



**PROVISIONAL
CONCLUSIONS AND
RECOMMENDATIONS**

April 2017

1. INTRODUCTION

- 1.1 This report contains our provisional conclusions and recommendations on the implications of Brexit for UK competition law and policy.¹ We invite comments and discussion on the report, including at a half-day conference being held at the British Institute of International and Comparative Law on 2 May 2017. Following that, we will complete our final report.
- 1.2 This report draws on the analysis set out in our Issues Paper (October 2016)² and on the many responses we have had to that paper, both through written contributions and participation in two roundtable workshops (one on antitrust, held in November, and one on mergers, held in December). The report focuses on the impact of Brexit on the various elements of the UK competition regime and their consequent practical implications for enforcement of the competition rules. Our working assumption continues to hold that Brexit will result in the UK leaving the EEA and the ‘single market’.
- 1.3 Aspects of the wider economic policy context are worth emphasising at the outset. The first is the broad convergence over the past two decades of competition law and policy and enforcement, not only across the EU, but worldwide – a process in which the UK has played a leading part. Competition law and policy work reasonably well, helping to ensure that markets work well for consumers and efficient business, and hence for economic productivity, by guarding against anti-competitive practices and mergers. Second, the effectiveness and consistency of policy has been greatly enhanced by international cooperation and coordination, especially between the UK and EU authorities. Third, Brexit will not change the fact that all UK firms doing business across Europe will continue to be subject to EU competition law in respect of that business.
- 1.4 The Annexe of our Issues Paper traced the development of UK competition law and its relation to EU competition law. The central pillars of competition law in the UK were established 15-20 years ago. They are the Competition Act 1998 (‘CA98’) and the Enterprise Act 2002 (‘EA02’). The Chapter I and Chapter II prohibitions in the CA98 prohibit respectively anti-competitive agreements and the abuse of a dominant position: these may be referred to as the ‘antitrust’ rules. The EA02 provides for certain mergers/acquisitions to be investigated and, where a transaction gives rise to a likely substantial lessening of competition (‘SLC’) provision is made for its modification or, if necessary, its prohibition. The EA02 also provides a mechanism whereby markets can be investigated and, in contrast to most or all peer jurisdictions, where adverse effects on competition are identified, remedies can be imposed to improve the functioning of the market(s) under review.
- 1.5 Our report has two main themes. The first is that Brexit need not, and should not, jeopardise the legislative or institutional **continuity** of UK competition law. The two

¹ We are very grateful to Deirdre Taylor, Alex Baker and Julian Gregory for their assistance with the preparation of this paper.

² Available at: www.bclwg.org/activity/bclwg-issues-paper

main instruments – CA98 and EA02 – are UK statutes, the Competition and Markets Authority (the ‘CMA’) is well-established, and so is the role of the courts (notably the Competition Appeal Tribunal (‘CAT’)) in this sphere. Moreover, the Chapter I and II provisions of CA98 mirror those in Articles 101 and 102 of the EU Treaty, which facilitates substantive continuity of law. Some alterations to the substantive antitrust rules will however be required, and we make recommendations on them in paragraphs 2.6-2.7 below; these are relatively simple matters.

- 1.6 As for mergers, we recommend that the SLC test should be retained as the substantive standard to be applied by the CMA; we also recommend that no change be made to the approach to public interest considerations set out in the EA02. Further, we see no reason to recommend any change to the substantive test for market investigation references contained in the EA02.
- 1.7 Overall, while there remains room for debate about more radical changes to the constitution and procedures of UK competition enforcement (such as a prosecution model for antitrust infringements, a compulsory notification regime for mergers, etc.) we think it would be unwise to link resolution of these questions to Brexit. On the contrary, there will already be sufficient systemic change to which the private and public sector will need to adapt. More radical proposals, some of which were anyway mooted and rejected at the time of the 2012 reforms leading to the CMA, would be better revisited, if at all, once Brexit reform has had a chance to bed down. This is consistent with the broad approach of the Government as set out in its White Paper on the Great Repeal Bill, which is that *‘wherever practical and sensible, the same laws and rules will apply immediately before and after our departure’* and that secondary legislation passed under the Great Repeal Act will not be *‘a vehicle for policy changes’*.³
- 1.8 Our second theme is the problematic nature of **transition** to the environment post-Brexit, and of how to secure effective international **coordination and cooperation** within it. There are numerous issues of a transitional nature that require careful consideration as a result of Brexit, both in relation to the antitrust rules and merger control (though not market investigations) and it is highly desirable that arrangements be put in place to facilitate coordination and cooperation between the competition authorities in the UK and the EU, both for antitrust and for mergers. We also recommend that the Government should ensure that the CMA will have adequate **resources** to enable it to manage the increased workload that will be an inevitable consequence of Brexit.
- 1.9 We set out our recommendations in relation to each of these matters below. They are summarised in our concluding section.

³ *Legislating for the United Kingdom’s withdrawal from the European Union* (CM 9446), March 2017, Foreword by David Davis MP. The White Paper further states: ‘we will ensure that the power [to use secondary legislation to change the law] will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU’ (para 3.17).

2. SUBSTANTIVE LAW: ANTITRUST

PRIMARY LEGISLATION

- 2.1 The Government's intention is that the Great Repeal Act will repeal the European Communities Act 1972, which gives direct effect to EU law within the UK. As far as the antitrust rules are concerned, Articles 101 and 102 TFEU, which contain the EU antitrust rules, will therefore almost certainly cease to have direct effect in the UK upon Brexit. We say 'almost certainly' because the Government has stated that it intends to incorporate into UK law a number of EU Treaty articles that confer rights which can be relied on directly in court by individuals,⁴ and it has not yet indicated whether these will include Articles 101 and 102 (though that appears highly unlikely).
- 2.2 In any event, the UK antitrust rules, found in Chapter I and Chapter II of the CA98, are substantively identical to the EU antitrust rules.⁵ As a result, anti-competitive agreements and the abuse of a dominant position that affect markets in the UK will remain unlawful as a matter of UK law.
- 2.3 Our recommendation is that the Chapter I and Chapter II prohibitions should remain as they are currently drafted. There is no need to change these provisions as a result of Brexit, and maintaining them in their current form would promote legal certainty for businesses, regulatory authorities and consumers. The UK rules have been in effect since 1 March 2000; there is considerable decisional practice at the level of the CMA and the sectoral regulators and a solid body of jurisprudence in the UK courts explaining their application.
- 2.4 Our recommendation is also to leave the criminal cartel offence, contained in section 188 EA02, in its current form, as it provides an important (if currently somewhat underused) limb of enforcement. Post-Brexit, any constraint on prosecuting that offence in order to avoid impacting the European Commission (the 'EC') in its civil enforcement of the competition rules would fall away. The criminal cartel offence may therefore become a more prominent enforcement tool for the CMA.
- 2.5 Where anticompetitive conduct affects competition within the EU, it will continue to be unlawful as a matter of EU law. Thus, while Articles 101 and 102 will no longer have direct effect in the UK, they may be enforced both by the EC and by the competitors and customers of UK businesses in national courts of the Member States (as discussed at paragraph 2.14 below). As a result, UK companies that undertake activities capable of affecting inter-state trade in the EU will still need to comply with those provisions.
- 2.6 This has implications for how to address section 60 CA98, which requires, in essence, that Chapter I and Chapter II of CA98 must be interpreted consistently with the jurisprudence of the European Court of Justice (the 'ECJ'). Given the Government's

⁴ Legislating for the United Kingdom's withdrawal from the European Union (CM 9446), March 2017, paragraphs 2.9 to 2.1.
⁵ The differences relate to geographical scope and jurisdictional threshold.

intention to bring an end to the jurisdiction of the ECJ in the UK, it follows that section 60 cannot continue in its current form.

