Brexit Competition Law Working Group Issues Paper
Response of Alistair Lindsay

Introduction

1. In this paper I supplement the Monckton Chambers response to the Issues Paper by providing my views on the implications of a hard Brexit for UK merger control. (The views expressed in this paper do not represent those of Monckton Chambers, my colleagues, my clients or any other clients of barristers practising from Monckton Chambers.)

The Short Term

2. Five points arise in the short term.

3. First, there is no strong case for wholesale amendments to the UK merger rules. With only relatively minor amendments, they are capable of operating as a free-standing autonomous system and Parliament will presumably, and quite reasonably, choose to commit its resources to other topics.

4. Secondly, there is a strong and obvious case for the UK and the EU cooperating closely on merger cases post-Brexit, but it is not evident to me that this issue needs to be addressed as part of any headline "deal" between the UK and the EU, since the UK cooperates effectively with other non-EU antitrust authorities and the EU commonly cooperates with other antitrust authorities at present on the basis of lower key arrangements. I would, though, expect the "headline" deal to include transitional arrangements about ongoing and pending cases, per Issues Paper para. 2.5.4.

5. Thirdly, the CMA will face an increased volume of merger cases. As to Issues Paper, para. 2.5.1, ideally, the government would make available more resources to the CMA, but if we end up with a hard Brexit, there may simply not be enough money available. If the CMA is underfunded, it has some tools it can use to manage its mergers case load.

(a) It has in recent history chosen to be much more selective about the cases it calls in: it could move further in this direction by being yet more discriminating (and by being even more open to guiding potential notifying parties away from notification).

(b) The CMA does not necessarily need to conduct its investigations (or all of them) with the intensity it does, or write up its analysis in the detail it does (Peter Freeman launched a campaign for more concise phase 2 decisions, which enjoyed initial success, but seems now to have been forgotten).

(c) When the CMA considers cases which are also reviewed by the EU Commission and where the UK issues are not materially different from those raised in EU Member States, there may be scope for the CMA to clear the case on the basis of undertakings in lieu in phase 1 on the basis of UK versions of the remedies agreed by the EU Commission in phase 1 or 2. Conceivably, in this type of case, the CMA could focus its analysis and therefore its resources 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 EU Commission's market analysis or the remedies package.

(d) There is potential for the CMA to expand the scope of the *de minimis* exception (although this ability is not boundless as it is constrained by the legislation).

6. Fourthly, the CMA's case mix will change. At present, it rarely considers "large" mergers (BT / EE being a notable, recent exception): almost all of its cases are medium and small sized deals. As a leading authority in considering this type of transaction, the CMA has been willing to prohibit transactions that other authorities have cleared even when the issues as they affect the UK are not materially different, for example in Akzo Nobel / Metlac and Eurotunnel / SeaFrance. It will be much more controversial if the CMA were to diverge materially from the EU Commission in considering mergers falling within EU and UK jurisdiction, absent any material difference in the issues raised in the UK. In this type of case, I would expect that the CMA would in practice allow the EU Commission to act as the lead authority and largely – albeit not necessarily invariably – follow suit, cf. Issues Paper, para. 2.5.3.

7. In my view, this is not inconsistent with the assertion of UK sovereignty implicit in the Brexit vote: the UK will be asserting sovereignty by itself reviewing the UK aspects of cases such as Hutchison 3G / Telefonica UK (Three / O2), which raise UK-specific issues. The fact that the UK will have greater power to block international deals does not mean it is appropriate or responsible for the CMA to use those powers to block deals which numerous other sovereign states (acting along or through a pooled jurisdiction) have chosen to approve, where the issues raised in the UK are no different from those raised elsewhere. If every one of the 100+ merger authorities globally decided it would take a wholly separate and independent line on each and every merger that came before it, international deals would be nigh on impossible.

8. Fifthly, I am not particularly concerned about the different timetables applicable to UK and EU merger control in the short term, cf. Issues Paper, paras 2.5.2 and 3.4.

   (a) If both processes "go the distance" then, for the reasons given in para. 6 above, it seems to me better if the EU goes first, so that the UK can (usually) follow suit when the issues faced by the two authorities are comparable.

   (b) There is nothing unusual about different merger authorities following different timetables. The parties and the authorities have an incentive to manage those timetables intelligently. So, for example, parties will commonly file in the US early on in the expectation that the analysis by the US agencies will influence other authorities. As noted in para. 5(c) above, it is perfectly possible that parties will delay filing in the UK in the hope that they will be able to establish that remedies that have been accepted by the EU Commission (following cooperation with the CMA) are sufficiently clear cut to avoid a phase 2 reference when replicated for the UK.

The Longer Term

9. In the longer term, once the post-Brexit world has bedded down, there may well be a case for reform of UK merger control in one or more of three respects.

10. First, the "share of supply" test can be justified in a world where the CMA's case load comprises predominantly small and medium sized deals. It looks more anomalous when the CMA's status changes and it finds itself reviewing more global deals. The case for a clearer, less discretionary set of jurisdictional thresholds is stronger in that situation.

11. Secondly, for the same reasons, the case for timetables that are more similar to international comparators (i.e. other individual countries) will be strengthened by the change in the CMA's status (notwithstanding the points made above that divergent timetables can and do exist in global merger control). A more compressed phase 2 timetable may also spell the end of the panel system.

12. Thirdly, if the resourcing issue is pressing, Parliament could legislate to raise the jurisdictional thresholds and/or to give the CMA more flexibility to accept remedies in phase 1 (the EU Commission, for example, is strikingly more flexible in accepting remedies at this stage).

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