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Ronan Scanlan
ronan.scanlan@matheson.com
Senior Associate, Matheson, Dublin

INSTITUT de droit de la concurrence

Ronan Scanlan*
ronan.scanlan@matheson.com
Senior Associate, Matheson, Dublin

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ABSTRACT

The United Kingdom (UK) is expected to leave the European Union (EU) in the near future. When it does so, mergers affecting both the EU and the UK will lose the benefit of the "one stop shop" under the EU Merger Regulation (EUMR) and the European Commission (the Commission) will have no right or duty to take account of the impact on the UK of mergers it reviews under the EUMR. Instead, the UK's Competition and Markets Authority (CMA) must decide whether and how to deal with those mergers where they also qualify for investigation in the UK. This article seeks to frame the challenge facing the CMA and proposes steps to ensure that its review of these new mergers remains efficient and effective.

Le Royaume Uni devrait quitter l'Union européenne sous peu. Quand ce sera le cas, des concentrations touchant aussi bien l'UE que le Royaume Uni perdront les bienfaits du "guichet unique" sous le règlement 139/2004 relatif au contrôle des concentrations et la Commission européenne n'aura ni le droit ni le devoir de prendre en compte l'impact sur le Royaume Uni de concentrations qu'elle examinera dans le contexte du règlement concentrations. En revanche, la CMA, l'autorité de la concurrence et des marchés britannique, doit décider si et comment gérer les opérations de concentrations qui justifient également un examen également au Royaume Uni. Cet article vise à identifier le défi qui attend la CMA et propose des étapes pour garantir un examen efficace de ces nouvelles opérations de concentrations.

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I. Defining the problem

1. Which mergers raise the issue?

1. Over the last two decades, the Commission has reviewed thousands of concentrations under the EU Merger Regulation (EUMR),[1] reducing both the cost to EU Member States and merging parties of multiple investigations and the attendant risks of divergent outcomes.[2] Once the UK leaves the EUMR,[3] some mergers that would have been notifiable to the Commission may also be notifiable in the UK (either because the target's turnover exceeds £70 million in the UK, or because together the acquirer and target will account for a share of 25% or more in the supply of goods or services in the UK).[4] Mergers notifiable to both authorities are referred to in this paper as "UK/EUMR mergers."

2. Mergers that were previously notifiable to the Commission under the EUMR but which, post-Brexit, will only be notifiable to the UK, may increase the CMA's workload but will not involve parallel reviews. Conversely, UK/EUMR mergers that qualify for the UK's investigation but do not give rise to substantive concerns in the UK will not require a detailed review by the CMA.[5] Finally, UK/EUMR mergers that qualify for the UK's investigation and do give rise to concerns not only involve significant resourcing implications for the CMA but additionally raise serious procedural risks because of the nature of parallel reviews.

3. Therefore, the focus of this article is on the future review by the CMA of UK/EUMR mergers raising competition concerns in the UK.

1 Council Regulation 139/2004.

2 Since the implementation of Regulation 4064/89, the Commission has received over 6,000 notifications and between 500 and 1,000 of those may have qualified for investigation by the UK. *See* statistics available on the Commission's website at http://ec.europa.eu/competition/mergers/statistics.pdf. For a comprehensive introduction to merger control in the European Union, *see Bellamy and Child, European Community Law of Competition* (7th edition, Oxford University Press). For a discussion of the benefits of the current regime, *see* S. Mills, Brexit and merger control in the United Kingdom – some reflections from the enforcement perspective (ABA Spring Panel, May 2017). *See also* C. Mosso, EU Merger Control: The Big Picture (November 2014).

3 The British Prime Minister, Theresa May, has made it clear that the UK will cede from the jurisdiction of the European Court of Justice (ECJ) and the economic, legal and political framework of the EU and EEA. *See* The UK Government's negotiating objectives for exiting the EU: PM Speech, 17 January 2017 and The UK Government's position paper on Enforcement and dispute resolution, 23 August 2017.

4 Section 28 EA 2002 sets out the turnover test and section 23 EA 2002 sets out the share of supply test. *See further* section 4 of Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2). This is subject to review at present to introduce separate thresholds for mergers giving rise to potential national security considerations. *See further*: https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review.

5 UK/EUMR mergers can be dealt with by the CMA like any merger (either by self-assessment by the parties or engagement with the CMA's Mergers Intelligence function). *See further* para. 2 of Guidance on the CMA's mergers intelligence function (CMA56).

2. What are the challenges of parallel reviews?

4. Some commentators have argued against the need for cooperation between the UK and EU, suggesting that lower key or ad hoc arrangements would suffice.[6] However, effective joint enforcement requires active engagement and understanding between agencies and so,[7] whilst ad hoc arrangements may be acceptable when cooperation is only necessary on a very occasional basis, they are entirely unsatisfactory when required on a regular basis.

5. Absent clear protocols for cooperation, parallel reviews raise real risks for agencies and in the context of UK/EUMR mergers it is the UK that would likely bear the most risk. The UK must be realistic about the extent to which it can regulate in a manner inconsistent with the EU, the second-largest economy in the world.

6. Specifically, parallel reviews give rise to substantial procedural challenges, including difficulties in sharing information, misalignment in timing and divergence in substantive assessment and remedies.[8]

2.1 Sharing information

7. Sharing of information is of critical importance to effective cooperation. Outside the EUMR, the UK will no longer be entitled to obtain any information provided to the Commission by parties or other sources, or generated by the Commission (such as the Form CO, initial 6(1)(c) decision, statement of objections or draft or final commitments).[9]

8. The potential lack of information sharing may lead to significant duplication of effort by the authorities third parties and the parties themselves. Whilst the need to engage in separate evidence gathering for UK-specific issues may be unavoidable, duplicative evidence gathering, especially for mergers raising similar concerns in both jurisdictions, is clearly undesirable.[10]

9. Waivers from the parties, routinely used in other parallel reviews, cannot replicate the sharing of all relevant evidence and analysis through the ECN, since they cannot cover documents containing third party confidential information or analysis which incorporates such information (including sections of the Commission's decisions and SO). For UK/EUMR mergers, the starting point is therefore likely to be one of substantially less transparency for the CMA over the Commission's evidence gathering, analysis and decision-making.

