COMMENTS ON THE BREXIT COMPETITION LAW WORKING GROUP PROVISIONAL CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

1.1 Pinsent Masons LLP ("Pinsent Masons") welcomes the opportunity to comment on the Brexit Competition Law Working Group (“BCLWG”) paper setting out its provisional conclusions and recommendations on the impact of Brexit on competition law (the "Paper").

1.2 The comments made in this submission are those of Pinsent Masons and do not necessarily represent the views of any of our individual clients or of individual partners or lawyers of Pinsent Masons.

1.3 Pinsent Masons agrees with BCLWG's recommendations as set out in the Paper. We offer below some additional observations.

2. VERTICAL RESTRAINTS

2.1 We are of the view that Brexit potentially could have a significant impact on competition law enforcement in relation to vertical restraints, particularly as regards parallel trade and the exhaustion of IP rights. We recommend that this is considered further and raised in the final BCLWG submission to the Government.

2.2 It is currently possible under EU competition law to ban exports to a non-EEA country if the products could not realistically be re-exported into the EEA. Post-Brexit, there would thus be a real risk of suppliers potentially being able to partition the UK market from the EU-27 market without infringing EU competition law rules, i.e. unlike the case today where such a dividing of markets within the Single Market would be prohibited. This could result in a significant upward effect on prices for UK consumers, who would no longer be able to benefit from cheaper prices through parallel imports and competition.

2.3 Whilst goods placed on the Single Market with the trademark holder’s consent can currently be freely traded throughout the Single Market because the trademark rights have been exhausted (subject to some limitations on e.g. repackaging under the *BMS* criteria), this would not be the case post-Brexit in relation to the UK, unless addressed in the UK/EU agreement.

2.4 In our view, it would appear difficult for the UK alone to address these issues, e.g. purely through domestic UK legislation. For example, the UK Government cannot feasibly prohibit contractual provisions imposed by EU businesses on non-UK businesses, preventing the latter from exporting goods to the UK. We therefore suggest that the BCLWG recommends the Government to seek to ensure in its negotiations with the EU and the remaining 27 EU Member States resulting in a trade agreement that should include, either:

2.4.1 the continued inclusion of the UK in the EEA/Single Market, thereby ensuring that references in e.g. the Vertical Restraints Block Exemption and the Vertical Restraints Guidelines to export bans and outright restrictions of parallel trade (passive sales) within the EEA continues to bind the UK;

2.4.2 that e.g. the Vertical Restraints Block Exemption and the Vertical Restraints Guidelines are amended post-Brexit to the effect that the scope of the

'hardcore' restriction of banning exports and parallel trade (passive sales) altogether to territories within the EEA is extended to also encompass the territory of the UK; and/or

2.4.3 that the Great Repeal Act should include some provision that would make the free trade agreement provisions enforceable in English courts.

3. SUBSTANTIVE LAW: ANTITRUST

Primary legislation

3.1 We agree with the recommendation that **section 60** CA98 should be amended such that UK courts and regulatory bodies are required only to have regard to relevant EU Court judgments and EC decisions. Whilst "having regard to" still can entail a significant burden on those courts and bodies, we consider it would be sensible to include such a requirement.

3.2 Competition case law developed in non-EU countries may of course also prove relevant to consider for UK courts and authorities. However, UK competition law is closely mirrored on EU competition law, rather than non-EU competition law; and thus warrants the inclusion of a requirement in section 60 to have regard to relevant EU Court judgments and EC decisions for the purposes of legal certainty. This would not prevent the UK courts and authorities from also considering and relying on non-EU law, as and when relevant.

Secondary legislation

3.3 As regards **block exemptions** and sections 6 and 10 CA98, we support the alternative option described in para. 2.11 of the Paper, i.e. to maintain section 10 CA98 in something like its current form, allowing for current and future EU Block Exemptions to continue to exempt agreements from the Chapter I prohibition unless the UK authorities varied or removed the exemption. We believe that this would 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; and do not believe the disadvantages of this approach to be very significant. As the Commission is moving away from adopting new block exemptions and have been phasing out a number of such in recent years, we do not consider it likely that there would be many scenarios of new block exemptions being adopted and where UK authorities would wish to take a different approach. Given that many UK businesses will continue to be subject to Article 101 TFEU post-Brexit, they may also prefer this option for more certainty.

