Brexit: Merger Review Implications and Recommendations

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The United Kingdom’s June 23, 2016 vote to leave the European Union, known as Brexit, triggered a political and economic earthquake. Some immediate consequences were dramatic, including the replacement of the Conservative Prime Minister, leadership struggles in the Labour party, a sharp drop in the value of the pound against other major currencies, and fluctuations in the UK and global stock markets. The new Prime Minister, Theresa May, has committed to triggering the Article 50 process to start Brexit negotiations by March 2017, with indications that she will seek a “hard Brexit”—involving a clean break from the European Union and loss of access to the single market. However, the backlash to this approach is gathering steam and EU leaders are suggesting they will not grant the United Kingdom any advantageous deal involving the benefits of EU membership without the related obligations. In reality, the long-term consequences of Brexit will not become clear for many years, and certainly not before the process of negotiating the United Kingdom’s exit from the EU and the post-exit relationship between the United Kingdom and the European Union begins.

While the detailed terms of the new relationship will take time, some of Brexit’s main implications for competition law are already reasonably clear. For example, the United Kingdom’s rules on restrictive agreements and abuses of dominant positions, which are based on EU law, are unlikely to change in the short term. Likewise, in areas where the United Kingdom’s antitrust laws already diverge from the laws in other EU Member States or the European Union as a whole, like the United Kingdom’s regime for private antitrust enforcement and criminal sanctions for individuals in cartel cases, those divergences will likely remain post-Brexit.

One area in which Brexit can be expected to have significant implications for EU and UK authorities and for companies operating in Europe is merger control. Many observers have noted that, after Brexit, the “one-stop-shop” of the European Union’s Regulation 139/2004 on the control of concentrations among undertakings (EUMR)1 will probably cease to apply to the United Kingdom. This will likely result in more UK merger notifications, a significant increase in the Competition and Markets Authority’s (CMA’s) workload, and increased burdens for companies engaged in mergers or acquisitions who may have to make parallel filings in Brussels and London. Under the current system, jurisdiction of the Commission precludes the need to file in the United Kingdom.

In this article, we explore the merger control implications of Brexit in more detail and offer some preliminary suggestions of ways to mitigate the burden on competition authorities and business.

Brexit Background
The basic mechanism for an EU Member State to leave the European Union is set out in Article 50 of the Treaty on the European Union (TEU), but the language of this article is very general. The Article 50 process is triggered by a notice from the leaving Member State to the European Council. Article 50 TEU does not define the conditions or procedure for giving such a notice, which depend on Member State law. Even in the United Kingdom, there is some uncertainty about this, and a number of lawsuits are ongoing to test whether the Government can trigger Article 50 without support of the UK Parliament (with a large majority of Parliamentarians having opposed Brexit), and questions as to whether devolved assemblies in Scotland or Northern Ireland could frustrate the Brexit process.

Once the Article 50 notice is given, the leaving Member State and the European Union have two years to negotiate an exit agreement (unless an extension is mutually agreed), failing which the Member State’s exit becomes effective two years after the notice date. After much posturing on whether and if so when the United Kingdom would deliver the Article 50 TEU notice, Prime Minister Theresa May has confirmed she plans to deliver the Article 50 notice before the end of March 2017, and in the meantime is seeking informal discussions on the new agreement. EU officials, in contrast, are refusing to enter any discussions ahead of Article 50 being triggered. Because there is no way for the European Union to start the process, refusing to negotiate until the United Kingdom gives notice under Article 50 TEU is seen as the only leverage the European Union has to accelerate the process, and perhaps to push the United Kingdom into a more conciliatory approach.

Once the Article 50 TEU notice has been given, the complexity of the issues involved makes it highly unlikely that an agreement can be reached in less than two years. Therefore, the earliest effective date for the United Kingdom’s exit from the European Union will be sometime in early 2019.

