Kluwer Competition Law Blog

EU Merger Control: Life without the UK – Brexit and Beyond

Gavin Bushell (Baker McKenzie, Belgium) · Thursday, December 3rd, 2020

On 2 December 2020, the European Commission published a Notice to Stakeholders on Brexit and EU competition law.[1] It essentially reflects the UK position as set out in CMA guidance published on 1 December 2020.[2]

These papers are equivalent to the divorce papers governing the children's custody. Who has the kids and when over the holiday period, and how they should be dealt with. It's a sad development to report on, but a necessary one.

The guidance is useful, as we travel to the Brave New World of 2021 in Europe: Brexited, and hopefully, Vaccinated (and in some cases, I suspect slightly Pickled).

Here are some practice points from, and quick thoughts on, the guidance, and merger control life in 2021:

1. **Timing – when should we include UK turnover in the EUMR threshold analysis?**

- As is well-known, the relevant date for establishing EU jurisdiction under the EUMR is the date of the conclusion of a binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of a merger notification based on a good faith intention, whichever date is earlier.[3]
- If you or your (internal) clients are contemplating any of these events taking place prior to the end of the Transition Period (i.e. 31 December 2020), the Commission will assess whether the jurisdictional test of the EUMR is met on the date of that event and will take into account the UK turnover of the parties. It may all be in the numbers, and it may be wise to check.
- If you or your (internal) clients are contemplating any of the above events taking place after 31 December 2020, the Commission will no longer take into account the UK turnover of the parties.
- This may result in some deals that ordinarily would have met the EUMR thresholds (if the UK turnover of the parties were included), not being notifiable under the EUMR and that could be good news.
- This is conceivable for deals with a majoratively UK-based and/or UK-active party, that may not realise a turnover of EUR 250 million or more in the EU without counting its turnover in the UK (think of the ten or so UK rail franchises that were notified to the Commission, all but two of which were referred back to the UK competition authorities).[4]

2. **Timing: when will the UK cease to be part of the EUMR's one-stop-shop?**

- The Commission will retain exclusive jurisdiction to assess the effects of a transaction on the UK where merger proceedings under the EUMR have been initiated before the end of the Transition Period (31 December 2020).
- A case is considered to have been "initiated" by virtue of a notification to the Commission of a Form CO (or short Form CO), or Form RS with a view of initiating a referral procedure under Article 4(4) EUMR. It would be prudent to also note that the Commission closes for the holiday period. This year the dates are 24 December 2020 to 4 January 2021 (equivalent to seven working days).[5]
- So, if you still want to benefit from the European one-stop-shop, you need to get in quick. With two and bit weeks until the Commission's holidays, there may yet be time to still pre-notify a transaction to the Commission, particularly under the Simplified Procedure.
- Cases presenting substantive overlaps, and not yet in pre-notification, will likely struggle to obtain a green light from the Commission to file this year. This is particularly likely in the light of the Commission's "*Special measures due to COVID-19*" (pursuant to which the timing of a filing in such cases is more likely than not to be subject to delay).[6]
- Cases already in pre-notification will likely be the subject of intensive discussions between the parties and the Commission in the coming days to "get on file" before the looming holiday break potentially changes their roadmap to clearance (and inviting the risk of a CMA letter in the New Year).
- It is a little more complicated for referral cases involving the UK. Recall that a transaction not meeting the EUMR thresholds can be "referred up", if the merger control thresholds in at least three Member States are triggered (pursuant to an Article 4(5) EUMR submission).
- For now, the three Member States may include the UK. The guidance provides, however, that where such a submission has been made by parties, the Commission will acquire jurisdiction if, prior to 31 December 2020, the review period of 15 working days has elapsed without any Member State expressing its disagreement.
- What this means is, if you have not already made such a referral request, based on three Member States including the UK, the Commission can no longer take jurisdiction – as the 15 working days cannot expire prior to 31 December 2020 for any submission lodged on or after 3 December 2020.[7]
- Similarly, after the end of the Transition Period, the UK will no longer be able to refer cases to the Commission or to join referral requests by other Member States under Article 22 EUMR. The guidance provides that if the UK has requested a referral or joined a referral request by another Member State, and the Commission has decided to review the merger before the end of the Transition Period, the case will be referred also with respect to the UK.
- If the UK has not made or joined such a referral request, or if the Commission has not decided (or is not deemed to have decided) to examine the concentration before the end of the Transition Period, the case will not be considered to be referred in relation to the United Kingdom. Article 22 EUMR provides a 15 working day period from the date of national notification for a Member State to make a referral request, and a further 10 working day period for the Commission to consider such a request.
- In practice, therefore, only Member State requests made before 9 December 2020 could be determined before the end of the Transition Period. Realistically, the UK CMA is unlikely now to be seeking the Commission to review any cases or even joining requests by other Member States – preferring to review relevant cases under its own merger control rules.

