission has not decided (or is not deemed to have decided) to examine the concentration before the end of the transition period, the case will not be considered to be referred in relation to the United Kingdom.

3. SUBSTANTIVE ASSESSMENT

The Commission will have to take account of the fact that the United Kingdom will, after the end of the transition period, no longer be part of the internal market. This

implies that the Commission will after the end of the transition period no longer be competent to find that a planned concentration would (or would not) significantly impede effective competition in UK national or subnational markets (save in cases initiated before the end of the transition period²⁰). Moreover, the modalities of trade between the EU and the United Kingdom may have a bearing on the Commission's competitive assessment including the suitability and viability of remedies where a concentration leads to competition concerns. The consequences will have to be assessed individually for each case concerned and merging parties are invited to discuss those aspects with the services of the Commission's Directorate-General for Competition.

4. CONTINUED VALIDITY OF COMMISSION DECISIONS UNDER THE EUMR AFTER THE END OF THE TRANSITION PERIOD

All Commission decisions under the EUMR (including decisions imposing conditions and obligations) remain valid after the end of the transition period. The decisions will remain valid also in instances where commitments address a competition issue only affecting a UK national or sub-national market.²¹

The Commission remains competent to monitor and enforce commitments in its merger cases after the end of the transition period. This also applies to remedies in a UK national or sub-national market or a wider market that includes the United Kingdom. Nonetheless, the Commission and the designated national competition authority of the United Kingdom can agree that the monitoring and enforcement of commitments is transferred to the designated national competition authority of the United Kingdom. Such transfer is not automatic but requires the explicit agreement of both the Commission and the relevant UK authority.²²

The website of the Commission on EU rules on competition (http://ec.europa.eu/competition/index_en.html) provides general information concerning EU Competition law. These pages will be updated with further information, where necessary.

European Commission
Directorate-General for Competition

²⁰ Cf. section B.2.2 of this notice.

²¹ At the time of taking the decision, the Commission had jurisdiction and therefore the obligation to seek a remedy to address a competition concerns in the United Kingdom, while the UK national competition authority did not have jurisdiction to do so.

²² Article 95(2) of the Withdrawal Agreement.