2.2 Timing

10. The EU has an initial phase 1 period of 25 working days, whilst the CMA has an initial phase 1 period of 40 working days. Active alignment of these timetables could reduce the risk of delay or divergence. However, if parties to a UK/EUMR merger do not engage with both the CMA and the Commission at the same time, or if both agencies do not proactively stay in step with one another, this could lead to decisions on substance and remedies being taken at different times, resulting in substantial delays for parties.[11] Even where agencies are cooperating, it may be difficult (absent enhanced information sharing) for one to provide meaningful or informed comment on, for instance, a set of draft commitments, if it itself has not at that point carried out (or concluded) its own investigation.

11. In a UK/EUMR merger, the risk of misalignment in timing may affect the UK disproportionately given its voluntary regime and its smaller size relative to the EU, which together make it more likely that merging parties could prioritise engagement with the EU (and other authorities, such as the US DOJ or FTC) over the UK.

6 For example, *see* Brexit Competition Law Working Group Issues Paper: Response of Alistair Lindsay (2017).

7 Note by UNCTAD Secretariat, International cooperation in merger cases as a tool for effective enforcement of competition law, p. 6.

8 Other potential issues include (a) limitations caused by differences in legal frameworks in relation to criminal and civil enforcement, (b) institutional and investigatory impediments, (c) resource constraints and practical difficulties, (d) jurisdictional constraints, differences in legal standards and lack of trust and confidence in legal systems. For an excellent summary of the challenges of parallel reviews and the experience of major and minor jurisdictions in international cooperation, *see* p. 6 *et seq.*, Note by UNCTAD Secretariat on international cooperation in merger cases.

9 *See* Article 17 of the EUMR, which states that "*information acquired* (…) *shall be used only for the purposes of the relevant request, investigation or hearing* (…) *the Commission* (…) *shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy*." Whilst it is possible for the Commission to share redacted versions of its decisions, this will necessarily add delay to the process and may mean that important third party information is not available to the CMA. *See also* Article 19 of the EUMR.

10 From the EU's perspective, it may be difficult, absent any mutual arrangements with the UK, to compel companies based in the UK to provide information it deems necessary to assist it with its merger review. Specifically, the penalty provisions in Article 12 of the EUMR may be limited in enforceability to undertakings located within the EEA.

11 For example, the *Glencore/Xstrata* deal required notification in Australia, China, the EU, South Africa and the US. Whilst clearances in Australia, the EU and the US were obtained by August 2012, China did not provide its consent until April 2013, 10 months later. *See* J. Tivey and R. Campbell, Glencore's Long March to Take Over Xstrata (2013).

2.3 Divergence in assessment

12. From a legal standpoint, the CMA and the Commission are largely aligned as regards the substantive test. Both apply economics-based and analytical approaches, which reduces the likelihood of conflict.[12] However, it is quite plausible that the CMA may identify, with regard to a UK/EUMR merger, a UK-specific concern which the EU does not identify.

13. By reference to recent CMA investigations involving parallel reviews in the financial year 2016–2017, the CMA investigated three mergers at phase 2 that involved one or more EU-based or global businesses (*ICE/Trayport*, *Diebold/Wincor* and *VTech/LeapFrog*). While *VTech/Leapfrog* was cleared unconditionally by the CMA, *ICE/Trayport* was prohibited by the CMA, requiring divestiture of the entire target business.[13] Further, *Diebold/Wincor* was cleared with commitments to protect competition in the UK, notwithstanding that it had been cleared unconditionally in Germany and other jurisdictions.[14] Similarly, in *Tullett/ICAP*,[15] the CMA accepted commitments at phase 1 notwithstanding that the transaction had been cleared in multiple other jurisdictions, including Germany.

14. These cases demonstrate that there may be elements of the UK's markets, as compared to those in continental Europe, which make it more likely for competition concerns to arise (for example, because as an island nation, cross-border constraints are less likely to be present). As such, for some UK/EUMR mergers, it is perfectly plausible that the CMA may identify competition concerns where the Commission may not.

2.4 Divergence in remedies

15. As regards remedies, again, the approach of the CMA and the Commission is increasingly aligned, including, for example, with regard to the use of fix-it-first and upfront buyer remedies (although these themselves give rise to additional concerns from a parallel review perspective that warrant even closer cooperation at early investigation stages).[16]

16. However, whilst remedies agreed between the parties and the Commission for mergers which are genuinely EEA-wide (or global) may address UK concerns, there is a significant risk that they will not (given the potential for UK-specific concerns to arise). The CMA must therefore either effectively influence the Commission's thinking to ensure that remedies reflect UK economic conditions, or be able to undertake its own investigation and remedies process in a manner which is consistent with extraterritoriality and jurisdictional issues.

17. Conflict may arise where the authorities commence their investigations at different times and/or because of the very different procedures that the CMA and Commission follow. For example, the CMA has a "one-shot" approach to remedies at phase 1 and, if the parties do not voluntarily offer UILs, the CMA must launch an in-depth phase 2 investigation.[17] Conversely, if the parties to a merger pursue phase 1 remedies with the CMA, whilst proceeding to an SO with the Commission, this could push the UK process ahead of the Commission process. Once the CMA launches a phase 2 investigation, it must appoint an independent panel of members, which can limit its ability to act cooperatively with another agency.[18]

18. By way of example, in *Teva/Actavis*, the Commission accepted commitments to address competition concerns in two national markets: Ireland and the UK.[19] Post-Brexit, had it been a UK/EUMR merger, the Commission would only have addressed the Irish competition concerns. In the event, the parties were able to sell a "divestment business" that covered both Ireland and the UK. However, if misalignment in terms of timing had occurred, the CMA (and the parties) could have faced difficulties in designing their divestment package.

