



# **ISSUES PAPER**

**October 2016**



## PREFACE

We<sup>1</sup> set up the Brexit Competition Law Working Group (BCLWG) following the referendum with the aim of fostering public debate and informing government policy on implications of Brexit for competition law and policy.

This Issues Paper sets out what we see as key legal and policy questions within the competition sphere that HM Government will need to examine when considering its options in respect of Brexit. We are keen (a) to obtain feedback from stakeholders and interested persons on whether these are the right questions on which to focus at this stage and (b) to encourage submissions and views that will feed into our final report, which we plan to publish and deliver to Government early in 2017.

We intend to hold a number of roundtable discussions during November 2016. Details of these roundtables can be found at [www.bclwg.org](http://www.bclwg.org).

Comments and submissions on the Issues Paper are requested by 30 November 2016 please.

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<sup>1</sup> The members of the working group are: Sir John Vickers (chair), Prof. Amelia Fletcher OBE, John Fingleton, Sir Nicholas Forwood QC, Ali Nikpay, Jon Turner QC, and Prof. Richard Whish QC (Hon).

# 1. INTRODUCTION

## POLITICAL AND LEGAL CONTEXT

- 1.1 There has been much speculation about the Government's Brexit strategy since the referendum vote in June. While much remains uncertain, a number of elements in the overall Brexit process are now becoming clearer. On 2 October 2016, the Prime Minister confirmed that it was intended that the UK would trigger Article 50 by the end of March 2017, thereby commencing the process for leaving the EU. On this timing, the UK will probably<sup>2</sup> no longer be an EU Member State by spring 2019.
- 1.2 Further, the Prime Minister has announced that a Great Repeal Bill will be introduced during the next parliamentary session beginning with the Queen's Speech next May. The intention is that the Bill will pass through Parliament at the same time as the exit negotiations take place. If passed, the Great Repeal Bill will take effect at the point of Brexit. The Bill will repeal the 1972 European Communities Act (ECA), which gives direct effect to all EU law within the UK's legal orders. As a result, EU law will cease to apply in the UK from the day of exit, EU law will no longer be supreme over UK law in the event of a difference, and judgments of the European Court of Justice as final arbiter of EU law will no longer bind the UK.<sup>3</sup> At the same time, it appears to be envisaged that the Great Repeal Bill will transpose the substance of existing EU law into domestic law, so far as is possible, while allowing Parliament to amend, repeal or improve any law after appropriate scrutiny and debate.
- 1.3 This is the constitutional context for considering the implications for UK competition law and policy of Brexit. The economic policy context is important too, and in this regard several observations about the development of competition policy may usefully be made at the outset.
- 1.4 The first is the broad convergence over time of competition law and policy and enforcement not only across the EU, but worldwide. The last twenty years have seen the widespread adoption of principles and policies that increase the efficacy of cartel investigations and strengthen deterrence; recognise the important role of economics in the assessment of unilateral conduct and mergers; and incentivise compliance on the part of business. The UK, both in its own right and through its membership of the EU, has played a major role in these developments. In this context, it could be argued that the current rules and arrangements in this area of economic life work reasonably well, providing both an effective enforcement regime and sufficient legal certainty for businesses and their customers.
- 1.5 The second factor is the close coordination and cooperation between the UK competition authorities and the EU institutions, in particular the European

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<sup>2</sup> Article 50 allows the withdrawal agreement to fix another date, which might be later than 2 years after notification.

<sup>3</sup> The Bill will presumably clarify the extent to which EU law, and judgments of the ECJ, are still to be regarded as supreme, and binding, in respect of disputes concerning matters arising before the date of Brexit. This will also be important for the interpretation of UK legislation adopted prior to Brexit to give effect the UK's EU obligations (such as EU directives), but which are applied after Brexit.

Commission. This extends across all facets of competition law and policy, from the practicalities of carrying out investigative steps into potential anticompetitive conduct to the consideration of appropriate remedies in merger reviews. It reduces burdens on business from a duplication of effort, it avoids conflicting regulatory decisions (with the attendant problems of increased risk and uncertainty), and it helps the competition authorities to make the best possible decisions by pooling information and expertise. Considerable thought will be required as to whether and how the benefits of the current close cooperation can be retained or replicated post-Brexit, in order to maintain the effectiveness and successful application of UK competition policy. In this context it is also worth noting that new or enhanced co-ordination and co-operation mechanisms may be needed for interaction with countries outside the EU.