The substantive terms of the future relationship between the United Kingdom and the European Union will not be clear for years. On the one hand, it seems unlikely that the United Kingdom will agree to any arrangement in which it must abide by EU law, like the members of the European Economic Area (the EEA—consisting of Norway, Iceland, and Liechtenstein), given the sovereignty-related concerns motivating the UK vote. Specifically, to accept the EUMR in a post-Brexit world would mean the United Kingdom ceding jurisdiction to Brussels with respect to large transactions with potentially significant impacts on UK markets. This would be at odds both with the desire for sovereignty (“taking back control”), which was a major theme of the “leave” campaign, and also with Prime Minister Theresa May’s stated intention to pursue a “proper industrial strategy.” Moreover, the recent comments regarding the United Kingdom favoring a “hard Brexit” suggest such an approach is unlikely. For purposes of this article, therefore, we assume that EU law, including the EUMR, will cease to apply in the United Kingdom after Brexit.

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2 An arrangement, for example, whereby, the United Kingdom would be bound by the competition provisions of the EEA Agreement, which stem from the EU provisions (Articles 53 to 60 (Chapter 1, Rules Applicable To Undertakings), Annex XIV (which contains specific provisions giving effect to the principles set out in Articles 53, 54, 57, and 59) and Protocols 21 to 24 of the EEA Agreement). Decisions of the EEA Joint Committee transpose all EU Regulations and Directives. In addition, EU acts, like Notices, Communications, and Guidelines are usually re-adopted for the European Free Trade Association (EFTA) or EEA States by the EFTA Surveillance Authority.

3 See, e.g., William James, PM May Resurrects Industrial Policy as Britain Prepares for Brexit, REUTERS (Aug. 2, 2016), http://uk.reuters.com/article/us-britain-eu-industry-idUKKC10C3CR.
On the other hand, it also seems unlikely that the United Kingdom will immediately change its existing competition laws, given (among other things) the huge amount of work required to review and update UK legislation to reflect Brexit and the need to negotiate new trade agreements with other countries to replace the EU agreements that currently cover the United Kingdom. In particular, it seems reasonable to assume that wholesale change to the existing UK merger control regime will not be a high priority.

EUMR vs. UK Review
Before discussing merger control in the post-Brexit world, it is worth summarizing the main similarities and differences between the European Commission’s and the UK CMA’s merger review processes.

In many ways, the Commission’s and the CMA’s approaches to merger control are similar. Both are sophisticated authorities, and they apply similar substantive tests. While the Commission blocks or remedies mergers that would lead to a “significant impediment to effective competition,” and the CMA looks for a “substantial lessening of competition,” the theories of harm and underlying economic theory are essentially identical (although do not necessarily lead to identical outcomes). The CMA’s and the Commission’s notification requirements are similar, requiring detailed information and supporting documents. Both apply similar tests for establishing the relevant market (which the Commission refers to as its “small but significant and non-transitory increase in price” test (SSNIP), and the CMA as its “hypothetical monopolist” test), and understand that market definition is not completely distinct from the assessment of competitive effects. Both are more concerned with horizontal than with vertical or conglomerate mergers, and both look at possible unilateral and coordinated effects. Both use a two-phase process, where more problematic mergers are subjected to a more in-depth assessment, commonly referred to as “Phase 2.”

The key difference between the EU and UK systems lies in which mergers are caught in the first place. The UK system captures “relevant merger situations” where the target has turnover above £70 million or the combined market share of the parties on any plausible market definition is 25 percent or more. In those situations, because notification is voluntary, parties can decide whether or not to notify the CMA. In practice, however, parties that meet the test are well-advised to inform the CMA, even if by an informal letter explaining why the parties do not intend to notify formally. The CMA can, wherever a relevant merger situation occurs, call in a merger for review (subject to a 4-month deadline for opening an in-depth investigation from the time the deal completes or becomes public). By contrast, if a deal meets the EU notification thresholds—which are entirely turnover-based—an EU notification is mandatory. Moreover, the parties cannot close a deal until EU clearance has been obtained: in the United Kingdom, it is legal to close a deal qualifying as a relevant merger situation, although the CMA will likely require the parties in a case that the CMA is investigating to hold their businesses separate until a decision has been reached.