19. Even where legal mechanisms exist to enable cooperation between two jurisdictions, this does not always make it possible to avoid conflicting views or to reach commonly accepted solutions. For example, in *General Electric/Honeywell*, reviewed by the EU and US in parallel,[20] notwithstanding established cooperation arrangements between the EU and US, the US DOJ approved the merger and the Commission subsequently (and controversially)[21] blocked it.[22] Other examples include *Boeing/McDonnell Douglas* (cleared by the US

12 *See further* Merger Assessment Guidelines (OFT1254/CC2), September 2010, adopted by the CMA. For a comparison of the different substantive assessments, *see* OECD Roundtables, Substantive Criteria Used for the Assessment of Mergers, 17 January 2005, and Standard for Merger Review, 10 May 2010. *See also* BCLWG Issues Paper, para. 7.3.

13 In October 2016, following an in-depth phase 2 investigation, the CMA found that ICE could use its ownership of Trayport's platform to reduce competition between itself and its rivals. This case was "called in" by the MIC.

14 The merger had received final competition clearance in Germany and completed prior to conclusion of the CMA's phase 1 investigation. The CMA imposed an Order requiring the companies to remain separate. The CMA subsequently permitted some degree of integration to take place but required detailed ring-fencing arrangements to be put in place so that the UK retail businesses could continue to compete.

15 ME/6579/15: Anticipated acquisition by Tullett Prebon plc of ICAP plc's voice and hybrid broking and information businesses: Decision on acceptance of undertakings in lieu of reference (2016).

16 *See*, for example, D. Long, C. Wylie and D. Weaver, Rising tide of "Fix-it-first" and "Up-front Buyer" remedies in EU and UK merger Cases, *Competition Policy International* (October 2016).

17 *See* section 8 of CMA2.

18 *See* chapter 9 of Report on the anticipated acquisition by BT Group plc of EE Limited, January 2016. Specifically, the need for the CMA to identify "the most likely counterfactual" as compared to the Commission's "first past the post" approach will always raise challenges for parallel review.

19 *See* Press Release IP/16/727 (available at: http://europa.eu/rapid/press-release_IP-16-727_en.htm).

20 Case COMP/M.2220 *General Electric/Honeywell*. *See further* Multijurisdictional mergers: Facilitating substantive convergence and minimizing conflict (DOJ article).

21 Specifically, many accused the Commission of bureaucratic capture in seeking to protect national champions rather than consumers. *See*, for example, J. Grant and D. Neven, The attempted merger between General Electric and Honeywell: A case study of transatlantic conflict, *Journal of Competition Law and Economics*, Vol. 1, Issue 3, 2005, pp. 595–633.

22 For the position of the US DOJ, *see* GE-Honeywell: The U.S. Decision, Antitrust Law Section, State Bar of Georgia, November 29, 2001.

but the Commission required commitments)[23] and *Ciba/Sandoz* (cleared by the Commission but the US required certain behavioural remedies).[24] Cooperation arrangements can, however, clearly work to limit divergence to genuine differences rather than those arising simply from poor timing.

3. A further complication: The UK's voluntary regime

20. These risks make it all the more vital that the UK, post-Brexit, adopts processes that do not place it at a disadvantage to the Commission. However, attempts to align the UK and EU processes by informal means are likely to be complicated by the fact that parties to a UK/EUMR merger would not be required to notify that transaction to the CMA prior to completion.[25] Although the CMA can theoretically initiate an investigation whilst a merger is anticipated, it does not usually "call in" a merger until after completion.[26] Parties are therefore incentivised to undertake an informed self-assessment (often with expert legal and sometimes economic advice) of the likelihood that the CMA will open an investigation and to proactively engage with the CMA in pre-notification discussions prior to completion where the risk of *ex post* investigation is adjudged to be substantial. Nonetheless, each year a proportion of parties to mergers raising potential competition concerns do not notify and are duly called in and investigated by the CMA.[27]

21. Post-Brexit, the introduction of a large number of UK/EUMR mergers requiring review by the CMA alongside the Commission has the potential to skew the incentive on parties to problematic mergers from proactively notifying the CMA. Instead parties could wait to contact the CMA until later in the Commission's process, potentially after the merger has been formally notified, cleared or commitments have been agreed or even decide not to notify the transaction to the CMA.

22. The "execution risk" for the CMA is markedly higher in parallel reviews as compared to mergers where it is the sole authority. Parties may judge it to be legally, procedurally and reputationally difficult for the CMA to seek to unwind a transaction that has completed subject to remedies agreed by the Commission.[28] Two cases illustrate the point.