- 1.6 Third, in a number of areas, Brexit will result in an immediate lacuna in the regime notwithstanding the Great Repeal Bill. Consideration will have to be given to some of these as a matter of urgency.
- 1.7 Finally, all UK-based undertakings trading in or with Europe will continue to be subject to the EU's competition regime (and vice-versa). The interaction between the two competition regimes will therefore require careful analysis from a business as well as policy perspective.<sup>4</sup>

## ISSUES PAPER APPROACH AND STRUCTURE

- 1.8 Much of the political commentary regarding Brexit focuses on whether the Government will choose a “soft” or “hard” Brexit. Consideration of this issue is beyond the scope of this Issues Paper. However, it is clear that if the UK remained in the EEA there could be little change to the current competition regime, although the UK might lose influence in future policy developments. Much more complex issues arise if the UK leaves the EEA, and we therefore propose to take this as our working assumption for consideration of the legal and policy issues. For the avoidance of doubt, adoption of this hypothesis does not in any way imply support for one form of Brexit over another.
- 1.9 This Issues Paper is divided into three parts. **Part A** explores the question of what would be needed immediately at the time of Brexit, to ensure that those features of the current arrangements that are critical for the mergers, market investigations and public antitrust enforcement regime continue to function effectively.
- 1.10 **Part B** explores potential changes which could be made to UK competition law and policy over time. Brexit gives rise to opportunities to amend the current regime and, if judged desirable, to move away from the EU's approach. In this Part, the Issues Paper identifies options that the UK Government and Parliament would have, with the aim of seeking views both on the range of possible changes and their pros and cons.
- 1.11 **Part C** of this Issues Paper contains a brief description of areas that we see as being beyond the scope of our current work programme. Brexit will clearly have significant implications for other areas of competition law and policy, such as State Aid and competition in the regulated sectors and agriculture. Issues relating to regional

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<sup>4</sup> Similar issues will arise in respect of the EEA, and its enforcement agency, the EFTA Surveillance Authority.

competition policy, public procurement, and de-regulation will also arise. While these are clearly important issues, our current report will focus on the core central pillars of competition law and policy, namely merger control and the antitrust rules. The other issues therefore fall outside the scope of this Issues Paper, but they could be pursued in future work.

- 1.12 Finally, the Issues Paper is supported by an annexe outlining the development of UK competition law and its relationship with EU competition law. The interaction between the legal instruments of both jurisdictions is key to understanding and evaluating the options available to the UK once the UK leaves the EU.

## 2. PART A: IMMEDIATE ISSUES

- 2.1 The central pillars of competition law in the UK are the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02). Chapters I and II of CA98 establish the antitrust rules applicable to the conduct of business in the UK, and Part 3 of EA02 establishes the rules applicable to the UK's review of mergers. This legislation being in the form of UK statutes, Brexit will not directly and immediately alter the core legal rules that govern public enforcement of competition law in the UK. However, much of the practical enforcement of these rules is governed by EU regulation and relies on cooperation with the European Commission. These elements will be affected immediately by Brexit, as discussed below.

### MERGERS AND MARKET INVESTIGATIONS

- 2.2 The implications of Brexit for merger control are considerable. The EU Merger Regulation<sup>5</sup> (EUMR) creates a “one-stop-shop” for the review of mergers within the EU. Under the EUMR, all mergers that meet certain EU turnover thresholds must be notified to the European Commission and cannot complete until clearance is received. The Commission is given exclusive competence over such mergers, subject only to the rules within the EUMR allowing for mergers to be “referred back” to Member States under specific circumstances. Once mergers meet the EU thresholds, therefore, they are almost always examined solely by the Commission; and in certain circumstances mergers which do not meet the thresholds in the EUMR may also be referred by Member State competition authorities to the Commission.
- 2.3 The Commission's examination determines whether a merger concentration “would significantly impede effective competition, in the common market or in a substantial part of it”. Mergers that cannot be remedied to remove such an effect are prohibited. National competition authorities (the CMA in the UK) play an advisory role in the Commission's process.
- 2.4 Following Brexit, the UK will no longer be a Member State of the EU and will not be part of the Single Market. The “one-stop-shop” will no longer apply to mergers with effects in both the UK and the EU (and there will be no referrals to or from the CMA). Also, the Commission will not take account of the effects of a merger in the UK when it is carrying out merger reviews. In addition, the CMA will no longer have a formal mechanism to influence directly the Commission's decisions.
- 2.5 This raises (at least) three immediate critical issues:
- 2.5.1 With the end of the “one-stop-shop”, the UK will now have jurisdiction over a number of mergers that would otherwise have come within the sole competence of the EU. Many of these mergers will have potential effects across

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<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

a number of Member States, in which case any UK investigation would occur in tandem with the EU investigation, whilst others will be UK-focused, which means that the primary substantive review (or in some cases, potentially only substantive review) would be by the UK. Should the resources of the CMA be increased in order to allow it to assess these cases without affecting its other activities? If that were not to happen how should the CMA respond? It seems likely that it would wish (and indeed may be under a duty) to review in depth at least a proportion of such deals. What should it cut back on in order to resource these mergers? At present, the policy of the CMA is to review small as well as large mergers. Post-Brexit, should the CMA retain this policy? If not, where and how should it draw the line? If yes, what types of non-merger work should it reduce so as to increase resources for mergers?<sup>6</sup>