The differences between the thresholds affect the types of mergers reviewed by each authority. For example, the Commission reviews a large number of “full function joint ventures,” where a new joint venture has been set up by large multinational firms. Though the joint venture itself may be small scale and have minimal—or no—market presence in the European Union (sometimes in markets in which the parents themselves are not active), the deal will still fall to be reviewed by

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6 See, for example, the outcome of the SeaFrance case, infra note 17.
7 EUMR, supra note 2, arts 1(2) & (3).
the Commission if the joint venture partners meet the turnover tests. For example, a deal struck by Maersk, a Danish shipping company, and Statoil, a Norwegian energy company, to buy a tugboat operator in the Bahamas was notifiable in Brussels. Cases of this nature are not caught under the UK rules where cases involving no substantive competitive overlap are not typically notified to the CMA.

These structural differences are reflected in the outcomes of cases reviewed under the UK and EU systems. The CMA's long-term average of cases that are subjected to an in-depth investigation is currently 36 percent. The Commission has gone to Phase 2 just 242 times out of 6239 cases—approximately 4 percent of cases. This reflects the fact that the CMA's caseload includes a larger number of difficult cases, with routine cases presenting no serious issues cases typically not notified under the CMA's voluntary system. Similarly, a far larger proportion of CMA decisions require remedies or commitments to resolve competition concerns than is the case in Brussels, again reflecting the fact that the CMA's caseload is made up of a higher proportion of more challenging transactions. Because the CMA's cases are more difficult, on the whole, the CMA has a number of different processes from the Commission:

- The CMA can fast-track cases straight to the in-depth Phase 2 review when it is clear that the deal could not be cleared in Phase 1.
- The CMA has no “short form” notification procedure. At the EU level, parties to deals that on their face raise no concerns can use the less onerous “Short Form CO,” an abbreviated version of the full Form CO used for notifying transactions under the EUMR. Indeed, the Commission even exempts notifying parties from complying with all aspects of the Short Form CO in the most straightforward cases. (The CMA might expect no notification or a simple informal letter in such “no issues” deals.)
- The CMA's Phase 1 review lasts 40 working days, compared to the Commission's 25. The CMA's longer review period may be offset, however, by the Commission's practice of engaging in (sometimes lengthy) pre-notification discussions, which take place before the Commission accepts the notification as complete. While the CMA also has a pre-notification period that can last several weeks—or months—on more complex deals, in the authors' experience, this pre-notification period is typically longer in Brussels than in London. In essence, the pre-notification procedures allow the Commission to extend the review process outside the statutory timetable.

Finally, the Commission does not have any discretion to apply non-competition factors in its assessment of notified transactions. The United Kingdom retains an (admittedly narrow) role for public interest factors, such as national security, plurality of the media, and preserving stability of financial markets. It is possible that Theresa May's renewed focus on “industrial strategy” will lead to more interventions on such grounds—or potentially a relaxation of rules to support consolidation creating “national champions”—but, by contrast, the EU regime carves out public interest factors as an issue for Member States and so there is, at least in theory, no scope for policy issues to intrude on EUMR reviews.

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8 Case COMP/M.5783—Statoil/Svitzer/FTTS (JV), Comm’n Decision, 2010 O.J. (C 30).
Commission/CMA Staff

The Commission’s competition team (DG Comp) has more than 700 members, including more than 450 higher level officials who “play a key role”\(^ {12}\) in the Commission’s activities.\(^ {13}\) Unlike cartels and state aid, there is no specific “mergers” unit in DG Comp. Instead, for each of five sector-focused units, there is a mergers team. In addition, there is a mergers case support and policy team within the Policy and Strategy Unit, and a mergers unit within the Chief Economist’s team. Altogether, around 75–100 individuals focus on mergers at any one time within DG Comp.