3.1 *Groupe Eurotunnel S.A./SeaFrance S.A.*

23. This case involved a review by the UK and French authorities of an acquisition by the channel tunnel operator of a major cross-channel ferry company, in financial difficulty. SeaFrance (a ferry operator) was in liquidation and, on 11 June 2012, the French Commercial Court (FCC), received bids for its assets from several companies and chose Eurotunnel as the buyer. Eurotunnel informed the French Competition Authority (FCA) of its intended acquisition of the SeaFrance assets and the FCA permitted Eurotunnel to complete the transaction (before merger clearance had been given). The Office of Fair Trading (OFT) (the predecessor body to the CMA) opened an investigation into the proposed acquisition of SeaFrance on 22 June 2012. However, ten days later, whilst the UK and French merger reviews were still underway, Eurotunnel completed its acquisition. The OFT subsequently found concerns regarding competition with regard to cross-Channel transport services and referred the acquisition to the Competition Commission (CC) (the other predecessor body to the CMA) for an in-depth investigation. In June 2013, following a phase 2 investigation, the CC prohibited Eurotunnel's acquisition of three SeaFrance vessels and ordered that it either cease its ferry service from Dover or divest the *MyFerryLink business*.[29] The CC was unable to require full divestiture because of the order of the FCC but instead ordered a partial prohibition.[30]

24. In other words, where the UK identified wider competition concerns than another NCA, it found itself at a serious disadvantage largely as a result of its voluntary regime and the lack of any formal cooperative mechanism for mutual notification in place with the French authority.

3.2 *GTCR/PR Newswire*

25. This more recent case involved a review by the UK and US authorities of a merger involving media monitoring companies active in the US and UK. GTCR LLC (GTCR) owned the largest media contact database provider in the United States and was acquiring the third-largest, PR Newswire business (PR Newswire).

23 Case No. IV/M.877 – *Boeing/McDonnell Douglas*.

24 Case No. IV/M.737 – *Ciba-Geigy/Sandoz*.

25 Section 24 of the EA 2002. *See further* para. 6.5 to 6.8 of Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2).

26 Once called in, the CMA opens an investigation into the merger, orders the parties to hold separate any further investigation and ultimately determines whether remedies, including the unwinding of integration which has already occurred, is necessary. Exceptionally, the CMA can impose a hold-separate order on anticipated mergers where it has concerns about pre-emptive action although, absent evidence of gun jumping (unlikely in cases being notified to the Commission), this is unlikely. *See further* Annex C.5 – Use of interim measures in anticipated mergers (CMA2) and Guidance on the CMA's mergers intelligence function (CMA54).

27 The CMA has dedicated mergers intelligence staff responsible for monitoring non-notified merger activity and liaising with other competition authorities. Just over 20% of all phase 1 investigations are initiated as a result of the CMA identifying mergers that may raise competition concerns, which have not been notified to it. In financial year 2015–2016, 14 merger investigations were initiated in this way, out of a total of 62. In financial year 2016–2017, 13 were initiated out of a total of 57. This represents approximately 22–23% of all phase 1 investigations in that period. *See further* https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2016-to-2017.

28 This is not without risk to the parties if the CMA did decide, notwithstanding remedial action undertaken by the Commission, to seek its own solution, although such a scenario is clearly undesirable for all concerned.

29 Groupe Eurotunnel S.A. and SeaFrance S.A. merger inquiry: A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A., UK Competition Commission (6 June 2013).

30 *See further* Jones Day, Antitrust Alert: UK and French Competition Authorities Issue Conflicting Decisions in Cross-Channel Ferry Merger (June 2013).

26. The DOJ identified horizontal concerns in the provision of media contact databases and had all but concluded its investigation when the CMA launched its phase 1 investigation on 31 May 2016.[31] Less than two weeks into that investigation, the DOJ announced, on 10 June 2016, a proposed settlement that would resolve the competitive harm alleged by the DOJ.[32] This agreement was conditional on acceptance by the CMA of the proposed undertakings.[33] However, the transaction completed on 16 June 2016, before the CMA had taken its phase 1 decision, which followed on 20 June 2016. On the same day, GTCR offered undertakings in lieu of reference to the CMA, which mirrored the proposed settlement with the DOJ and, on 21 June 2016, the CMA duly decided that there were reasonable grounds for believing that the undertakings offered by GTCR might be accepted in lieu of a reference to phase 2.

27. Whilst the outcome of this case reflected a degree of cooperation between the UK and US that gave the CMA confidence that the US remedies would address its concerns, it cannot be seen as a template for future UK and EU cooperation. For example, the duration of the CMA's phase 1 investigation of the case was 15 working days, which is well below the 40 working days it would usually take with a case that gives rise to competition concerns. It is therefore clear that normal procedure, including the sending of an Issues Letter and the holding of an Issues Meeting,[34] was waived. Whilst the CMA found the divestiture agreed by the US authorities to address its concerns, such a light-touch procedure, should it become commonplace post-Brexit, would need to ensure that due process and transparency were taken account of (including, where relevant, concerns raised in the CMA's consultation process on the proposed UILs).

II. The case for a special approach to EU mergers

28. As set out above, post-Brexit, the CMA faces both general issues arising from parallel reviews and specific issues arising from the CMA's voluntary regime with regard to the investigation of mergers also notifiable to Brussels.

29. In seeking to identify a comprehensive solution, this paper proposes:

– a tailored cooperation agreement to referee engagement between the CMA and Commission going forward;

– the introduction of mandatory notification of UK/EUMR mergers; and

– the use of existing case management powers to streamline the process.

1. Towards a new cooperation arrangement

30. Building on the discussion in the last section, any cooperation agreement between the CMA and Commission with regard to UK/EUMR mergers should seek to:[35]

– enable early discussion between both authorities in pre-notification to allow effective triage of cases by the CMA between those raising UK-specific concerns and those raising EEA-wide concerns (adopting the domestic procedures discussed in the next chapter);

– coordinate information gathering and enable information sharing to minimise duplication without the need for confidentiality waivers;[36]

– ensure alignment so far as possible in timing of key decision-making and adopt effective case management practices;

– anticipate and manage potential divergence in the substantive assessment and remedies that may differ between the UK and EU/EEA; and

– protect the CMA's ability to follow due process and enforce and implement remedies that may be required (including where these differ from those required by the Commission).