- 2.5.2 It seems likely that the majority of these mergers will also be investigated by the European Commission. This not only raises co-ordination issues (see below) but could also introduce delay in the clearance process for these types of case. This is because the merger review process in the UK works to longer timetables than that of the EU (as set out at paragraph 3.4 below). Are there any immediate steps that the CMA could and should take to reduce the impact of this on mergers that receive dual scrutiny?
  - 2.5.3 The coordination mechanisms under the EUMR and Implementing Regulation will no longer be available to the Commission and the UK. Under UK law (Part 9 of the Enterprise Act 2002), the UK can share information with the Commission, but there is no reciprocal provision for receiving information. More generally, parallel review by the UK could lead to conflicting decisions and/or complications in remedies design. As such a potentially large “cooperation gap” could open up which would need to be filled.
  - 2.5.4 What form of cooperation/coordination should be sought in its place? Would a form of cooperation similar to that between the US and EU, which allows for considerable substantive and procedural discussions on the basis of company waivers, be sufficient? Should the UK seek a deeper form of cooperation? If so, what elements should be included? This issue will be of particular importance for mergers that are notified to the Commission immediately before Brexit or that are already going through a Phase II review by the Commission. For these deals, should the CMA seek to agree a transitional arrangement that retains the current cooperative provisions?
  - 2.5.5 Are there other immediate critical issues relating to mergers?
- 2.6 Brexit is likely to have a lesser immediate impact on market investigations, as action by the European Commission does not preclude action by the UK authorities. However, the CMA’s current practice is not to open a market investigation where the market or conduct at issue is being investigated by the European Commission. This reason will fall away upon Brexit, which raises the following immediate issues:

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<sup>6</sup> Longer term solutions to this problem, such as legislative change or significant alterations to the current procedures (e.g. revising the way the CMA operates in Phase II) will be covered in Part B of this Paper.

- 2.6.1 Should the CMA take into account Commission investigations when considering its own priorities in this area? If so, should the CMA retain a similar policy in future and effectively limit its market investigation activities to areas where the Commission is not also investigating (to the extent that it is aware of such cases)? On the other hand, if the Commission considers that there are problems in a given market that require investigation at the EU-level, might this sometimes indicate that there may be similar issues at a UK-market level that ought to be investigated by the CMA?
- 2.6.2 Similarly, to the extent that the current frameworks of sectoral EU regulation are considered as preventing sectoral regulators from making market investigation references to the CMA, should they consider making more references post-Brexit?
- 2.6.3 If, for these or other reasons, the CMA wishes to carry out more market investigations, and given the considerable resources required, from which other activities should the CMA divert resources?

## ANTITRUST RULES

- 2.7 The UK's antitrust rules are closely bound up with those of the EU. Chapters I and II of CA98 mirror Articles 101 and 102 TFEU, which are themselves directly applicable in the UK. Regulation 1/2003<sup>7</sup> lays down a system for the uniform application of those rules across the EU. And Section 60 of CA98 provides that competition law questions are to be decided in a manner which is consistent with the treatment of corresponding questions under EU law. EU legislation in the field of antitrust includes in particular Block Exemption Regulations (providing for automatic exemption from Article 101(1) provided certain conditions are met), guidance on the application of Article 102, guidance on various competition law concepts, and an EU-wide leniency regime for cartel conduct. The jurisprudence of the European Court of Justice is binding in the UK (for Chapter I and II of CA98 also, to a substantial degree, by virtue of section 60), and Article 267 TFEU provides a right for UK courts to request a ruling from the Court of Justice *inter alia* on questions of competition law. Together, these legislative provisions provide consistency of treatment for businesses operating in the UK. They also provide the basic blueprint for the UK authorities and courts when addressing competition law questions.
- 2.8 There is substantial cooperation in relation to the public enforcement of these rules. For example, under Regulation 1/2003, the Commission and national authorities can provide one another with, and use, confidential information. Similarly, the authorities are empowered by Regulation 1/2003 to conduct inspections on behalf of each other and to transmit information between each other. In practice, the CMA and the European Commission coordinate very closely on antitrust inspections ("dawn raids") and on gathering information through formal requests for information. In addition, the CMA plays a leading role in the ECN, the network of European competition authorities, through which the national authorities of the EU Members States share information on

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<sup>7</sup> Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [now 101] and 82 [102] of the Treaty.

current or planned investigations, enforcement hot topics, and best practice. As well as coordination and cooperation with national authorities, Regulation 1/2003 creates a significant role for the European Commission in the public enforcement of competition law by national courts, including through the submission of opinions on questions concerning the application of the EU competition rules.