Similarly, the CMA employs around 700 people, although the CMA’s team includes its legal service, whereas the Commission has a standalone Legal Service.\(^ {14}\) The CMA has a specific “Markets and Mergers” directorate, with a Senior Director responsible for mergers and three Directors who oversee merger control enforcement in the United Kingdom. Below this level however, staff work across mergers, market studies, and enforcement cases.\(^ {15}\) This means there is more flexibility at the CMA to allocate staff to merger review in times when M&A activities are higher. In recent years, the CMA has allocated significant resources to market investigations of particular sectors—notably banking and energy—but the individuals involved in those investigations could be redeployed to deal with a greater volume of merger notifications. Thus, the CMA likely has the scope and resources to take on a higher volume of merger reviews than at present.

Brexit Consequences for Merger Control

Having set out some of the key similarities and differences in the existing regimes, we now turn to focus on the future.

**Increased Number of UK Filings and Greater Burden on Business.** As noted, the most immediate consequence of Brexit from a merger control perspective is that merger filings to the European Commission under the EUMR will no longer cover the United Kingdom. This change can be expected to lead to a significant increase in the number of UK filings post-Brexit and possibly to a much more modest reduction in the number of EU filings, in particular as UK turnover will no longer count towards EU turnover.

As regards UK filings, many transactions that meet the EU thresholds are also likely to meet the UK thresholds. Following Brexit, therefore, many transactions currently notifiable to the Commission will likely also qualify for review before the CMA (although transactions clearly raising no competition issues, like many private equity transactions, will probably not need to be notified in the United Kingdom). Moreover, some transactions having a “Union dimension”\(^ {16}\) under the EUMR

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\(^{16}\) A concentration will have a “Union dimension” where: (i) the combined aggregate worldwide turnover of all undertakings concerned is more than €5000 million; and (ii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration will alternatively have a “Union dimension” where: (i) the combined aggregate worldwide turnover of all undertakings concerned is more than €2.5 billion; (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million; (iii) the combined aggregate turnover of all undertakings concerned is more than €100 million in each of at least three Member States; and (iv) in each of at least three of these Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. EUMR, arts. 1(2) & (3).
may not meet the UK test. For instance, joint ventures that meet the EU turnover thresholds by virtue of the parents’ turnover are unlikely to be captured under the UK rules. In addition, many deals that meet the EU thresholds will not trigger the UK thresholds because the target does not have more than £70m in UK turnover and the transaction does not involve the creation or increase of a 25 percent share of supply in the United Kingdom.

In short, while not all transactions notifiable under the EUMR will also have to be notified in the United Kingdom, it seems likely that many horizontal and even vertical combinations will need to be notified in both jurisdictions. This duplication will lead to a significant increase in the CMA’s workload. As discussed above, however, the CMA is likely to have sufficient staff to deal with such an increase—and this increased workload may even have the positive benefit of streamlining the UK review process and reducing the currently onerous focus the CMA places on smaller transactions. From the business perspective, though, the requirement of an additional UK notification will increase the cost of obtaining required antitrust approvals and the complexity of managing the approval process.

Reduction in the Number of EU Filings. Conversely, Brexit may lead to a reduction in the number of EU filings. Many companies derive a significant portion of their EU turnover in the United Kingdom (as the EU’s second largest economy). Some transactions that would currently be notifiable under the EUMR will therefore likely not meet the turnover thresholds for mandatory filing when the United Kingdom is excluded.

Post-Brexit, the impact on the number of EU filings made pursuant to a voluntary referral request could also be affected. Under the EUMR, parties acquiring control in transactions that would otherwise be notifiable in three or more Member States can request that the transaction be referred to the Commission for review. The United Kingdom’s jurisdictional thresholds are broad, and it is not uncommon for the United Kingdom to count as one of the jurisdictions that can be used to trigger a referral request. The parties to transactions that would be subject to review in only three EU Member States, one of which is the United Kingdom, would no longer be able to take advantage of the referral process. Overall, while it is not possible to predict with any accuracy the likely effect on the number of EU merger filings based on data published by the Commission, it seems likely that Brexit will result in a small but noticeable drop in the number of filings to Brussels.

