Crunch time for Brexit – a German Perspective on Implications for EU Merger Control and Asset Management

Published February 20 in *Süddeutsche Zeitung*, Germany's largest broadsheet newspaper, the supplement "Rechtguide 2019" ("Law Guide") features an interview, titled "Der Brexit naht – was bringt er mit sich", with Germany-based Dechert partners Clemens Graf York von Wartenburg (Antitrust/Competition) and Angelo Lercara (Financial Services/Asset Management) on the potential impacts of a cliff-edge Brexit.

A convenience translation can be found here:

Mr. York, a "no deal" Brexit appears increasingly likely. Can you comment on its potential impact on cross-border transactions from a merger control perspective?

What we are seeing is that Brexit puts many well-established and efficient processes at risk. This is particularly true in the field of merger control. At present, EU merger control is based on the "one-stop shop" principle, whereby international deals of a certain size are reviewed only by the European Commission and not by multiple member states. The system has been very efficient and has led to more planning security for companies contemplating cross-border deals. However, in the case of a "no deal" Brexit on March 29, EU Merger Regulation would no longer apply to the UK. This could increase complexity in regards to transactions that have effects both in the EU and the UK.

Where do you see the main issues?

To the extent that the UK jurisdictional thresholds are met, the UK Competition and Markets Authority (CMA) would be the only regulator with the power to review mergers that affect the UK market – even if the transaction is also being reviewed by the European Commission. This would create an additional hurdle for global deals and give rise to increased uncertainty: the CMA may decide to block a merger that has been cleared by the Commission and vice versa. Transactions that require remedies in order to achieve merger control clearance will face additional challenges. Experience with third country regulators shows that coordinating remedies across multiple jurisdictions can be highly complex.

Mr. Lercara, what are the implications for the asset management industry?

In the event of a cliff-edge Brexit, a fundamental pillar of the EU-wide asset management, the "EU Passporting" ("Europäischer Pass"), would no longer be in effect.

What does that mean?

Asset management and marketing of investment products are regulated in every EU country. This implies that market participants need to consult their home country's regulation authority to receive the required permission to be active across Europe. We know this concept – it is based on the country of origin principle ("Herkunftsstaatsgrundsatz"), as "EU Passporting". In the UK, many asset managers and fund distributors are internationally active. They would lose this considerable simplification. Instead, they would be required to examine if and how they may manage customer portfolios and EU funds and distribute separate funds for each and every EU country.

Questions arise such as: “Would a London-based provider aiming to market a fund be allowed to travel to a potential Frankfurt-based investor?” The answer is basically no, unless he or she receives an explicit invitation, which is referred to as Reverse Solicitation. A situation of huge complexity.

However, there is good news as well. The European Securities and Markets Authority (ESMA) signed a Memorandum of Understanding with the regulatory authority of the UK. It regulates, among other things, administrative cooperation in the area of asset management and ensures that UK asset managers can continue to manage EU funds in a “no deal” Brexit scenario. Vice versa, these funds benefit from their excellent portfolio management expertise. This is a partial success at least.

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More information at dechert.com/brexit

Interviewees

Clemens Graf York von Wartenburg
Partner
Frankfurt: +49 69 7706194258
Brussels: +32 2 535 5411
clemens.york@dechert.com

Angelo Lercara, LL.M. EuR
Partner
Munich: +49 89 21 21 63 15
angelo.lercara@dechert.com