31. In this regard, it is instructive to look to the approach of the EU to one of its closest trading partners, Switzerland.[37] The parallels with the UK and Switzerland vis-à-vis the EU are quite apparent. For example, the Swiss Federal Department of Foreign Affairs recently found that "*Close relations with the EU and its member states are particularly important for Switzerland as a business location. In 2014, for example, Switzerland's volume of exports to the EU amounted to approximately CHF 14 billion, while the volume of imports from the EU totalled CHF 131 billion. About 55% of Swiss exports*

31 For a timeline of the case, *see* the CMA's case website.

32 Under the terms of the proposed settlement, GTCR would divest Agility to Innodata Inc., or to another buyer approved by the United States. *See* the US DOJ Press Release 16-675.

33 *See* para. 8 of the Notice of Consultation in *GTCR/PR Newswire*.

34 *See* para. 7.34 of Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2).

35 This builds on the work of the Brexit Competition Law Working Group (BCLWG) and specifically the paper Conclusions and Recommendations Paper, BCLWG (2017).

36 As advocated by Sir Peter Roth, Competition law and Brexit: the challenges ahead (2017).

37 Switzerland has observer status within the EEA and over 120 bilateral agreements with the EU. *See further*: EU Parliament: Fact Sheets on the European Union. The European Economic Area (EEA), Switzerland and the North (available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.5.3.html).

went to the EU, and 73% of Switzerland's imports came from the EU."[38] It is therefore reasonable to argue that the UK, as a much larger economy, should seek a similar arrangement with the EU post-Brexit, at a minimum.

32. The EU–Swiss cooperation agreement between the Commission and the Swiss Competition Authority, ComCo, came into force at the beginning of 2014.[39] It is a "second generation agreement" and so requires the Commission and ComCo to notify each other if either takes a decision to refer a case to phase 2, enables sharing of confidential information without a waiver,[40] and allows for the possibility of negative and positive comity.

33. These arrangements, which are unique for the EU, demonstrate, as Commissioner Vestager said "*that the EU and Switzerland are two very important economic partners, whose economies are deeply integrated. As a result, many anticompetitive practices have cross border effects on trade between the EU and Switzerland*."[41] Indeed, in terms of further qualifying context, it is relevant to note that, in 2016, a total of 22 notifications of company mergers were filed with ComCo.[42] In contrast, the CMA is likely to receive on average over 100 notifications per year post-Brexit.

1.1 Introducing some UK-specific features

34. The CMA should not simply adopt this agreement wholesale. There are several amendments which, based on practice elsewhere, would be of great benefit to the UK regime and go some way to addressing the risks to the CMA of UK/EUMR mergers identified in the preceding chapters.

1.1.1 Mutual notification

35. The EU/Swiss Merger Control Agreement requires mutual notification by each party with regard to concentrations either at the point the Commission takes an Article 6(1)(c) decision or at the point where ComCo takes a decision to initiate a phase 2 investigation.[43] This is much later than under the current ECN regime, whereby Article 19(1) of the EUMR requires the Commission to transmit a copy of the Form CO within 3 working days of the notification to all Member States via the ECN.[44]

36. To ensure that the CMA and the Commission are aligned so far as possible with regard to the timing of their respective investigations, the UK should seek to argue for much earlier notification.[45] For example, any agreement could stipulate that each authority should contact the other no later than 10 working days after initial contact from the parties about an anticipated UK/EUMR merger. This would be in addition to legal obligations on the parties themselves to provide certain information and documentation (including the Form CO) to the CMA for UK/EUMR mergers.

37. Mutual notification in pre-notification could enable the CMA and Commission to hold an early case management meeting to discuss whether the merger gave rise to distinct UK issues (which would warrant a separate UK investigation in parallel with the Commission)[46] or genuine EEA-wide issues (that warranted a single Commission investigation, with or without some UK input).

1.1.2 Ongoing case management and cooperation

38. In addition to the provisions of the EU/Swiss Merger Control Agreement, the EU–US Best Practices on Cooperation in Merger Cases[47] sets out useful and detailed provisions with regard to how and when case teams should contact one another and also the role of parties in facilitating alignment in timing and the sharing of key information. This form of detailed case management is essential for effective dual-running of cases.[48]

39. For example, in *General Electric/Alstom* the US DOJ did not share the Commission's main concern related to the supply of 50 Hz heavy-duty gas turbines (as the US is a 60 Hz market where Alstom was essentially not present) but both authorities identified common concerns regarding the servicing of GE's mature gas turbines for 50 Hz and 60 Hz (where a subsidiary of Alstom was one of very few capable independent service providers). Despite the different points of focus in the two agencies' assessments, the Commission noted that close cooperation on the design of the remedies led to satisfactory and mutually supportive remedy solutions for both agencies concerned, notwithstanding that they were not identical.[49]

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38 *See* Switzerland and the European Union, Swiss Federal Department of Foreign Affairs (2016, available at: https://www.eda.admin.ch/dam/eda/en/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_en.pdf).

39 Signed in May 2013 and came into force on 1 December 2014. *See* Commission Press Release IP/14/2245 (28 November 2014, available at http://europa.eu/rapid/press-release_IP-14-2245_en.htm).

40 It is relevant to note that, notwithstanding the presumption of information sharing, the Swiss Competition Act was amended to require that merging parties will be informed about and have the right to comment on the ComCo's decision to share the parties' information with a foreign competition authority. *See* response to question 31, at: https://gettingthedealthrough.com/area/20/jurisdiction/29/merger-control-2017-switzerland/ (accessed 22 September 2017).

41 Ibid.

42 A long-term comparison shows an average of around 30 notifications of mergers a year. *See*: Global Legal Insights, Switzerland: 2017 at: https://www.globallegalinsights.com/practice-areas/merger-control/global-legal-insights---merger-control-6th-ed./switzerland.

