

# BREXIT

Critical issues in merger control

Laurent Garzaniti – 100th GCLC Lunch Talk  
22 May 2018



Freshfields Bruckhaus Deringer

# Agenda

- 1 Current UK merger control regime
- 2 Transition challenges
- 3 Post-Brexit coordination challenges
- 4 Conclusion



## **Current UK merger control regime**

# Current UK merger control regime

## Jurisdictional thresholds

- Transactions may be subject to review where:
  - the UK turnover of the target > £70m; OR
  - the parties together have a share of supply  $\geq$  25 per cent, and the transaction results in an increment to that share
- Notification is voluntary, but the CMA can ‘call in’ transactions that are not notified, and can refer a transaction to Phase 2 up to 4 months after closing

## Number of reviews per year

- As the regime is voluntary, transactions that do not raise substantive issues are less likely to be notified
- Over the past 5 years, the CMA reviewed an average of 66 transactions per year
  - Of these, on average 10 per cent (7 cases per year) were resolved through undertakings in lieu of reference, and 12 per cent (8 cases per year) were referred to Phase 2
  - The CMA anticipates receiving 30–50 additional notifications, resulting in approximate half a dozen additional Phase 2 investigations, per year post-Brexit
- Some proportion of these cases will no longer trigger EUMR; others will be reviewed in parallel in both jurisdictions

## Public interest and national security reviews

- Public interest review regime relating to national security, media plurality, and the stability of the UK financial system
- Currently expanding scope to review transactions based on national security concerns



# Transition Challenges

# Transition challenges: cut off point for jurisdiction

Numerous transactions in contemplation face uncertainty if jurisdictional position between the UK and EU is uncertain at the point of Brexit

## 'Brexit straddling cases'

- Cases where:
  - a legally binding agreement has been concluded or a public bid has been announced; or
  - notification has been made to the Commission; and
- Where the Commission has not issued a final decision under Article 6 and/or Article 8 on the date of Brexit

Transactions in pre-notification 11 months (or more) prior to Brexit could be affected

## Potential scenarios

- Concentration would cease to meet EUMR jurisdictional thresholds if UK turnover were excluded
- The Commission finds an SIEC with respect to a market that includes (or is exclusively based in) the UK



# Transition challenges: cut off point for jurisdiction

Continued

Businesses must have clarity, well ahead of Brexit, as to when and to whom they should notify transactions in the period leading up to Brexit, and the consequences of Brexit for the review of such transactions

Transitional Agreement should address some of the uncertainty, but further clarification will be required

- Commission-CMA cooperation agreement and/or joint best practice guidelines
- Prospect of a specific competition law or merger control protocol being included in the withdrawal agreement is limited

Risk the Withdrawal Agreement is not completed prior to Brexit



# Transition challenges: cut off point for jurisdiction

## Options

Draft withdrawal  
agreement  
(EU proposal):

- European Commission would continue to be competent for administrative procedures initiated before the end of the transition period
- 'Initiated' is defined as 'formally registered' (Article 88)
- Decisions adopted in these procedures would remain binding on the UK, and on entities in the UK

Question remains  
as to when a merger  
control proceeding  
would be 'initiated'

- Submission of case team allocation request
- Submission of first draft Form CO
- Submission of formal merger notification
- It may be appropriate for the Commission to remain competent where an agreement is signed pre-Brexit and no draft or formal filing has been made yet with the Commission, but this is not consistent with the concept of 'formally registered'
- Except possibly if the merger agreement or announcement of this bid is considered as the "facts forming the subject matter of the administrative procedure" within the meaning of Article 89

If trigger is submission  
of formal notification;  
risk significant duplication  
and unnecessary costs

- Pre-notification processes at EU and UK level can be lengthy and involve substantial submissions
- Timing of pre-notification is inherently uncertain
- If it is unclear whether one or both agencies would retain responsibility for the merger review, Parties may need to engage in pre-notification with both agencies



# Transitional challenges: procedural rights

Judicial review  
and appeal mechanisms

- **Draft withdrawal agreement (EU proposal):**  
legality of decisions adopted prior to Brexit or as part of an administrative procedure ongoing as the time of Brexit '**may be reviewed exclusively by the Court of Justice of the European Union**' (Article 91.2)

Monitoring  
and enforcement  
of commitments

- **Draft withdrawal agreement (EU proposal):**  
decisions in administrative procedures adopted before the end of the transition period, or in cases already underway at the end of transition period, addressed to the UK, or to natural or legal persons residing or established in the UK, shall be binding on and in the UK (Article 91.1)



# **Post-Brexit coordination challenges**

# Post-Brexit coordination challenges

## Merger control cooperation arrangement

- Extent of trade between UK and EU makes it likely a large number of merger cases will have effects in both markets; potential remedy options are also likely to affect both markets
- Negotiation of a formal cooperation agreement likely the best way to facilitate cooperation

## Challenges in alignment

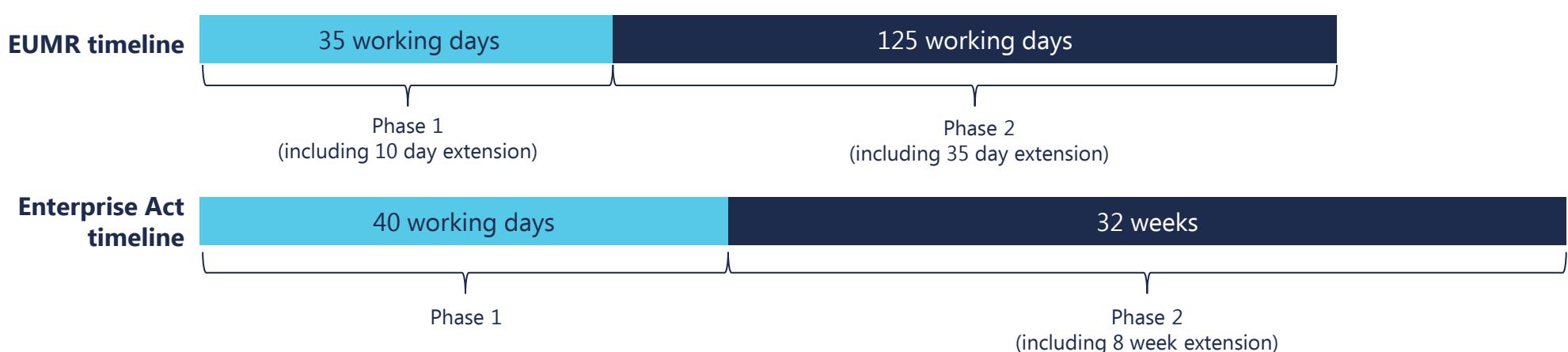
- Alignment of differing merger control timelines to support alignment at key decision points, and on remedies
- Potential for alignment on gathering evidence, particularly data in cross border markets

## Notification thresholds

- Question as to whether EUMR thresholds should be adjusted downwards to reflect UK exit

## National security/foreign investment review

- EUMR already provided scope for domestic review on public interest grounds (and UK already had a regime)
- As both the UK and EU expand the scope for review on national security grounds, likely efficient to establish some basis for cooperation or alignment



# Thank you

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales authorised and regulated by the Solicitors Regulation Authority) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'.

For regulatory information please refer to [www.freshfields.com/support/legalnotice](http://www.freshfields.com/support/legalnotice).

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2018