Response to Brexit Competition Law Working Group Issues Paper

John Madill

I am a former civil servant with experience in competition policy replying as a private individual. Any views expressed herein are my own and do not reflect my former employer. I can be contacted on competition.brexit@madill.co.uk

SUMMARY

Competition policy is a vital tool is vital in ensuring economic growth and consumer welfare and the UK should maintain its commitment to a competition regime that is among the best in the world and ensure adequate resource to achieve this goal. In addition, the UK should continue to champion the benefits of competitive markets, the importance of competition policy in improving the functioning of markets, and the value of strong international co-operation.

While it is clear that Brexit will require the reach and scope of UK competition law to be reviewed, there is a potential for impact across the EU where future thresholds and definitions will apply to a significantly smaller single market. As a result, more cases – in particular mergers – may fall outside EU law and potentially into the remit of member states' national laws. Such cases may, of course, lie within the jurisdiction of more than one member state, raising issues of consistency. At European level, an assessment of the scale of this risk should be undertaken and the European Commission and member states may need to develop their own strategies and resources to adapt.

In relation to the UK, while in principle UK law is closely aligned with EU law, there are a number of technical differences, procedurally, substantively and in application. The immediate priority will be to identify and develop options for addressing these. The BCLWG issues paper highlights many of these and I set out my views on detailed points in the full text of my response.

Looking further to the Brexit negotiations, I believe competition policy is an area where a close relationship can be maintained with the European Union. Securing – and even funding – full co-operation and co-ordination in respect of competition law would be a small, relatively uncontroversial contribution to smoothing the passage to Brexit and, at least in the short term, would suit the UK as well, by reducing burdens and complexity. As part of the negotiation, the UK and EU will need to agree an approach for handling transitional cases. I believe the best option would be to allow EU law to be enforced in full in respect of all breaches or notifications that take place before Brexit.

Nevertheless, in the longer term, if the balance of UK trade tips away from the EU, or if EU and UK attitudes to competition policy begin to show signs of strain, there are a number of potential opportunities for the UK to develop a separate approach, in particular in relation to the way economic analysis is used.

The full response goes into much more detail and gives my opinion on individual issues raised by the BCLWG as well as presenting some thoughts not covered by the Issues Paper.

INTRODUCTION

Political and legal context

1. The UK's anticipated departure from the EU will be a major political event in both the UK and the rest of the EU/EEA, with possible knock-on effects beyond. In the case of competition policy, an area where the interaction between the UK and EU is particularly deep-rooted, the work of the BCLWG will be valuable in providing independent analysis, unconstrained by political dogma and the immediate challenges of balancing the broader needs of competition policy against securing a negotiating position. The issues paper is an excellent opening salvo in what will no doubt be an ongoing debate and I hope my views will prove helpful.

2. International markets and trade will continue across borders between the UK and EU after Brexit. The way in which future UK and EU law governing these should interact will be a matter for the negotiation. Regardless of broader considerations, my opinion is that a robust and effective competition framework that remains enforceable and effective across markets and borders is vital in ensuring economic growth and consumer welfare in both the UK and the remaining members of the EU/EEA. This is even more relevant when the political language worldwide is increasingly of protectionism and closing markets. While there are clear issues about the impact of globalisation on certain groups within societies, I believe these are, in the main, best addressed through other policy interventions rather than by restricting competition. Therefore, a strong competition regime should remain a priority post-Brexit.

3. The UK has for many years prided itself on having one of the best competition regimes in the world, and is regularly recognised as such by bodies such as the Global Competition Review and the OECD. The EU regime is also rated at the top, meaning the UK is subject to highly effective competition enforcement. **The challenge for Brexit will be to replace the strong EU element with an equally strong UK one. The opportunity will arise from the ability to develop the UK regime in its ability to handle complex multinational antitrust and merger investigations, raising its profile still further.**

4. The UK's position in global rankings has enabled it to become a world leader in defining competition policy – an opportunity pursued with vigour by the Competition and Markets Authority (CMA) and experts such as those in the BCLWG. This has included recognition of the value of international co-operation. Regardless of Brexit, **the UK should maintain its role championing both the benefits of competition policy and of strong co-operation across borders.** This function is not limited to the Government and institutions but should engage the legal, economic and academic professions more broadly. The membership and remit of the BCLWG are well equipped for this.

5. Turning to the substance of the issues paper, I agree with the BCLWG's assessment that, in general, the current structures of competition policy have served the UK well [para 1.4]. It is unlikely that a failure of competition policy was at the forefront of the minds of many Leave voters, and I would surmise that many anti-EU commentators would concede it as an area where a trans-national approach is working. I would also agree that the co-

operation and information sharing in the EU, and even globally have served to improve the efficacy of competition policy at all levels [para 1.5].