- 2.7 Our recommendation is that section 60 should be amended such that UK courts and regulatory bodies are required only to have regard to relevant EU Court judgments and EC decisions.⁶ Such an amended provision would free UK competition authorities and courts to depart from the principles of EU jurisprudence and allow the law to evolve over the medium to long term. However, it would also reduce the likelihood of sharp divergences in the short term between the two sets of provisions, by encouraging the courts and regulators to continue to rely on established, well understood principles. This will promote legal certainty and minimise the burden for UK businesses including the many businesses that will continue to be required to comply with both the EU and UK rules.⁷

SECONDARY LEGISLATION

- 2.8 The objectives of promoting legal certainty and minimising compliance burdens are also promoted by the various EU Block Exemption regulations enacted by the EC that provide a 'safe harbour' for agreements falling within their scope. Under section 10 CA98, these currently also operate to exempt agreements from the domestic Chapter I prohibition – under what is known as a 'parallel exemption' – unless and until it is varied or removed by the UK authorities. Block Exemptions are an important element of the antitrust enforcement regime, as they significantly reduce compliance costs and only exempt categories of agreement that overall have a benign effect on competition. We would therefore recommend that, post-Brexit, the UK retain a system of block exemptions. The question is how this should be achieved.
- 2.9 The first option, which we favour, would entail dealing with existing and future Block Exemptions separately. Section 10 CA98 would be repealed, such that future EU Block Exemptions would have no effect as a matter of domestic law. Instead, the UK authorities could enact their own block exemptions under section 6 CA98. In relation to existing Block Exemptions, however, the Great Repeal Act (or statutory provision made under it) would provide that they would continue to apply to the Chapter I prohibition⁸ until such time as they have expired or the UK authorities amended or revoked their domestic application.
- 2.10 This approach would remove the possibility of future EU Block Exemptions applying domestically by default. However, it would maintain the currently applicable system, increasing legal certainty for business and avoiding a 'gap' that would require immediate legislative action to address. In the longer run, this option also allows the UK greater flexibility, for while future domestic block exemptions could potentially be modelled on future EU Block Exemptions, they could equally be quite different. The principal drawback of this option is that it entails greater work for the authorities in the

⁶ Relevant authorities would include, as currently, EC decisions as well as EU court judgments.

⁷ As well as Articles 101 and 102 TFEU discussed above, UK businesses will also need to comply with the antitrust rules in the other 27 Member States, which broadly conform with Articles 101 and 102, and in a number of other jurisdictions around the world where the antitrust regime is modelled on that of the EU. We see benefits for UK consumers, business and public policy in competition laws that are broadly convergent throughout the world.

⁸ In the same way that they do under section 10 CA98 currently.

long run, as they would have to adopt their own Block Exemptions in place of the EU Block Exemptions. In practice, it may also result in a greater divergence between EU and UK law over time.

- 2.11 An alternative option would be to maintain section 10 CA98 in something like its current form. Current and future EU Block Exemptions would continue to exempt agreements from the Chapter I prohibition unless the UK authorities varied or removed the exemption. Maintaining a modified version of section 10 CA98 would probably be less costly for the UK authorities, as less work would be required than if they had to develop and consult on their own domestic Block Exemptions. However, the disadvantages of this approach are, in our view, significant. In particular, once it has left the EU, the UK will not be able to influence the nature and shape of future EU Block Exemptions. If the UK authorities wished to take a different approach, they would have to provide for specific Block Exemptions not to apply and would need to draw up their own domestic Block Exemption in any event, thus reducing any resource savings.
- 2.12 Finally, in relation to exemptions, Schedule 3 to the CA98 exempts various categories of agreement from the domestic antitrust rules. The question is whether any of these exemptions should be removed post-Brexit. The UK's withdrawal from the EU should have no impact on the exemptions under paragraphs 1 (planning obligations), 4 (services of general economic interest), 5 (compliance with legal requirements), 6 (avoidance of conflict with international obligations), or 7 (public policy). Paragraph 2 is no longer in operation. That leaves paragraph 3 (EEA regulated markets), paragraph 8 (coal and steel), and paragraph 9 (agricultural products).
- 2.13 Our recommendation is that the exemption in paragraph 9 relating to agricultural products should be removed, as it applies only to the extent necessary to attain the objectives of the Common Agricultural Policy, which will no longer apply to the UK following Brexit. Paragraph 3 exempts agreements and practices related to certain financial markets currently regulated under EU law. The extent to which this exemption would need to be revised will need to be assessed in light of the scope of any agreement reached between the UK and the EU on regulation of these markets post-Brexit. The exemption under paragraph 8 for coal and steel is no longer relevant following the expiry of the ECSC Treaty in 2002.

PRIVATE ACTIONS

- 2.14 Successive UK governments have sought to make it easier for private parties to bring actions in UK courts based on competition law infringements. Such actions make it easier for UK consumers and businesses to seek redress for wrongs, and also increase the incentives on companies to comply with the law. We see no reason why Brexit should change this policy.⁹
- 2.15 The UK is currently a leading forum for private competition litigation in the EU. This has resulted, in no small part, from the ability to bring a 'follow-on' action, which allows a claimant to rely on the infringement decision of a competition authority as proof of

⁹ As recognised in HM Treasury, *Fixing the foundations: creating a more prosperous nation*, July 2015, more competitive markets are believed to foster productivity growth.

the infringement, effectively limiting the main contentious issues to causation and quantum of damages. Currently, EU infringement decisions, as well as UK infringement decisions, can be the basis for a follow-on action, thus opening up the UK courts to claimants from across the EU who have suffered from an infringement of Article 101 or Article 102 TFEU¹⁰, and who satisfy the relevant jurisdictional criteria for bringing a claim in the UK courts. The main question is whether, post-Brexit, it will remain possible for claimants to bring follow-on claims that rely on a decision by the EC that Article 101 and/or 102 has been infringed. In our view, such actions should continue to be possible.

