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Merger Control Law and Policy in Times of Brexit

Prospect of Brexit and EU Competition Law:
Some critical issues for the European Commission's Agenda

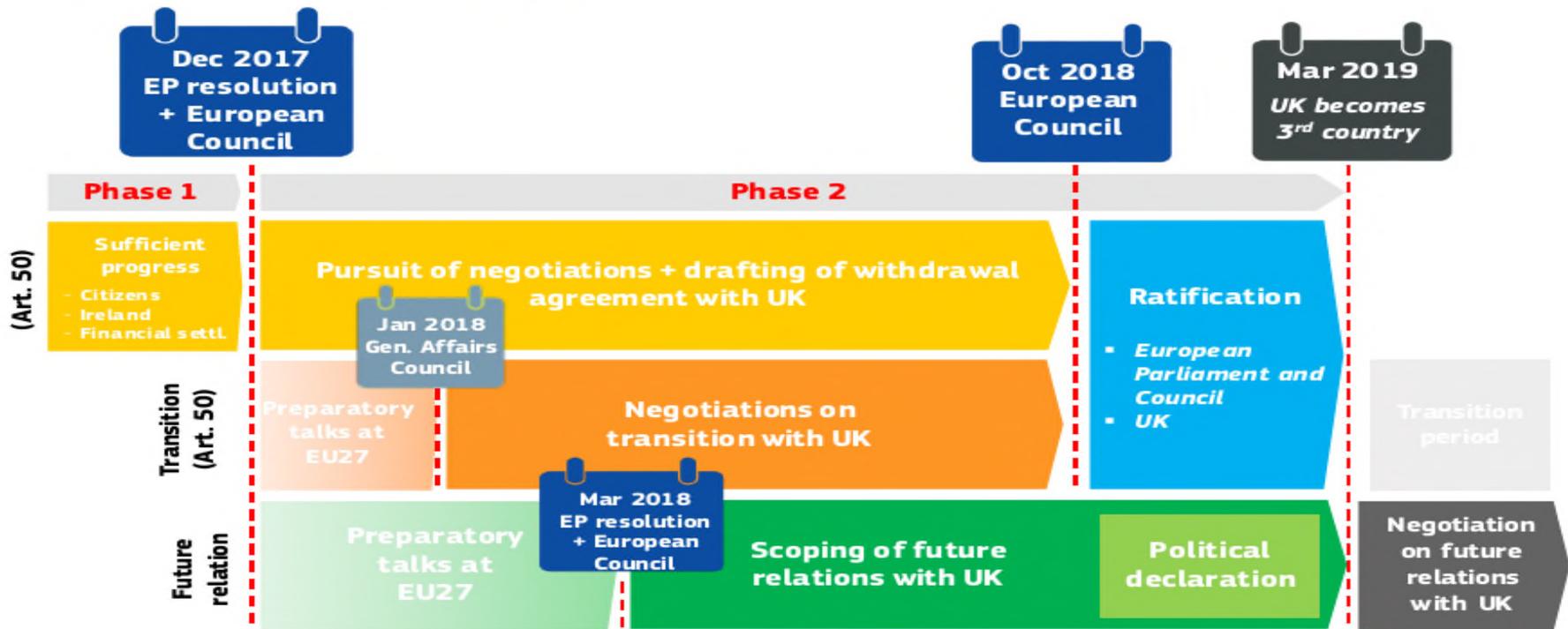
GCLC, 100th Lunch-Talk, Brussels, 22 May 2018
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Overview

1. Brexit – the current context
2. Brexit and the EUMR's jurisdictional thresholds
3. Post-Brexit divergence on merger control and foreign investment reviews?
4. Brexit increases merger control costs for businesses
5. Need for transitional arrangements
6. Reducing Brexit costs by Commission/CMA cooperation

Brexit – the current context

Brexit – Next steps



The Commission's schedule for UK withdrawal (Source: House of Commons. Exiting the European Union Committee. The progress of the UK's negotiations on EU withdrawal: December 2017 to March 2018. Third Report of Session 2017-19, p. 37)

Brexit and the EUMR's jurisdictional thresholds

- UK companies doing transactions triggering thresholds of the EU Merger Regulation (“**EUMR**”) will remain subject to EUMR jurisdiction: However, after 2020 (unless transitional arrangements apply), the EUMR’s “one-stop-shop” ends for the UK:
 - An EU clearance will not apply in the UK, and
 - Many transactions notifiable to the Commission likely to at the same time trigger UK thresholds (GBP 70 million target revenues or 25% share of supply in UK), but not all of them will translate into a UK notification, due to the UK’s voluntary regime.
- No more upward or downward referral from or to the UK
- Possibly more notifications in individual Member States
 - Fewer deals will satisfy the EUMR thresholds when UK revenues are excluded
 - UK falls away as possible one of three Member States where aggregate turnover of each of at least two of undertakings concerned exceeds EUR25 million
- Possibly a few additional EU notifications as well: 2/3 rule will not be triggered by UK revenues (no EU merger control where each undertaking concerned achieves more than two thirds of its aggregate EEA-wide turnover within one and the same Member State)

Should Brexit lead to a reassessment of EUMR thresholds?