3. **And, what does the guidance say about the substantive assessment?**

- After the Transition Period, the Commission will not be competent to find that a planned merger will or will not significantly impede competition in the UK or any part of it. However, it may do so either in cases initiated before the end of the Transition Period (as described above) or indirectly, where the UK forms part of a larger market (such as a Western European or a Global market including the European Union and the EFTA States over which it does have jurisdiction).
- Therefore, it is entirely conceivable, and consistent with prior practice, that the Commission may seek to address concerns on such broader markets, and accept remedies from merger parties involving not only assets located in the UK, but also where the proposed remedies will have effects in a market including the UK.
- Clearly, in such a situation the Commission is highly likely to coordinate with the UK CMA, much in the same way as it already does today through the ECN, and outside of the ECN, pursuant to dedicated agreements with third countries like Brazil, Canada, China, India, Japan, Korea, Mexico, Morocco, Russia, South Africa, Switzerland, and the United States.[8]
- Currently, the post-Brexit situation is governed by Article 23 of Annex 4 the Withdrawal Agreement.[9] In that document, the EU and the UK have already expressed their common interest to promote cooperation with regard to competition policy development and the investigation of antitrust and merger cases. They will therefore seek to coordinate their enforcement activities relating to the same or related cases, including the exchange of information. It is highly conceivable that once the dust has settled, the Commission and the UK CMA will put in place a separate agreement or framework regarding their future cooperation, much like the EU-US Best Practices on Merger Cooperation.[10]
- Interestingly, in terms of substantive assessment, the guidance notes that the modalities of trade between the EU and the UK may have a bearing on the Commission's competitive assessment. Conceivably, this may be a short-term issue, depending on the nature of the "deal" that is struck between the EU-UK and on what terms.
- Clearly, if trade between the two blocks is difficult or impaired, then this may play into the analysis of the geographic market definition, the ease of entry and switching. Undoubtedly, this will entail a case-by-case analysis, where the consequences will be assessed individually for each case. It would be highly prudent for these issues to be well-thought through before approaching the Commission (and the UK CMA) – having a consistent and credible argument based on tangible evidence will be important.
- Finally, it should be recalled that the Commission will remain competent to monitor and enforce commitments in the merger cases decisions adopted by it after the end of the Transition Period. So, any remedies imposed in respect of a UK national or sub-national market continue to have force – any parties hoping to get out of their existing EUMR commitments and obligations post-Brexit will be sadly disappointed. Its decisions remain binding.[11] The Commission's full arsenal of measures (including fines) are still available to it for breaches of EUMR decisions adopted by it in respect of the UK prior to 31 December 2020.
- On a technical note, the Commission and the UK CMA may agree that the monitoring and enforcement of commitments is transferred to the UK CMA if relevant – so if you or your (internal) clients are subject to any such commitments, you may in due course want to check if you need to engage with the UK CMA going forward.

4. **But what does all of this mean in practice for clients?**

The guidance from both the Commission and the UK CMA is useful.

However, the guidance does not reveal everything about the Brave New World of Merger Control in 2021.

In discussions with my London partners at Baker McKenzie, it is clear that the world is about to change dramatically – and that there will be real issues for merging parties dealing with both the Commission and the UK CMA going forward. Some of these issues are well-known, some less so.

SPA/APA negotiations may have a UK chapter. All of this will have implications for not only the planning but also the negotiation, of a transaction. The days of avoiding a UK CMA condition precedent may be limited. Trade purchasers or PE purchasers with overlapping portfolio investments (even in auction processes) will be increasingly reluctant to take the economic risk upfront and "wait it out" (until the four-month period for the UK CMA intervention has passed).[12]

Increased Filing Burden. Obviously, dealing with two regulators is an increased burden. That's clear. The costs of doing merger control in Europe (in the broad sense) for cases involving overlap and a meaningful UK nexus will go up from 1 January 2021.

Whilst the UK regime is voluntary (meaning that no mandatory notification requesting approval prior to completion is required), the reality is that UK-nexus-overlap deals will be systematically pulled in. The UK CMA has been increasingly interventionist. It is active, and indeed, proactively monitoring for deals that may be of interest to it, routinely contracting parties to transactions to ask questions. Slipping under the UK CMA's radar seems highly unlikely today. Completed deals with overlaps also risk holding separate orders being imposed.[13]

Well-publicised is the ensuing debate on the application of the UK CMA's jurisdictional test – one limb of which entails a "share of supply" threshold.[14] The UK CMA has described this part of the UK jurisdictional test as a "piece of elastic". This appears to be an understatement.