- 2.16 One option for securing scope for EU follow-on actions would be to retain sections 47A and 58A of the CA98 as currently drafted. These provisions expressly refer to actions for infringements of Article 101 and/or 102, and maintaining them would help to provide certainty to UK businesses and consumers that the UK courts will continue to offer a means for redress for any infringement of the EU competition rules that result in harm to them. It cannot be assumed that the CMA will carry out parallel investigations into all infringements investigated by the EC that have a UK component. There may well be situations in which the EC has found a breach of the EU competition rules potentially causing harm to UK companies and consumers, but the CMA has not carried out a UK investigation. In such cases, UK businesses and consumers would be able to rely on the infringement findings of the EC (once final) as binding. They would then additionally need to prove that the infringement has caused them harm.
- 2.17 Regardless of whether sections 47A and 58A of the CA98 are retained, claimants will still be sometimes able to bring actions in the UK courts for breaches of Articles 101 and 102 as claims for breach of a foreign tort. However, in such cases, it is usual that expert evidence would be required in order to prove the content of the foreign law as a matter of fact. This would be inefficient, and unnecessary, given the effectively identical nature of the EU and UK competition rules and the familiarity of the UK courts with them. Unless the point is addressed by the Government adopting a broad approach in the Brexit legislation providing that the content of EU law generally does not need to be proved as a fact in the UK courts, we recommend that express provision be made to remove the requirement for the content of the EU antitrust rules to be proved as a fact in claims brought following an EU infringement decision.
- 2.18 As regards the rules governing issues central to competition litigation, such as disclosure of evidence, passing-on of overcharges by purchasers to their own customers, and joint and several liability of cartel participants for damage suffered by victims, the UK has already implemented the provisions of Directive 2014/104/EU (the ‘Damages Directive’) through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.¹¹ These regulations introduce a new section 47F and Schedule 8A into CA98 to give effect to the Directive’s provisions. We recommend that the changes introduced by the regulations remain unaltered post-Brexit. We would expect the decisions of the UK courts applying the regulations to be influential in the courts of the European Union, and also that the UK courts would benefit from

¹⁰ Section 47A of CA98 provides that EC infringement decisions may be relied on for the purposes of follow-on damages claims in the Competition Appeal Tribunal, and section 58A of CA98 provides for final infringement decisions (including EC decisions) to be binding before the High Court (or in Scotland the Court of Session or sheriff court), as well as in actions for damages and in collective proceedings before the Competition Appeal Tribunal.

¹¹ The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385) entered into force on 9 March 2017.

having regard to (but not being bound by) decisions of EU courts applying in effect the same legislative rules. This approach would also help ensure that the UK economy benefits from our courts remaining an attractive venue for competition litigation post-Brexit.

- 2.19 Finally, the extent to which claimants continue to bring claims in the UK for infringements of EU competition law post-Brexit will depend on the applicable rules concerning jurisdiction and enforcement of judgments. As set out in our Issues Paper, we consider this to be beyond the scope of our paper, as these matters extend beyond competition litigation. Nonetheless, we recommend that the potential impact on competition litigation be taken into account when assessing whether or not the UK ought to seek to remain within the current European jurisdictional and enforcement regime post-Brexit.

3. SUBSTANTIVE LAW: MERGERS

- 3.1 The EU Merger Regulation¹² (the 'EUMR') will cease to apply to the UK on Brexit. As a consequence, the 'one-stop-shop' system of merger review will no longer operate, and the jurisdiction of the CMA over mergers meeting the EU thresholds will no longer be curtailed. By dropping out of the EUMR, a good number of transactions that face review at EU level will, post-Brexit, also be subject to UK jurisdiction.
- 3.2 The removal of the UK from the scope of application of the EUMR has further consequences for UK merger control.¹³ First, there will no longer be a process for the CMA and the EC to refer mergers to each other for review. Second, the EC will no longer be entitled under the EUMR to take account of the effects of a merger on the UK's domestic markets when it is carrying out merger reviews or designing remedies to guard against any anti-competitive effects that may be expected to result from them. Third, the rules of the EUMR limiting the circumstances in which non-competition considerations can be taken into account in merger reviews, for those cases which fall within the jurisdiction of the EU, will no longer apply to the UK.
- 3.3 Brexit will, however, have no direct effect in terms of UK substantive law – unlike in antitrust matters, the CMA is not required to take account of EU jurisprudence in deciding how to assess cases that fall within its jurisdiction. We also see no reason why the current test – whether a merger could give rise to an SLC – should be changed. The test is well understood, has a strong pedigree (it is the standard used in the US and elsewhere) and focuses on the right issues.
- 3.4 As regards non-competition factors, sections 42 to 68 of the EA02 govern 'public interest cases' and 'other special cases'. These legislative provisions will again be unaffected by Brexit (other than to remove a small number of provisions dealing with cases that have been referred to the CMA by the EC and with European mergers).
- 3.5 Therefore Brexit will not have an immediate or direct impact on the substantive competition assessment in relation to mergers that currently fall within the jurisdiction of the UK (i.e. outside the EUMR).
- 3.6 As regards cases within the scope of the EUMR, the vast majority are dealt with exclusively by the EC and are assessed solely on competition grounds. However, under Article 21 of the EUMR there are limited circumstances in which Member States can seek to intervene on non-competition grounds in the case of a concentration having an EU dimension. Three criteria – public security, plurality of the media and financial stability – are automatically considered 'legitimate' grounds for this purpose; any other reason for intervention must be notified to the EC for its assessment and approval. To date, the EC has rarely permitted interventions in EUMR cases by Member States that go beyond those set out explicitly in Article 21.

¹² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

¹³ There may also be consequences for EU merger control post-Brexit, as UK turnover of businesses will be removed from turnover calculations to establish EC jurisdiction. Without a change in the EUMR thresholds, this may reduce the number of cases notifiable to the European EC.

- 3.7 The direct effect of Brexit as regards the application of non-competition criteria will also be limited. The criteria specified in Article 21 of the EUMR are essentially the same as the public interest considerations in EA02. For a merger within the exclusive jurisdiction of the EC, a Member State cannot intervene on other non-competition grounds unless the EC assesses that the intervention would be compatible with the principles of community law. This limitation will not apply post-Brexit for mergers which fall within UK jurisdiction: it will be open to the Government, should it wish to do so, to intervene further in such cases by, for example, adding a new public interest criterion to EA02.
- 3.8 The wider question, however, is whether the Government should broaden the set of non-competition criteria in UK merger law. We recommend against doing so.
- 3.9 The competition focus of merger review has created a system that blocks or amends deals that are harmful to economic growth and consumers while allowing those that create efficiencies.¹⁴ Interventions on specified non-competition grounds (such as national security) can already be made in a disciplined way that does not run counter to the consumer and economic benefits of a competition-focused regime, which include its independence from politics. Before EA02 came into force the statutory standard for merger appraisal in the UK was the 'public interest' and ministers were accordingly the ultimate decision-makers. In practice, however, competition had for many years been the primary criterion by which mergers were assessed, and ministers generally accepted the advice of the independent competition authorities. EA02 consolidated this position, largely removed ministers from decision making, and increased judicial oversight by establishing the possibility of appeals, in first instance to the CAT. At the same time EA02 retained the possibility of intervention in merger decisions on certain specific non-competition grounds.¹⁵
- 3.10 That is not to say that non-competition objectives were considered unimportant by successive governments. The point rather was that it was accepted that these objectives were best pursued directly (e.g. through regional policy) rather than by distorting merger policy away from its prime focus on competition. We share this view: in our opinion, using the merger review process indirectly to address non-competition issues would be inefficient and costly, and would risk the re-politicisation of this part of competition policy. Further, maintaining the established competition focus of merger policy would help secure the continuing attractiveness of the UK as a destination for investment and productivity-enhancing activities, by avoiding the imposition of potentially unpredictable and politicised hurdles to obtaining merger clearance for deals.¹⁶

¹⁴ The Government's recent Green Paper '*Building our Industrial Strategy*' recognises the importance of a competition-focused regime, giving it primacy in the list of factors contributing to the success of the UK market: 'The UK has benefitted greatly from its open economy: pro-competition rules, flexible labour markets, less intrusive regulation and a favourable taxation regime have all made this country an excellent place to do business'.

