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Brexit Vote Creates Conundrums For Competition Attorneys

By Eric Kroh

Law360, New York (June 24, 2016, 8:44 PM ET) -- As the shock of the U.K.'s vote to leave the European Union wears off, international competition attorneys will have to sort through many changes that could impact their practice and figure out how to deal with possibly overlapping antitrust and merger enforcement authorities in the two jurisdictions.

The full effect of Britain's exit from the EU on competition law may not even be known for years, after leaders from Britain and the EU negotiate how, exactly, the U.K.'s departure is going to work. Britain will have to decide what model to follow as a nation independent of the EU — for example, joining the European Economic Area, like Norway, or pursuing a different avenue altogether.

While much remains to be seen, one result of the U.K.'s exit from the EU is that mergers that impact both jurisdictions and cross the notification thresholds are no longer going to be able to benefit from the European Commission's "one-stop shop" for merger review.

For EU members, the EC has exclusive jurisdiction to review transactions that fall within its scope. That will no longer apply in Britain's case, which will require competition lawyers and their clients considering such a transaction to weigh whether they will need to notify both the U.K. and EU authorities.

"People really haven't had to worry about the U.K. for big deals," said Michael L. Weiner, a partner with Dechert LLP and co-leader of the firm's antitrust and competition practice group. "Now for big deals that also involve companies that are doing business in U.K., they will need to consider whether they will need to file in the U.K."

Richard Wolfram, an independent antitrust lawyer in New York, said the potential for such duplication of efforts may mean more work for international competition attorneys, at least initially, but that clients are unlikely to be happy about it.

"If you have to go duplicate something you're doing in Europe, that gives you more work. For the clients, I think it does create a lot more expense and uncertainty and inefficiency," Wolfram said. "Businesses hate uncertainty."

Regarding cartels and behavioral conduct, EC law is still going to apply to any conduct by U.K. companies that do business on the continent, so much will likely remain substantively the same in that area for large businesses, Wolfram said.

EU regulations prohibit concurrent enforcement proceedings by national competition authorities and the EU, but Britain's exit raises the possibility of simultaneous proceedings by the U.K. Competition and Markets Authority and the EC's Directorate-General for Competition, he said.

Another consequence of the U.K.'s exit from the EU that will become clear as the details fall into place is how European state aid rules will apply to the U.K. With no change, the U.K. will no longer be bound by those rules, which prohibit national governments from granting businesses an unfair advantage over competitors.

If the U.K. does decide to join the EEA, it will be bound by the agreement's similar prohibition of state aid, according to competition attorneys at Norton Rose Fulbright. Otherwise, if the U.K. does not enact its own set of state aid rules, it will remain bound by the World Trade Organization subsidy regime, which has intentions akin to the EU state aid rules, the attorneys said in a report.

And U.K. competition attorneys will have to wrestle with how to respond to changes to their professional status that come with the country's exit from the European Union. Outside counsel in the U.K. will no longer be admitted to practice automatically before the EC Directorate-General, Weiner said. Additionally, U.K. lawyers would no longer enjoy what is known as legal professional privilege for their communications with clients when it comes to the commission.

Some U.K. lawyers are considering or have already made plans to gain admission to the Irish court system, which has an arrangement with its English counterpart that allows solicitors who first qualified in England, Wales or Northern Ireland to gain admission to the Irish courts with relatively little trouble.

In the first six months of the year, 186 U.K. solicitors have been admitted to practice in Ireland, according to the Law Society of Ireland. That record-breaking figure is more than three times the number for the same period in 2015.

--Additional reporting by Melissa Lipman. Editing by Katherine Rautenberg and Kelly Duncan.

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