6. I also agree that there will need to be a full assessment of gaps in the UK regime following the Great Repeal Bill [para 1.6]. The (few) statements so far indicate the Bill will transpose EU law directly into UK law, at least in the interim, but I would argue this would be perverse in respect of competition law (and possibly many other areas too). EU competition law has as its primary function the efficacy of the single market, and is drafted accordingly. This purpose is unlikely to be (and indeed in my view should not be) the case for the UK post-Brexit. In practice, as UK competition law and EU competition law are so closely aligned, the most elegant (and therefore most likely) solution will be an extension of UK law through removal of EU law and its primacy from the statute book. For the majority of the work of the competition authorities and for business, this will mean no practical change, but there are some areas where UK and EU competition laws differ. The most notable of these is the definition of the relevant geographic market, which seems a simple change, but which could nevertheless raise unforeseen issues. **The Government will therefore need to make an assessment of the extent to which current UK law is "fit for purpose" in addressing competition matters that currently fall to EU law**, and ensure any changes that are identified are made in or alongside the Great Repeal Bill. The BCLWG paper already highlights many of the differences and I will return to this issue at relevant points in my response to the "Immediate Issues" section of the BCWLG paper.

7. The wording of the remit of the BCLWG is unclear as to whether consideration of implications outside the UK is a matter for the group. Nevertheless, the drafting of the BCLWG's assertion in paragraph 1.7 that all UK-based undertakings trading in Europe will continue to be subject to the EU's competition regime post-Brexit could be read as inferring that Brexit will mean minimal change to EU competition policy. According to the International Monetary Fund, UK GDP is approximately 17% of the EU total and the presence of UK companies in various markets is widely different. Exclusion of such a large part of the market from future analyses may well cause unforeseen changes in the application of EU law. Additionally, if the UK ceases to be an EU or EEA member state, some trade between the UK and EU/EEA – or even within the EU/EEA – may no longer trigger EU merger thresholds or meet the definition of "affects trade between member states" (my underlining) in antitrust. I lack the resources to undertake an assessment of the level of this risk, as it is based on a number of factors – not least that the vast majority of trade between the UK and EU will be multipartite and/or of a large enough scale that EU competition law will continue to apply. Given these points, some form of **assessment of implications for EU competition law without the UK as a member state** would be a valuable piece of evidence to understand the impacts of Brexit. I will return to the detail on some of these points in the relevant paragraphs on mergers and antitrust in my response to the "Immediate Issues" section of the BCWLG paper.

Approach

8. I agree with the BCLWG's working assumption to consider a Brexit model other than where the UK remains a (potentially restricted) member of the EEA/single market [para 1.8].

In such a model, competition policy would almost certainly remain integrated with the EU regime with minimal or no change. Likewise, a "Swiss-style" model for Brexit, with single market membership on some principles but not all would also be likely to see an integrated competition regime. Competition policy is broadly uncontroversial and technical, with many efficiencies and benefits from being integrated at the level of the single market. Moreover, as an overarching tool across different sectors, it is likely that EU members would require EU competition law to apply to those sectors that are incorporated into the single market. One small anomaly in this area is that the Competition Appeals' Tribunal does not have jurisdiction in relation to private actions arising from decisions under EEA law. This is already under consideration by the Government and was covered in its recent consultation on reforming competition law[1], but any definitions would need to be amended to take account of the framework for a bespoke agreement.

9. Notwithstanding the likely position as regards competition law in an EEA/Swiss-style model, the BCLWG should be open enough to make the case for competition policy to be excluded if analysis shows that opportunities and benefits outweigh costs and risks.

10. Without getting involved in the substance of Brexit negotiations, the language used on both sides so far – from the EU side regarding the requirement of free movement of people in any EEA deal and from the UK side about the Great Repeal Bill – the current likelihood seems to be the UK not being a member of the single market but instead applying its own law unilaterally – even if this continues to mirror EU law as a requirement for free trade access to the single market.

11. In this context, competition law offers a valuable case-study of some of the issues with transposing EU law into UK law. The annex to the BCLWG paper demonstrates clearly how UK competition law has already adopted much the same structure as EU law, and the tools it has used to do this. In particular it highlights the voluntarily decision to create section 60 of the Competition Act 1998 which requires 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"[2]. If, under the Great Repeal Bill, the UK Parliament chooses to maintain a broad mechanism for aligning repatriated functions with EU law, then Section 60 may provide a valid model. In such a scenario, the UK Government could evaluate how Section 60 has worked**.** This should include the extent to which it has relied on EU frameworks of which the UK may no longer be a member; in particular the European Competition Network.

[1] Options to refine the UK Competition Regime: May 2016 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525462/bis-16-253-options-to-refine-competition-regime.pdf)

[2] Quote from the BCLWG paper

RESPONSE TO PART A: IMMEDIATE ISSUES

Mergers and market investigations

12. As I indicate above in paragraph 7 above, Brexit could have a significant impact on EU merger enforcement. The EU Merger Regulation applies to mergers with, broadly:

- An aggregate worldwide turnover of €5 billion and Community-wide turnover of €250 million or
- An aggregate worldwide turnover of €2.5 billion and specific turnover levels in three or more member states.[3]

If the UK no longer holds the status of a member state, there are likely to be mergers affecting companies that operate in the UK (even if they are not based here) that no longer meet these thresholds and fall outside EU law. There may even be mergers in the remainder of the EU that no longer meet these thresholds. As indicated above, I have not performed any assessment of how many mergers will fall outside these thresholds, but while I believe numbers may be small, I fear they will not be insignificant.