- 2.9 On Brexit, this coordinated system governing the rules applicable to antitrust conduct will fall away, as Regulation 1/2003 will no longer apply to EU/UK relations. This raises a number of immediate issues:
- 2.9.1 Will the Commission have the *vires* to take action with respect to the UK market in cases which are in train at the point of Brexit? If not, what transitional arrangements, if any, should be put in place for these investigations? Alternatively, the CMA could simply open a parallel investigation in these cases on Brexit. Should it do so automatically or selectively?
  - 2.9.2 Competition investigations can take years to complete, and the appeal process through the European courts can take equally long, if not longer. For investigations that are in train or just finished prior to Brexit, companies will presumably retain the benefits of the appeal process even in relation to the UK-market aspects of the Commission's decision. More controversially, should the Commission start new investigations involving pre-Brexit conduct by British companies, or which primarily affect the UK markets, or should these be left to the CMA? As regards ongoing CMA cases, what would be the status of statements of objection which have been issued pursuant to Articles 101/102 as well as Chapter I/II?
  - 2.9.3 A related issue is the status of commitments under Article 9 of Regulation 1/2003. Article 9 commitments are a means to terminate a Commission investigation by remedying the concerns of the European Commission. They are binding for a period of time and, once adopted, mean that the Commission no longer has grounds for action. Post-Brexit, once the UK is no longer a Member State of the EU, the question arises as to whether commitments entered into to remedy EU competition concerns would remain binding where they relate to the UK market. If they do, will the EC be able to enforce them as regards the UK? If not should the CMA review whether enforcement action on its part is necessary to remedy potential harm to UK customers?
  - 2.9.4 In the immediate aftermath of Brexit, will Block Exemption Regulations apply as they do now in relation to UK markets by virtue of the Great Repeal Act? If not, should the UK seek to fill this gap? If so, how?
  - 2.9.5 At present, businesses that suspect they have been involved in cartel conduct can benefit from EU-wide leniency in respect of civil sanctions. Once the Commission opens a cartel investigation, the UK loses jurisdiction over any civil investigation into the same matter, with the result that it is investigated only by the Commission. The benefit of this "one-stop-shop" in cartel investigations will no longer be available post-Brexit. Arguably, the impact of this will be somewhat tempered by the fact that many cartel participants already seek "fail-safe" leniency applications in many Member States in case the Commission does not take forward an investigation, particularly in the UK because of its

criminal cartel sanction powers. Nonetheless, the loss of EU-wide leniency, together with the possibility for parallel civil investigations by the UK and the Commission could reduce legal certainty and increase risks for business. This may be of particular concern for current EU leniency applicants. Should the CMA, for example, review cartel cases currently under investigation by the Commission to determine whether it should open a parallel investigation given that the Commission will no longer examine the impact on markets and customers in the UK? If so, what would be the status of an applicant with conditional immunity under the EU's leniency regime that does not have equivalent status under the UK's programme? To provide certainty to business, should the CMA consider issuing guidance on its approach to cartel investigations and update its leniency policy either in the run up to Brexit or immediately thereafter?

- 2.9.6 Finally, for companies active in the UK and trading in or into the EU, an immediate question pertains to legal privilege. Under the EU rules, advice given to a company by external EEA-qualified legal counsel is privileged and is protected from disclosure in the context of a Commission investigation. This protection from disclosure is a key part of the "rights of defence" under EU competition law. Once the UK exits the EU, it seems probable that UK-only qualified lawyers will no longer come within the scope of the protection, at least for post-Brexit advice. If this is the case, an immediate question, therefore, is whether some form of equivalence should be afforded to UK-lawyers such that this protection can be extended post-Brexit? This is of general importance going forward, particularly as UK businesses will continue to need advice on EU competition law if they trade within the EU. A further issue that may arise in relation to ongoing investigations is whether material that is currently protected could potentially lose that protection.

### 3. PART B: LONGER-TERM ISSUES

- 3.1 Beyond ensuring that the UK's existing competition regime remains fully effective in the immediate period following Brexit, consideration should also be given to the longer term options open to Government and Parliament in terms of competition law and policy. As EU law will no longer be directly effective and there will no longer be a "duty of sincere cooperation" between the UK and EU authorities in the competition sphere, the opportunity exists for UK competition law and policy to diverge from EU law and policy. Whether such opportunities should be taken is, however, another matter. The sections below outline some areas for consideration in this respect.

#### MERGERS AND MARKET INVESTIGATIONS

- 3.2 Under Article 21 of the EUMR, Member States may take appropriate measures to protect certain legitimate public interests in relation to mergers being reviewed by the Commission. Public security, plurality of the media and financial stability are regarded as being "legitimate interests". If a Member State wishes to take action to protect any other public interests, it must notify that interest to the Commission for assessment and approval. Post-Brexit, the EUMR will no longer apply to the UK. Other non-competition considerations could therefore be applied to mergers that, but for Brexit, would have been within the Commission's exclusive competence. Non-competition considerations (e.g., concerning nationality) could also come to play a larger role in the UK's merger policy more generally. We will consider the pros and cons of such developments in our report and would welcome thoughts in response to this Paper. Linked to this, it would be helpful to have input on the interactions between domestic law and WTO rules in this area.
- 3.3 In the event that Government and Parliament were to conclude that such changes are desirable, what options are there for altering the legislative framework? For example, should the CMA be required to take into account of any additional 'public interest' issues in its assessment, or should that be left to ministers? If the latter, what powers should ministers have, and what checks on the exercise of those powers should there be? As regards business, how can the Government and the CMA provide certainty to those operating in the UK, for whom competition considerations have for many years been the almost-exclusive basis for merger approval?
- 3.4 Brexit also raises longer-term issues regarding the statutory provisions governing the CMA's jurisdiction and timetables for review of mergers. As to the former, the end of the "one-stop-shop" could, conceivably, result in the CMA facing many new and complex cases. Should the UK amend its current thresholds for jurisdiction to address this? In relation to the latter, many deals involving multinational businesses condition completion on the receipt of clearance from the antitrust authorities. Once deals are subject to dual notification to the EU and the CMA, the divergence in the time taken to review mergers may become a significant issue. The UK timetables are currently considerably longer than the EU timetables. The UK has 40 working days in Phase I and

24 weeks in Phase II; whereas the EU has 25 working days in Phase I and 90 working days (18 weeks) in Phase II. Should the UK speed up the timetables under which the CMA reviews mergers so as to minimise the impact of a dual review on completion timetables? If so, should the CMA's timetables be more closely aligned to the EU timetables?