43 Article 3(3) of the EU/Swiss Merger Control Agreement.

44 Article 19(2) requires the Commission to carry out the procedures set out in the EUMR in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. It was, for example, via this route that the UK CMA was able to make submissions with regard to *H3G/Telefonica O2*, attend the oral hearing, submit questions and ultimately seek to influence the outcome of that investigation.

45 *See* para. 7.14 of BCLWG, Conclusions and recommendations (September 2017).

46 The logic of Article 9 may be useful by analogy to the detail of these guidelines.

47 *See* further Best practices on cooperation in merger investigations, US–EU Merger Working Group (2011, available at: http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf).

48 Ibid.

49 Ibid., footnote 85.

40. Any cooperation arrangement between the EU and UK should seek to adopt a similar written protocol setting out how and when the case teams will contact one another.

1.1.3 Information sharing

41. The EU/Swiss Merger Control Agreement requires the parties to file the Form CO and supply the names of the European Commission case handlers to ComCo.[50] A similar arrangement with the UK would be desirable. The CMA should also seek to establish arrangements for attendance at the Oral Hearing and other key meetings, in a manner akin to the Administrative Arrangement on Attendance, which is in place between the US and EU and supplements the 1991 EU/US Cooperation Agreement.[51] This would ensure that the CMA's access to the Commission mirrored as far as possible the existing arrangements under the EUMR.

42. Further, in keeping with the EUMR, the CMA should seek to attend the Advisory Committee, where it could make its views known with regard to whether or not proposed commitments would adequately address any UK-specific concerns.[52] In return the CMA can offer to minimise the disruption that would result from undertaking an entirely separate review of the transaction.

1.1.4 Negative and positive comity

43. The EU/Swiss Merger Control Agreement provides for two types of comity:

– First, it provides for negative comity, which requires each agency, when taking important decisions during the lifetime of an investigation that may impact the other agency, to use its "best endeavours" to notify the other agency of significant developments, allow for comments and take account of those comments, while fully respecting the independence of each agency to make its own decision.[53]

– Second, and of most interest, it provides for positive comity, which encourages either agency to consider requesting that the other agency initiate or expand enforcement activities to cover conduct affecting the first agency's jurisdiction, where the other agency may be better placed to take such action.[54]

44. Positive comity provisions are not frequently used since companies generally prefer to address directly the competition authority they consider to be best suited to deal with the situation.[55] Indeed, merger control is expressly excluded from the 1998 EU–US Positive Comity Agreement.[56]

45. However, in the context of UK/EUMR mergers, it could:

– preserve some of the synergies associated with the one-stop-shop, by providing a single point of contact for the parties and third parties with regard to information gathering and analysis, notwithstanding that the CMA would need to independently ensure that it took decisions in a manner consistent with the Enterprise Act 2002; and

– enable the EU to take account of the potential impact of a UK/EUMR merger on the UK in the context of coordinating a single remedies package to address concerns across multiple EU Member States, and the UK. This could be attractive to the CMA and Commission, given the existing closeness of their relationship and their familiarity of joint working.

2. Mandatory notification of UK/EUMR mergers

46. Post-Brexit, given its substantially increased workload, the CMA may struggle to identify and monitor UK/EUMR mergers or determine, from publicly available information and absent the ECN, which qualify for EUMR jurisdiction. Moreover, even if it is aware of these mergers, parties may choose not to notify the CMA prior to completion. In that scenario, short of launching a pre-emptive investigation while the merger remains anticipated, which would be a significant departure from the CMA's usual practice,[57] the CMA would simply have to "sit on its hands" until completion had occurred. This would inevitably lead to a misalignment in the timing between the UK and Commission processes. It also gives rise to real risks that remedies processes underway or completed by the time it concludes its own investigation make it difficult, if not impossible, to extract remedies appropriate for UK-specific concerns. *Eurotunnel*/*Sea France* and *GTCR*/*PR Newswire* serve as a warning of the risks of non-notified UK/EUMR mergers raising UK competition concerns.

50 *See* the ComCo Guidance on information requirements.

51 *See* further, http://ec.europa.eu/competition/international/bilateral/usa.html.

52 Article 19(3) of the EUMR provides for the establishment of the Advisory Committee, consisting of representatives of Member States to be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 of the EUMR.

53 Article 5(1) of the EU/Switzerland Merger Control Agreement.

54 Article 6(1) of the EU/Switzerland Merger Control Agreement.

55 *See*, A. Svetlicinii, Cooperation Between Merger Control Authorities of the E.U. and the U.S.: A Viable Solution for Transatlantic Mergers?, European University Institute, *U. C. Davis Bus. L. J.* 4 (2006).

56 Ibid.

57 It is unclear how the CMA could take decisions to launch formal investigations of anticipated cases because of parallel review concerns in a consistent manner without seriously undermining the existing voluntary regime.

47. Given the risks of misalignment and the difficulty, if not impossibility, of extracting remedies appropriate for UK-specific concerns after the Commission's investigation has concluded, one solution is to avoid this scenario arising by requiring the mandatory provision by the relevant parties of information relating to any UK/EUMR mergers to the CMA.[58]

48. This could take the form of an initial short submission including details of key elements of the transaction, activities of the parties in the EU and UK (including relevant turnover and estimated shares of supply) and contact details for the Commission case team. This would need to be submitted no more than five or ten working days after the draft CO is submitted to the Commission. This would then enable the CMA to consider whether the merger raised UK-specific competition concerns, in which case it could then require the parties concerned to submit a full merger notice, or EEA-wide concerns, in which case it may open and suspend a formal investigation, pending further engagement with the Commission. In terms of amendment of the Enterprise Act 2002, mandatory notification could simply be required for mergers that meet the global financial thresholds under the EUMR and qualify for UK jurisdiction, since they will be relatively few in number.