13. In most cases these mergers will instead be subject to national competition laws in the UK and other EU member states. **In advance of Brexit, all member states are going to need to assess the scale of this and adapt the procedures and resources of their own national competition authorities to cope with the increased workload**. At the same time, certain larger companies will no longer be able to use the "one-stop-shop" and potentially face parallel investigations in more than one country. They will therefore need to anticipate the cost and complexity of multiple parallel investigations, with different evidence submissions, different timescales and the potential for remedies being imposed inconsistently.

14. At EU level some of these costs and inconsistencies could be addressed through new information sharing and co-ordination within the European Competition Network. This would require consultation as the corporate world may prefer higher transaction costs over an automatic sharing of commercial information across regimes where competition issues may be very different. The alternative would be **for the European Commission to propose an amendment to the thresholds in the EUMR**, if there is scope for agreement. Either way, the Commission may need to consider whether new merger procedures are needed and develop proposals appropriately.

15. For the UK, the thresholds are based on turnover or share within the UK market. It is probable that mergers which currently fall within the EUMR but which nevertheless have an anticompetitive effect in the UK will be caught by these thresholds. Nevertheless, this risk of creating gaps where the UK competition authorities[4] have insufficient jurisdiction should

[3] P4 EU Competition Law Rules Applicable to Merger Control
http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf

[4] UK competition authorities are the Competition and Markets authority and sector regulators with concurrent powers to enforce competition law. The vast majority of the impact will fall on the CMA.

be considered in the context of deciding how to handle the transposition of competition law and kept under review.

Resources [BCLWG paper para 2.5.1]

16. The BCLWG correctly point out that removal of the "one-stop-shop" will bring a large number of mergers into UK jurisdiction that currently sit in the remit of the European Commission. As well as cases that no longer meet future EU turnover thresholds and therefore fall automatically to the UK under any scenario (potentially in parallel with other national competition authorities) the UK competition authorities will also need to assess all mergers that affect the UK market even if they meet EU thresholds, as the EU assessment will in nature exclude the UK. In advance of Brexit, the Government should identify the likely scale of this increase, as well as the impact on both business and competition institutions (in particular the CMA but potentially also sector regulators and the Competition Appeals' Tribunal).

17. Some of these costs could be mitigated through prioritisation of different merger types. In practice, this is likely either to be by an exclusion of small mergers (an introduction of UK thresholds) or based on analysis of impact during pre-Phase I Scrutiny.

- Excluding all small mergers would be a retrograde step, as even small mergers can have a major impact if their effect is very localised (for example two leading minicab firms in a single city).
- A pre-scrutiny analysis would be a better option. However, given the complexities of defining relevant markets and the work involved, in practice it may offer few genuine savings and could increase bureaucracy and timescales. This would be counter to the desire set out in the Government's May 2016 consultation that the CMA should minimise the burden on business imposed by pre-phase 1 scrutiny.

The final alternative is to divert resource away from other competition activity – principally antitrust work or market investigation. While clearly this is a political decision, both of these are valuable tools (as I set out below) and their reduction would also be undesirable and potentially harm the international reputation of the UK.

Timescales [BCLWG paper para 2.5.2/3.4]

18. The BCWLG raises the difference between timescales for UK and EU merger law. Of course, a wholesale adoption of EU law into UK law via the Great Repeal Bill would need to address this, as it would involve either an immediate change from EU to UK timescales (with associated issues if maintenance of an equivalent regime were to be used to justify ongoing/transitional access to the single market), a change to UK law or a creation of two classes of merger.

19. It is my view that the impact of different timescales need not be a significant factor. Looking forward, both Phase I and Phase II assessment will be based on fundamentally different criteria, and the impact of preparing multiple sets of evidence and submissions in for the UK and EU will be far more significant factor than a longer wait for a decision (indeed the UK Government has already raised concerns over information requirements in mergers

in its May 2016 consultation). Nevertheless, **if the UK maintains its longer timescales, it should evaluate the impact of a different system 2-3 years down the line**.

20. A potentially greater issue impacting on timescales and consistency is the fact that EU merger law includes mandatory notification while UK merger law is based on a voluntary system. This can mean that Phase I in the UK incorporates the time taken to request and gather evidence from merging parties. It is probable that most mergers notified in the EU will also be notified in the UK, but not certain. The May 2016 consultation already proposes clarifying the information that the CMA can request in notified and non-notified mergers and a key risk here is that CMA procedures could be subject to a poorer evidence-base that EU decisions. Any difference in evidence availability could increase the number of mergers being blocked or amended retrospectively, possibly in a manner inconsistent with EU decisions, further increasing cost and uncertainty.

21. The UK Government repeats in its May 2016 consultation that it sees voluntary notification as a benefit of the UK regime. While I agree that notification can be a burden in respect of small-scale mergers, this does not follow for large mergers, in particular those that will still be subject to mandatory notification in the EU. Therefore, **I would suggest replacing the UK's system of voluntary notification with a mandatory approach, subject to a de minimis threshold.**

Co-operation and co-ordination [BCLWG paper para 2.5.3]

22. As I set out in paragraph 11, the impact of Brexit on merger thresholds may create a new impetus for greater co-operation and co-ordination between remaining EU Member States if more cases fall outside the one-stop shop. Although the Commission is likely to lead on policy design, it may be helpful for the UK if any proposals of this nature are outside EU law. Co-operation in this sense will be as much about alignment of parallel *national* frameworks as about a top-down approach to comply with EU law. A partnership approach that allows the UK (and potentially third countries) to participate may be more politically pragmatic. Alternatively, the renegotiation could try to ensure the UK remains a member of or an observer to the European Competition Network to secure a stronger co-ordinated approach.