¹⁵ Those two grounds were national security and media plurality. Thus, for example, a takeover that does not have the prospect of substantially lessening competition can be blocked on either of those grounds. In 2008 a third non-competition criterion was added – financial stability – and used to allow a merger between Lloyds and HBOS, which the OFT believed should be referred to the Competition EC for Phase II review, to be cleared without an in-depth scrutiny of its effects on competition.

¹⁶ To the extent that political concerns relate to the potential for hostile takeovers by foreign companies of UK firms, we note an alternative approach which could mitigate this risk. The 'poison pill' provisions of the UK Takeover Code are more stringent than those in many other jurisdictions. Relaxing these would enable listed UK companies to protect themselves against hostile takeovers more effectively, without any need for political intervention. We have not analysed this

3.11 If, contrary to our recommendation, new non-competition criteria were to be added to UK merger law, we consider they should be kept as narrow as possible and applied in a disciplined, transparent and objective manner, and subject to judicial oversight and/or review by an independent agency. In this respect, the processes set out in EA02, section 42 *et seq* could provide a model. It should further be stressed that increasing ways to permit anti-competitive mergers on non-competition grounds would be of particular concern, given the harm to consumers and productivity that can arise from anti-competitive mergers. This is not an issue with the existing media plurality criterion, since anti-competitive mergers never increase plurality. Similarly it does not appear to be an issue with the existing national security criterion. To date, where national security considerations apply they have resulted in takeovers being allowed (rather than prevented) subject to undertakings to protect various defence issues. However, as none were referred for an in-depth competition investigation, there is no indication that they have been used to date to secure the approval of an otherwise anti-competitive merger.

alternative in detail, but note that it would also raise issues that would need to be considered carefully. For example, it could weaken the market for corporate control, which is an important driver of efficiency and productivity.

4. SUBSTANTIVE LAW: MARKET INVESTIGATIONS

- 4.1 Given that the market investigation regime is UK-specific, we have identified only one implication arising from Brexit. Under Article 3(2) Regulation 1/2003, the CMA is constrained from applying stricter treatment to agreements in market investigations (MIRs) than under Article 101. This provision is designed to ensure that priority is given to EU competition law over domestic competition law, and it will cease to apply post-Brexit. This could potentially allow the CMA to use the market investigation regime more widely, unless the Government were to incorporate into national law a domestic equivalent through the Great Repeal Act.
- 4.2 There may be benefits to allowing the CMA to employ MIRs more widely, as in some cases it may be the most effective tool to address features of markets that create adverse effects for consumers. However, there are also likely to be concerns, given the potential for blurring the lines between different tools available to the CMA, which offer different rights of appeal. Thus, unless this aspect of EC legislation is 'nationalised' by replacing Article 101 with Chapter I, we consider that it may be appropriate for the CMA to consult on when it would be appropriate for it to take action under its MIR powers, as opposed to under the Chapter I prohibition.

5. TRANSITIONAL ARRANGEMENTS: ANTITRUST

INVESTIGATIONS

- 5.1 Under the current legal regime, if the EC has initiated proceedings under Articles 101 or 102, the Member State authorities are 'relieved of their competence' to act (Article 11(6) of Regulation 1/2003). As a separate matter, if under the current legal regime the member state authorities want to apply their national competition laws to any agreements or conduct which may affect trade between member states, they are currently obliged also to apply EU competition law to it (article 3(1) of Regulation 1/2003). The combination of these rules means that there is currently no real scope for the UK authorities to take competition law enforcement action, when the EC has opened its own investigation. Brexit requires separate consideration with respect to cases already opened by the EC at the time of Brexit, and those that might be launched post-Brexit but which relate to pre-Brexit behaviour.
- 5.2 As regards ongoing EC cases involving pre-Brexit agreements or conduct with effects on the UK (as well as other EU) markets, the EC will by definition have relieved the UK authorities of their competence to investigate the matter in parallel under Article 101 or Article 102. Generally, we believe that the EC should and probably will continue, post Brexit, to address the UK aspects of the pre-Brexit conduct under investigation. The conduct under investigation would have taken place when the UK was still a member of the EU, and the EC should wish to ensure that EU competition law was enforced irrespective of the surrounding circumstances. In cases of pan-European behaviour, the evidence relating to the UK would often be regarded by the EC as helpful in establishing a single overall infringement throughout Europe. It also seems to us that it would be in the interests of the EC to take forward the UK aspects of such cases from a practical viewpoint, not least since it would benefit from the fines imposed relating to UK markets (though of course the UK may secure at least a proportion of these monies through the Brexit negotiations).
- 5.3 If, however, the EC were for any reason to decide that it no longer intended to investigate a suspected infringement of Article 101 or Article 102 insofar as it affected the UK, the CMA would be free post-Brexit to commence (or recommence) its own investigation under the Chapter I or Chapter II prohibition. It has been put to us that in those circumstances the CMA may still be under a duty to apply Article 101 or 102 to the pre-Brexit agreement or conduct as well as national competition laws – in other words that that Article 3 of Regulation 1/2003 may continue to apply in relation to pre-Brexit agreements and conduct. If this is correct, removing the CMA's power under the Competition Act to enforce Article 101/102 through the Great Repeal Act would put the CMA in a difficult position legally. To avoid this, we would recommend that the CMA's power to apply Article 101/102 in relation to pre-Brexit agreements and conduct be retained.
- 5.4 As regards new cases that might be opened post-Brexit, but which cover pre-Brexit conduct or agreements, it might prove harder for the EC to justify expending resources and time to protect UK markets and consumers. Unless the UK and the EU agree that

EC will not de-prioritize the investigation of suspected pre-Brexit infringements, there is a risk that there will be under-enforcement of infringements affecting UK markets unless the CMA steps in (based on the application of the Chapter I or Chapter II prohibitions).