49. From the UK perspective, this proposal is more evolution than revolution. In the last 12 months, the CMA has increasingly encouraged the use of "*briefing notes*" in marginal cases where parties to a prospective transaction have a signed agreement but do not intend to notify.[59] Here the CMA can either indicate to the parties that (a) it has "*no further questions at this stage*" which means that, absent new evidence coming to light (including from third parties) it is not minded to investigate the transaction or (b) it is minded to investigate, in which case have strong incentives to notify the transaction by way of a merger notice, either prior to or following completion. Internationally, mandatory notification for very large transactions alongside a voluntary regime operating at lower thresholds is not particularly unusual. For example, both Norway and Sweden operate a mandatory notification regime based on turnover but retain a residual ability to "call-in" smaller mergers that may give rise to competition concerns.[60] The US authorities also have discretion to review mergers below the HSR reporting thresholds.[61]

50. There is a strong case for reforming UK legislation to provide greater certainty for the CMA, the Commission and business more generally, at least with regard to UK/EUMR mergers.

3. Practical case management

51. Having established a mandatory notification regime for UK/EUMR mergers and at least a second-generation cooperation agreement with the EU, there are then a number of ways in which the CMA could seek to case-manage UK/EUMR mergers using its existing practice and procedure.

3.1 Case triage and pre-notification

52. For UK/EUMR mergers, the UK will need to seek an appropriate balance between maintaining flexibility and providing business with sufficient certainty as regards the level of its intended involvement. It will therefore need to decide how it intends to proceed relatively early on in pre-notification. For the purposes of this triage exercise, and drawing on some recent examples of EUMR mergers that would qualify as UK/EUMR mergers post-Brexit, there are essentially three categories of UK/EUMR merger:

– those that raise only UK issues and so warrant a standard CMA investigation;[62]

– those that may raise both UK-specific issues and EU-wide issues, and so may necessitate both UK involvement in the Commission's investigation, the engagement of positive comity and some UK-centric detailed investigation, e.g., *LSE/Deutsche Börse*[63]; and

– those that raise predominantly EU-wide issues (that necessitate some UK involvement in the Commission's processes but may not require positive comity or any detailed UK investigation, e.g., *Dow/DuPont*[64] and *Bayer/Monsanto*[65]).

58 The same logic could, of course, apply to mergers being notified to other jurisdictions, but this is beyond the scope of this paper.

59 *See*, for example, p. 227, *UK Merger Control*, 5th Edition, Jones Day, Global Legal Insights (2016, available at: http://www.jonesday.com/files/Publication/3788d441-5138-4428-892e-2225ac3a6ccf/Presentation/PublicationAttachment/b1752709-5a6c-4823-b2c2-2bd8431d322b/Merger%20Control.pdf).

60 *See* response to question 5, Norway Merger Control – Getting the Deal Through. *See also* response to question 5, Sweden Merger Control – Getting the Deal Through.

61 *See* response to question 24, US Merger Control – Getting the Deal Through. The US authorities have in fact challenged more than 30 transactions falling below the HSR thresholds since December 2008.

62 These may, for example, be subject to a short-form notification procedure in the EU if they do not give rise to significant shares of supply in any product markets. The Commission will therefore not undertake a detailed investigation. See, for example, Press Release 13/1214 (2013, available at: http://europa.eu/rapid/press-release_IP-13-1214_en.htm).

63 Case COMP/M.7995 *Deutsche Börse/London Stock Exchange Group*. This merger impacted multiple Member States Germany, Italy and the United Kingdom and the CMA cooperated closely with other NCAs, including the German Bundeskartellamt and Italian AGCM, to ensure the Commission took note of its concerns. It was prohibited by the Commission on 29 March 2017.

64 This was a proposed merger between US-based chemical companies Dow and DuPont, cleared unconditionally by the Commission. *See* Press Release IP/17/772 (2017, available at: http://europa.eu/rapid/ press-release_IP-17-772_en.htm).

65 Case COMP/M.8084 *Monsanto/Bayer*. This is a proposed merger between Bayer (a company headquartered in Germany) and Monsanto (a company headquartered in the US). It is being reviewed alongside the US, among other jurisdictions. *See* Press Release IP/17/2762 (2017, available at: http://europa.eu/rapid/press-release_IP-17-2762_en.htm).

53. Once the CMA has been made aware of a UK/EUMR merger (by the parties to that transaction or the Commission), the CMA's Mergers Intelligence Committee would be well placed to take an initial view as to how such a merger could be classified. This would then inform how pre-notification information gathering was undertaken.

54. For mergers giving rise to UK concerns, the CMA could begin pre-notification discussions with the parties as normal. For those raising EU-wide issues, the CMA case team could instead provide UK-specific questions to the Commission case team with a view to the parties preparing a Form CO which could form the basis of both the Commission's and the CMA's investigations.[66] For mergers raising EU-wide issues where there was no specific impact on the UK, contact in pre-notification could be limited to receiving drafts of the Form CO (or simply awaiting the final Form CO).[67] It may be in some cases appropriate at that stage for the CMA to indicate to the parties that no separate UK notification (or clearance) would be necessary.