23. In terms of remedies design, the critical feature of both/all regimes should be evidence-backed remedies that address the competition issue in question, which will likely be in future based on a different geographic definition of the relevant market. Therefore, difference in remedies is not a bad thing per se. However, where remedies are likely to overlap, some element of discussion and flexibility on all sides to ensure alignment of, for instance, information requirements would be beneficial.

Transitional issues

24. Despite the short timescales for merger decisions, it is uncertain that the international corporate market will put activity on hold for 115 days before Brexit. This will mean that some mergers may be notified before Brexit, but clearance or remedies imposed afterwards. The decision will be for the UK to decide whether to accept all decisions on

mergers notified before the date of Brexit, or for the CMA to launch priority investigations immediately after Brexit. Due to the likely short-term resource implications I believe the former approach ("I've started so I'll finish") to be practical, in particular at Phase I. Nevertheless, I would temper this with a discretion for the CMA to open its own automatic Phase II investigation if it feels the Commission is likely to impose orders or agree undertakings that fail to address competition issues in the UK market, or to reject orders/ undertakings it considers detrimental. Whether or not this approach is chosen, both UK and EU authorities will need to consider the risk and impact of companies bringing forward or pushing back mergers around the date of Brexit in order to take advantage of the most favourable regime.

Market Investigations [BCLWG Paper para 2.6]

25. As with merger remedies, I do not believe that, post-Brexit, **EU activity in a sector should preclude the CMA or sectoral regulators from opening market investigations**. EU investigations will remain focused on trade within the single market and by default will not consider impact in the UK – not least because the UK will no longer be contributing to the Commission's budget to do so. The UK authorities should therefore be free to take independent decisions based solely on harm to the UK market.

26. With both merger and market investigations, the substance of Brexit negotiations may limit the scope for a full discretion by UK authorities, with some element of subservience to EU authorities being a requirement for continued access to the single market. In my personal view this would be an acceptable compromise, if accompanied by a formal procedure to ensure that UK competition policy is not worse off.

Antitrust

27. As indicated in paragraph 7 it is unclear in a post-Brexit world whether the phrase "between Member States" would capture activity stemming from the UK and treating different EU Member states as individual marketplaces. I believe this will be less of an issue than the effect on merger thresholds – not least because the European Commission is unlikely to be conservative in developing the meaning of the word "between". It is also likely that national competition laws in other member states will fill any gaps, albeit with two drawbacks:

- Individual countries may have to take separate cases under domestic laws – creating more duplication, cost, and potentially leading to inconsistent outcomes.
- For antitrust, fines under domestic law are normally significantly less than the maximum of 10% of annual single market turnover permissible under EU law. Increased reliance on domestic competition enforcement could potentially reduce the deterrent effect of competition law.

28. These potential downsides – as well as the increase in costs to remaining EU member states – could be a minor risk in Brexit negotiations over access to the single market. If EU member states feel there will be insufficient protection from anticompetitive

behaviour arising from the UK, they may wish to obtain concessions, or retain the ability to use trade or anti-dumping measures. A full analysis of the extent to which historic antitrust cases would still have been addressed had the UK been outside the EEA may bolster the UK's position. If an analysis *does* show that the effectiveness of EU competition policy could be impeded the Brexit negotiation will no doubt need to reconcile this.

29. Either way, it is worth noting that competition policy (and particularly the importance of a strong antitrust regime) is an important feature in EU free trade deals. Chapter 17 of the Comprehensive Economic and Trade Agreement (CETA) with Canada makes reference to competition policy and highlights the 1999 co-operation agreement[5]. Early-stage accession agreements with new member states have competition policy as one of the first points to address. Given the uncontroversial nature of competition policy in general and the recognised benefits of antitrust enforcement in particular, I believe that it is an area **where UK negotiators should offer maximum co-ordination with the EU and look creatively at methods to support EU policy**. This could be a commitment to co-fund Commission enforcement of cross-border trade involving the UK, or a commitment to give the CMA the powers, duty and funding to take action in cases where there is a gap. At the very least, the UK should seek to offer a full co-operation and co-ordination agreement to the Commission and other EU competition authorities on the investigation, evidence-sharing and enforcement procedures, including ensuring Commission decisions and fines are enforceable on UK companies technically based outside EU jurisdiction. I believe the UK should also **maintain Section 60 of the Competition Act 1998** binding the UK courts into decisions by the European Court of Justice and having regard to Commission statements and decisions. As well as smoothing the passage to a free trade deal (at the margins: other topics will carry far more weight in negotiations) retaining a fully co-ordinated approach will retain the maximum deterrent factor of an effective competition regime. I discuss the longer-term options for S60 at paragraph 47.

