EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMPETITION

Brussels, 25 March 2019

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU COMPETITION LAW

The United Kingdom submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. On 22 March 2019, the European Council (Article 50) decided, in agreement with the United Kingdom, and in the event that the Withdrawal Agreement is approved by the House of Commons by 29 March, to extend the 2-years period provided for in Article 50(3) of the Treaty on European Union until 22 May 2019.

In the event that the Withdrawal Agreement is not approved by the House of Commons by 29 March 2019, the European Council decided to extend the period provided for in Article 50(3) of the Treaty on European Union until 12 April 2019. This means that as from 13 April 2019, 00:00h (CET) ('the withdrawal date') the United Kingdom may be a 'third country'.[1]

Preparing for the withdrawal is not just a matter for EU and national authorities but also for private parties.

In view of the uncertainties surrounding the ratification of the Withdrawal Agreement, all interested parties, and especially economic operators, are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.

Subject to the transition period provided for in the draft Withdrawal Agreement,[2] as of the withdrawal date, the United Kingdom will become a third country as regards the application of EU competition rules[3].

This note provides some guidance only on the main implications that can be foreseen of a no deal scenario for the application of EU competition law (antitrust, merger control).[4]

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

2 Cf. Part four of the 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, C 66 I, 19.2.2019, p. 1).

3 Until the United Kingdom withdraws, however, EU competition law remains fully applicable in the United Kingdom, as in any other Member State.

4 This is an informal document of the services of DG Competition and it does not create or affect legal rights nor does it bind the European Commission.

1. EU ANTITRUST ENFORCEMENT

EU antitrust enforcement is governed by Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), Regulation No 1/2003,[5] and the implementing Regulation No 773/2004.[6] 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,[7] notices and guidelines adopted by the European Commission ("Commission") and in the case law of the Union Courts.[8]

Territorial application of EU competition law

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[9]. 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 EU[10] or on the basis of the qualified effects doctrine in the EU.[11]

Hence, the fact that the United Kingdom will become a third country following its withdrawal, will not have as such an impact on the applicability of the EU antitrust rules to UK companies. As any other company registered or headquartered in a third country, a UK company will be subject to EU antitrust rules if its anticompetitive conduct is implemented or produces effects in the EU. This applies to public undertakings and undertakings enjoying special or exclusive rights located or established in the United Kingdom.

Specific issues in the enforcement of EU antitrust rules following the United Kingdom's withdrawal

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5 Council Regulation (EC) No 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles [10]1 and [10]2 of the Treaty, OJ L1, 4.1.2003, p. 1.

6 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [10]1 and [10]2 of the Treaty, OJ L123, 27.04.2004, p. 18.

7 Commission decision 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.

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

9 See for example, Case 22/71, *Béguelin Import*, EU:C:1971:113, paragraph 11.

10 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, Ahlström Osakeyhtiö and Others v Commission, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16.

11 Case C-413/14, Intel Corp. v European Commission, EU:C:2017:632, paragraphs 43-47.

The Commission will continue to exercise its jurisdiction on agreements or conduct affecting competition within the internal market. The jurisdiction of the United Kingdom over such practices pursuant to its own national antitrust rules may also be applicable in parallel.

Consequence on the Commission's investigative powers and validity of Commission decisions

The Commission will no longer be able to carry out inspections under Article 20 of Regulation No 1/2003 in the United Kingdom. The Commission will still be able to obtain information under Article 18 of Regulation No 1/2003.

All Commission decisions adopted under Articles 101 and 102 TFEU before the United Kingdom's withdrawal from the EU will remain valid.

2. EU MERGER CONTROL

EU merger control is governed by the EU Merger Regulation ("EUMR")[12] and its Implementing Regulation.[13] This legal framework is complemented by guidance provided in various Commission notices and guidelines and in the Union Courts' case law.[14]

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 this 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 a company are located. Hence, the fact that the United Kingdom will become a third country following its withdrawal from the EU, will not have an impact on the applicability of the EUMR to UK companies when the jurisdictional criteria of the EUMR are fulfilled.

