

Response to the Consultation on the Draft Guidance on the effects of the UK's "no deal" exit from the European Union on the functions of the CMA

Arianna Andreangeli, Edinburgh Law School, University of Edinburgh

I am an academic working in Edinburgh Law School, University of Edinburgh and am responding in a personal capacity. My area of expertise is Competition Law, substantive and procedural.

3.1.

The document is overall clear, especially in the way in which it spells out which legislation is affected by the UK exit from the EU and how. It is recognised that at this stage a great deal of uncertainty exists as regards future powers that are envisaged for the CMA—e.g. in the field of state aid. However, one of the issues that could have been explored in the Guidance is the future impact of Brexit on how the CMA intends to identify individual cases, or even areas of work, as priorities in the future. It is acknowledged that in section 1.9, the CMA expressly states that the Prioritisation Principles are beyond the scope of the Guidance. However, it would have been desirable for the CMA to articulate how the exit may impact on the prioritization process and especially on the Commission's assessment of the strategic significance of transnational cases that may have an impact on the UK and the EU. In particular, it is going to be important to understand to what extent the inability to rely on the same degree of cooperation and coordination available to the CMA may play a part in informing the decision to take up a particular investigation whose scope may span several countries.

3.2.

(a)

The document spells out reasonably clearly the position concerning mergers upon which the EU Commission has taken a decision prior to exit day or which are still being investigated in Brussels. However, it is suggested that the Draft Guidance should have been far more explicit about the implications of exit for continuing EU Commission powers as well as of the issues arising from the CMA taking action in respect of cases not yet decided at Union level. Thus, para. 3.5 of the document correctly spells out the possibility for the CMA to review a merger that, while having been notified to the authorities in Brussels, has not yet been the subject matter of a decision under the EU Merger Regulation. As para. 3.7 and 3.8 highlight, the circumstance that the UK merger regime is voluntary does not exclude that the CMA might take action vis-à-vis similar mergers, even when they are still pending before the EU Commission. However, the Draft should have discussed the implications that such a decision to take action is going to have for the notifying parties and the agencies involved.

Parallel proceedings are going to mean additional administrative hurdles in London and Brussels as the referral mechanisms provided in, inter alia, Articles 9 and 21 of the EU Merger Regulation<sup>1</sup> cease to apply and in the absence of (at least until such time as relevant arrangements are negotiated) official communication, coordination and cooperation mechanisms between the two agencies. In addition, it is not excluded that the outcome of each procedure might be different. In a similar case, undertakings would be faced with significant uncertainty as to the status of the proposed concentration.

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L24/1 (hereinafter referred to as 'the EU Merger Regulation').

More generally, this section of the Draft Guidance should have stated far more explicitly that even after exit day, undertaking wishing to merge with or take over other commercial entities will still be obliged to make a notification to the EU Commission if the proposed concentration fulfils the turnover criteria set out in Article 1 of the EU Merger Regulation. It is certainly true that, as para. 3.15 states, after exit “the CMA (...) will no longer be prohibited from investigating under the provisions of the [Enterprise Act 2002] a merger which does have a Community dimension under the EU MR”.<sup>2</sup>

However, it is equally true that UK-based companies involved in similar concentrations will remain obliged to make a notification to the EU Commission, even though the UK is no longer an EU member state. It is reminded that *in Gencor/Lonrho*<sup>3</sup> the EU Commission was recognised as having the jurisdiction to review a merger between two South-African companies which had already been approved by the competent authorities in South Africa.<sup>4</sup> Dismissing an appeal brought against the prohibition decision, the General Court held that “(...) Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory (...)”.<sup>5</sup> What matters is instead whether the notified concentration meets the “Community dimension” requirements.<sup>6</sup>

Against this background, it would have been desirable for the CMA to set out these principles at the forefront of its analysis in Section 3 of the Draft Guidance, since it would have increased legal certainty and clarified the context of any ensuing discussion of the issues arising from parallel proceedings in the UK and in the EU. In respect to the latter, it can be agreed with the CMA that cooperation and communication between these two jurisdictions as well as between the UK and individual member states will be central to the efficient disposal of individual cases.<sup>7</sup> However, until agreed frameworks exist on either side to allow for such cooperation, it is highly uncertain how the commitment offered in the Draft Guidance will “fit” in the existing legal and administrative frameworks that are at the CMA’s disposal.

It may be expected that the CMA will continue to communicate with other agencies, including the EU Commission and the other European NCAs, in the context of the International Competition Network and of the Organisation for Economic Cooperation and Development. However, it is legitimate to doubt whether these forms of cooperation and dialogue will allow for the same degree of cooperation, dialogue and coordination as the ones provided by the EU Merger Regulation. It is argued that, unlike the referral mechanism provided by Articles 4(4)-(5), 9 and 21 of the Regulation, cooperation under the ICN and the OECD is purely voluntary and mainly aimed at developing common understanding as regards good enforcement practices.<sup>8</sup> It therefore lacks many of the features of the mechanisms for referral and joint discussion, provided by the EU Merger Regulation, such as the binding force on the concerned competition agencies. Accordingly, it is argued that significant

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<sup>2</sup> Draft Guidance, para. 3.15.