Transitional Issues

30. Article 50 specifies a two-year process when the departing member state is a full member and when EU law is applied in a manner that reflects this. Therefore, the current approach to antitrust investigations must operate up until the date that Brexit takes place, including who should commence enforcement action under Regulation 1/2003. The BCLWG rightly raises the question of whether the Commission will have vires to take action in UK markets beyond the date when Brexit takes place, either where a case is commenced [para 2.9.1], or a breach is committed before that date [para 2.9.2].

31. I believe that the change in the relevant geographical markets in both UK and EU accounts to a substantive rather than procedural change to competition law, and I fear that it may constitute retrospective application of the law if the new market definitions are applied to breaches that take place before they come into force. On the other hand, simply to stop or prohibit the enforcement of cases due to Brexit offers a carte blanche for

[5] Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws, done at Bonn on 17 June 1999

companies to engage in anti-competitive behaviour for the next two years. In my view, the only practical solution is for **EU law to be enforceable as though the UK were still a member in respect of breaches that first took place when it was a member**. This should therefore enable the Commission, CMA and other national authorities to enforce competition law without significant limit. One possible consideration could be a power for the UK court to step in and bring to a halt a case where there are grounds to believe the relevant authority is going beyond investigating a reasonable suspicion of a pre-Brexit breach. It would only need to be the UK court, and not the ECJ, as the UK court would have sufficient jurisdiction over the activities of the UK authorities abroad, and over the UK companies being targeted by foreign authorities.

32. The one area I would propose a different approach is in respect of any forward-looking commitments imposed by EU authorities post-Brexit. These should not automatically be binding and instead be replaced by a simple process where they can be ratified by the CMA. Ideally this would be accompanied by a duty on EU competition authorities to consult the CMA before proposing commitments in cases that have an impact on the UK market.

33. If such a transitional agreement cannot be negotiated the UK Government should give the CMA a unilateral power and the funding to take cases under pre-Brexit EU law even if the Commission is blocked from doing so. If possible the negotiation process should seek to obtain a financial contribution from other member states (for political expediency perhaps offset against other continued payments to the EU by the UK).

Commitments and Block Exemptions [BCLWG paper paras 2.9.3-2.9.4]

34. I believe the spirit of the announcements around the Great Repeal Bill is to transpose EU law into UK law wholesale, and for consistency this should include commitments and block exemptions. Responsibility in the UK should transfer to the relevant UK authority, with a review power in respect of UK impact. In respect of EU impact, the CMA should be given a duty to comply with any reasonable formal request from the Commission to enforce commitments by UK companies where EU authorities are unable to do so.

Leniency [BCLWG paper para 2.9.5]

35. I agree with the BCLWG that the one-stop-shop for leniency will not automatically be available post-Brexit, although I would submit that leniency applications could be included in any post-Brexit co-operation agreement. This could ensure leniency applicants are automatically protected under UK civil law. Likewise, any protection or anonymity for whistleblowers should remain integrated so as not to discourage individuals who identify illegal behaviour.

Legal Privilege [BCLWG paper para 2.9.6]

36. I believe legal privilege should be highlighted as an issue for negotiation on the future of mutual recognition of qualifications and status, rather than considered in competition law. If the outcome of the negotiation is that qualified lawyers retain mutual

recognition then EEA lawyers should retain their power to give privileged advice. If mutual recognition is removed, then companies should seek advice from qualified lawyers in each jurisdiction. Either way, advice received from a qualified lawyer who was recognised as such at the time it was provided should remain subject to legal privilege.

Resources [BCLWG Paper para 3.12]

37. The BCLWG paper comments on resourcing of antitrust action post-Brexit as a longer-term issue but I believe it is relevant sooner, alongside discussion on resourcing mergers and market investigations. I believe it is clear that the CMA in particular will need to be resourced to take parallel enforcement action on cases that affect both the UK and EU.

38. More broadly, the CMA has a tendency to use the market study approach to identify markets that are not working well and then decides whether or not to take action using antitrust powers, a more in-depth market investigation, regulatory recommendations or enforcement using other (primarily consumer law) powers. While in principle, I would hope to see sufficient resource devoted to all valid work improving competition in markets, in practice this is likely to be limited. In such a case, the CMA and sector regulators should appraise both the market impact and the realistic change of securing a positive outcome and prioritise on those two grounds.

39. The only area where the CMA could conceivably reduce resources to fund antitrust and merger control activity is in its market investigation work and exercise of powers to make recommendations to Government set out in the Enterprise Act 2002 and the Small Business Enterprise and Employment Act 2015. In my opinion this would be a significant loss to the UK due to what I believe are unique benefits of these additional elements over and above the "pure" approach in EU policy. An ironic consequence of this is that the frameworks set out in the 2002 and 2015 Acts are the most significant diversion from consistency with EU law. Reducing the allocation of resource to this work would have the effect of bringing UK competition policy more closely in alignment with that of the EU.

RESPONSE TO PART B: LONGER-TERM ISSUES

40. I have drafted this section of the response to set out my view on possible areas where UK law could be altered in future. Therefore, this section of my response should be read as ideas and viewpoints rather than issues of principle where I have concerns. I will first address the issues raised by the BCLWG and then take the liberty to make some suggestions of my own. Some of these may be somewhat controversial but are intended in the spirit of provoking a debate.