- 3.5 As for market investigations, Brexit will result in the removal of the constraint imposed by the requirement under Article 1/2003 for consistency in the application of the competition rules, in particular the requirement that agreements are not subject to stricter treatment than under Article 101. Should the UK adopt a mechanism to ensure some consistency of approach post-Brexit (either vis-a-vis the EU rules or vis-a-vis the UK Chapter 1 and 2 rules)? This applies both to the substance of reviews (for example, whether some non-competition criteria should play a larger role in UK market investigations in the longer term) and to the circumstances in which the UK will act (bearing in mind the potential burdens of parallel reviews on business). If some form of consistency is warranted, what are the mechanisms for cooperation open to the UK in the long-run? Should the UK aim for the relatively loose cooperation similar to that applicable between the UK and third countries such as the US on merger reviews, or a type of tighter cooperation similar to that between the EU and Switzerland on conduct reviews?

## ANTITRUST RULES

- 3.6 As set out above, section 60 of CA98 imposes a duty on the CMA, courts and tribunals to deal with questions arising under the statute in relation to competition within the UK in a manner which is consistent with the treatment of corresponding questions arising in EU competition law. The operation of section 60 is ultimately predicated on the availability of recourse to the ECJ for an ultimate ruling on questions that depend on EU competition law. Brexit may result in calls to repeal section 60 altogether. However, the EU competition rules will continue to govern how businesses, including UK businesses, compete in the UK's largest and nearest trading market. Given this, would it be beneficial to retain the principle of consistency provided for by Section 60 in some form or other? If so, what options should be considered?
- 3.7 A related question arises is how EU case law should be treated post-Brexit. Such cases currently form part of the UK's body of law. Indeed, CMA decisions, and CAT/court judgements have relied heavily on, and embodied, such precedent. Would it be right to "freeze" the binding precedent value of EU law at the moment of Brexit, with all pre-Brexit judgments remaining binding given the benefits for both businesses and consumers? Should the answer differ depending on whether the conduct in issue occurred pre- or post-Brexit?
- 3.8 Since the Chapters I/II are modelled on Articles 101/102 it seems likely that for the foreseeable future the CMA and the courts/CAT will have regard to post-Brexit case law, at least to some extent. This could be formalised and the s60 consistency requirement could in principle be retained. There are arguments for and against this. On the one hand maintaining a consistency requirement as a matter of law would create the anomaly of a wholly non-UK court determining the meaning of a UK statute, and moreover doing so without the UK courts being able to refer such questions to the

ECJ. In addition, it is possible that EU competition law and policy could diverge significantly from the approach currently taken without the UK's influence being taken into account. On the other hand, given that UK businesses trading in the EU will remain subject to EU competition law, it could be argued that there would be benefits in retaining consistency, at least to the extent of requiring the CMA/courts *to have regard to* EU case law following Brexit. We would welcome thoughts on this issue. In addition we would value comments on the status of appeal judgments relating to cases decided by the Commission pre-Brexit; should the ECJ's ultimate determination on the issues raised in those cases be "grandfathered" by virtue of the Commission's pre-Brexit findings?

- 3.9 If UK law were to diverge from EU law in future, there are varying degrees to which it could do so, with different pros and cons. The most limited degree of divergence would be to retain the competition rules as they stand now, but to allow the development of different meanings as to the substance or economic assessment of these rules. For example, the issues of whether certain agreements have the "object" of restricting competition, so that it is unnecessary to examine their "effects", or whether certain types of rebates are presumptively considered to be abusive, could be developed along lines that differ from current EU jurisprudence. (To the extent that the single market imperative influences EU competition law, some such divergence might be natural.) However, the divergence could potentially be more radical. To what extent, if at all, and in which areas, should changes to the UK's antitrust rules be considered?
- 3.10 In recent years, moreover, and with some notable exceptions, the enforcement efforts of the European Commission have tended to focus on cartel enforcement (where effects need not be shown) as opposed to cases where it is necessary to prove effects on competition. Post-Brexit, should the UK enforcement authorities take steps to increase the number of "effects" cases they investigate? If so what steps could facilitate this?
- 3.11 In terms of public enforcement, the UK and its partners will need to decide on the methods of coordination and cooperation that would be most effective.
- 3.11.1 What model of cooperation should the UK seek to have with the European Commission and EU national authorities in respect of information gathering, inspections, and sharing of evidence/information? The UK already cooperates effectively with third countries, notably the US, in relation to cartel investigations (a notable example is the Marine Hose investigation which resulted in a successful cartel offence prosecution). Should the CMA seek to adopt similar cooperation mechanisms with the EU authorities? Alternatively, should it seek a deeper cooperation, and try to replicate the provisions of Regulation 1/2003? How should it address co-ordination issues which could arise in the context of leniency, commitment decisions, and settlement of fines?
- 3.11.2 Aside from cooperation on specific cases, should the CMA seek to obtain some form of special status within the ECN, such that it can continue to share and receive information on the public enforcement of the antitrust rules and participate in discussions regarding best practice?
- 3.12 Under the current jurisdictional arrangements, most high-profile international investigations are handled by the European Commission. Post-Brexit, the CMA will

need to decide whether to carry out parallel investigations of such cases, where there is a significant link to the UK, since the EC will no longer take into account impacts in the UK. In what circumstances should the CMA take on this additional work? Should additional resources be provided to it to do so (funded in part from additional fines generated)? If no further funding is provided, in which areas should the CMA cut back to release resources? As regards its formal prioritisation principles, revision of the CMA's current guidance will be required given that the potential for action by the Commission or EU regulatory/legislative developments are a factor in determining whether the CMA is best place to act. What other guidance might be usefully revised or created?

