



Competition Law Forum

THE HOUSE OF LORDS EU INTERNAL MARKET SUB COMMITTEE –
INQUIRY ON BREXIT (COMPETITION): SUBMISSION BY DR LIZA
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Introduction

1. This paper is submitted to the House of Lords EU Internal Market Sub Committee, chaired by Lord Whitty by Dr Liza Lovdahl Gormsen (Director of the Competition Law Forum and Senior Research Fellow at the British Institute of International and Comparative Law) and Dr Joe Tomlinson (Lecturer in Public Law at University of Sheffield), as a response to some of the questions raised in the inquiry into the impact of Brexit on UK competition policy.
2. The Sub Committee is seeking answers and views to a number of questions on antitrust, mergers, and State aid. We welcome the opportunity to respond to some of the questions relating to mergers and State aid – two of the major challenges facing competition administration in the UK post-Brexit. We are currently undertaking research on these issues. At a general level, post-Brexit administrative reform, as well as being inevitable, is likely to be fast-paced and wide-ranging. Competition administration is a powerful example of this. While there is an existing UK competition administration structure, competition law and enforcement is highly Europeanised and, as a result of Brexit, many changes are likely. These changes will concern both: substantive issues of law and policy; and administrative (or implementation) challenges. Both of these broad areas have to be considered, and they must be considered in relation to each other.
3. Competition law is seen as an important tool for ensuring consumer welfare and a significant driver in the UK economy. In the *Report by the Comptroller and Auditor General: The UK competition regime* (2016), the National Audit Office estimated that the Competition Markets Authority ('CMA') produced an annual average of direct consumer benefits of £745 million between 2012-2013 and 2014-2015. The pending UK departure from the EU raises the concern that any weakening of the competition law regime would ultimately have a negative impact on the consumer and the wider economy.
4. It is important to note that even if substantive laws are kept for the most part, ensuring effective competition administration will remain a key issue, as the success of competition rules is contingent upon effective enforcement.

Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?

5. In 2014/15 the CMA published 72 decisions concerning qualifying mergers and in 2015/16 it published 60 such decisions. In 2014, 2015 and 2016 respectively, the EU Commission was notified of 303, 337, and 362 mergers it ought to consider.
6. Post-Brexit, the CMA will, almost without doubt, have to consider some of these EU notifications. Even 20 or 30 extra merger decisions to be dealt with at the UK-level would represent a substantial increase in the CMA's workload. Currently, the CMA would not have the adequate staffing for such an increase in workload.
7. To manage its workload, the CMA has discretion not to refer a merger case if the market concerned is of insufficient importance to merit a 'Phase II' investigation, also known as the *de minimis* exception. In the light of Brexit, the CMA has recently changed the upper bound threshold over which the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference from £10 million to £15 million. Furthermore, the CMA has altered the lower bound threshold (i.e. the threshold which the CMA will generally not consider a reference justified) from £3 million to £5 million. The decision of whether a case falls within the *de minimis* exception is not linked to the parties' cost of the proceedings but cost to the public purse. Thus, a case may be referred even if a referral negates the anticipated synergies of the case.
8. The CMA could involve sector regulators with current competition powers, but this is only a viable option if the mergers fall within their area of expertise. Furthermore, there would be additional administrative implications for such regulators. With such a move, the possible problems with fragmenting competition enforcement powers would need to be grappled with.
9. Some avenues to manage the anticipated increase in merger notifications are:
 - a. Increasing notification thresholds in order to reduce the number of smaller mergers that are notifiable to the CMA.
 - b. The CMA could also take a prioritisation decision that it will investigate fewer smaller or simpler mergers.
 - c. The CMA could simply not conduct investigations with the intensity that it currently does.
 - d. The review process could be altered for simpler cases, for example by: changing the 'duty to refer' to a 'discretion to refer'; reducing the time available at Phase I and Phase II investigations (including

placing limits on pre-notification discussions); revisiting the powers and duties of the Panel at Phase II so that they focus solely on remedies or on issues that remain in dispute at the end of Phase I.

- e. In the longer term, if resourcing is a pressing issue, Parliament could legislate to raise the jurisdictional thresholds and/or give the CMA more flexibility to accept remedies in Phase I, especially considering that the European Commission is strikingly more flexible in accepting remedies at this stage.
- f. The CMA could look at its internal resourcing, such as reallocating staff from other areas (such as market investigations or antitrust) to merger cases. In fact, it has been noted that staffing on cases at the CMA is high compared to the European Commission. Thus, a reduction in staff per case could free up resources to take on more cases.
- g. Where the CMA considers cases which are also reviewed by the European Commission, in particular where the UK issues are not materially different from those raised in the Member States, for the CMA to clear cases on the basis of UK versions of the remedies agreed by the European Commission in Phase I or Phase II. With these types of cases, the CMA could focus its analysis and its recourses on whether the UK raises any materially different issues from those arising in the EU Member States and whether there are any plain flaws in the European Commission's market analysis or the remedies package.

How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?

10. At present, UK mergers that meet certain turnover thresholds fall exclusively under the jurisdiction of EU Merger Regulation. However, Brexit is likely to end this 'one-stop' merger control regime for UK companies, leading to more mergers being reviewed by the CMA under the Enterprise Act 2002.
11. In certain cases, this will result in parallel investigations between the CMA and the Commission. A transaction that qualifies under the EUMR may also be subject to UK merger control. Mergers, whether of UK or foreign businesses that meet both UK and EU thresholds will likely face scrutiny under both systems.
12. Furthermore, the CMA will not be able to seek a reference on the back of a UK national dimension of an EU merger. While the CMA could apply its own merger control rules in such a case, it will do so in parallel with the Commission, rather than in its stead.
13. Such parallel review raises the possibility of one authority permitting a merger and the other blocking one, or of diverging remedies between the UK and EU regimes. All mergers requiring

multi-jurisdictional consent face the challenges of coordination and conflicting outcomes, but Brexit will generate additional transaction risks if the a merger requires clearance in both the UK and the EU. The risk of double jeopardy for firms operating in both the UK and the EU is likely to create a trading disincentive.