Mergers and Market Investigations

Public policy requirements [BCLWG Paper paras 3.2-3.3]

41. I believe **the UK should be very careful indeed before introducing additional public interest protections**. Of the three legitimate interests highlighted in the BCLWG paper, two

– national/public security and financial stability – are both factors without which a functioning competition regime (and quite possibly a functioning state) may be threatened. The third – media plurality – in practice operates as a parallel competition regime, taking into account a non-economic concept of impartial access to news rather than the economic criteria that underpin traditional competition law. Considerations that neither underpin an effective competition regime nor parallel its operation should not be factors in merger decisions for two reasons:

- Competition policy should be used to address competition concerns, and should not be a Trojan Horse for wider public policy. Addressing issues of public policy should be a matter for Government beyond competition law, and there are many different tools with which action can be taken, including, if necessary, a direct regulatory intervention. This is particularly the case in respect of foreign takeovers, where a public policy justification would damage the integrity of the entire merger process.
- While there are legitimate reasons for competition authorities to be independent from Government in terms of competition policy, decisions on measures to address broader issues of public policy correctly sit with the Government or Parliament. If too many public policy exceptions are introduced there is a risk of either politicising the CMA and regulators or effectively transferring final authority over a huge swathe of mergers back to the Government.

42. Nevertheless, a possible compromise may be for the CMA and regulators to have a power to make representations to Government on areas where a merger analysis uncovers a threat to broader public policies. In specific named areas, this could include an information sharing provision where confidential evidence could be passed to the Government. Use of such a provision should always be initiated by the CMA or regulator; there should be no power for the Government to demand information and "go fishing".

Market Investigations [BCLWG paper para 3.5]

43. I believe the market investigation framework is a valuable element of the UK competition policy framework and one which makes UK policy more powerful than EU policy. In particular the market investigation framework allows the CMA to consider where competition is failing in markets even where there is no breach of Chapters 1 and 2/Articles 101-102. Examples include markets which exhibit abusive behaviour but which nevertheless lack a single dominant entity, or "aftermarkets" where purchase of a specific product effectively ties a buyer into follow-up products[6]. The market investigation regime also has flexibility to use behavioural economic analysis which is far more constrained in antitrust enforcement (I discuss this further below). Finally, by integrating different tools for resolving problems; including bespoke remedies, the power to make regulatory recommendations and use consumer enforcement powers; the market investigation regime is often the strongest mechanism for improving outcomes for consumers.

[6] The EFIM case (T-296/09 - EFIM v Commission) found that there was no potential for abuse of a dominant position in an aftermarket in the absence of dominance in the primary market.

44. This contrasts to the EU approach where different parts of the Commission have tended to lead on proposing measures that enhance competition – for example the successes of DG CONNECT in reducing roaming charges. The EU process means there is no choice but to implement these through the traditional political framework of proposing legislation to the Parliament and Council and waiting for the inevitable compromise. As competition-enhancing measures of this type more often than not clearly benefit consumers they are generally uncontroversial and often popular and better understood than antitrust enforcement and so can play a strong role in highlighting the benefits of a functioning competition policy. It sometimes feels like this is a missed opportunity at EU level, in particular where Commissioners other than the Competition Commissioner take credit.

45. Given the clear benefits of the market investigation regime, increasing freedom from EU law as regards the treatment of agreements may secure more effective competition. On the other hand, as the Article 101/Chapter 1 system in general functions very well, this may simply be introducing unnecessary uncertainty.

46. In terms of public policy requirements, I would oppose the reintroduction of a general public policy consideration. In principle I believe that – from a purely competition point of view – public policy and protectionism often walk hand-in-hand and genuine public policy issues are best achieved by other means under closer scrutiny from Parliament without risk of politicising the competition regime. This is not to say that competition policy should trump other public policy in all cases; simply that the decision on balance should be taken by democratic representatives and the integrity of the competition policy itself should be maintained. Nevertheless, as with mergers, a power for the CMA to highlight public policy issues if they are uncovered during the course of a market investigation may be a valuable tool.

Antitrust Rules

Section 60 [BCLWG paper paragraphs 3.6-3.8]

47. Given the likely complexity of the Brexit process and the time it will take for relationships to settle down, I believe there should be no rush to delink UK competition policy from EU policy and abolish Section 60. As I set out in my response to Part A of the BCWLG paper, I believe the minimalist approach will nevertheless incur substantive and procedural changes to both UK and EU policy. It would be better to maintain consistency as much as possible for at least several years and the issues around operating a separate regime properly evaluated. As indicated in Paragraph 29, S60 could support future UK/EU relations in an uncontroversial policy area. A further consideration is that if Brexit does not lead to a significant departure from European attitudes and policies more widely, I can envisage a door remaining open for EEA membership in future. This would be easier if there has not been a wholesale departure from EEA rules. On the other hand, if Brexit allows the UK to forge a more internationalist path, then the time may well come when UK competition policy needs to adapt to new trading relationships, and S60 – which ties the UK

into a European rather than global approach – may begin to hold the UK back. It is also possible that EU jurisprudence itself may begin to diverge in an unwanted direction. Given this, a sunsetting clause on Section 60 after – say – five years could be an alternative to an evaluation.

