BREXIT COMPETITION LAW WORKING GROUP: SECOND ROUNDTABLE

5 DECEMBER 2016
THE BRITISH ACADEMY, LONDON

The second Roundtable of the BCLWG was held on 5 December 2016 and focused on the merger issues relating to Brexit. The discussion was divided into four sessions, namely:

1. Transitional issues;
2. Longer-term procedural issues;
3. Merger policy; and
4. The UK's place in the competition world.

TRANSITIONAL ISSUES

The consensus was that transitional arrangements would be needed for mergers following Brexit to address the loss of the "one stop shop" and, importantly, for designing remedies.

Issues are likely to arise in two merger situations: (i) where a merger has already been formally notified to the European Commission pre-Brexit and the review is ongoing at the point of exit; and (ii) where formal notification stage has not been reached but the parties have already been engaging with the Commission. In addition, for those mergers that are reviewed by the Commission pre-Brexit (and, to whatever degree is appropriate, post-Brexit), there will be issues of rights of appeal and the enforcement of remedies.

Specific issues that would need to be considered in relation to the above include:

- **The appropriate cut-off point for the CMA to take jurisdiction rather than the Commission**: options noted include (i) the time at which an SPA is signed and (ii) the time at which a case team is allocated. The consensus appeared to be that the latter would be most appropriate.

- **Referrals**: In any event, whatever cut-off point is agreed between HMG and the Commission, it was generally agreed that there would need to be an equivalent to articles 4,9, and 22 of the EUMR to allow for referrals to be made to or from the CMA in appropriate cases.

- **Rights of defence**: For those mergers that are under review by the Commission and/or under appeal to the European courts, companies involved should have the same rights of defence post-Brexit as they do now. This should include the ability to choose to be advised and represented by UK lawyers; it was noted that this would require HMG/EU to agree that UK-qualified lawyers would continue to have rights of audience before the EU courts in relation to proceedings already in train. Consistent with this, legal privilege should continue to apply to documents that would have been privileged pre-Brexit.

- **Procedural cooperation**: the EC and the CMA will need to enter into an agreement to allow for co-operation. Whether this will require a separate MOU on mergers or be part of a broader agreement will depend on the approach taken to transitional issues more generally. Regardless of form, however, the consensus was that these issues will need to be addressed in order to provide certainty for business and to avoid gaps in the merger regime.

LONGER-TERM PROCEDURAL ISSUES

As regards longer-term procedural issues, the key effect of Brexit for mergers will be the end of the "one-stop-shop". This will have an impact on both companies and the CMA. As regards the former it was generally recognised that this would represent an increase in regulatory cost but one that is an inevitable consequence of Brexit – the CMA would have to assess cases that fall within its jurisdiction whether or not they were reviewed by the EC (as the EC would no longer take into account the impact on the UK in its analysis). Some of the increase in cost could be reduced by changes to CMA practice (see below).

As regards the impact on the CMA, it was noted that up to 50 additional merger cases could fall within its jurisdiction annually. Furthermore, a number of these cases would likely be large and complex. As a result, the CMA would face potentially a very significant resourcing challenge following the end of the "one-stop-shop". The consensus was that this could not be addressed exclusively through CMA action and would require additional funding as regarding the source of funding it was noted that extra monies could be generated through significant (but proportionate) filing fees for very large mergers - it was noted in this regard that many agencies worldwide fund their merger regimes through their filing fees.

In the absence of full funding, participants identified a number of steps that the CMA could take (some of which would also reduce the increase in regulatory cost for businesses noted above):

- First, the notification thresholds could be increased in order to reduce the number of smaller mergers that are notifiable to the CMA. Similarly, the CMA

could take a prioritisation decision that it will investigate fewer smaller or simple mergers.

- Second, the *de minimis* exception could be revised. At present, only mergers taking place in markets worth less than £3 million are safely within the exception. One possibility would be to increase this to between £3 million and £10 million. The consideration of *de minimis* could also be brought forward to an earlier stage in the process.

- Third, the review process could be changed for simpler cases. Suggestions made included:

    - changing the "duty to refer" to refer to a "discretion"

    - reducing the time available at Phase I and Phase II (including placing limits on pre-notification discussions)

    - revisiting the powers/duties of the Panel at Phase 2 so that they focus solely on remedies or on issues that remain in dispute at the end of Phase 1

- Fourth, the CMA could look at its internal resourcing, reallocating staff from other areas (such as market investigations or antitrust) to merger cases.

It was generally noted that whilst these steps could be taken, the first two would likely result in a loss of consumer welfare and, over the long term and in aggregate, would reduce competitive pressures in the economy. There was also little support for option 4. However, one participant noted that staffing on cases at the CMA is high compared to the EC. A reduction in staff per case would free up resources to take on more cases.

There was a strong consensus that the CMA should retain responsibility for merger enforcement in all sectors of the economy irrespective of the resource challenges it might face; there was no support for the notion that the regulators should take over cases in their sectors. In particular, a number of participants expressed strong a concern that sectoral regulators, if given control over mergers, could seek to bring non-competition policy goals into play to the detriment of business certainty and consumer welfare (see discussion on merger policy below).