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12 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal, OJ L24, 29.01.2004, p. 1.

13 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Implementing Regulation") and its annexes (Form CO, Short Form CO, Form RS and Form RM) (OJ L 133, 30.04.2004, 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 of 5 December 2013, OJ L336, 14.12.2013, p. 1.

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

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.[15] Therefore, companies will no longer benefit from the one-stop-shop principle in that regard.

Specific issues concerning the assessment of the Commission's jurisdiction

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[16]. These rules are not altered by the United Kingdom's departure from the EU. If any of the relevant events takes place prior to the United Kingdom's withdrawal, the Commission will assess whether the jurisdictional test of the EUMR is met on the date of that event.

If the relevant date for establishing EU jurisdiction takes place after the United Kingdom's withdrawal, the Commission will no longer take into account the turnover that the parties to the concentration realise in the United Kingdom, when establishing the relevant EU-wide turnover and the relevant turnover realised in individual Member States.[17]

Specific jurisdictional issues over concentrations without EU dimension following a referral

As regards the Commission's jurisdiction following a referral of a concentration without EU 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.

- 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 prior to the withdrawal date 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 United Kingdom's withdrawal, the period

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

[16] 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 16.04.2008, p. 1.

[17] 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.

of 15 working days has elapsed without any competent Member State expressing its disagreement.

The fact that a concentration is capable of being reviewed in the United Kingdom will no longer be relevant for the application of Article 4(5) EUMR for submissions made after the day of its withdrawal.

- Post-notification referrals pursuant to Article 22 EUMR

After its withdrawal, 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 the referral or joined a referral request by another Member State prior to its withdrawal and the Commission has decided (or is deemed to have decided) to examine the concentration in accordance with Article 22(3) EUMR before the date of its withdrawal, the case will be considered to be referred also with respect to the United Kingdom. If not, the case will not be considered to be referred in relation to the United Kingdom.

Substantive assessment

After the withdrawal date and if the Withdrawal Agreement is not ratified, the Commission will have to take account of the fact that the United Kingdom will no longer be part of the internal market. This implies that the Commission will no longer be competent to find that a planned concentration would (or would not) significantly impede effective competition in UK national or subnational markets. Moreover, trade between the EU and the United Kingdom may become subject to new tariffs and non-tariff barriers. This 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 respective 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.

Inspections pursuant to Article 13 EUMR will no longer be possible in the United Kingdom. The Commission will still be able to obtain information under Article 11 EUMR.

Continued validity of Commission decisions under the EUMR after the United Kingdom's withdrawal

All Commission decisions under the EUMR (including decisions imposing conditions and obligations) remain valid after the United Kingdom's withdrawal. For the sake of clarity, no distinction should be drawn between decisions that relate to the effect of a concentration on competition at the level of the European Economic Area or within any of the remaining 27 EU Member States, and Commission decisions that relate to the effect of a concentration in UK national or sub-national markets. The decision will in principle remain valid also in instances

where commitments address a competition issue only affecting a UK national or sub-national market.[18]

Following the United Kingdom's withdrawal, parties may in certain circumstances consider requesting the Commission to waive, modify or substitute certain commitments under the standard review clause that is typically contained in commitments.[19] Requests may be considered founded in instances where the commitments in question address competition issues in UK markets only (or markets including only the United Kingdom and a third country). The services of the Commission's Directorate-General for Competition will be available for guidance in individual cases.

The Commission website on EU Competition law (http://ec.europa.eu/competition/index_en.html) provide additional information. These pages will be updated with further information, where necessary.

European Commission
Directorate-General for Competition

[18] Indeed, 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, remains in place.

[19] See Section F – The review clause of the Commission's Model text for divestiture commitments, available at http://ec.europa.eu/competition/mergers/legislation/legislation.html.