## THE FUTURE OF PRIVATE LITIGATION

- 3.13 Private enforcement of competition law has the potential to be significantly affected by Brexit. A major area for private enforcement to date is through follow-on actions based on infringement decisions. Section 47A of CA98 provides that Commission infringement decisions are “infringement decisions” for the purposes of follow-on damages claims, and Section 58A of CA98 provides for infringement decisions (including Commission decisions) to be binding before the High Court, as well as in actions for damages and in collective proceedings before Competition Appeal Tribunal.
- 3.14 Under Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on *Certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (the “Damages Directive”), infringement decisions of a national competition authority are “at least prima facie” evidence that an infringement has occurred. The Damages Directive, which the UK must implement into national law by December 2016 in line with its obligations as a current EU Member State, also sets minimum standards for various key elements of private actions, including the protection of leniency documents from disclosure, the application of the pass-on defence, and the joint and several liability of defendants.
- 3.15 The impact of Brexit on private litigation concerns issues such as jurisdiction, forum, and enforcement of judgments that go beyond competition law (and therefore the scope of our work). However, there are a number of competition-specific issues that ought to be addressed, including:
- 3.15.1 The UK is currently a leading forum for private competition litigation in the EU, where claimants can exercise choice of forum. Should the UK take steps to encourage claimants to continue to bring private actions for breach of the EU competition rules in the UK? If so, what would or should be the impact, if any, of Brexit on sections 47(A) and 58(A) of CA98? Should these sections remain as written or would some distinction between “national” competition infringement decisions and Commission decisions be warranted? What should be the position on the decisions of national authorities or national courts in light of their new status under the Damages Directive?

- 3.15.2 What status/standing, if any, should the Commission have in national proceedings for breach of competition law? On the assumption that UK competition law will remain consistent with EU competition law, at least in the short to medium term, and given that current UK precedent will rely on EU case law, should the UK seek to continue arrangements whereby the UK courts can request the opinion of the Commission or information on the application of Articles 101 and 102 TFEU? Might the provisions of Protocol 2 of the Lugano Convention 2007 prove the basis for a possible model of institutional cooperation between the UK and the EU in this field?
- 3.15.3 Should the UK retain some or all of the mechanisms, rights and obligations under the Damages Directive? Of key importance in this respect is the protection from disclosure of leniency statements and settlement submissions. The risk of disclosure in civil litigation is a key factor that cartel participants weigh up in deciding whether or not to apply for leniency. Many jurisdictions worldwide offer (at least some) protection against disclosure of leniency statements in order to safeguard the efficacy of their leniency programmes and thus the effectiveness of public enforcement. Should the UK ensure that the protections under the Directive remain in force post-Brexit? What other provisions of the Directive would be necessary or advantageous to retain in the short term?

## 4. PART C: AREAS OUTSIDE THE SCOPE OF THE REPORT

- 4.1 As noted above at paragraph 1.11, there are a number of other important areas where Brexit will clearly have significant implications for competition policy, including State Aid, the regulated sectors, agriculture, public procurement, and questions arising from deregulation. However, our proposed report (like this Issues Paper) will focus on the central pillars of competition law and policy, namely merger control, market investigations and the antitrust rules. Nonetheless, we set out below some high level matters that will quickly need to be addressed in relation to two important areas, State Aid and the regulated industries.
- 4.2 **State Aid:** Post-Brexit, the current restrictions on State Aid and the need for aid to be assessed by the European Commission will no longer apply to the UK. Though UK policy has for many years generally been against taxpayer subsidies to industry, the UK will therefore be free, in theory, to grant subsidies to industries throughout the UK (subject, potentially, to WTO anti-subsidy rules). However, depending on the trade relationship with the EU and, indeed, trade relationships with other third countries, it is possible (even likely) that the UK would be required to accept (and might welcome) some limitations on giving State Aid to UK businesses. In the longer term, one issue that could be considered is whether, assuming that the general stance of policy remains anti-subsidy, it would be appropriate for the UK to create an “internal” discipline on subsidy policy, at least by reference to the devolved nations or regional investment policy? Transitional issues will arise in this area too.
- 4.3 **Regulated Industries:** Brexit raises immediate and difficult questions with respect to the treatment of the regulated industries, such as telecoms, transport and energy. Whereas the principal basis of competition law is UK statute (albeit statute that in good part reflects and expressly refers to EU rules and principles) for the regulated sectors many of the current legal rules are heavily dependent on a framework of EU regulation. Brexit could therefore have an immediate and significant impact. For example, both telecoms and aviation have rules governing access to the “internal market”, which are predicated upon the companies being established/licensed in an EU Member State. With Brexit, the UK will lose its status as an EU Member State for the purpose of these regulatory frameworks. The question which arises therefore is whether it is possible, and if so how, to secure the benefits of these frameworks for businesses in the UK?