The UK legislation allows the UK CMA to measure share of supply with considerable discretion. In the recent *ION/Broadway* case, the UK CMA believed that the share of supply test was met on the basis of overlap between the parties in the supply of sell-side front-office systems for electronic trading of gilts to Gilt-edged Market Makers (GEMMs) designated by the United Kingdom Debt Management Office in the UK.[15] The combined share of the parties was above 25% as the parties supplied such systems to 10 out of eighteen GEMM customers with an increment of at least one GEMM customer.

So the test can be applied even within the scope of a selected bunch of customers, and potentially even with respect to one customer's demand (there is a current "live" challenge to the UK CMA on its interpretation of jurisdiction, which is not the subject of this blog piece).[16]

Be aware that careful consideration of all potential angles on UK CMA jurisdiction will be required – and it may not be intuitively obvious whether jurisdiction could be found. Active engagement on the facts with (internal) clients will be essential.

Increased Demands on (internal) clients and resources. Interventionist also describes well the UK CMA's process. Consonant with the EU experience, it is not an easy ride, once you get on the rollercoaster.

The UK CMA routinely issues statutory requests for detailed information, even during the pre-notification phase. The deadlines for responding to these requests are typically short, placing further pressure on the resources of the merger parties – that will likely already be dealing with burdensome requests from the Commission and other regulators (why cannot the ECN and ICN encourage coordination on authorities' RFIs one asks oneself).

Preparing (internal) clients even more assiduously for engaging with both regulators will be ever more important. Pro-active engagement strategies with these authorities should be seriously considered if there are potential substantive issues. Such preparation should include considering the pros and cons of approaching the UK CMA, the potential use of "briefing papers" to the Commission and the UK CMA prior to filing, and the use of digital or (when we can) in-person meetings.

Increased Need to Proactively Manage Your Filing Timetable (and impact on the deal timetable). In addition, given the structural and timing differences between the EU and the UK merger control systems, a greater challenge will be for parties to "parallel" their procedures before the two (and other competent) authorities. Those differences may also be exaggerated if the merging parties have not proactively approached the UK CMA, either formally or informally.

For instance, the EUMR Phase I is 25 working days, which can be extended to 35 working days if the parties submit Phase I remedies or a Member State makes a "referral back" request. The Commission has the legal right to, but not the policy of, "stopping the clock" in Phase I.

In contrast, the UK CMA must decide whether to refer a merger to Phase II within 40 working days starting from the first working day after it confirms to the parties that the notification is complete. If the parties did not notify the merger and the UK CMA started the investigation of its own accord, the timetable starts on the first working day after the UK CMA confirms that it has received sufficient information to begin its investigation.

So already in Phase I, there can be a dramatic difference in timing between the two authorities. Furthermore, the UK CMA's 40 working day limit can be extended by up to 50 working days from the date of the Phase 1 decision if undertakings in lieu of a reference to Phase 2 ("UILs") are accepted in Phase 1. Accordingly, the CMA has a maximum of 90 working days from the date of its Phase 1 decision within which to accept UILs.

Similarly, in Phase II, the UK CMA is given 24 weeks (extendable by up to a further 8 weeks) from the date of referral to Phase II (whenever that takes place) to investigate and make its final decision. That could be as many as approximately 160 working days. Notably, the UK CMA is not

able to "stop the clock" to allow time for further consideration of complex issues or significant volumes of new information, except in limited circumstances where the information it has formally requested from parties remains outstanding.

In contrast, the Commission in Phase II is given 90 working days, which can be extended eventually and by various means, up to 125 working days as a maximum. But the Commission does have the policy (and makes use of it) of stopping the clock routinely in Phase II.

All of this to say, that navigating these timetables, and the rigours imposed on the parties by the two authorities' processes, will take considerable effort, resources and time.

Increased Scrutiny. Each of the Commission and the CMA considers itself at the "cutting edge" of merger enforcement and substantive analysis.

They do not, and will not, shy away from complex and novel theories of harm. We have certainly seen this at both levels and we can expect this to continue.

Managing your (internal) clients and their expectations on the process will be even more critical when dealing with both authorities. And do not be surprised to see potentially divergent outcomes (as per the *Eurotunnel/Sea France* case where the UK authorities prohibited the transaction, whereas the French competition authority conditionally approved it).[17]

Dr Andrea Coscelli CBE, the Chief Executive of the UK CMA has admitted they will be more interventionist: "*Observers that are closer to our work will see no difference in our determination to come to the right answer based on the evidence. But they will see an organisation that continues to get tougher on mergers and enforcement. They will see an organisation taking on the bigger global cases that follow the UK's departure from the EU*".[18]

We can therefore expect the UK CMA to be at the cutting edge of theories of harm in a variety of ways – such as in the tech sector, on market definition and substantive analysis, on the assessment of potential competition, on the review of the counterfactual, the list goes on…

And all of this will increase the burden for the merging parties facing off both the Commission and the UK CMA. This is particularly the case as both authorities increasingly require significant amounts of internal documents to be made available to them by parties. Systematically collating, cataloguing and reviewing internal documents upfront (as well as having properly defined document creation guidelines for internal clients) will be an increasing priority in significant overlap or theory of harm cases.