<sup>3</sup> Commission Decision on case M.619, *Gencor/Lonrho*, [1997] OJ L11/1.

<sup>4</sup> 97/26/EC: Commission Decision of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV / M.619 - *Gencor / Lonrho*), [1997] OJ L11/30.

<sup>5</sup> Case T-102/96, *Gencor v Commission*, [1999] ECR II-753, para. 79.

<sup>6</sup> *Id.*, para. 78.

<sup>7</sup> Draft Guidance, para. 3.18.

<sup>8</sup> See e.g. OECD, *International Co-operation in competition*, available at: <http://www.oecd.org/competition/internationalco-operationandcompetition.htm>.

uncertainty will remain until binding cooperation mechanisms are in place, perhaps as part of a broader Free Trade Agreement (FTA).

(b)

Section 4 of the Draft Notice provides a clear overview of the impact of no-deal Brexit on live cases, especially under subpara. 4.5 and .6. However, and as for merger review, it would have been helpful if the CMA had spelled out explicitly that, even after the UK exits the EU, the EU Commission will still be able to investigate suspected antitrust infringements involving UK-based companies and UK markets, subject to the 'interstate trade effect' jurisdictional criterion being met. On this point, it is reminded that in *ICI v Commission* the Court of Justice expressly declared Article 101 applicable to a concerted practice for which the applicant, a UK company at a time in which the UK was not a member of the EEC, had been found to be responsible.<sup>9</sup> The Court emphasised that since the infringement had been "(...) put into effect within the common market and concerned competition between producers operating within it (...)", the fact that the applicant was not at the time based within the Common Market was irrelevant.<sup>10</sup>

Against this background, it would have been highly desirable for the CMA to give clear guidance as to the possible cases in which the EU Commission or other NCAs within the Union might take action against UK-based businesses. It is certainly true that, as para. 4.7 states, the CMA and sector regulators that may be conducting an investigation having an "EU element" on Brexit day will no longer be able to apply EU competition law to these cases, but will have to continue their investigations just in light of the Competition Act 1998. Nonetheless, this will not exclude that the EU Commission or another EU NCA may either continue any inquiry as regards the same case or start a brand new investigation in respect of the same set of facts, thus leading to parallel proceedings. It is suggested on this specific point that dealing with parallel investigations and, more generally, seeking to detect and punish the most serious cartel and abuse cases without being able to rely on the cooperation, coordination and communication mechanisms enshrined in Council Regulation No 1/2003 is likely to become a significant obstacle for the CMA.

As with mergers, it may be expected that the CMA will be committed to collaborating with the EU Commission and the other Union NCAs in the context of the informal frameworks for soft cooperation offered by the OECD and the ICN, for instance. However, it is argued that the communication and assistance that can be offered through these channels is in no way comparable with the cooperation mechanisms available under Regulation No 1/2003. On this specific point, it is certainly true that Article 23 of the Withdrawal Agreement, for instance, provides a commitment on the part of the UK and of the EU to "cooperate" in competition cases, including "exchanging information". However, it is suggested that the cooperation envisaged in the WA resembles more analogous provisions contained in the Competition Chapter of a Free Trade Agreement or in a Mutual Legal Assistance Treaty than Articles 12 o 21 of Council Regulation No 1/2003. It is argued that should the CMA wish to rely on these provisions of the WA in order to seek the assistance of the EU Commission, it might run against limits arising from the duty of confidentiality enshrined in the TFEU itself. Thus, it is very likely that the EU Commission, for instance, would have to seek the consent of the investigated parties before handing documents to the UK competition authority.

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<sup>9</sup> Case C-48/69, *ICI v Commission*, [1972] ECR 619, para. 125.

<sup>10</sup> *Id.*, para. 127.

These challenges are likely to be even more significant should the UK exit the EU without a deal, since there will be no express agreement as to how this cooperation might take place. It is argued that, as was highlighted for merger cases, the CMA might find it very difficult to continue to cooperate with its counterparts at EU and member states' level in the event of a no-deal Brexit. It is suggested that the absence of a treaty basis and the limits that the domestic laws of the affected NCAs may place on their ability to disclose confidential information gathered in the course of a competition investigation could prevent informal cooperation, based on goodwill, from taking place. In light of above, it would have been highly desirable for the CMA to articulate some of the consequences that an exit without the stipulation of a withdrawal agreement might have on its competition enforcement powers. It is acknowledged that some of these challenges are analysed in parts of the Draft Guidance, especially in respect of the future of the leniency regime. However, it is argued that since multiple investigations are possible in all cases, an explicit analysis of the implication of a no-deal exit for the CMA's investigating and decision-making powers more generally would have contributed to greater clarity on these issues.