

Law

A cliff-edge Brexit heralds uncertainty for cross-border mergers



ALEC BURNSIDE

A cliff-edge Brexit threatens deals that are notified for EU competition clearance before March 29 but not cleared by then. If the UK exits the bloc with no agreement, an additional review by the UK's Competition and Markets Authority might be triggered.

At present, the EU Commission runs a one-stop shop for cross-border merger and acquisition deals of a certain size; above the EU threshold, a deal is notified only in Brussels, bypassing the need for individual national approvals across the union.

The system became law during Sir Leon Brittan's watch as EU competition commissioner and has been a great success: 414 cases were handled in 2018, compared with some 60 CMA cases.

Under the proposed withdrawal agreement, that system will stay in place at least until the end of 2020, after which there are rules for the orderly handover of work to the CMA.

However, if the UK leaves without a deal, there are no handover rules for live cases. The CMA has just issued draft

guidance on procedures at the UK end, which is half of the story. The other half is the way the EU rules will play, and the implications for cases ongoing in Brussels.

How could this pan out? The date when a deal is signed determines whether it needs an EU filing. Even if it was UK revenues that brought the deal into the EU net, Brussels will keep the case after March 29.

But UK review will no longer be precluded by EU oversight. If the thresholds for UK examination are met, the CMA may also examine the deal – and it may want to because Brussels will no longer address any UK problems.

Ideally, businesses planning mergers should notify in time for EU clearance by March 29. But that is more easily said than done for those businesses that are not already far down that track. Alternatively, they should start a parallel dialogue with the CMA now.

Or businesses could simply wait until the Brexit dust settles – which may mean not signing a deal until April Fool's Day. Waiting may or may not be an advantage, depending on which filings

would be triggered.

Either way, Brexit could affect the outcomes of EU and CMA reviews. If the UK is outside the single market, and behind tariff barriers, the conclusion may be that the UK is a separate market.

The CMA estimates that its 2018 total of 60 deals will increase by at least half, and maybe far more than that. And these additional cases could well be meaty ones.

The UK will become an additional filing jurisdiction for major international deals – for the likes of Siemens-Alstom or Dow-DuPont, for example. Until now these have been in the one-stop Brussels shop.

That spells a double burden – for the public purse, and for companies already navigating multiple filings across the globe. Timelines for getting through the merger control process just got a little longer – and the difficulty of coordinating outcomes a little taller.

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