Divergent Outcomes and Resulting Burden on Businesses. One theoretical possibility that would raise material concerns for business is the increased prospect of concurrent reviews in London and Brussels leading to divergent outcomes (i.e., one authority clearing a merger and the other blocking it) and/or of differing, inconsistent remedies. A recent example of such divergent outcomes involved Eurotunnel’s acquisition of the bankrupt SeaFrance ferry operation, which was approved by the French authorities but blocked by the United Kingdom.17

Currently, Section 60 of the UK Competition Act 1998 contains a “convergence clause” to ensure the compatibility of UK competition law with EU competition law. Post-Brexit, there will be no legal need for such a clause, and it might be removed from UK law. Removal of the convergence clause would increase the likelihood of the CMA’s approach diverging from the Commission’s in specific cases, although both authorities will presumably strive to avoid such divergent outcomes. Moreover, the UK Government has indicated it will favor a “grandfathering” approach

to Brexit, which would mean existing EU law remains in force in the United Kingdom until specifically repealed. This should help ensure consistency of approach, at least in the medium term.

**Exit from the European Competition Network.** Another significant consequence of Brexit for competition policy within the European Union would be the removal of the CMA from the European Competition Network (ECN), which includes the Commission and EU Member State competition authorities. Two notable advantages of the ECN are (1) close cooperation and consistency among national competition authorities such as the CMA and (2) a flexible and informal case allocation system. Leaving the ECN will mean this close cooperation and consistency will be lost, with, importantly, both the CMA and the other national authorities losing out. The outgoing head of the CMA, Alex Chisholm, who has been vocal in warning that Brexit would be an “unfavourable outcome” for the United Kingdom, commented in *The Financial Times* on January 18, 2016, that “from a competition regime perspective, we’re very interconnected through the ECN. So there’s a high level of consistency in the way in which competition law is enforced in every one of the 27 countries.” The United Kingdom will need to seek some alternative method to cooperate with the Commission and EU national authorities, but whatever is agreed will be less effective than the integrated ECN framework.

Many would also argue that the loss of the CMA’s voice from the ECN and from consultations with the Commission could lead to adverse outcomes for business. The CMA was influential (along with the German authority), for instance, in leading the European Commission to shelve, at least for the time being, its proposal to expand the EUMR mandatory notification regime to include minority investments in which the acquirer does not enjoy veto rights conferring “joint control.” The Commission currently lacks power to review such transactions but, although the CMA has a power to review transactions where a company acquires “material influence”—a lower threshold than control—this has rarely been used. This lower control threshold has been effective on occasion—for example, it allowed the CMA to intervene to block Ryanair’s minority stake in its rival Aer Lingus, which ultimately led to the acquisition of Aer Lingus by British Airways’ parent company, IAG. The Commission proposed to broaden its jurisdiction to cover certain non-controlling minority shareholdings, but with a mandatory notification regime instead of the United Kingdom’s voluntary one. The CMA argued that the burden on business of having to notify acquisitions of minority shareholdings on a mandatory basis was disproportionate and highlighted how seldom it had in fact used its powers to investigate cases involving levels of control below “joint control.”

In summary, Brexit may somewhat reduce the number of EU filings and thereby alleviate the burden on the Commission staff, but Brexit will likely lead to a significant increase in the number of UK notifications. This increase may strain the CMA’s resources, although as noted the CMA probably has flexibility to deal with a higher case load. The duplication of work and the risk of divergent timetables and (potentially) outcomes will impose significant additional costs on businesses and (in some cases) increase legal uncertainty for business.

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Mitigating the “Brexit Tax” in Merger Review

There are some concrete steps that could be taken to mitigate these negative consequences. Some of these steps are discussed below.