- In essence/absolute numbers, the turnover threshold under Article 1(2) EUMR is still the same as under the old merger regulation of 1989
- A lower additional threshold has been introduced in 1998, the current Article 1(3) EUMR
- Also continuous enlargements (1995, 2004, 2007 and 2013) as well as inflation have consecutively decreased the thresholds
- Brexit will for the first time lead to an effective increase of the EUMR thresholds
- Effect in terms of less EU filings unlikely to be significant and would in the course of a few years again be “eaten up”
- Role of possible new transactional threshold
- No action item for the Commission’s agenda

	GDP EU15 (Mar. 1998) + EEA MS (1997 numbers)	GDP EU28 + EEA MS (2017)	GDP EU27 + EEA MS (2017)
EUR billion	8,313	15,699	13,375
Growth from 2004	0%	+88.8%	+60.9%
Reduction due to Brexit ((EU28 to EU27)+EEA MS)			-14.8%

Source GDP figures: Eurostat

Post-Brexit divergence on merger control and foreign investment reviews?

- Article 21(4) of EUMR “*appropriate measures to protect legitimate interests*”: “*public security, plurality of the media and prudential rules*”
- Additional public interest grounds require Commission approval
- The EU’s September 2017 proposal for foreign investment reviews on grounds of security and public order (by Member States, but with possibility for Commission opinion) foresees a separate regime, outside the merger control area.
- UK: Sections 42 to 68 of Enterprise Act 2002: essentially the same public interest grounds as under Article 21(4) EUMR.
- UK Government proposal, October 2017:
 - Amend merger control turnover threshold and “share of supply” test for military and dual use sector, as well as parts of advanced technology sector to allow greater number of merger reviews in these sectors.
 - Secretary of State should be allowed to intervene against acquisition of a UK business based on national security concerns.
 - Mandatory notification regime for foreign investment in specified sectors, amongst which the energy and civil nuclear sectors.

“[P]ost-Brexit, there may be pressure for wider public interest criteria to be considered—particularly in relation to foreign takeovers—as well as opposing pressures, (...) to dilute merger controls to encourage more inward investment. (...) [Overall,] Brexit should [not significantly change] (...) existing public interest criteria.”

HoL, EU Committee, 12th Report of Session 2017-19, Brexit: competition and State aid, February 2018, p. 43

Brexit increases merger control costs for businesses

- Additional UK filings (see above): significance of “(just) one additional filing”:
 - Maybe no when one out of 15 or 20 filings, but certainly yes if only a few filings
 - Likely overlapping issues between EU and UK proceedings (if markets broader than national)
 - Timeline coordination challenge due to different lengths of Phase I in EU and UK
 - Risk of diverging remedies
- Businesses can expect transaction costs to rise:
 - Most mergers investigated by the CMA subject to a fee
 - No fee payable for transactions reviewed under the EUMR
- Unless the UK opts for the EEA-model for its future relationship with the EU (extremely unlikely), no more EU-UK cooperation in ECN after end of transition period

CMA: businesses can streamline potential dual review requirements by “agreeing to waivers allowing the European Commission and the CMA to share and discuss information”

HoL, EU Committee, 12th Report of Session 2017-19, Brexit: competition and State aid, February 2018, p. 22

Need for transitional arrangements?

- First transitional arrangement: transition period following Brexit at the end of March 2019, during which the EUMR will continue to apply in the UK → pushes any transitional concerns back to end of December 2020
- Mergers filed with Commission during transition period, but
 - Phase I not ended by 31/12/2020 → Article 6(1)(a) decision and thereafter separate proceedings in UK? → need for transitional arrangement, e.g. Article 88 EU Draft Withdrawal Agreement
 - Phase II not ended by 31/12/2020 → Phase II investigation continues, but decision will not apply to UK
 - CMA to try for partial referrals through Article 9 EUMR (but possible enforcement gap for cases with EEA- or worldwide market → if need be, post-closure review in the UK?)
 - Parties may try to achieve same through Article 4(4) EUMR
 - Would likewise be solved with Article 88 EU Draft Withdrawal Agreement
- Transactions with significant UK aspects that meet EU thresholds: in last 8 months of transition period recommendable to conduct pre-notification discussions with both the Commission and the CMA

“These issues create significant challenges for businesses, advisors and officials in handling mergers with UK nexus that are notified under the EUMR and for which the review ‘straddles’ the date of Brexit.”

BCLWG (Brexit Competition Law Working Group), July 2017, p. 24

Reducing Brexit costs by Commission/CMA cooperation

- In all likelihood, the UK will be out of the EEA following the transition period, so no more ECN-level cooperation with the UK
- What type of cooperation agreement?
 - Formal (Article 50(2) TEU) or informal, at the administrative level?
 - If formal, what type of cooperation agreement (first or second-generation)?
 - Second-generation-type (allowing information-sharing without party waivers) only as formal agreement
 - However, confidentiality waivers would in any event be needed in the merger area (Section 243(3)(d) of the Enterprise Act)
 - Should a formal agreement not be achievable, an administration-level agreement between DG COMP and the CMA would be a good alternative in many respects

“[I]f it is to achieve the (...) same, or equivalent, levels of current cooperation, the Government will need to negotiate the most comprehensive competition cooperation arrangement the EU has ever agreed [to].”

HoL, EU Committee, 12th Report of Session 2017-19, Brexit: competition and State aid, February 2018, p. 43



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