- 5.5 This in turn means that we might expect to see the CMA and EC opening parallel cases for pre-Brexit behaviour. Absent effective information-sharing and coordination with the EU, the CMA may not even be aware of the extent of any overlap between its work and the EC's on such cases, while both the EC and CMA investigations could suffer from not being able to pool information and coordinate their work. In relation to cases concerning Article 101, we consider that Article 3 of Regulation 1/2003 would probably continue to apply, requiring the CMA to follow the principle that any infringement action taken under UK law in respect of restrictive agreements or concerted practices does not lead to an outcome inconsistent with what would be the position were Article 101 applied also (which, for practical purposes, would equate to the EC's decision in the case). Again, this may be difficult to achieve on parallel cases, absent effective information-sharing.
- 5.6 We therefore recommend that the Government give priority to agreeing transitional arrangements with the EU which provide for effective information-sharing and clear case-allocation procedures in respect of pre-Brexit conduct where both the EU and UK competition authorities have the power to take enforcement action in respect of agreements or conduct affecting the UK.
- 5.7 Where the UK does open an investigation in parallel to an investigation by the EC concerning effects in other territories, the arrangements should empower the EC to disclose any relevant information to the CMA (and for the CMA to be able to use this information), and vice versa. Where the CMA does not open a parallel investigation, the transitional arrangements should provide for the current European Competition Network ('ECN') arrangements to continue to apply, to allow the UK to give input (at least as regards the relevant elements of the case).
- 5.8 We note that both of these suggestions might require amendments to EU legislation and may therefore be difficult fully to achieve in the short term. Nonetheless, we strongly recommend that they be included in any transitional discussions, with a view to obtaining these protections to the extent possible at an early stage. There is a strong mutual interest in achieving them.

LENIENCY

- 5.9 Important transitional issues arise also in respect of the leniency arrangements that have been developed to encourage disclosure of illegal cartels. For example, should/could the CMA offer conditional immunity to a company that has been granted conditional immunity under the EU leniency provisions, but not in the UK (in circumstances where the UK decides to open a cartel case in relation to behaviour that is already being investigated by the EC in respect of territories other than the UK)?¹⁷

¹⁷ For cases involving pre-Brexit conduct that do not commence until after Brexit, this issue is less likely to arise, as parties would reasonably be expected to make leniency applications in both the UK and the EU.

- 5.10 In order to ensure legal certainty, in our view it should be CMA policy to ‘adopt’ any pre-Brexit conditional leniency granted by the EC in the event that it opens its own parallel investigation (unless a competing applicant has already been granted conditional immunity at the time of the original application). We do not believe that this would in any way harm the UK leniency policy given the unique circumstances of Brexit. We further recommend that the CMA publish guidance/notice to this effect in the run-up to Brexit.

COMMITMENTS

- 5.11 A further transitional issue relates to the status of existing commitments affecting UK markets under Article 9 of Regulation 1. They are binding for a period of time and, once adopted, mean that the EC can close its file. Post-Brexit, once the UK is no longer a Member State of the EU, it is not clear whether commitments obtained pre-Brexit would remain binding in respect of the UK. This may depend on their precise wording. Even where they remain binding, however, it is not clear that the EC would have the inclination or even the vires to enforce them. Whilst the CMA could in theory seek new commitments in each of these cases, this could be heavily resource-intensive.¹⁸ We recommend instead that they should be ‘nationalised’ through the Great Repeal Act process, insofar as they affect the UK, and the CMA given the power to enforce them.

OTHER ISSUES

- 5.12 Under EU rules, advice given to a company by external EEA-qualified legal counsel is privileged and protected from disclosure in the context of an EC investigation. This protection from disclosure is a key part of the ‘rights of defence’ under EU competition law. However, once the UK exits the EU, it seems likely (even if not certain) that privilege will no longer be held to apply to the advice given by those solely qualified in the UK. In order to ensure that rights of defence are not undermined, we recommend that transitional arrangements provide for continued recognition of legal professional privilege in EC cases involving investigations relating to pre-Brexit agreements or conduct, where undertakings receive legal advice from UK qualified lawyers both before and after Brexit.
- 5.13 We would also draw attention to the budgetary aspects of fines imposed by the EC post-Brexit for infringements involving wholly or partly pre-Brexit conduct. Fines for competition infringements currently run at billions of Euros annually (Euro 19.8 billion since 2004). Fining decisions are typically adopted many years after the infringements have taken place. Under current rules, fines are entered into the EU budget as receipts only when the fining decision becomes definitive (i.e. when any appeals have been resolved). As a result, post-Brexit, the remaining 27 Member States are likely to receive some tens of billions of Euros in fines relating to pre-Brexit infringements; and these fines will arguably reflect, in significant part, damage done to the UK economy as

¹⁸ At present, there are 10 commitment decisions in force that affect/potentially affect the UK. Seven of these are EEA-wide commitments that could impact UK markets/companies (including, for example, the Visa MIF commitments and the Paramount studio commitments) and three (Samsung; E-books; and BA/AA/IB) specifically involve UK companies and/or UK markets.

a result of the agreements and conduct. In the context of the Article 50 negotiations, the Government will no doubt wish to consider whether and how it wishes to raise the question of the appropriate allocation of such monies.

6. TRANSITIONAL ARRANGEMENTS: MERGERS

INVESTIGATIONS

- 6.1 Brexit will have a significant impact on merger review for cases that are undergoing EC review at the time of Brexit. Unless the EU revises the EUMR, from the moment of Brexit the EC will lose its jurisdiction to block mergers or accept remedies in relation to their effect on the UK. This will be true even of mergers that have been notified to the EC pre-Brexit.
- 6.2 The loss of the UK as a Member State could also affect the EC's jurisdiction over mergers that meet the EUMR thresholds pre-Brexit and are undergoing review at the time of Brexit. The requirements of Article 6 EUMR may well lead to a number of cases that initially came within the scope of the EUMR no longer doing so at the end of Phase 1, and thus requiring consideration at national level instead.¹⁹
- 6.3 These issues create significant challenges for businesses, advisors and officials in handling mergers with UK nexus that are notified under the EUMR and for which the review 'straddles' the date of Brexit. From the UK's perspective, the essential question is how to ensure that the impact of such transactions on UK markets and consumers are properly investigated, and remedied where appropriate.
- 6.4 The provisions of the EA02 would allow the CMA to open a parallel investigation into any mergers that meet the UK thresholds and are under EC review at the moment of Brexit.²⁰ However, wholesale duplication of merger reviews over this transitional period would be neither desirable nor realistic, given the resourcing demands that this would place on the CMA. In addition, parallel investigations of mergers by the CMA and the EC would put a burden on businesses in terms of cost, process misalignment, and the risk of differing substantive outcomes and/or remedies.
- 6.5 To minimise the impact and burden of potential parallel reviews, and avoid a situation where transactions affecting UK market(s) 'fall between two stools' and are not reviewed, we recommend the following:
- 6.6 First, for mergers that have been notified to the EC by the time of Brexit, the CMA should make fullest use possible of its ability under Article 9 of the EUMR to request full or partial reference back to the UK of any notified merger that is likely to have a significant nexus to or impact on the UK.²¹ This will need to be done for a period

¹⁹ No equivalent decision is open to the EC at the end of Phase 2, implying that if the EC's investigation has already entered the Phase 2 stage at the time of Brexit, the EC will retain vires and will take a decision determining the compatibility of the merger with the competition rules, albeit that it can no longer include the UK within the scope of its findings.