The second major theme of this section of the meeting centred on the procedural issues that would arise post-Brexit for complex cases that were being reviewed in parallel by the CMA and the Commission. The following points were discussed:

- Whether the CMA's timetables for review ought to align more closely with the Commission's timetable. There was general agreement that this would be helpful for business. However, it was noted that alignment of the formal timetables alone would not likely achieve very much, given the very prominent role played by pre-notification contacts in both the Commission's and the CMA's processes.

- Whether the CMA ought to consider closing an investigation if it appears that a parallel review by the Commission would result in an effective remedy. It was noted that, while this may be desirable in many cases, whether it is achievable will depend on how the parties interact with the regulators during the process.

MERGER[1] POLICY

The discussion in this session considered the issue of whether, post-Brexit, public interest ("PI") or other criteria should be introduced into the merger regime, such that the assessment of a merger would no longer be purely on competition grounds.

There was a very clear consensus that it would be best not to introduce more non-competition grounds into merger review for three main reasons. First, to the extent that the policy aim would be to tackle issues such as unemployment or industrial concerns, it would be inefficient and costly to try to address these indirectly through merger policy. Second, such a move would effectively "undo" the progress made over the last two decades in terms of legal predictability for business and ensuring that the economy is competitive. In particular, different industrial PI aims would result in sectors being scrutinised differently, distorting competitive outcomes. Finally, the broader political situation should not be ignored. For example, if public interest criteria were to become part of the merger control regime, this could bring Scottish devolution issues into play.

The meeting then discussed the least bad ways for PI to be reintroduced into merger control should HMG wish to proceed on this basis. The following points were made:

- A preliminary question is whether HMG should limit itself to creating special rules for mergers in pre-defined strategic sectors (e.g., to prevent foreign takeovers) or whether it should change the law to permit broader industrial policy aims to be taken into account in any deal (e.g., effects on employment). The strong consensus was that the former would be preferable. It was noted that guidance for designing such a system could be derived from existing legal instruments (e.g., the sections dealing with foreign takeovers of national assets under the EU's Third Energy Package). Such an approach would also limit the potential negative impact on competition and legal certainty.

- As regards the latter option, participants discussed whether rules could be drafted to mitigate concerns relating to the potential distortion of competitive outcomes if merger review in different sectors took into account different industrial policy aims. The consensus was that this would be very difficult to achieve in practice.

- As regards who is best placed to assess PI, the general view was that the CMA should do this if the only issue to consider was whether a takeover/deal should not take place in identified strategic sectors. This would secure a degree of independence from purely political concerns and would provide transparency whilst delivering on HMG's objectives. It was noted that would be possible to draft a PI condition that could be invoked so as to allow the CMA to prohibit mergers running counter to the stated public interests, but would not allow an otherwise anti-competitive merger to be approved purely on public interest grounds. Recommending such an approach would need to be accompanied by reasoned arguments regarding the harm that would be caused if public interest

[1] While the discussion during this session focused on mergers, many of the points made apply also to the market investigation regime.

criteria were allowed to permit otherwise anti-competitive mergers to take place.

- There were mixed views on whether Ministers or the CMA should decide, if HMG were minded to adopt a more general PI test. There was a general consensus that addressing non-competition aims in a merger review would be very difficult and, for the reasons set out above, unsatisfactory. Nonetheless, if a general PI test were to be adopted, some participants took the view that, in the interest of transparency and objectivity, the CMA Panel should be responsible for its application, while others considered that such a test would be, by its nature, political and should therefore be applied by ministers.

THE UK'S PLACE IN THE COMPETITION WORLD

This session focused on whether the CMA should continue to allocate resources to international intellectual leadership and in particular the issue of the future relationship between the CMA and other merger authorities.

It was noted that despite some areas of weakness, the CMA is currently regarded as an outstanding authority. This was based on high quality policy work by CMA staff; the independence of the organisation from political control; a clear focus on making markets work well for consumer; and supervision by an expert appeal body. As a result, the CMA (and its predecessors) has been a major player in internal and European fora for almost 2 decades. These have delivered clear benefits to the UK, in particular for those business that export, by keeping overseas markets more open than they might otherwise have been.

However, Brexit will result in the loss of direct influence on EU policy and enforcement. The UK was a strong proponent of the single market, of liberalisation and of the move towards a more economic approach to merger reviews. There is a risk that, post-Brexit, without the UK's influence, the EU will move back towards a more formalistic approach.

Given this risk, participants saw merit in the CMA continuing to engage as closely as possible with the EU. One idea floated was that HMG should consider seeking some form of involvement for the CMA in the ECN – this could range from associate membership with some rights and obligations to participation in the capacity of observer.

As regards the practicalities of international merger control Brexit raises a number of issues:

- First, it may be inevitable that the outcome of the review for some deals will differ as between the UK and the EU. This would be a natural consequence of the assessment of deals involving different geographic markets. It may also arise because, as a practical consequence of dealing with one geographic market rather than multiple markets, the UK has a greater ability to carry out an in-depth analysis than the Commission.

- Second, where markets are wider than national, remedy design becomes critical. The parties will press for global or at least Europe-wide remedies, and will want the authorities (CMA, Commission, DOJ etc.) to work together in this respect. It was noted in this regard that in some cases remedies adopted by the EC could offer adequate protection to UK consumers. In such cases the CMA and the EC could rely on comity (or an express agreement) to allow the latter to take the lead.