Effects-based competition policy [BCLWG paper paragraphs 3.9-3.10]

48. I support the CMA's preference for an "effects-based" approach to competition policy rather than an "object-based" approach. While an object-based approach delivers more certainty, it can waste resources on cases that do little to improve the functioning of a market and potentially fail to engage the public and politicians with why a strong competition policy is so important. Linked to this, the CMA should maintain a focus on prioritising harm to consumer welfare rather than total welfare. One advantage of Brexit is that these principles could be spelled out more clearly in law – and therefore be binding on the Competition Appeals' Tribunal in particular.

Competition enforcement

49. One area I would submit for consideration is whether an administrative enforcement system remains appropriate under UK competition policy in the longer term. A significant difference between the UK and EU is that UK competition law allows appeals to be made to the Competition Appeals' Tribunal "on the merits" essentially where a party believes the substantive analysis of the competition authority (CMA or sector regulator). This contrasts with EU law where appeals against Commission decisions are only on procedural grounds. The net result of this is a higher proportion of UK cases go to appeal, and these appeal cases tend to be more complex – often amounting to a wholesale rerun of the competition authority's decision. Even when the substantive finding of a breach is upheld, if there is dispute about the level of harm then a fine can be reduced (or increased), a technical defeat for the competition authority which can cause reputational damage. This is exacerbated by the effects-based approach favoured by the CMA, as it is the analysis of effect that is most subject to dispute (perhaps this is in part the reason the Commission prefers the object-based approach!). An increased number of antitrust cases is certain to mean an increased number of appeals and potentially defeats.

50. Many other jurisdictions – most notably the United States – have a prosecutorial model for competition law, where the competition authority takes no decision but instead takes a case to court immediately. The UK has resisted this approach for a number of reasons, including the likelihood that a prosecutorial system would not significantly reduce appeals – they would simply switch to being from a lower court to a higher one. Nevertheless, consistency with the EU's administrative approach was certainly a factor in why a prosecutorial approach has not been considered seriously.

51. I do not wish to come down for or against a prosecutorial model, but I would argue that Brexit offers a real opportunity to look again at how the balance between administrative enforcement and appeal is managed.

The Future of Private Litigation

52. In terms of breaches of EU competition law occurring before Brexit, I believe that the UK should continue to permit EU citizens to bring actions in the UK courts without any restriction. For breaches of EU law post-Brexit, the issue is more complex. Notwithstanding Brexit, the integrated nature of European trade will mean that UK citizens and companies can potentially be harmed by breach of EU competition law where the breach takes place in another member state. It would potentially be undesirable for British citizens – in particular consumers – to have to seek redress or action in a foreign jurisdiction. Therefore, I would argue UK courts should look to retain some way of maintaining jurisdiction over EU competition law in respect of private litigation by British citizens. This raises a number of procedural points:

- Mechanisms will be necessary to ensure UK courts do not impose a different interpretation of EU law from European courts. This will require decisions of the ECJ, European Commission and potentially other national competition authorities and even courts to be binding on UK courts in respect of private litigation. It may require a power for the European Commission to intervene or appeal if it feels a UK court has misinterpreted EU law. It may even require a power to continue to refer substantive issues of EU law to the European Court.
- If the UK courts do retain jurisdiction over EU law for British citizens then the argument for excluding other EU citizens is less, should the UK be a preferred forum. In part the broader question of standing will need to be addressed as part of the negotiation beyond competition law, but a scenario where EU citizens could seek jurisdiction under a different interpretation of EU law is likely to be unacceptable and potentially harmful. Therefore, if standing is to be allowed, then the UK will more than likely be required to maintain – and fund – a right for the Commission to intervene and for issues to be referred to the European Court. Nevertheless, I am uncertain whether this should be addressed in negotiations around competition policy or around the future role of the Court, but it should certainly be highlighted.
- If standing is to be limited to British citizens, how will the UK courts determine damages? It is unlikely a European Commission decision (or one of a national competition authority) would isolate harm to or share to UK citizens. In particular for collective redress cases there will need to be procedures to ensure UK courts make an assessment of damages that is proportionate to the harm suffered by those citizens
- If a decision is made to retain S60 for public enforcement then it would drive a coach and horses through the objective of consistency if private enforcement were excluded. If/when S60 is repealed then the need for consistency in private enforcement should be altered to match.

Other issues for consideration

Use of behavioural economics

53. I mentioned above that the market investigation regime has flexibility to apply behavioural economic theory in its analysis of whether a market is working effectively, and even when imposing remedies. An understanding of the fact that many market failures are caused by business taking advantage of poor consumer decision-making (either actively or passively) underpins many of the CMA decisions and those of the Competition Commission before it. Thinking in the antitrust and merger fields about the interaction between competition law and consumer behaviour is much less advanced, and is certainly not pursued as actively by DG Competition (although other DGs are more keen). The separation of UK from EU policy could provide greater opportunity to integrate behavioural theories into a range of areas, from effect-based analysis, to commitments and orders/undertakings. Assessing and controlling for behavioural antipathy to switching, for example, or the discounting pf aftermarket prices, could lead to a theory of abuse of dominance being developed that is substantially different from EU law.