²⁰ The effect of (a) the suspensory effect of the EUMR and (b) the temporal aspects of the 'relevant merger situation' definition under the EA02, means that the CMA will have jurisdiction over mergers that meet the EA02 thresholds throughout the EC's review process and for a period of four months thereafter.

²¹ The CMA estimates that Brexit could lead to an increase in the CMA's caseload of 40-50% since its creation (e.g., an additional 30-50 Phase 1 cases and six Phase 2 cases per year).

extending at least eight months prior to the date of Brexit in order to capture cases that could be notified pre-Brexit and enter EUMR Phase II post-Brexit.

- 6.7 The legal requirements for referral are set out in Article 9 (see further paragraph 6.9 below) and the EC's referral notice discusses in detail the principles governing when a merger can be referred back to a Member State. These will continue to apply in the run-up to Brexit. The key consideration for the CMA will be whether a merger would need to be recalled for UK review because UK-specific remedies may be needed. To provide greater certainty to businesses as to the considerations that the CMA may take into account and the type/extent of engagement that it may have with parties in order to make the necessary determinations, it would be helpful for the CMA to issue guidance on this as the Brexit process develops. It would also be advisable for the CMA to work with the EC to agree a pre-Brexit referral strategy/approach, so as to ensure that the process runs smoothly. This will, of course, depend on the ability and willingness of the EC to engage on this issue, but it would appear to be one of clear mutual interest.
- 6.8 The merging parties themselves might also make use of equivalent provisions under Article 4(4) and pre-emptively request a reference of the UK aspects of any transaction. The legal requirements are similar to those set out in Article 9 EUMR but easier to fulfil as they do not require (concession of) a negative impact on competition.
- 6.9 For mergers that have been notified to the EC for which the geographic market(s) is EEA-wide or global, and/or the relevant assets that might be subject to a remedy are outside the UK, the Article 9 requirements may not allow the EC to refer the transaction back to the UK for review (in whole or in part). However, a significant 'enforcement gap' is less likely to arise in relation to these transactions merely because the EC's post-Brexit review does not take into account the impact of the transaction on the UK market. This is because the incentives facing the parties, the CMA and the EC will, in most cases, be aligned on matters of procedure. In particular, the UK regime has the advantage, unique in Europe, of allowing merger review post-closure, subject to interim 'hold-separate' powers. As well as reducing the risk of an enforcement gap, this gives the parties incentives to engage proactively with the CMA in a timely way on mergers that might raise UK competition issues. To provide certainty to business, we recommend that the CMA, ideally in conjunction with the EC, publicise the advisable mechanics for merging parties in preparing to deal with both authorities before the date of Brexit to ensure smooth case transition.
- 6.10 Second, for mergers that have not yet been notified at the point of Brexit, it would be sensible for the parties to mergers with a significant UK component to engage in pre-notification contacts with both the EC and the CMA. Where parties approach both authorities, the EC and CMA should agree that they will use the full extent of the information sharing and coordination abilities under the EUMR (supplemented as necessary by consent from the parties) to discuss the most effective allocation of merger review upon Brexit. This may require consideration of the scope of potential remedies. See further paragraphs 6.12 to 6.13 below.
- 6.11 To reduce uncertainty for businesses and advisors, the CMA should finalise and communicate its policy on such transitional issues by the end of June 2018 (nine months before Brexit) at the very latest.

REMEDIES AND PROCEDURAL ISSUES

- 6.12 Mergers that have been approved by the EC subject to conditions raise similar issues to commitment decisions under Article 9 of Regulation 1/2003 (discussed above at paragraph 5.11). However, most commitments offered to remedy competition concerns involve the divestiture of a business or business unit within a relatively short space of time (usually 6 months). In practice, therefore, merger remedies are unlikely to require long-running post-Brexit enforcement. Nonetheless, to the extent that UK-specific merger remedies have been accepted by the EC pre-Brexit and are still ongoing at the time of Brexit, we recommend that these be ‘nationalised’ through the Great Repeal Act, insofar as they affect the UK, and that the CMA be given the power to enforce them.
- 6.13 As with antitrust cases, transitional provisions would be needed to enable continuity of advice and representation (including in respect of appeals) for those mergers that come within the jurisdiction of the EUMR and are undergoing EC review at the time of Brexit. Consistent with this, legal privilege should continue to apply to documents that would have been privileged pre-Brexit. See further the discussion above at paragraph 5.12.

7. COORDINATION AND COOPERATION: ANTITRUST

- 7.1 The EU will have no role in reviewing post-Brexit infringements of competition law relating to UK markets. We are therefore likely to see parallel UK/EU antitrust investigations. Although the priority will be to ensure transitional arrangements are negotiated and put in place, the UK and EU will, in our view, need as soon as possible to develop formal coordination and cooperation arrangements to address their interactions over the longer term. The efficiency and effectiveness of the UK regime, and legal certainty for business, will be enhanced if such arrangements are adopted.
- 7.2 In the antitrust enforcement context, particular issues arise with respect to ‘dawn raid’ inspections in cartel cases. Currently sections 61-65N CA98 create an obligation on the CMA to assist in EC inspections. These sections will presumably no longer apply post-Brexit. However, given the cross-border nature of many major cartels, the effective enforcement of the competition rules would be promoted if the two authorities continued to support each other on a reciprocal basis. There may be cases, for example, in which the CMA wishes to carry out a dawn raid on a company based inside the EU (and vice versa).
- 7.3 Ideally, any new arrangement would build, as far as possible, on the existing one in place under Regulation 1/2003 and sections 61-65N CA98. If this is not feasible post-Brexit, arrangements mirroring the cooperation with the US Department of Justice should be considered.
- 7.4 Given that actions based on breaches of Arts 101 and 102 could continue to be brought in the domestic courts (see paragraph 2.17 above), it would be helpful if national courts could continue to communicate with the EC. While UK courts would no longer need to avoid inconsistent decisions with those of the EC when determining cases under CA98, there may be circumstances in which UK courts may want to request information about the progress of ongoing parallel proceedings or about previous decisions or judgments, simply for their own domestic purposes.