## 5. HOW TO CONTRIBUTE TO THE BCLWG REPORT

- 5.1 We welcome comments and papers on any of the topics touched upon in this Issues Paper in whatever form is most convenient. We are particularly keen for responses that address the questions identified in this issues Paper and for views on whether or not the right questions have been identified.
- 5.2 Interested parties can send responses to [contribute@bclwg.org](mailto:contribute@bclwg.org). Responses received will be published on the BCLWG website (unless they have been sent to us in confidence).
- 5.3 Interested parties that submit responses will be contacted and, subject to availability of places, invited to participate in one or more of our planned discussions.

# ANNEXE: THE DEVELOPMENT OF UK COMPETITION LAW AND ITS RELATIONSHIP WITH EU COMPETITION LAW

## 1948-1998

After the second world war, the first legislation addressing the problem of uncompetitive behavior in the UK economy was the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. This Act established a mechanism whereby monopoly behavior and restrictive practices could be referred by the President of the Board of Trade to the newly-established Monopolies and Restrictive Practices Commission for review. That Commission's findings were sent to the Minister, who was given various powers to remedy any problems identified. Over the next fifty years a series of further Acts was passed. In particular mergers were brought within the scope of the system by the Monopolies and Mergers Act 1965; the current systems of EU and UK merger control are discussed separately below. Over the years a somewhat stricter line was taken in relation to restrictive practices and resale price maintenance. Legislation that was consolidated in the Restrictive Trade Practices Act 1976 and the Resale Prices Act 1976 made these practices unlawful, although the sanctions against them were weak and their deterrent effect was limited. The provisions on monopoly behavior and mergers were consolidated in the Fair Trading Act 1973, the powers remaining with the Minister; legally the Minister's decision was made on the basis of the public interest, but successive Ministers focused their attention on competition considerations.

During the period from 1948 to 1998 there was no provision prohibiting unlawful behavior on the part of monopolists (or, in modern parlance, 'dominant undertakings'). Their conduct could be reviewed only under the provisions of the Fair Trading Act, with the possibility that the Minister might require a change of behavior prospectively; there was no provision making their past behavior unlawful, and there were no penalties.

From the late 1970s onwards there were several consultations as to whether the domestic competition law of the UK was in need of reform. The legislation was extremely complicated – noticeably the Restrictive Trade Practices Act; it was seriously lacking in terms of deterrence; and it was very different in both form and substance from the provisions of EU competition law which, by then, were applicable in the UK. The most obvious omission from UK law was anything resembling what is now Article 102, which prohibits the abuse of a dominant position: breach of this provision can result in the imposition of very significant fines and awards of damages to the victims of the abuse. The Conservative Government from 1979 to 1997 at times appeared to be moving towards at least some degree of reform, but this was never carried into practice.

## REFORM OF UK COMPETITION LAW

The Labour Government that came to power in 1997 swiftly took action, and the Competition Act 1998 was passed in November of that year, followed in November 2002 by the Enterprise Act. These two pieces of legislation radically changed the domestic law of the UK, leading to the creation of a system that in many ways resembled that of the EU. However certain distinctive features of UK law were retained, notably what is now known as the 'market investigation reference' whereby markets can be referred to the Competition and Markets Authority ('the CMA'), the body which in 2014 replaced the Office of Fair Trading ('the OFT') and the Competition Commission, for review. An important feature of the Enterprise Act was that it removed the Minister from the decision-making process in market and merger cases, except in a very limited range of 'public interest' cases. Decisions are now made by the CMA, subject to judicial review by the Competition Appeal Tribunal.

The Competition Act 1998 is closely modeled upon EU competition law. The so-called 'Chapter I prohibition' is very similar to Article 101, which prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition. The Chapter II prohibition follows Article 102 in prohibiting the abuse of a dominant position. Investigations of infringements of these provisions are conducted (now) by the CMA, or, within their spheres of responsibility, by the sectoral regulators such as the Office of Communications, making use of their 'concurrent powers'. Infringements of these provisions can attract significant fines, and damages can be awarded to the victims of anti-competitive behavior. Brexit would mean that Articles 101 and 102 would no longer be applicable in the UK; however undertakings would remain subject to the Chapter I and II prohibitions of the Competition Act, which are almost identical in scope.

Many agreements – for example distribution agreements and agreements for the transfer of technology – benefit in EU competition law from so-called 'block exemption': even if they infringe Article 101(1), they are deemed to benefit from Article 101(3), provided that they satisfy certain criteria. Agreements that are block exempted under EU law are also exempted from UK law; and purely domestic agreements that would be block exempted if they were to have an effect on trade between Member States of the EU are granted 'parallel' exemption under domestic law. It will be necessary to determine how agreements that benefit from an EU block exemption will be treated post-Brexit.