54. Another area where a more behavioural approach might prove fruitful is in addressing monopsony. Traditional economic theory argues that monopsony on a supply chain upstream is unlikely unless there is also a downstream monopoly. However, this is based on a theory of rational decision making – principally that consumer-facing businesses in a competitive market will seek to maintain a viable but competitive supply chain of their own and that suppliers will choose market exit over trading at a loss. Such outcomes do not seem to occur as often in the real world as traditional economics would suggest. Meanwhile, consumers, themselves tempted by good marketing and low prices discount the value they may otherwise place on sustainable supply, and companies who ignore their supply chain can succeed in the short term, precipitating a "race to the bottom". Such imperfections are well known, but currently, interventions to address concerns over buyer power have been somewhat fudged or disputed such as the market investigation reference which led to the creation of the Groceries Code Adjudicator. Rooting competition analysis more strongly in behavioural theory and recognising that the decisions underpinning business action may not be fully rational could open up a whole new direction for competition policy.

Integrated tools for addressing competition concerns

55. As I mention above, one benefit of the current UK framework is the integration of tools to address market failure. Prior to the creation of the CMA, the Office of Fair Trading was also the national consumer enforcement authority, although in practice this was a small role with smaller cases being taken by Local Authority Trading Standards Services. As part of the creation of the CMA, this role – and associated funding – was transferred to a new Trading Standards consortium to take on the enforcement role in national-scale cases where breach of consumer law was harming individuals directly. Nevertheless, following consultation, a decision was made that consumer enforcement powers – in particular under the Consumer Protection from Unfair Trading Regulations 2008 and the Unfair Terms in

Consumer Contracts Regulations 1999 – be retained as tools for the CMA where it believes breach of consumer law is inhibiting competition and therefore harming consumers indirectly. This ability to apply a relevant tool can potentially save a lot of time and complexity, and this principle may be more creatively developed if the UK is not bound by European competition jurisprudence.

56. Given this, one area the Government could consider enhancing the competition regime is to look at other available tools. For example, non-payment of the living wage creates an instant unfair competitive advantage for a business choosing to do so. In looking to enhance the effectiveness of the competition regime, especially if it begins to develop away from consistency with the EU, the UK Government could consider whether other enforcement powers could be added to the CMA's armoury. An alternative could be to open information gateways with other enforcers where CMA analysis uncovers a breach of the relevant laws.

Devolution

57. One consequence of the wider Brexit debate is likely to be a partial reopening of the devolution settlement. Many of the areas where the EU has jurisdiction would otherwise be devolved matters under the current settlement and others may be considered better suited to devolution. At the same time, the political language around the "Northern Powerhouse" and combined authorities/elected mayors indicates there will be a significant devolution of powers within England over the coming years. I strongly believe competition policy should *not* be devolved – ensuring consistency across 3 devolved administrations and potentially multiple English regions would be a procedural nightmare.

58. Nevertheless, over time, devolved administrations and local elected mayors may well get wide-ranging powers that could be applied in a manner that severely damages competition (either deliberately or by accident). If the "northern powerhouse" takes off, local markets could develop that, despite a relatively small scale, could potentially hide very serious competition problems. Allowing either of these would be inconsistent with a UK Government's public message of promoting competition.

59. Application of policy by local and devolved Government could be addressed by some form of duty as regards ensuring competition. In general, national Government is not keen to restrict the freedom of locally elected representatives in this way but competition policymakers would need to weigh up the risks and benefits. An alternative could be a "negative duty" – that local and devolved Governments should use whatever measures have the least impact on competition when implementing a policy but accept that the policy itself may be superior.

60. Either way, the risk with such duties is that they can often be complied with in a manner that pays no more than lip service, either due to political will, or more likely lack of resource and expertise to perform the type of analysis necessary. Government and the CMA may wish to consider whether to set up a function to support devolved and local Governments to undertake competition assessments, or (if there is political will) extend S37

of the Small Business, Enterprise and Employment Act 2015 to include devolved and local Government.

61. In terms of engaging with local and devolved decision-makers, one method would be to dedicate one or more units within the CMA solely to sub-national enforcement, focussing on competition concerns in small geographic areas. The optimal number may be 4-5 units, one for each devolved administration and 1-2 for English regions. In particular for Wales and Northern Ireland this would be disproportionate, but it may reap political rewards. These units should be located outside London, and if they also took on the role of engaging with local and devolved Governments suggested in the previous paragraph, could potentially add significant value to the competition framework.

RESPONSE TO PART C: AREAS OUTSIDE THE SCOPE OF THE REPORT

62. I understand the BCLWG's decision not to consider state aid and regulated industries in their Report. These raise highly complicated principles of their own and each could form the substance of full analysis and merit their own working group. Nevertheless, in developing options and proposals, the BCLWG should remain mindful of the impact of any recommendations on sector regulators and the need to maintain concurrency across the UK regime. In respect of State Aids, one possible consideration is whether a future market investigation regime should have a power to review, or even strike down, a subsidy where it is found to be harming competition.

NOTE: The full Brexit Competition Law Working Group Issues Paper and other materials can be found at http://www.bclwg.org/. This response was answering a general call rather than a direct commission.