8. COORDINATION AND COOPERATION: MERGERS

- 8.1 Outside the referral process, the current merger regime requires little active coordination or cooperation between the UK and the EU because of the exclusive nature of the EUMR ‘one-stop-shop’ regime. This will change post-Brexit because the UK will review mergers that would previously have fallen exclusively under the EC’s remit. In particular, coordination will be required to deal with those EUMR cases that are likely to (a) raise concerns in the UK and (b) require UK-specific remedies.
- 8.2 The CMA cannot unilaterally secure coordination. While the EA02 provides the CMA with a gateway to share information with other authorities, there is no mechanism to oblige those other authorities to share information with the CMA. A formal cooperation mechanism will therefore need to be put in place post-Brexit, whether by agreement, memorandum of understanding or similar.
- 8.3 Current cooperation agreements between the EU and third countries provide potential models for such an agreement. For merger control, the EU-US ‘Best Practices on Cooperation in Merger Cases’ provides the most comprehensive model. It is predicated on the common-sense idea that coordination between authorities avoids conflicting or diverging outcomes, which is best for the parties and for third parties. This applies equally to UK-EU cooperation post-Brexit. Aspects of cooperation and coordination that the CMA is likely to desire post-Brexit include:
- Communication between the authorities at the outset of any investigation for which substantial cooperation might be beneficial and then at various stages through the investigation. (This goes further than the EU-Swiss agreement, for example, which provides for the EC to notify the Swiss of investigations only when they reach Phase II.)
 - Coordination of investigative timings to the extent possible, including key decision-making stages. (As with the UK/EU processes, the formal timetables of the EU and US processes are different, so the best practices envisage discussions with the merging parties about pre-notification investigative steps and timing of filings.)
 - Discussion and coordination of information gathering, relying heavily on the provision of confidentiality waivers by the parties.
 - Coordination of remedies to ensure that inconsistent or conflicting remedies are not imposed, to minimize difficulties in implementation, and to achieve a compatible outcome where the authorities may be considering different remedies for similar concerns.
- 8.4 More generally, post-Brexit, existing cooperation agreements between the EU and third countries will no longer apply to the UK. The UK will therefore need to replicate or replace these with bilateral agreements with those third countries and engage actively with them to estimate the likely increase in activity under these agreements (i.e. the extent to which the UK will now find itself dealing with matters that would

previously have been exclusively dealt with by the EC). Given the likely resourcing implications, it would be sensible for the UK to prioritise agreements with those countries that have an active merger regime that is likely to be triggered by international deals that could also have a UK nexus (for example, the US, China, Canada, Brazil). Again, the current EU agreements with these third countries would serve as a model for the UK.

- 8.5 While formal cooperation agreements are necessary to ensure that international mergers take due account of the impact on UK markets and consumers, less formal measures are also needed to ensure effective cooperation. These include engagement and participation in bodies such as the ICN and OECD, as well as specific bilateral engagement with the competition authorities of other Member States. Having a continuing role within the ECN, perhaps through some form of 'associate' membership would be desirable, if this could be agreed.

9. CMA: RESOURCING AND ENFORCEMENT PRIORITIES

ANTITRUST

- 9.1 As noted above, in a number of cases, the CMA will need to investigate the UK-specific elements of cross-border agreements and conduct that will not be covered by EC enforcement action post-Brexit. However, it may take some time for the increase in cases to take effect (given the retrospective nature of antitrust enforcement and the fact that it can be a number of years before conduct comes to the attention of the authorities).
- 9.2 Nonetheless, given that these matters are likely both to be large in scale, and in some cases far more complex than the vast majority of UK investigations undertaken since CA98 came into effect, we would recommend that the CMA begin to review its procedure and staffing as soon as possible to determine whether it has the appropriate capacity and capabilities for the task ahead. Until this work is done, we would not favour radical changes to the UK regime. Whether or not radical changes warrant contemplation in due course, we advise that a 'wait and see' approach be adopted for now.
- 9.3 We recommend that the Government consider increasing the CMA's budget if a review shows that it currently does not have sufficient resources to deal with this additional workload. This could well be at no cost to the Treasury because expanded antitrust enforcement by the CMA is likely to result in some substantial fines: as a rough indication, EU fines for antitrust infringements currently run at approximately Euro 2 billion per year. The UK's notional 'share' of these fines – assuming that CMA fines would be at a similar level but related to UK turnover – is approximately Euro 300 million. In comparison, the current annual budget of the CMA (across all areas of its activity) is approximately Euro 80 million. Additional resources for the CMA to detect and prosecute competition law infringements are likely to be at least cost-neutral from a public finance perspective.

MERGERS

- 9.4 The impact of Brexit on resources for merger review will be more immediate. Not all of the additional deals that will fall within the UK jurisdiction will raise concerns, but a good number will. And as each of these mergers is likely also to meet the EUMR thresholds, each will, by definition, be a large, cross-border matter and many will be complex. They may also cover sectors in which the CMA has little experience. The CMA's case mix is therefore likely to change substantially. The CMA has estimated that 30-50 additional cases a year will fall within its jurisdiction, with around 6 of these potentially being Phase II cases in need of in-depth scrutiny. Our own review of the

data suggests that these estimates, in particular the number of additional Phase II investigations, are conservative.

- 9.5 The CMA will have to determine how best to balance review of large 'EU' cases against smaller, national or sub-national mergers. As noted above, larger matters will inherently be more complex and resource intensive than smaller ones.
- 9.6 There may be also be an additional resource implication to the extent the CMA has to take on the monitoring of remedies with effect in the UK implemented by the EC in previous merger decisions. However, the use of monitoring trustees in such cases may limit the impact of any such resource demands.
- 9.7 A number of approaches have been mooted to enable the CMA to deal with its increased merger workload post-Brexit.
- 9.8 One approach would be for the CMA to review only mergers above a certain financial threshold, thus avoiding expending resources on smaller cases. This could be achieved by increasing the turnover threshold so that fewer mergers come within the CMA's jurisdiction. Alternatively, the existing *de minimis* thresholds could be increased further. However, both of these options could lead to anticompetitive mergers being excluded from review simply because of their size. This would weaken UK merger regime contrary to the economic and consumer welfare objectives of policy. We would therefore not recommend this approach.
- 9.9 Another approach would be to elect to investigate only those mergers that involve a market share in a UK market above a certain threshold (for example, a 20% threshold). However, given the complexities that can arise in defining markets and calculating market share, this could result in the CMA unnecessarily trammelling its ability to investigate mergers that could lead to potentially negative effects on competition in the UK. We would therefore not recommend this approach either.
- 9.10 A third option would be to focus on cases where the effects on the UK market are likely to be significantly different from those in the rest of the EU (which would avoid the CMA expending resources on cases that are likely to be prohibited by the EC in any event). This option, however, would require the CMA to carry out sufficient investigation to determine the likely effects in the UK and to obtain enough information about the EU proceedings to compare the effects. The resource savings from this approach may ultimately therefore be relatively small.
- 9.11 Various legislative changes have also been mooted by commentators to address this issue, including amending the 'duty to refer' under EA02 to a 'discretion' to refer or to include an exception to the duty where a merger is under review by other authorities in particular the EU. We do not recommend that changes of this type be made. The duty for the CMA to carry out an in-depth investigation into mergers that raise significant concerns is a key element of the merger regime. Softening this duty would run the risk that anticompetitive mergers are approved (and without scope for third parties to challenge approval) simply because the authority is unable or unwilling (perhaps under political pressure) to carry out a full investigation. As regards the second option, the current SLC test would adequately deal with a situation where the 'counterfactual' against which a merger is assessed includes remedies imposed by the EC. Where EC remedies would not address UK issues, UK scrutiny is needed.