14. The risk of double jeopardy for firms operating in both the UK and the EU is a strong reason for the CMA to consider some form of coordination relationship with EU enforcement. This could take the form of an *ad hoc* agreement or be part of a wider framework. It could provide for, for example, early-stage sharing of notification information, evidence sharing processes, investigation coordination, and alignment of decision and response timeframes. Precedents for such agreements can be found in the Swiss-EU and Canadian-US contexts. In the UK-EU context, it may be logical to start with existing EU arrangements and practices, and work from there.
15. It is difficult to suggest, in precision terms, the likelihood that divergent outcomes will occur, but there is certainly a possibility of this. The main determining factor is the approach/economic theory underpinning the merger regimes in question. Where the two regimes are similar, the possibility of divergent outcomes is lower. Where the two regimes are different, the possibility of divergent outcomes is higher. Empirical studies of parallel US and EU merger regimes have shown in more granular detail that other features—such as enforcement priorities—can also have effects in this respect.

How burdensome would dual CMA/European Commission merger notifications be for companies?

16. As it stands, the UK utilises a voluntary filing system, meaning that businesses are not required to notify their mergers to the CMA. This means that even if a merger triggers either the turnover threshold or the share of supply threshold, the merging parties can choose not to notify the merger to the CMA but rather to go ahead and complete the transaction. The voluntary nature of UK merger control is unusual compared to most merger control regimes.
17. Brexit naturally raises questions as to whether this should persist, as the UK CMA is likely to acquire sole responsibility to investigate mergers affecting the UK, or whether the CMA should implement a mandatory merger notification system and thereby create a dual merger notification systems for business.
18. The regulatory interest in ensuring effective arrangements does need to be balanced against the concerns of businesses. The flexibility of the voluntary system with a clawback right (meaning that the CMA can still intervene in those mergers which may already be underway but were not notified to the CMA) means that there is still protection against anticompetitive activity, but without the harm on businesses by forcing them to notify. The downside to the voluntary regime however is that it may cause costs and damage to businesses when the CMA intervenes post-merger.

19. If (and this is a big if) the CMA decides to introduce a mandatory merger notification system like that in the EU, it could be burdensome for businesses in terms of costs and time. A mandatory regime require the parties to file – and the CMA to investigate - regardless of whether the merger raises any real competition issues that warrant investigation and that takes time and costs money. Moreover, a mandatory merger notification system involves merger filing fees. Such a fee is expected not to be very welcome, especially for smaller mergers.

Will the UK require a domestic State aid authority after Brexit?

20. State aid is likely to be the most urgent problem following Brexit, because the EU is likely to insist on State aid control as a condition for any comprehensive trading agreement, as confirmed in the European Council (Art. 50) guidelines for Brexit negotiations.

21. According to these guidelines, a trading agreement ‘must ensure a level playing field in terms of competition and state aid’ as well as ‘appropriate enforcement and dispute settlement mechanisms’. Thus, according to the guidelines, it is not enough to merely include State aid as a principle of UK competition law and/or policy, there must be appropriate enforcement of State aid in the UK.

22. There are no State aid statutes in the UK. Unless a State aid framework is created within the UK at the time of the UK’s exit from the EU, it will create enormous legal uncertainty for existing State aid recipients, as well as for businesses/sectors being involved in ongoing State aid cases.

23. Currently, the CMA does not deal with State aid or have any powers to enforce State aid provisions. The Department for Business, Energy and Industrial Strategy (BEIS) is responsible for State aid across the whole of government, including for local and regional government and the devolved administrations in the UK.

24. Following Brexit, it has been suggested that the CMA is the obvious candidate –although the National Audit Office cannot be ruled out – to enforce State aid rules in the UK as opposed to the court. The reasons why it has been suggested that the CMA is the best placed authority to deal with State aid are multiple:

a. The CMA currently has wide jurisdiction across the UK in relation to, amongst other things, competition law enforcement.

b. It has the necessary combination of legal, economic, and policy expertise.

c. It has the experience of analysing the effect of competition law on government policies and of conducting complex investigations involving detailed factual inquiry and economic assessments.

d. It already has experience of giving advice to public bodies on the competition implications of their policies or on proposals for legislation.

e. Its independence is widely recognised.

25. If the CMA will be the agency to enforce State aid, there will be an urgent need to establish a new State aid unit within the CMA.

26. If a new State aid unit is created within the CMA, it will need to be given proper enforcement powers and its independence and its authority is likely to need to be strengthened. While the CMA has a history of independence from government, there is a risk that the relationship between the CMA and the government may be strained at times e.g. if the CMA takes enforcement action against the government for providing unlawful State aid.

27. Creating a new State aid unit within the CMA will carry resource implications that are potentially very significant. It is unimaginable that it could be funded on the current budget. There would be an unavoidable need to recruit and train specialists in the area of State aid.

28. Unlike in a merger regime, there is no way to make State aid cost neutral. In the area of anticompetitive behaviour, the CMA can impose fines. This is not an option in the context of State aid. At best, the CMA can decide to have a recovery mechanism, which attempts to restore the situation before the granting of aid, which is different to imposing a fine for anticompetitive behaviour.

29. It is unknown how many State aid cases any unit would deal with on an annual basis, but it would naturally be more than now, where there is no State aid enforcement in the UK.