Up-front and careful analysis and preparation, therefore, will be even more of a must. Getting a handle on the UK aspects quickly will be essential, as will be understanding how they dovetail into the global filing strategy, the strategic overlap assessment and remedy planning.

Concluding remarks

Volume 3 of the 1627 short story collection by Feng Menglong, "*Stories to Awaken the World*",

contains the expression “Better to be a dog in times of tranquillity than a human in times of chaos”.

On the other side of the Channel, they say “May you live in interesting times” (wrongly claimed in the UK to be a “Chinese curse”, which it is not). I think we can all agree that these are interesting times. But the point is, you may be saying the same thing across the divide – but using different analytical tools and doing it in a different way.

Navigating the EUMR and UK Merger Control regime in future will require skill, planning and engagement. Having a carefully prepared strategic plan, well upfront, can help avoid the chaos.

But then, looking down at my dog (Sir Clive) sleeping tranquilly on the carpet of my study, I think I just might prefer to be a dog.

Wishing you and yours all the best for the holiday period.

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[1] See, https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/eu-competition-law_en_0.pdf.

[2] The CMA published new guidance on how it will work after the end of the Transition Period, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940067/Guidance_Document_for_End_of_Transition_Period_-.pdf. The Guidance will come into effect at 11pm UK time on 31 December 2020 when the Competition (Amendment etc.) (EU Exit) Regulations 2019 (the Competition SI – https://www.legislation.gov.uk/uksi/2019/93/contents/made) and the Competition (Amendment etc.) (EU Exit) Regulations 2020 (the Implementation SI https://www.legislation.gov.uk/uksi/2020/1343/contents/made) come into force. The Guidance does not cover the future EU-UK relationship, and the CMA may issue further guidance as a result of the outcome of the future relationship negotiations.

[3] See, paragraphs 154-156 of the Consolidated Jurisdictional Notice, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF.

[4] See, for example, Case M.9407 – *First Trenitalia West Coast Rail/ West Coast Partnership Rail Franchise* (referred back), and Case M.8636 – *ABELLIO / MITSUI / EJR / WEST MIDLANDS PASSENGER RAIL FRANCHISE* (not referred back).

[5] See, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019D0131%2801%29.

[6] See, https://ec.europa.eu/competition/mergers/information_en.html.

[7] See Article 24 of Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004R0802-20140101.

[8] See, https://ec.europa.eu/competition/international/bilateral/index.html.

[9] See, https://ec.europa.eu/competition/mergers/information_en.html.

[10] See, for example, the Best Practices on Merger Cooperation https://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf.

[11] See, Article 95(2) of the Withdrawal Agreement.

[12] If merger parties do not notify a merger to the UK CMA, it can, of its own initiative, start a preliminary investigation into the transaction, within four months of the closing of the deal, unless the merger took place without having been made public and without the UK CMA being informed of it (in which case the four-month period starts from the earlier of the time the merger was made public or the time the UK CMA was told about it).

[13] For completed deals called in for consideration or contemplated deals scheduled to close prior to the end of a UK CMA Phase 1 review, initial enforcement orders (IEOs) – requiring the acquirer to hold the target's business separate until conclusion of the UK CMA's review can be imposed almost automatically. See *Facebook v CMA* and also the prior ruling in *Electro Rent Corporation v CMA*.

[14] For the UK CMA to have jurisdiction: two or more enterprises (broadly speaking, business activities of any kind) must cease to be distinct, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct; AND EITHER target's UK turnover exceeds GBP 70 million (the "turnover test"); OR the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it (the "share of supply test").

[15] See, https://assets.publishing.service.gov.uk/media/5f4392fcd3bf7f67a7a48fe0/ION_Broadway_-_full_text_decision.pdf.

[16] See a prior Kluwer Competition Law Blog on this http://competitionlawblog.kluwercompetitionlaw.com/2019/11/05/uk-merger-control-an-expansive-approach-to-jurisdiction/. Sabre is challenging the CMA in relation to its blocked Amadeus deal – on the basis that the target had no UK sales… Presumably, someone will update us on this interesting case once it comes to fruition.

[17] See, https://www.gov.uk/cma-cases/eurotunnel-seafrance-merger-inquiry.

[18] See, https://www.gov.uk/government/speeches/andrea-coscelli-closer-to-consumers-competition-and-consumer-protection-for-the-2020s.

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