One key step that the Commission and the CMA can and, in our view, should take is to create an ad hoc framework for cooperation in merger cases. This framework should provide for close cooperation between the Commission and the CMA in cases notified to both jurisdictions, beginning well before the Commission’s existing procedures for consulting EU Member State authorities on proposed merger decisions. To reduce the duplication of effort for themselves and for businesses, for example, the Commission and the CMA could consult on the information to be included in a complete notification. The CMA could also agree that it would accept EU notifications (with some supplemental UK-specific information) for UK purposes. The Swiss competition authority already follows such an approach with respect to transactions that have also been filed in Brussels.

Similarly, the Commission and the CMA could cooperate in the collection of evidence with the approach governed through a formal cooperation agreement. For instance, they could prepare common questionnaires, cooperate in interviews with customers and competitors, and conduct site visits and state-of-play meetings jointly. The U.S. and Canadian authorities embrace such practices to facilitate their parallel merger reviews. Parties would be encouraged to grant waivers to allow the CMA and EU agencies to exchange evidence from their respective files to support collaborative approaches—much as currently occurs between the EU and U.S. agencies. In each of these cases, the parties’ rights of defense would need to be protected, but merging parties would benefit from close cooperation in many if not most cases.

In the relatively small percentage of cases raising substantive issues, cooperation may be more challenging, but may offer even greater potential for efficiencies. If the recipients of an EU statement of objections wished to exercise their right to an oral hearing, for example, the hearing could be coordinated with the CMA—or, perhaps more realistically, the CMA could consult closely with the Commission and adjust its review timelines to allow the EU and UK processes to move forward in parallel and align key decision points. As noted, the current UK process is 40 working days in Phase 1 in comparison to 25 working days in Brussels, which will mean the Commission may have had to conclude whether to open a Phase 2 investigation before the CMA has reached the same point. It would be in the interest of all parties if such decision making could be better coordinated—including synchronizing the end of pre-notification periods to allow formal review periods to be aligned (a concern which already exists with respect to the larger global transactions facing divergent merger review timelines between the United States, European Union, China, and elsewhere).

Where the parties wish or are required to submit remedies to obtain merger clearance, the Commission and the CMA could agree to accept remedy proposals in the same format, if and to the extent the issues are the same. The Commission and the CMA could also agree to cooperate in the market testing of proposed remedies. Similarly, in remedy implementation the Commission and the CMA could agree to accept the same forms and otherwise avoid duplication. For example, in many cases only one monitoring or divestiture trustee should be required for both the EU and UK processes.21

In many cases, we anticipate that it would make sense for the CMA to rely on the Commission’s existing precedents and procedures. A useful model might be the existing arrangements under

which the Canadian Competition Bureau sometimes relies on remedies negotiated by the U.S. agencies based on a side letter, without the need for a complete separate remedy process in Canada. The United Kingdom’s proposed “grandfathering” approach should be helpful in this respect.

Procedural cooperation and convergence between the United Kingdom and the European Union are clearly desirable post-Brexit, but it remains to be seen how far the CMA will be prepared to accept the Commission as the “lead authority” on European competition matters. The CMA may be less willing to allow another agency to take a leading role than the Swiss and Canadian authorities have been. If that turns out to be the case, a looser structure in which the Commission and the CMA could agree on a case-by-case basis which authority is best placed to take the leading role may be preferable—and it is to be hoped that this would not result in political stalemate, duplication, and an increased burden on the notifying parties. The level of cooperation in the transitional period as Brexit takes effect may be a useful indicator for the future: will the CMA allow the Commission to assert jurisdiction on deals notified just before Brexit takes effect? Will any transitional rules be agreed?

In summary, Brexit will likely lead to parallel EU and UK notifications in many transactions that meet the EUMR thresholds. The additional notification requirements may put a strain on the CMA’s resources and will very likely lead to increased costs and complexity for business. With creativity and good will, however, the Commission and the CMA could do much to mitigate these burdens. In many cases, the Commission and the CMA could potentially make significant improvements through bilateral agreements without the need for new legislation. Although the structure and contents of the broader Brexit negotiations are likely to be unclear for some time, we encourage the Commission and the CMA to consider potential steps and to set up working groups to discuss these initiatives in parallel with or potentially even before the commencement of the broader negotiations.

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