3.2 Opening an investigation

55. Some may question whether it is necessary for the CMA to open an investigation (only to suspend it) in a scenario where the EU is taking account of the views of the CMA. However, in practical terms, by opening an investigation, the CMA would be reserving its ability to quickly proceed to phase 2 if, for whatever reason, the commitments offered by the merging parties to the Commission would not address any UK-specific concerns identified.[68]

56. By way of example, in *Continental AG/Veyance Technologies*, the DOJ reviewed Continental AG's proposed acquisition of Veyance Technologies in parallel with Canada and Brazil (among other jurisdictions).[69] The acquisition would have left two dominant firms in the market for commercial vehicle air springs. While Canada relied upon the DOJ's remedy and closed its investigation,[70] Brazil had different market concerns which led it to require the sale of a plant in Brazil.[71] While the decision of Canada to accept the DOJ's remedy was pragmatic, the fact that Brazil required a separate divestiture demonstrates the risk of country-specific divergence and therefore the wisdom, in a scenario where there was a good chance that the Commission remedy would address the CMA's concerns, to nonetheless open and suspend its investigation pending the outcome. It would also give the CMA formal information gathering powers which it would not have otherwise.[72]

57. In any event, opening an investigation would allow the CMA to send any UK-specific issues to the parties for response (i.e., in an Issues Letter), which would also assist it in ensuring that any commitments required were suitably scoped.

3.3 Market testing of commitments in phase 1

58. For UK/EUMR mergers where UK specific issues could arise, once the Commission and CMA had both commenced their formal investigations, if the parties proposed commitments in phase 1, the CMA could suspend its investigation whilst it prepared and provided comments on them.[73] This could include publishing a summary of the commitments and its views on them for comment by interested parties.

59. Such an approach, whilst novel from the UK's perspective, is not without precedent. For example, in *John Wood Group/AMEC Foster Wheeler*,[74] the CMA began testing a remedy offer before concluding its investigation into whether or not the deal gave rise to competition concerns. This was a first for the CMA since its inception in 2014.[75] It was only possible for the CMA to test the offer with third parties (without indicating whether a remedy would in fact be required) because the parties had made it public on their own initiative. This is in contrast to discussion of different potential remedies between the CMA case team and the parties which sometimes goes behind the scenes during an investigation. In the event that the commitments were deemed to address the UK specific concerns, and the EU also accepted them, these could then form the basis of UILs, which the CMA could then quickly move to

66 For useful comment in this respect, *see* J. Modrall and I. Giles, Brexit: Merger Review Implications and Recommendations (2016). This would require limited amendment to the Enterprise Act 2002, specifically provisions at sections 96 to 102 that relate to Merger Notices.

67 The sharing of draft Form COs could occur via the existing ECN network and within the context of an agreed cooperation agreement (similar to Article 7 of the EU/Swiss cooperation agreement and with similar provisions to those contained in Articles 8 and 9 of the same).

68 Ibid.

69 *United States v. Continental AG and Veyance Technologies, Inc.* (2015, available at https://www.justice.gov/atr/case/us-v-continental-ag-and-veyance-technologies-inc).

70 Competition Bureau Statement Regarding the Acquisition by Continental of Veyance, CCB Press Release (2014, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03861.html).

71 Press Release, Veyance Acquisition by Continental is Approved by CADE, CADE, Jan. 29, 2015 (2015, available at http://www.cade.gov.br/Default.aspx?2114e236cf45db27f34112223012).

72 Specifically, powers to compel a party to provide relevant information and/or documents under section 109 of the Enterprise Act 2002.

73 This would require amendment to the Enterprise Act 2002, which does not at present give the CMA unrestricted discretion to stop the clock. However, it would be relatively straightforward to amend the Act to allow, for example, suspension of the phase 1 clock where commitments were offered by the parties or otherwise to enable the CMA to align its process with that of the Commission's. Such suspensions are already anticipated where the parties have failed to provide sufficient information in response to a formal information request (i.e., section 2). *See*, for example, *Heineken/Punch Taverns*, where the clock was suspended a number of times during the formal investigation (available at: https://www.gov.uk/cma-cases/heineken-punch-taverns-merger-inquiry).

74 ME/6687/17 *John Wood Group plc/Amec Foster Wheeler plc* (2017, decision available at: https:// www.gov.uk/cma-cases/john-wood-group-amec-foster-wheeler-merger-inquiry).

75 *See further* Comment: UK Could approve complex mergers more quickly with novel 'twin track'approach, MLex (2017).

approve.[76] By "grandfathering" the EU's commitments in this way, this would preserve the CMA's ability to take enforcement action for breach.

3.4 The UK's approach where the Commission moves to phase 2

60. Where a UK/EUMR merger is assessed by the Commission at phase 2, there are strong arguments for the CMA retaining that case at phase 1, especially where commitments obtained by the Commission are likely to address its concerns. This is because, once a case transfers to phase 2, the CMA has much less flexibility to dispense with fact-finding and interim decision-making procedures. In the worst-case scenario, the CMA would still have the ability to "fast-track" mergers to phase 2, with the consent of the parties.[77] This would, of course, be a judgment call, to be made on the facts of each case, but would clearly incentivise parties to offer appropriate commitments to the Commission that addressed UK-specific concerns.

III. Conclusion

61. This paper has sought to articulate the risks for the CMA of UK/EUMR mergers, drawing on recent discussions in the UK legal and economic community, as well as developments in UK and EU merger control. It has set out a framework for how these could be mitigated in a manner that maintains the integrity of the CMA's regime; specifically, through the negotiation and adoption of a second-generation cooperation agreement with the EU, which incorporates key elements of the EUMR process and positive comity, together with limited reform of the UK's domestic legal framework.

62. In doing so, it has sought to show how the desire expressed by many for a lighter-touch approach by the CMA to UK/EUMR mergers can be achieved whilst protecting the CMA's ability to effectively intervene in those cases, keeping it on a par with the Commission and seeking to avoid the potential pitfalls that could arise should the CMA choose to proceed on an ad hoc basis. ■

76 Again, the CMA has in recent cases been able to expedite its timing with regard to UILs. *See*, for example, *Vision Express/Tesco Opticians*, where it accepted a UIL just 35 working days after its initial SLC decision.

77 *See*, for example, *BT/EE*, *Ladbrokes/Coral* and *Tesco/Booker*.

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