The alignment of the domestic competition law of the UK and EU law was a voluntary act on the UK's part: the UK was not under a duty imposed by the EU to align it. An important provision in the Competition Act 1998 is section 60, which requires, as a general proposition, that the competition authorities and courts of the UK should interpret UK competition law consistently with the principles of EU law and the jurisprudence of the European Court of Justice. In practice this provision has worked well, and decision-makers in the UK have been able to draw upon a sophisticated body of jurisprudence developed over a period of more than 50 years. Any post-Brexit amendment to the Competition Act 1998 will have to decide what is to happen to section 60.

## EU MODERNISATION

Significant changes to the way in which EU law is enforced in practice were effected by Council Regulation 1/2003. This Regulation contains important provisions on the relationship between EU and UK law; the enforcement powers of the European Commission and the national competition authorities of the Member States ('NCAs'); and on cooperation between NCAs and national courts, on the one hand, and the European Commission on the other. In particular this Regulation establishes that the NCAs have the power to enforce Articles 101 and Article 102. Regulation 1/2003 also brought an end to an administrative procedure whereby an agreement that might infringe Article 101(1), and which did not fall within an EU block exemption, could be 'notified' to the European Commission for it to grant 'individual exemption' to the agreement if it satisfied the criteria set out in Article 101(3). Since Regulation 1/2003 came into effect on 1 May 2004 it is no longer possible to notify agreements to the European Commission for approval: instead undertakings have to assess for themselves whether an agreement infringes Article 101(1) and, if so, whether Article 101(3) is applicable.

The EU modernisation initiative led to significant amendments to the UK's domestic law, not because of any legal duty to do so, but because it seemed sensible to align the two systems as far as possible. Two particular consequences of EU modernisation were that the *domestic* system of notifying agreements to the OFT for individual exemption was repealed; and that the exclusion of 'vertical' and 'land' agreements from the Chapter I prohibition was removed. EU modernisation meant that the OFT and the sectoral regulators were invested with powers to investigate and punish infringements of Articles 101 and 102. Article 3 of Regulation 1/2003 required that, if a competition authority in the UK were to investigate conduct that might have an effect on trade between Member States, it must do so not only under the Chapter I and II prohibitions of the Competition Act 1998, but also under Articles 101 and 102; the Regulation specifically provided that it was not possible to apply stricter national competition law to *agreements* than the provisions of Article 101; however it was possible to apply stricter standards to *unilateral* behavior than those contained in Article 102. Post-Brexit, Regulation 1/2003 will cease to apply in the UK, including the provisions of Article 3. It follows that it would be possible for the UK to adopt stricter standards for the control of anti-competitive agreements than those in Article 101.

## PRIVATE LITIGATION

Victims of anti-competitive behavior often take their complaint to a competition authority, for example the European Commission or the CMA. Alternatively they can bring an action in a national court, for example for an injunction and/or damages. Private litigation of competition law disputes has grown considerably in recent years. Sometimes a claimant commences proceedings after the European Commission or CMA has found an infringement: in this case the claim is known as a 'follow-on action', and Article 16(2) of Regulation 1/2003 provides that a national court in the EU is bound by the Commission's finding. Section 58A of the Competition Act provides that the courts in the UK are also bound by a finding of infringement by the CMA or a sectoral regulator. Brexit will not affect section 58A of the Competition Act, but consideration will have to be given to the status of a European Commission decision in

an action in a UK court. A claimant can also bring a 'standalone action' where the conduct in question has not been the subject of an infringement decision by the European Commission or a UK competition authority. Article 16(2) of Regulation 1/2003 and section 58A of the Competition Act have no application in these circumstances.

## EU AND UK MERGER CONTROL

The system of merger control in the EU and UK has been stable for many years. Mergers between undertakings whose turnover is above specified turnover thresholds fall within the exclusive jurisdiction of the European Commission; mergers below those thresholds may be subject to the domestic merger provisions of the Member States. There are some provisions that enable EU mergers to be referred back to a Member State and vice versa. Mergers are examined for possible anti-competitive effects and can be prohibited, or modified, by the European Commission or the CMA, as the case may be, where competition will be significantly impeded (EU law) or substantially lessened (UK law). The system works well in practice. A benefit that flows from being subject to the European Commission's jurisdiction is that this excludes the possibility of investigation of the same merger by a number of Member States under domestic law: the so-called 'one-stop-shop'. A logical consequence of Brexit would be the loss of the principle of the one-stop-shop, so that the same merger might have to be notified to both the European Commission and the CMA.

Where a merger is subject to the European Commission's jurisdiction, a national competition authority cannot apply its competition law to that merger, unless the case is referred back to it. Member States may have non-competition objections to a merger. Article 21(4) of the EU Merger Regulation restricts the range of 'legitimate interests' that a Member State may raise in relation to a merger having an EU dimension: public security, plurality of the media and prudential rules are stated to be legitimate interests. Any other interest would have to be communicated to the European Commission and approved by it; approval would not be given to an interest that conflicts with the general principles and other provisions of EU law. Brexit would mean that the EUMR would no longer be applicable in the UK, which would therefore be released from the restriction imposed by Article 21(4) of the EUMR.