- 9.12 Other options open to the CMA involve shortening or simplifying the current review processes (whether by legislative changes to the EA02 timescales or by administrative practice):
- A shortened, simplified Phase II procedure could be introduced for parallel cases, which would allow the CMA to take into account and rely on the findings and remedies of the EC and thus close cases without completing its own in-depth review. This option would require close cooperation between the CMA and the EC in order for the CMA to have the necessary confidence to rely on the EC's findings and remedies with respect to the concerns that it has identified in the UK.
 - As a matter of its own practice, the CMA could produce shorter Phase I decisions for cases that do not raise issues and/or streamline the process to reduce the market investigation steps taken in non-problematic cases.
 - The CMA could target information requests and focus the Phase I analysis on a narrower range of issues (for example, only where overlaps are above a certain threshold or competitor presence is limited).
 - The CMA could create a simplified Phase I procedure, with smaller informational burdens and more limited investigative steps, for non-problematic deals.
- 9.13 An institutional change that we strongly recommend against would be for the exclusive competence of the CMA in UK merger control to be diluted. While input from sector regulators can be valuable, the disadvantages of sectoral regulators undertaking merger control functions would significantly outweigh the advantages. The CMA's exclusive competence in this area ensures consistency of practice and coherent application of the merger regime. It also ensures that decisions are made purely on competition grounds. There is also a far lower risk of regulatory capture or mission creep than with review by sector regulators.
- 9.14 While a number of the changes listed above would help ameliorate some of the impact of the additional workload arising from Brexit, we recommend that the CMA begin to review its procedure and staffing as soon as possible. The CMA has recently launched a consultation of its processes for Market Investigations. This is a welcome initiative which serves as a good model for review of the CMA's merger processes; however, we would recommend that the CMA go further and undertake a 'stock-take' of the skills of its current staff to ensure it has the right mix of experience and knowledge. We believe that the CMA will need to recruit a significant number of additional experienced lawyers and economists for merger control alone. This will require additional funding. This funding need not be negative for public finances because the additional resources can be funded through substantially higher merger filing fees for the largest deals (including but not only those that currently fall within the EUMR). Financing competition authority budgets through merger filing fees is common internationally.
- 9.15 While resourcing is perhaps the key immediate challenge for the merger regime, it has been put to us that the removal of the EU jurisdiction over large transactions affecting the UK might require the adoption of a compulsory, suspensory merger notification system similar to that under the EUMR to ensure the CMA is able to review such cases deals in good time.
- 9.16 We recommend against a move to a mandatory regime for a number of reasons.

- First, it seems inconceivable to us that a large, potentially problematic deal, which is likely to be subject to merger review in other jurisdictions including the EU, would either not be notified to the CMA by the parties or somehow fall below the radar of its Mergers Intelligence Unit.
- Second, the resource implications of such a system would be considerable. The EUMR currently catches a very large number of deals (over 80% of its caseload) which raise no competition issues. Adopting a system that would recreate this in the UK would not seem the best use of resources, particularly given the additional demands that Brexit entails for the CMA. Moreover, the CMA is geared to conduct a thorough review of potentially problematic deals, and it would take a large cultural shift for it to become an efficient processor of non-issue transactions on the one hand, and retain its thorough approach to others.
- Third, subjecting such a large number of no-issue cases to mandatory UK review would impose costs on business for no obvious public policy benefit.
- Fourth, the adoption of a ‘standard’ mandatory model would require design of jurisdictional thresholds at a time when resources dedicated to reform are likely to be stretched. The Government would need to determine the appropriate turnover level. It would also need to consider whether to allow review of deals below the mandatory notification thresholds or to accept smaller mergers, even to monopoly, that fall outside the regime. Previous reform debates highlight that the policy challenges of dealing with these two issues should not be under-estimated.

9.17 A hybrid/partial model might side-step some of these issues by requiring notification only of larger mergers (e.g. those that would have been subject to notification under the EUMR). That would preserve the CMA’s ability to ‘call-in’ any deal, thereby allowing it to address smaller anticompetitive mergers, much as it does now. However, it would still result in a large number of unproblematic cases being caught. So we would not favour its adoption at this point but would suggest that the CMA keep the matter under review in the light of experience in the first few years after Brexit.

9.18 In the longer run, the CMA may wish to consider revisiting its merger timetables to align more closely with the EC’s timetables. Having a more coordinated timetable for merger clearance may enhance the efficiency and legal certainty of the cross-European merger regime (including EU and UK). That said, we recognise that the EC’s process involves considerably longer pre-notification contacts than the UK and that amending timetables would be a costly effort. With that in mind, we would again recommend that the CMA gain post-Brexit experience of parallel merger reviews before it considers whether and how best to revisit its own timetables to this end.

10. SUMMARY AND CONCLUSIONS

- 10.1 Our view is that the interests of the UK economy, and those of businesses and consumers within it, will be best served by continuity of UK competition law and policy, so far as is possible following Brexit.
- 10.2 Brexit does not give cause for radical reform of the principal UK competition statutes, nor of the role of the competition authorities. Indeed, the challenges that Brexit poses to the effective operation of various areas of competition policy argue against contemplation of radical reform, at least for the time being.
- 10.3 Primary legislation will nevertheless require amendment. In particular, we recommend that the duty in section 60 CA98 for the UK authorities and courts to act consistently with European jurisprudence becomes simply a duty to ‘have regard to’ that jurisprudence. We also recommend repeal of section 10 CA98 so that future (as distinct from existing) EU block exemptions from the competition rules are not automatically imported into the UK; they would instead become a matter for the UK to decide. Brexit should cause some current exemptions, notably that for agricultural products, to fall away. To preserve continuity of the ability of private parties to bring actions for damages in the UK for breaches of EU (as well as UK) competition law, we recommend retaining the provisions of sections 47 and 58 CA98.
- 10.4 For mergers and market investigations we recommend retaining the existing statutory criteria, notably the ‘substantial lessening of competition’ test for mergers. Likewise we would not vary the existing public interest criteria. A question for market investigation references on which we do not have a settled view is whether there should be a domestic analogue of the current EU provision that precludes remedies relating to agreements between firms that go further than the competition rules.
- 10.5 Brexit poses formidable issues concerning transitional arrangements, future cooperation between UK and EU authorities, and the resources that the CMA will need to carry out a substantially expanded caseload. In relation to transition issues, we have made a series of recommendations on the carrying forward of commitments from past antitrust and merger cases, and of leniency arrangements. Particularly difficult issues could arise in relation to mergers that ‘straddle’ the date of Brexit, and (in the longer run) parallel UK/EC investigations, both of mergers and antitrust issues. These do not have easy solutions but we identify ways to ameliorate them, and stress the importance of measures being taken and communicated well ahead of the date of Brexit. These are matters in relation to which the UK and EC authorities should have strong interests in common.
- 10.6 On resources we note that, beyond transitional issues, the CMA is likely to have a substantial number of large and complex merger cases each year that would previously have been reviewed by the EC (including for effects on UK markets). Even with some adjustment of CMA priorities and procedures (transfer of powers to other bodies should be avoided), a substantial increase in resources will be needed if other activities are not to get squeezed. Bearing in mind merger filing fees and competition fines, this need not involve cost to the public purse.

- 10.7 This report has not addressed another aspect of EU competition law – State Aids, which will no longer apply to the UK after Brexit. In conclusion, we would however note that, as industrial subsidies are generally costly to the economy, the UK should be open to agreeing constraints on them in trade negotiations.