

Brexit: what might change

Competition Law

Introduction

On 23 June 2016 the UK population voted for the UK's exit from the European Union (EU). The applicable exit procedure and certain possible legal consequences of Brexit for Competition Law will be discussed below in the form of a Q&A.

In the short term, we do not identify material changes for the legal practice. The European law and regulations will remain in force until the negotiations between the EU and the UK have been completed and the withdrawal procedure has come to an end. To which extent European law and regulations will also apply following the UK's exit from the EU, will largely depend on the outcome of the negotiations. One of the fundamentals of the EU is the internal market, allowing for the free movement of goods, services, workers and capital (Internal Market). In this context we note that in January 2017, Prime Minister May announced that the UK will opt for a "hard Brexit", meaning that the UK will no longer maintain membership of the Internal Market, nor accede to any associated status. Instead, the UK will seek a free-trade deal with the EU outside the Internal Market.

Brexit – background

Since 2007 (Treaty of Lisbon), the EU Treaty offers a Member State an explicit legal basis to leave the EU (Article 50 TEU). Pursuant to Article 50(2) TEU, the UK can start the exit procedure by giving notice to the European Council. The exit agreement will be concluded on behalf of the EU by the Council¹, acting upon a qualified majority² and after having obtained the consent of the European Parliament. The agreement must set out the arrangements for the UK's exit and take account of the framework for the UK's future relationship with the EU. The UK cannot participate in the relevant discussions or decisions of the European Council or Council.

The EU Treaties cease to apply to the UK from the date of entry into force of the exit agreement or, if there is no such agreement, 2 years after the date of notice under Article 50 TEU, unless the European Council, in agreement with the UK, unanimously decides to extend this period. The exit procedure has never been called for and the way forward is full of uncertainties. Apart from Article 50 TEU, no further provisions or guidelines apply.

1 The Council consists of a representative of each Member State at ministerial level, who may bind the government of the Member State in question and cast its vote (Article 16 TEU).

2 The qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States (Article 238(3)(b) TFEU).



Q&A - Competition

Will the cartel prohibition still apply in the UK post Brexit?

Currently, both EU competition law and domestic competition law apply in the UK. Domestic competition law (the UK's Competition Act 1998 and Enterprise Act 2002) largely mirrors EU competition rules. Therefore, post Brexit the cartel prohibition will continue to apply in the UK.

Are UK businesses bound by EU competition law post-Brexit when offering their goods in the EU?

Any UK businesses wishing to offer their goods and services in the EU post-Brexit will continue to be bound by EU competition law.

What are the consequences expected to be in relation to competition law post-Brexit?

Post-Brexit, the competition authorities of the UK and the EU can apply their competition rules in parallel. Infringements of the cartel prohibition may be followed-up by both the UK Competition and Markets Authority and the European Commission (or competition authorities of the EU member states).

Post-Brexit, in principle:

- the EU (block) exemptions from the cartel prohibition no longer apply to the restrictions on competition within UK territory;
- the European Commission is no longer allowed to conduct dawn raids in the UK;

- exchange of information between the EU Competition Network and the UK Competition and Markets Authority, for example in relation to cartel investigations, may be affected negatively;
- it may also become more difficult to apply simultaneously for leniency in the UK and the EU Member States.

What will the consequences of a Brexit be for merger control assessment regarding mergers and acquisitions?

If a merger meets the relevant thresholds under EU merger control rules and under UK merger control rules, the merger may require notification and approval of both the UK Competition and Markets Authority and the European Commission. The one-stop shop principle no longer applies to the UK.

Q&A - State aid

Does state aid prohibition still apply in the UK?

After a formal exit from the EU, the state aid prohibition no longer applies in the UK. In principle, the UK may provide selective advantages to certain undertakings. Another effect may be that pending state aid investigations against the UK need to be terminated and that recovery orders can be disregarded by undertakings having received UK state aid. However, it is likely that the state aid provisions will continue to apply in the UK if the EU and the UK agree on a free trade agreement.



Can I challenge a distortion of competition by UK competitors that have benefited from state aid?

As long as the EU legislation applies, any illegal state aid granted by the UK can be challenged. Unless specific arrangements are made between the EU and the UK, this may no longer be the case following the UK's exit from the EU.

Q&A - Public procurement

Can UK undertakings participate in EU procurement procedures?

At an international level, the Agreement on Government Procurement (GPA) provides for access to procurement markets. Contrary to the EU, the UK is not party to the GPA, which means that UK undertakings do not automatically have access to procurement markets of GPA parties. However, EU Member States de facto allow undertakings from non-GPA parties to participate in procurement procedures.

Can EU undertakings participate in UK procurement procedures?

During the period when EU law and regulations still apply, it is possible to participate in UK procurement procedures

(the principle of non-discrimination). At this point, it is uncertain whether the UK will amend its procurement regulation after a formal exit from the EU. In the event the UK becomes party to the GPA, it will be possible for EU undertakings to participate in UK procurement procedures.

How does a contracting authority know which UK certificates are equivalent to the certificates requested in a specific procurement procedure?

eCERTIS provides for an overview of the most relevant public procurement certificates of thirty-two European countries (which include Turkey and Lichtenstein), i.e. not solely EU Member States. It seems that eCERTIS will remain relevant in relation to the UK even after the UK's exit from the European Union has become final.

What next?

Once the UK invokes Article 50 TEU, the UK and the EU will negotiate the terms of Brexit. It will be a highly political process and the outcome is as yet unclear. Therefore it is of the utmost importance to monitor the developments and the potential impact on your company's position closely. We will keep you informed about further developments.

Please contact your trusted adviser at Loyens & Loeff or send an e-mail to Brexit@loyensloeff.com if you have any queries.