3.4 The Paper does not discuss in detail legislative initiatives on the back of EU antitrust considerations where **regulation** was chosen as a better solution to competition problems, such as in the energy sector and certain outcomes of the EU's Digital Agenda. We propose that it is put to the Government by the BCLWG that any UK/EU agreement should ensure that certain EU sectoral regulations, e.g. the roaming tariffs caps (no extra charges post-15 June 2017) within the EEA, remain applicable also in relation to the UK post-Brexit, at least during a transitional period, to avoid negative impacts on UK businesses and consumers.

4. SUBSTANTIVE LAW: MERGERS

4.1 We agree the '**duty to refer**' should be retained to avoid any undue scope for political pressure or a risk of anti-competitive mergers being approved simply because the CMA is unable or unwilling to carry out a full investigation.

5. SUBSTANTIVE LAW: MARKET INVESTIGATIONS

5.1 We believe Article 3(2) of Regulation 1/2003, whereby the CMA currently is constrained from applying stricter treatment to agreements in market investigations

than under Article 101, should be 'nationalised' by replacing Article 101 with Chapter I, as the objective of this legislation would not change post-Brexit.

5.2 The CMA will likely experience resource limitations post-Brexit and the CMA's current desire is to streamline market investigations processes and make market investigations more efficient. We therefore do not consider that it would be appropriate for the CMA to have to consult on when it would be appropriate for it to take action under its market investigation powers, as opposed to under the Chapter I prohibition.

6. TRANSITIONAL ARRANGEMENTS: ANTITRUST

Leniency

6.1 We agree with the Paper's recommendations on transitional arrangements as regards leniency. However, we also agree with the view set out in the Monckton Chambers' contribution of suggesting that:

6.1.1 the UK and the EU should agree a post-Brexit mutual recognition of leniency applications, such that a leniency applicant in one jurisdiction benefits from protections for leniency applicants also in the other jurisdiction; and

6.1.2 that the most straight-forward way to achieve this would be to negotiate the mutual recognition of a leniency regime based on that currently set out in Regulation 1/2003 and the accompanying Commission notices.

Other issues

6.2 As regards legal privilege, we agree that transitional arrangements should 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.

6.3 However, we would propose that the BCLWG final paper to the Government urges the Government to secure in its negotiations leading to a free trade agreement with the EU the continued recognition of legal professional privilege as regards legal advice from UK qualified external lawyers also post-Brexit – i.e., to extend the current recognition of legal professional privilege for EEA-qualified external lawyers also to UK qualified external lawyers.

7. CMA: RESOURCING AND ENFORCEMENT PRIORITIES

7.1 We agree the '**duty to refer**' should be retained (see above).

7.2 We have noted the reference to **merger filing fees** being increased for "*the largest deals*" in order to fund, for example, CMA recruitment of a significant number of additional experienced lawyers and economists for merger control alone. We believe it is important to stress in any BCLWG submission to the Government that merger filing fees only should be increased for those very large deals currently caught by the EUMR jurisdictional thresholds; and not for smaller deals, as that would risk having a chilling effect on M&A activity in the UK. We also do not consider that non-notified mergers should be subject to higher fees simply to reflect any additional costs that such may give rise to (e.g., due to the need for interim enforcement orders being imposed), as this would be inconsistent with the concept of a voluntary filing regime.

7.3 We note the risk of the removal of EU jurisdiction over large transactions, which affect the UK, could trigger an adoption of a **mandatory**, suspensory merger notification system in the UK similar to that under the EUMR to ensure the CMA reviews such cases in good time. However, we agree with the recommendation against such a move.

7.4 However, as regards a possible **hybrid/partial model** (as referred to in para. 9.17 of the Paper) that could side-step some of the issues raised in the Paper, we do not agree that this necessarily "*would still result in a large number of unproblematic cases being caught*". In our view, this would depend on how the thresholds for the mandatory filings would be set. For example, if that threshold was set as a market share-based threshold (e.g. at least two merging parties being active in the same relevant market with a combined market share in the UK, or significant part thereof, exceeding 40%), it would presumably not capture unproblematic cases. On that basis, we agree that the CMA should keep the matter under review in the light of experience after Brexit.

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